



This is a digital copy of a book that was preserved for generations on library shelves before it was carefully scanned by Google as part of a project to make the world's books discoverable online.

It has survived long enough for the copyright to expire and the book to enter the public domain. A public domain book is one that was never subject to copyright or whose legal copyright term has expired. Whether a book is in the public domain may vary country to country. Public domain books are our gateways to the past, representing a wealth of history, culture and knowledge that's often difficult to discover.

Marks, notations and other marginalia present in the original volume will appear in this file - a reminder of this book's long journey from the publisher to a library and finally to you.

### Usage guidelines

Google is proud to partner with libraries to digitize public domain materials and make them widely accessible. Public domain books belong to the public and we are merely their custodians. Nevertheless, this work is expensive, so in order to keep providing this resource, we have taken steps to prevent abuse by commercial parties, including placing technical restrictions on automated querying.

We also ask that you:

- + *Make non-commercial use of the files* We designed Google Book Search for use by individuals, and we request that you use these files for personal, non-commercial purposes.
- + *Refrain from automated querying* Do not send automated queries of any sort to Google's system: If you are conducting research on machine translation, optical character recognition or other areas where access to a large amount of text is helpful, please contact us. We encourage the use of public domain materials for these purposes and may be able to help.
- + *Maintain attribution* The Google "watermark" you see on each file is essential for informing people about this project and helping them find additional materials through Google Book Search. Please do not remove it.
- + *Keep it legal* Whatever your use, remember that you are responsible for ensuring that what you are doing is legal. Do not assume that just because we believe a book is in the public domain for users in the United States, that the work is also in the public domain for users in other countries. Whether a book is still in copyright varies from country to country, and we can't offer guidance on whether any specific use of any specific book is allowed. Please do not assume that a book's appearance in Google Book Search means it can be used in any manner anywhere in the world. Copyright infringement liability can be quite severe.

### About Google Book Search

Google's mission is to organize the world's information and to make it universally accessible and useful. Google Book Search helps readers discover the world's books while helping authors and publishers reach new audiences. You can search through the full text of this book on the web at <http://books.google.com/>

**ALL MATERIAL NONCIRCULATING**

**CALL NUMBER**

**VOLUME**

**COPY**

**216**

**COPY** <sup>3</sup> ~~2~~

**AUTHOR**

**TITLE**

**SOUTHWESTERN REPORTER**

**NAME AND ADDRESS**




State Report Citation of Cases in the SOUTHWESTERN REPORTER, VOL. 216.

The left-hand column shows the page of this volume on which a case begins, and opposite at the right is shown where same case is to be found in the State Report.

Illustration: The case of *Neal v. Harris*, is in S. W. Rep., vol. 216, p. 6. This table shows that the same case is reported in "140 Ark. 619."

Repr. Page	State Report	Repr. Page	State Report	Repr. Page	State Report	Repr. Page	State Report	Repr. Page	State Report
1.....	141 Ark. 87	181...86	Tex. Cr. R. 253	535*	.....Mo.	775.....	279 Mo. 630	1004 to 1018*	Mo. App.
3.....	140 Ark. 572	182...86	Tex. Cr. R. 247	536*	.....230 Mo. 5	780*	.....Mo. App.	1020...204	Mo. App. 606
6.....	140 Ark. 619	183...86	Tex. Cr. R. 266	538*	.....Mo. App.	781*	.....Mo. App.	1023*	.....Mo. App.
9.....	241 Ark. 32	183...86	Tex. Cr. R. 261	539*	.....Mo. App.	783*	.....Mo. App.	1025*	.....Mo. App.
10.....	141 Ark. 79	184...86	Tex. Cr. R. 262	541...202	Mo. App. 345	785...202	Mo. App. 347	1029...202	Mo. App. 683
11.....	139 Ark. 489	185...86	Tex. Cr. R. 267	542*	.....Mo. App.	787...204	Mo. App. 597	1034...202	Mo. App. 673
15.....	141 Ark. 52	186...86	Tex. Cr. R. 265	543*	.....Mo. App.	791...202	Mo. App. 639	1038...140	Ark. 636
17.....	141 Ark. 84	186...86	Tex. Cr. R. 266	545*	.....Mo. App.	794*	.....Mo. App.	1039...141	Ark. 323
18...141	Ark. 641	188...86	Tex. Cr. R. 281	545**	.....Mo. App.	798...202	Mo. App. 630	1040...141	Ark. 332
20.....	141 Ark. 25	190...86	Tex. Cr. R. 291	547...202	Mo. App. 238	800*	.....Mo. App.	1042...144	Ark. 641
23.....	140 Ark. 544	192...86	Tex. Cr. R. 276	548...202	Mo. App. 245	802*	.....Mo. App.	1043...141	Ark. 79
26.....	140 Ark. 597	195 to 286*	Tex. Civ. A.	550*	.....Mo. App.	803...205	Mo. App. 15	1043*	.....141 Ark. 196
31...141	Ark. 641	282...141	Ark. 114	552*	.....Mo. App.	808...203	Mo. App. 249	1045	.....141 Ark. 256
32...141	Ark. 33	283...141	Ark. 170	556...202	Mo. App. 433	811...203	Mo. App. 1	1047	.....141 Ark. 288
33.....	140 Ark. 553	294...141	Ark. 137	563*	.....Mo. App.	814*	.....Mo. App.	1049	.....141 Ark. 188
34.....	141 Ark. 43	295...141	Ark. 64	566*	.....Mo. App.	815...202	Mo. App. 367	1052	.....141 Ark. 93
35.....	141 Ark. 1	298...141	Ark. 155	568*	.....Mo. App.	817*	.....Mo. App.	1054	.....141 Ark. 373
38.....	141 Ark. 18	300...140	Ark. 628	570...202	Mo. App. 212	819...202	Mo. App. 357	1059	.....141 Ark. 122
40.....	140 Ark. 371	302...141	Ark. 113	571*	.....Mo. App.	822 to 835*	.....Mo. App.	1063	.....186 Ky. 32
44.....	141 Ark. 48	303...141	Ark. 161	572*	.....Mo. App.	837...186	Ky. 91	1066	.....186 Ky. 335
47*	.....Mo.	304...141	Ark. 164	573...202	Mo. App. 352	840...186	Ky. 294	1068	.....186 Ky. 324
48.....	279 Mo. 569	305...141	Ark. 111	575...202	Mo. App. 365	842...186	Ky. 330	1071	.....186 Ky. 340
49...202	Mo. App. 232	308...140	Ark. 413	576...202	Mo. App. 622	844...186	Ky. 320	1073	.....186 Ky. 288
50*	.....Mo. App.	308...141	Ark. 177	579...186	Ky. 371	846...186	Ky. 261	1076	.....186 Ky. 308
52...202	Mo. App. 221	311...141	Ark. 133	583...186	Ky. 280	848...186	Ky. 314	1078	.....186 Ky. 345
54*	.....Mo. App.	311...140	Ark. 91	584...186	Ky. 394	850...186	Ky. 361	1082	.....186 Ky. 438
57.....	186 Ky. 7	315...230	Mo. 123	591...186	Ky. 252	852...186	Ky. 365	1085...86	Tex. Cr. R. 441
58.....	185 Ky. 351	317...230	Mo. 99	592...186	Ky. 298	856...110	Tex. 114	1086...86	Tex. Cr. R. 450
61.....	185 Ky. 626	320...279	Mo. 558	594...186	Ky. 429	862...110	Tex. 142	1087...86	Tex. Cr. R. 333
62.....	186 Ky. 17	323...280	Mo. 139	596...186	Ky. 246	863...86	Tex. Cr. R. 466	1089...86	Tex. Cr. R. 398
66.....	186 Ky. 25	330*	.....Mo. App.	599...186	Ky. 381	864...86	Tex. Cr. R. 362	1091...86	Tex. Cr. R. 407
69.....	186 Ky. 38	331*	.....Mo. App.	605...186	Ky. 256	865...86	Tex. Cr. R. 337	1094...86	Tex. Cr. R. 401
72.....	185 Ky. 717	332*	.....Mo. App.	607...186	Ky. 283	866...86	Tex. Cr. R. 329	1097...86	Tex. Cr. R. 406
74.....	185 Ky. 722	334*	.....Mo. App.	609...186	Ky. 266	867...86	Tex. Cr. R. 324	1097**	.....Tex. Cr. R.
76.....	185 Ky. 734	338...142	Tenn. 58	612...183	Ky. 254	869...86	Tex. Cr. R. 327	1097**	.....Tex. Cr. R.
80.....	186 Ky. 138	341...186	Ky. 171	613...187	Ky. 132	870...86	Tex. Cr. R. 322	1098...86	Tex. Cr. R. 461
82.....	186 Ky. 102	342...186	Ky. 155	614...187	Ky. 7	870...86	Tex. Cr. R. 364	1098...86	Tex. Cr. R. 444
83.....	186 Ky. 64	344...186	Ky. 114	618...110	Tex. 126	871...86	Tex. Cr. R. 334	1099...86	Tex. Cr. R. 369
86.....	186 Ky. 739	345...186	Ky. 114	621...110	Tex. 148	871...86	Tex. Cr. R. 336	1100...86	Tex. Cr. R. 354
88.....	185 Ky. 847	348...186	Ky. 124	624...86	Tex. Cr. R. 243	873...86	Tex. Cr. R. 33	1101 to 1115*	Tex. C. A.
90.....	186 Ky. 78	352...186	Ky. 241	626...86	Tex. Cr. R. 274	873...86	Tex. Cr. R. 331	1117*	.....Tex. Cr. R.
91.....	186 Ky. 134	354...186	Ky. 184	627 to 687*	Tex. Civ. A.	879...86	Tex. Cr. R. 352	1117*	.....Tex. Cr. R.
93.....	186 Ky. 61	356...186	Ky. 142	689...144	Ark. 642	880...86	Tex. Cr. R. 353	1117*	.....Tex. Cr. R.
95.....	186 Ky. 71	359...186	Ky. 180	690...141	Ark. 247	881...86	Tex. Cr. R. 356	1117...86	Tex. Cr. R. 437
99.....	185 Ky. 835	361...186	Ky. 120	693...141	Ark. 262	881...86	Tex. Cr. R. 356	1117*	.....Tex. Cr. R.
101.....	185 Ky. 830	362...186	Ky. 99	694...141	Ark. 182	882...86	Tex. Cr. R. 358	1117*	.....Tex. Cr. R.
104.....	185 Ky. 843	364...186	Ky. 104	695...141	Ark. 211	884...86	Tex. Cr. R. 327	1117...	137 Ark. 616
105.....	185 Ky. 817	366...186	Ky. 223	695...141	Ark. 276	884...86	Tex. Cr. R. 371	1117*	.....139 Ark. 606
109.....	185 Ky. 697	368...186	Kv. 178	697...14	Ark. 642	886...86	Tex. Cr. R. 389	1117*	.....144 Ark. 643
116.....	186 Ky. 45	370...186	Ky. 233	698...141	Ark. 363	888...86	Tex. Cr. R. 411	1117*	.....139 Ark. 606
121.....	186 Ky. 173	373...186	Kv. 226	700...141	Ark. 316	890 to 910*	Tex. Civ. A.	1118*	.....144 Ark. 643
123.....	186 Ky. 163	376...186	Ky. 183	702...141	Ark. 297	913*	.....Mo.	1118*	.....138 Ark. 613
127.....	183 Ky. 149	379...186	Ky. 217	704...141	Ark. 243	918...279	Mo. 663	1118*	.....137 Ark. 616
129.....	185 Ky. 194	382...110	Tex. 23	705...141	Ark. 57	922*	.....Mo.	1118*	.....144 Ark. 642
133.....	185 Ky. 84	385...110	Tex. 90	707...141	Ark. 290	923*	.....Mo.	1118*	.....139 Ark. 605
136.....	186 Ky. 9	388...110	Tex. 97	710...141	Ark. 310	923**	.....Mo.	1118*	.....138 Ark. 614
140 to 153*	.....Tex.	390...110	Tex. 104	712...141	Ark. 393	923**	.....279 Mo. 574	1118*	.....138 Ark. 613
161...86	Tex. Cr. R. 130	391...110	Tex. 106	716...141	Ark. 323	933*	.....Mo.	1118*	.....144 Ark. 643
164...86	Tex. Cr. R. 252	393...110	Tex. 128	717...141	Ark. 414	935...279	Mo. 606	1118*	.....137 Ark. 616
164...86	Tex. Cr. R. 232	394...86	Tex. Cr. R. 264	719...141	Ark. 410	938...279	Mo. 680	1118*	.....138 Ark. 614
165...86	Tex. Cr. R. 229	395...86	Tex. Cr. R. 298	721...141	Ark. 184	944*	.....Mo.	1118*	.....138 Ark. 613
165...86	Tex. Cr. R. 234	396...86	Tex. Cr. R. 439	722...141	Ark. 265	949*	.....Mo.	1118*	.....138 Ark. 613
165...86	Tex. Cr. R. 229	397...86	Tex. Cr. R. 469	727...142	Tenn. 76	954*	.....Mo.	1118*	.....139 Ark. 605
166...86	Tex. Cr. R. 304	397...86	Tex. Cr. R. 280	733*	.....Mo.	962...250	Mo. 653	1118*	.....144 Ark. 643
167...86	Tex. Cr. R. 271	398...86	Tex. Cr. R. 281	736...279	Mo. 672	967*	.....Mo.	1118*	.....137 Ark. 616
168...86	Tex. Cr. R. 285	398*	.....Tex. Civ. App.	738*	.....Mo.	970*	.....Mo. App.	1118*	.....139 Ark. 605
170...86	Tex. Cr. R. 272	399 to 495*	Tex. Civ. A.	740...279	Mo. 613	974*	.....Mo. App.	1118*	.....144 Ark. 613
170...86	Tex. Cr. R. 235	497...141	Ark. 102	745*	.....Mo.	976...203	Mo. App. 257	1118*	.....144 Ark. 643
172...86	Tex. Cr. R. 251	500...141	Ark. 140	754...290	Mo. 11	981...205	Mo. App. 31	1118*	.....144 Ark. 643
172...86	Tex. Cr. R. 217	505...141	Ark. 133	756*	.....Mo.	984*	.....Mo. App.	1118*	.....138 Ark. 613
173...86	Tex. Cr. R. 231	505**	140 Ark. 512	763...279	Mo. 616	989...205	Mo. App. 33	1118*	.....138 Ark. 614
174...86	Tex. Cr. R. 249	512 to 526*	.....Mo.	766*	.....Mo.	992...202	Mo. App. 667	1118*	.....139 Ark. 605
175...86	Tex. Cr. R. 237	530...280	Mo. 1	770*	.....Mo.	994*	.....Mo. App.	1118*	.....137 Ark. 616
175...86	Tex. Cr. R. 222	531*	.....Mo.	773*	.....Mo.	998*	.....202 Mo. App.	1118*	.....280 Mo. 268

\*Not reported in State Reports. † Not reported in full in Official Reports; reported in full in the Southwestern Reporter.

[End of Table.]



5/14/20







## **This is a Key-Numbered Volume**

Each syllabus paragraph in this volume is marked with the topic and Key-Number section ➡ under which the point will eventually appear in the American Digest System.

The lawyer is thus led from that syllabus to the exact place in the Digests where we, as digest makers, have placed the other cases on the same point--*This is the Key-Number Annotation.*

NATIONAL REPORTER SYSTEM — STATE SERIES

THE  
SOUTHWESTERN REPORTER  
VOLUME 216

PERMANENT EDITION

COMPRISING ALL THE CURRENT DECISIONS OF THE  
SUPREME AND APPELLATE COURTS OF ARKANSAS  
KENTUCKY, MISSOURI, TENNESSEE  
AND TEXAS

WITH KEY-NUMBER ANNOTATIONS

JANUARY 7 — FEBRUARY 4, 1920

ST. PAUL  
WEST PUBLISHING CO.  
1920

**COPYRIGHT, 1920**  
**BY**  
**WEST PUBLISHING COMPANY**  
**(216 S.W.)**



# JUDGES

## OF THE COURTS REPORTED DURING THE PERIOD COVERED BY THIS VOLUME

**ARKANSAS—Supreme Court.**

EDGAR A. McCULLOCH, CHIEF JUSTICE.

## ASSOCIATE JUSTICES.

CARROLL D. WOOD.  
JESSE C. HART.  
FRANK G. SMITH.  
THOMAS H. HUMPHREYS.

**KENTUCKY—Court of Appeals.**

JOHN D. CARROLL, CHIEF JUSTICE.

## ASSOCIATE JUSTICES.

ERNEST S. CLARKE.  
GUS THOMAS.  
ROLLIN HURT.  
FLEM D. SAMPSON.  
WARNER E. SETTLE.  
HUSTON QUIN.

## COMMISSIONER OF APPEALS.

WILLIAM ROGERS CLAY.

**MISSOURI—Supreme Court.**

HENRY W. BOND, CHIEF JUSTICE.<sup>1</sup>  
ROBERT F. WALKER, CHIEF JUSTICE.<sup>2</sup>

*Division No. 1.*

JAMES T. BLAIR, PRESIDING JUDGE.

## ASSOCIATE JUDGES.

HENRY W. BOND.<sup>1</sup>  
ARCHELAUS M. WOODSON.  
WALLER W. GRAVES.  
RICHARD L. GOODE.<sup>2</sup>

## SUPREME COURT COMMISSIONERS.

STEPHEN S. BROWN.  
WILLIAM T. RAGLAND.  
CHARLES E. SMALL.

*Division No. 2.*

FRED L. WILLIAMS, PRESIDING JUDGE.

## ASSOCIATE JUDGES.

ROBERT F. WALKER.<sup>3</sup>  
CHARLES B. FARIS.<sup>4</sup>  
JOHN I. WILLIAMSON.<sup>5</sup>

## SUPREME COURT COMMISSIONERS.

ROBERT T. RAILEY.  
JOHN TURNER WHITE.  
NORMAN A. MOZLEY.

**The St. Louis Court of Appeals.**

GEORGE D. REYNOLDS, PRESIDING JUDGE.

## ASSOCIATE JUDGES.

WILLIAM H. ALLEN.  
WM. DEE BECKER.

COURT OF APPEALS COMMISSIONERS.<sup>6</sup>

CLARENCE A. BARNES.  
DAVIS BIGGS.  
SIMON G. NIPPER.

**MISSOURI (Continued).****The Kansas City Court of Appeals.**

JAMES ELLISON, PRESIDING JUDGE.

## ASSOCIATE JUDGES.

FRANCIS H. TRIMBLE.  
EWING C. BLAND.

**The Springfield Court of Appeals.**

JOHN T. STURGIS, PRESIDING JUDGE.

## ASSOCIATE JUDGES.

JOHN S. FARRINGTON.  
JOHN H. BRADLEY.

**TENNESSEE—Supreme Court.**

DAVID L. LANSDEN, CHIEF JUSTICE.

## ASSOCIATE JUSTICES.

GRAFTON GREEN.  
COLIN P. MCKINNEY.  
FRANK P. HALL.  
NATHAN L. BACHMAN.

**TEXAS—Supreme Court.**

NELSON PHILLIPS, CHIEF JUSTICE.

## ASSOCIATE JUSTICES.

WILLIAM E. HAWKINS.  
THOMAS B. GREENWOOD.

**Commission of Appeals.***Section A.*

LEON SONFIELD, PRESIDING JUDGE.

## JUDGES.

BEEMAN STRONG.<sup>7</sup>  
WILLIAM M. TAYLOR.  
FRENCH SPENCER.<sup>1</sup>

*Section B.*

JAMES T. MONTGOMERY, PRESIDING JUDGE.<sup>8</sup>  
STERLING P. SADLER, PRESIDING JUDGE.<sup>9</sup>

## JUDGES.

STERLING P. SADLER.<sup>9</sup>  
JAMES W. McCLENDON.  
NORMAN G. KITTRELL, SR.<sup>10</sup>

**Court of Criminal Appeals.**

WILLIAM L. DAVIDSON, PRESIDING JUDGE.

## JUDGES.

WRIGHT C. MORROW.  
OFFA S. LATTIMORE.

**Courts of Civil Appeals.***First District.*

ROBERT A. PLEASANTS, CHIEF JUSTICE.

## ASSOCIATE JUSTICES.

CHARLES E. LANE.  
GEORGE W. GRAVES.

<sup>1</sup> Died September 28, 1919.<sup>2</sup> Became Chief Justice October 13, 1919.<sup>3</sup> Appointed November 1, 1919.<sup>4</sup> Resigned October 31, 1919.<sup>5</sup> Appointed October 1, 1919.<sup>6</sup> Resigned, effective January 1, 1920.<sup>7</sup> Appointed as third judge, Section A.<sup>8</sup> Resigned, effective November 23, 1919.<sup>9</sup> Became Presiding Judge.<sup>10</sup> Appointed as third judge, Section B.

**TEXAS—Courts of Civil Appeals (Cont'd).***Second District.*

TRUMAN H. CONNER, CHIEF JUSTICE.  
 ASSOCIATE JUSTICES,  
 IRBY DUNKLIN.  
 RAYMOND H. BUCK.

*Third District.*

WILLIAM M. KEY, CHIEF JUSTICE.  
 ASSOCIATE JUSTICES,  
 CHARLES H. JENKINS.  
 JOHN W. BRADY.

*Fourth District.*

WILLIAM S. FLY, CHIEF JUSTICE.  
 ASSOCIATE JUSTICES,  
 ANTON N. MOURSUND.  
 THOMAS D. COBBS.

*Fifth District.*

ANSON RAINEY, CHIEF JUSTICE.  
 ASSOCIATE JUSTICES,  
 JAMES M. TALBOT.  
 CHARLES A. RASBURY.

**TEXAS—Courts of Civil Appeals (Cont'd).***Sixth District.*

SAMUEL P. WILLSON, CHIEF JUSTICE.  
 ASSOCIATE JUSTICES,  
 RICHARD B. LEVY.  
 WILLIAM HODGES.

*Seventh District.*

STERLING P. HUFF, CHIEF JUSTICE.  
 ASSOCIATE JUSTICES,  
 ROBERT W. HALL.  
 WILLIAM BOYCE.

*Eighth District.*

JAMES R. HARPER, CHIEF JUSTICE.  
 ASSOCIATE JUSTICES,  
 ERASTUS F. HIGGINS.  
 ANDERSON M. WALTHALL.

*Ninth District.*

LEWIS B. HIGHTOWER, JR., CHIEF JUSTICE.  
 ASSOCIATE JUSTICES,  
 ARTHUR G. BROOKE.  
 DANIEL WALKER.

# AMENDMENTS TO RULES

## COURT OF APPEALS OF KENTUCKY

The rules were republished in the docket of the court, for the winter term of 1920, and exhibit the following changes from the rules as published in 154 S. W. vii; 191 S. W. vii; 207 S. W. vii:

**VI.—Decision of cases — Order of — Second appeal.**—Cases once adjudicated by this court, and again brought up by appeal may be advanced by leave of the court on motion of either party. Other cases will be decided as nearly as practicable in the order of their submission, and will not be advanced, unless involving some public question, or great injury will result from the delay, nor unless the reasons why it should be advanced are stated in the motion.

**XIII.—(1) Petitions for rehearing—When may be filed in clerk's office.**—When time is extended to file a petition for rehearing, and the time expires during vacation, or where the court adjourns before the time for filing a petition for rehearing has expired, the filing of the petition with the clerk in the clerk's office within the time shall be held sufficient. The clerk, however, has no right to extend the time for filing, and this can only be done by an order from one of the judges.

**(2) Petitions for rehearing—How disposed of—Ten copies.**—Petitions for rehearing shall be considered by a judge other than the one who delivered the opinion in the case. The petition must be printed, and ten copies must be filed.

**(3) Petitions for rehearing—Extension of time.**—No extension of time for filing a petition for rehearing will be granted except upon the affidavit or statement of the attorney or client stating sufficient cause therefor.

**(4) Petitions for rehearing—Notice to adverse party—Response.**—A party filing a petition for rehearing must, before filing the same, furnish to counsel for the adverse party a copy of the petition, and file with the petition a notice showing that he has delivered to counsel the copy required, and the adverse party shall have 10 days after the service of the notice to file a response if he desires to file one.

(Amended March 7, 1916.)

**(5) Rehearing—Notice of intention to file petition for—Opinions—When to be published.**—Opinions shall not be given out by the clerk for publication in the Advance Sheets, Kentucky Reports, or the Southwestern Reporter, except as hereinafter provided; but he will send them as he now does to the lawyers in the case.

Parties, or their attorneys, who desire to file a petition for rehearing or for the modifica-

tion or extension of an opinion, shall, within fifteen days (Sundays included) after the case is decided, file with the clerk of this court a notice that it is desired to file such a petition, and if this notice is not given within the time named no such petition shall thereafter be permitted to be filed, and upon the expiration of the fifteen days the opinion shall be deemed to have been handed down and be then given out for publication. If notice is given, the petition may be filed within the time now allowed by rules of the court.

When the notice is given, the opinion shall not be deemed to have been handed down or be given out for publication until the petition filed has been disposed of.

In other respects the present rules as to petitions for rehearing shall remain in force.

(Adopted January 28, 1910.)

**XVIII.—Docket, how arranged—Clerk to notify parties—Statement of counsel.**—To enable the court at the opening of each term to proceed with the business before it, the clerk is directed to docket the commonwealth cases and all cases from the first and second appellate districts, for the first day of each term, and the cases from the third, fourth, and fifth appellate districts, on Wednesday, the third day of each term, and cases from the sixth and seventh appellate districts on Friday, the fifth day of each term. When a record is filed he will set the case and notify the parties or their counsel of the day it is set for. The appellant in his statement of parties to the appeal, will give the name and address of appellee's counsel or if none, appellee's address.

**XXI.—Sessions of Court—Oral arguments—Filing motions in clerk's office.**—Beginning with the winter term in January, 1917, the court will sit every day during the call of the appearance docket, on which days no arguments will be heard. After the appearance docket has been called, the Western division will sit in open session only every Tuesday of each week, and the Eastern division only every Friday each week, and arguments will be heard only on these days. Motions may be filed with notice in the clerk's office of the court on any day during the term, to have the same effect as if filed in court on that day. Petitions for rehearing and briefs may also be filed with notice in the clerk's office of the court on any day of the term, to have the same effect as if filed in court on that day. All motions filed in the clerk's office will be disposed of by the court in the regular order of business.



# CASES REPORTED

	Page		Page
Abell, Davis v. (Ky.).....	104	Beasley, Middleton v. (Ky.).....	591
Adams, Yonts v. (Ky.).....	82	Beaty v. State (Ark.).....	1117
Adams v. State (Tex. Cr. App.).....	863	Beck v. State (Ark.).....	497
Adams & Allcorn, J. L. Collins Piano Co. v. (Tex. Civ. App.).....	420	Bell, Galveston, H. & S. A. R. Co. v. (Tex.)	390
A. L. Clark Lumber Co. v. Edwards (Ark.)	18	Bell v. State (Tex. Cr. App.).....	879
Alford v. New York Life Ins. Co. (Mo.)..	754	Benford Lumber Co., Leonard v. (Tex.)..	382
Allen v. Berkmier (Tex. Civ. App.).....	647	Benson v. Ashford (Tex. Civ. App.).....	283
Allen v. Crutcher (Tex. Civ. App.).....	236	Bering Mfg. Co. v. Sedita (Tex. Civ. App.)	639
Allen, First Nat. Bank v. (Ark.).....	1039	Berkmier, Allen v. (Tex. Civ. App.).....	647
Allen v. Jackson (Mo. App.).....	539	Berkshire v. Holcker (Mo. App.).....	558
Alsobrook v. State (Tex. Cr. App.).....	107	Biggs, Westchester Fire Ins. Co. v. (Tex. Civ. App.).....	274
Althoff v. Cull (Ky.).....	361	Biscoe v. State (Tex. Cr. App.).....	174
Ambrose v. Reece (Ky.).....	341	Bishop, Hayes v. (Ark.).....	298
American Forest Co. v. Hall (Mo.).....	740	Bishop v. Woodard (Ark.).....	1117
American Freehold Land Mortg. Co. of London v. Morris (Ark.).....	1117	Black v. State (Tex. Cr. App.).....	181
American Hardwood Lumber Co. v. Milliken-James Hardwood Lumber Co. (Ark.)	23	Blanke-Wenneker Candy Co., Wamsanz v. (Mo. App.).....	1025
American Indemnity Co. v. Noble (Tex. Civ. App.).....	441	Blissard, Texarkana Tel. Co. v. (Tex. Civ. App.).....	213
American Packing Co., Colorcraft Co. v. (Mo. App.).....	831	Bliss v. Manila Special School Dist. (Ark.)	700
American Ry. Exp. Co., Edwards v. (Mo. App.).....	781	Board of Health of City of Hot Springs, McClendon v. (Ark.).....	289
Angelina County Lumber Co., Tucker v. (Tex. Com. App.).....	149	Boatmen's Bank, Newell v. (Mo.).....	918
Appleton Nat. Bank, Peterson v. (Tex. Civ. App.).....	1114	Booe v. Road Imp. Dist. No. 4, Prairie County (Ark.).....	500
Arkadelphia Milling Co. v. Campbell (Ark.)	20	Bost v. Johnson County (Ark.).....	1117
Arkansas Valley Trust Co., City Nat. Bank v. (Ark.).....	1118	Bourland v. Baker (Ark.).....	707
Armour & Co., City of Dallas v. (Tex. Civ. App.).....	222	Boydston, Watson v. (Ark.).....	721
Armour & Co., Drury v. (Ark.).....	40	Boyer v. State (Ark.).....	17
Armstrong v. State (Tex. Cr. App.).....	1098	Boyers v. Lindhorst (Mo.).....	536
Armstrong v. Turbeville (Tex. Civ. App.)..	1101	Braden v. San Antonio (Tex. Civ. App.)..	282
Ascher v. Ascher (Mo. App.).....	578	Bradford v. State (Tex. Cr. App.).....	165
Asher, State v. (Mo. App.).....	1013	Brady v. Cobbs & Bonner (Tex. Civ. App.)	420
Ashford, Benson v. (Tex. Civ. App.).....	283	Bramhall v. Bramhall (Mo.).....	766
Atwood, Atwood's Guardian v. (Ky.)....	352	Bransford & Son, Town of Lonoke v. (Ark.).....	38
Atwood, Sleet v. (Ky.).....	352	Brent, Scobee v., two cases (Ky.).....	76
Atwood's Guardian v. Atwood (Ky.).....	352	Broach, Phillips v. (Ky.).....	80
Ault, Missouri Pac. Co. v. (Ark.).....	3	Broadbuss, City of Lancaster v. (Ky.)....	373
Avero v. Wells (Mo. App.).....	802	Brooker v. Wright (Tex. Civ. App.).....	196
Axtell v. State (Tex. Cr. App.).....	394	Brooks v. State (Ark.).....	705
Baker, Bourland v. (Ark.).....	707	Brooks, Zucht v. (Tex. Civ. App.).....	684
Baker v. Gates (Mo.).....	775	Brookshire v. Harp (Ky.).....	379
Baker, McClure v. (Mo. App.).....	1018	Brown, Courchesne v. (Tex. Civ. App.)..	674
Baldwin v. Hanley & Kinsella Coffee Co. (Mo. App.).....	998	Brown, Engle v. (Mo. App.).....	541
Rall v. Brown-Ross Shoe Co. (Ky.).....	612	Brown, E. O. Barnett Bros. v. (Ark.).....	1038
Bandera Independent Tel. Co., Miller v. (Tex. Civ. App.).....	900	Brown, Hart v. (Mo. App.).....	552
Bantrup, Messerli v. (Mo. App.).....	825	Brown, Miller v. (Tex. Civ. App.).....	452
Barber v. Sager (Ark.).....	36	Brown-Ross Shoe Co., Ball v. (Ky.).....	612
Barbuzza, Leeper-Curd Lumber Co. v. (Tex. Civ. App.).....	216	Broyles, Eversmeyer v. (Mo.).....	317
Bargas v. State (Tex. Cr. App.).....	172	Bruni, Martinez v. (Tex. Civ. App.).....	655
Bargas v. State (Tex. Cr. App.).....	173	Bryant, Groves v. (Ky.).....	364
Barnes, Hayti Development Co. v. (Mo.)..	733	Buchanan v. Gribble (Tex. Civ. App.)..	899
Barnett, Eureka Paving Co. v. (Tex. Civ. App.).....	903	Buddecke v. Garrels (Mo. App.).....	811
Barnett Bros. v. Brown (Ark.).....	1038	Buie v. Miller (Tex. Civ. App.).....	630
Barrera, Cardenas v. (Tex. Civ. App.).....	474	Burns, Wigginton v. (Mo.).....	756
Barringer, Fraternal Aid Union v. (Ark.)..	1118	Burchett v. Leslie (Ky.).....	850
Bartlett v. State (Ark.).....	33	Burress v. Richardson (Mo. App.).....	800
Barton v. Matthews (Ark.).....	693	Burri, Missouri Real Estate & Loan Co. v. (Mo. App.).....	570
Bassham v. Evans (Tex. Civ. App.).....	446	Bush v. Delta Road Imp. Dist. of Lee County (Ark.).....	690
Bates County, Drainage Dist. No. 1 of Bates County v. (Mo.).....	949	Bush v. Miller (Mo. App.).....	989
Baum v. Ingraham (Ark.).....	704	Bustillos, Southwestern Portland Cement Co. v. (Tex. Civ. App.).....	268
Baxter Realty Co. v. Martin (Ky.).....	110	Byrd, Shumaker v. (Tex.).....	862
		Cabble v. Hawkins (Ky.).....	345
		Caldwell, Dean v. (Ark.).....	31
		Caldwell v. E. F. Spears & Sons (Ky.)....	83
		Caldwell v. Puckett (Ky.).....	344
		California State Bank, Missouri State Life Ins. Co. v. (Mo. App.).....	785

	Page		Page
California Woolen Mills Co., Doody v. (Mo.)	531	Collins Piano Co. v. Adams & Allcorn (Tex. Civ. App.)	420
Cameron & Co. v. Gamble (Tex. Civ. App.)	459	Collison v. Curtner (Ark.)	1059
Camp v. United States Tire Co. (Tex. Civ. App.)	1115	Colorcraft Co. v. American Packing Co. (Mo. App.)	831
Campbell, Arkadelphia Milling Co. v. (Ark.)	20	Colonization Realty Co. v. Seeley (Mo.)	530
Cannon v. Foster (Ark.)	698	Combs, Virginia Iron Coal & Coke Co. v. (Ky.)	846
Cardenas v. Barrera (Tex. Civ. App.)	474	Commonwealth, Cline v. (Ky.)	594
Carneal v. State (Tex. Cr. App.)	626	Commonwealth, Jones v. (Ky.)	607
Cantrell, State v. (Mo.)	48	Commonwealth, Lay v. (Ky.)	123
Case Threshing Mach. Co. v. Street (Tex. Civ. App.)	426	Commonwealth, Music v. (Ky.)	116
Cassi v. State (Tex. Cr. App.)	1099	Commonwealth v. Roberta Coal Co. (Ky.)	584
Cates v. Cates (Mo. App.)	573	Commonwealth Bonding & Casualty Ins. Co., Cator v. (Tex. Com. App.)	140
Cator v. Commonwealth Bonding & Casualty Ins. Co. (Tex. Com. App.)	140	Cone v. State (Tex. Cr. App.)	190
Central Union Fire Ins. Co., Swift v. (Mo.)	935	Consolidation Coal Co. v. Grayson (Ky.)	848
Chadwick v. State (Tex. Cr. App.)	897	Cook v. Denike (Tex. Civ. App.)	437
Chadwick v. State (Tex. Cr. App.)	1117	Cooper Carriage Woodwork Co., City of St. Louis v. (Mo.)	944
Chandler v. Young (Tex. Civ. App.)	484	Cornelius, Gandy v. (Tex. Civ. App.)	467
Chenault v. Yates (Mo. App.)	817	Cornett, Evans v. (Ky.)	58
Chicago, R. I. & G. R. Co. v. Wisdom (Tex. Civ. App.)	241	Corsey, Home Life & Accident Co. v. (Tex. Civ. App.)	464
Chiles v. Ft. Smith Commission Co. (Ark.)	11	Courchesne v. Brown (Tex. Civ. App.)	674
Chittim v. Parr (Tex. Civ. App.)	638	Cox, Ex parte (Tex. Cr. App.)	1117
Choate v. Provident Sav. Life Assur. Soc. (Ky.)	1078	Cramer, Lomax v. (Mo. App.)	575
Churchill, Miners' Bank v. (Ark.)	695	Craven v. Whittenberg (Tex. Civ. App.)	251
Citizens' Nat. Bank, Windle v. (Mo. App.)	1020	Crawford, Hurst v. (Tex. Civ. App.)	284
Citizens' Nat. Bank, Windle v. (Mo. App.)	1023	Crawford, Wellington Railroad Committee v. (Tex. Com. App.)	151
City Nat. Bank v. Arkansas Valley Trust Co. (Ark.)	1118	Crayne, State v. (Mo.)	47
City of Clarendon, Nave v. (Tex. Civ. App.)	1110	Creech v. Creech (Ky.)	127
City of Dallas v. Armour & Co. (Tex. Civ. App.)	222	Cress v. Rogers (Ark.)	1118
City of Helena, Helena Water Co. v. (Ark.)	26	Crews v. Lombard (Mo.)	512
City of Lancaster v. Broadbuss (Ky.)	873	Crider v. Sutherland (Ky.)	57
City of Lexington, Purcell v. (Ky.)	599	Grier, Shotwell v. (Tex. Civ. App.)	262
City of Louisville, Langhan v. (Ky.)	1082	Crutcher, Allen v. (Tex. Civ. App.)	236
City of Ludlow v. Ludlow (Ky.)	596	Cull, Althoff v. (Ky.)	361
City of Mayfield, Moss v. (Ky.)	842	Culwell, Gulf, C. & S. F. R. Co. v. (Tex. Civ. App.)	457
City of Plattsburg v. Smarr (Mo. App.)	538	Curry v. State (Tex. Cr. App.)	165
City of San Antonio v. Pfeiffer (Tex. Civ. App.)	207	Curtner, Collison v. (Ark.)	1059
City of St. Joseph, Gibson v. (Mo. App.)	50	Dallas Power & Light Co. v. Edwards (Tex. Civ. App.)	910
City of St. Louis v. Cooper Carriage Woodwork Co. (Mo.)	944	Davey, Whitworth v. (Mo.)	736
City of St. Louis, Reese v. (Mo.)	315	Davidson v. State (Tex. Cr. App.)	624
City of San Antonio, Braden v. (Tex. Civ. App.)	282	Davis v. Abell (Ky.)	104
City of West Plains, Francis v. (Mo. App.)	808	Davis, O'Kain v. (Ky.)	354
Clark, Koger v. (Tex. Civ. App.)	434	Davis v. State (Ark.)	292
Clark, Matthaei v. (Tex.)	856	Dean v. Caldwell (Ark.)	31
Clark v. Maund (Tex. Civ. App.)	257	Dean v. Cole (Ark.)	308
Clark, Texas Co-op. Inv. Co. v. (Tex. Civ. App.)	220	Decker v. Kirlicks (Tex.)	385
Clark Lumber Co. v. Edwards (Ark.)	18	Delight Lumber Co., Dyer & Co. v. (Ark.)	294
Clarkson v. Laiblan (Mo. App.)	1029	Delta Land & Timber Co. v. Spiller (Tex. Civ. App.)	414
Claycomb, Meredith v. (Mo. App.)	794	Delta Road Imp. Dist. of Lee County, Bush v. (Ark.)	690
Clements, Stuart v. (Ky.)	136	Denike, Cook v. (Tex. Civ. App.)	437
Cleveland v. State (Tex. Cr. App.)	1117	De Queen Lumber Co. v. Harville (Ark.)	1118
Cliett, Kansas City, M. & O. R. Co. of Texas v. (Tex. Civ. App.)	682	De Queen Real Estate Co., Wofford v. (Ark.)	710
Clift v. Rice (Ky.)	101	Des Arc Oil Mill Co. v. McLeod (Ark.)	1040
Clifton Land Co. v. Reister (Ky.)	342	De Shong, United States Auto Co. v. (Ark.)	1119
Cline v. Commonwealth (Ky.)	594	Detroit Automatic Scale Co. v. Clinton (Mo. App.)	814
Clinton, Detroit Automatic Scale Co. v. (Mo. App.)	814	Dibrell, Leber v. (Tex. Civ. App.)	477
Cobb & Gregory v. Parker (Tex. Civ. App.)	214	Dickinson, Marion Hotel Co. v. (Ark.)	1049
Cobbs & Bonner, Brady v. (Tex. Civ. App.)	420	Dietz v. Nix (Mo. App.)	791
Cochran v. Matheny (Ark.)	1118	Director General of Railroads, Oil Trough Gin Co. v. (Ark.)	310
Coffee v. State (Tex. Cr. App.)	1117	Dixon v. State, three cases (Tex. Cr. App.)	1097
Cole, Dean v. (Ark.)	308	Dodge v. Lacey (Tex. Civ. App.)	400
Cole, Stratton v. (Mo. App.)	976	Dolan, State v. (Mo. App.)	334
Collett's Guardian v. Standard Oil Co. (Ky.)	356	Dollar v. State (Tex. Cr. App.)	1087
		Dollar v. State (Tex. Cr. App.)	1089
		Doody v. California Woolen Mills Co. (Mo.)	531
		Dougherty Motor Co., Missouri Lumber Co. v. (Ark.)	1118
		Drainage Dist. No. 1 of Bates County v. Bates County (Mo.)	949
		Drew v. Jarvis (Tex.)	618

	Page		Page
Drury v. Armour & Co. (Ark.).....	40	Garcia, Hernandez v. (Tex. Civ. App.)....	477
Dugan v. State (Tex. Cr. App.).....	161	Garcia, Texas Mexican R. Co. v. (Tex. Civ. App.).....	1108
Dyer & Co. v. Delight Lumber Co. (Ark.)	294	Garrels, Buddecke v. (Mo. App.).....	811
Edwards, A. L. Clark Lumber Co. v. (Ark.) .....	18	Garrison, Spicer v. (Ark.).....	1119
Edwards v. American Ry. Exp. Co. (Mo. App.) .....	781	Gates, Baker v. (Mo.).....	775
Edwards, Dallas Power & Light Co. v. (Tex. Civ. App.).....	910	General Bonding & Casualty Ins. Co., Texas Fidelity & Bonding Co. v. (Tex. Com. App.) .....	144
E. F. Spears & Sons, Caldwell v. (Ky.)..	83	General Cooperage & Timber Co. v. Hedges (Ark.).....	712
Elliott, Hill v. (Ark.).....	1118	Gerlach, Houston Heights Water & Light Ass'n v. (Tex. Civ. App.).....	634
Ellis v. Haynes (Tex. Civ. App.).....	249	Gerlich v. State (Tex. Cr. App.).....	164
Ellison, State ex rel. Kansas City Theological Seminary v. (Mo.).....	967	Gibson v. St. Joseph (Mo. App.).....	50
El Paso & S. W. R. Co. v. Havens (Tex. Civ. App.).....	444	Gilbert v. Greene (Ky.).....	105
Emerson-Brantingham Implement Co. v. Rogers (Mo. App.).....	904	Gilleylen v. Hallman (Ark.).....	15
Engle v. Brown (Mo. App.).....	541	Gipson v. State (Tex. Cr. App.) .....	870
E. O. Barnett Bros. v. Brown (Ark.)....	1038	Gleghorn v. State (Ark.).....	1118
Escajeda, McGregor & Henger v. (Tex. Civ. App.).....	398	Goad v. State (Ark.).....	1118
Eskew v. H. Friedberg & Co. (Ky.).....	1076	Godfrey v. Martha Inv. Co. (Mo. App.)....	822
Eslick, State v. (Mo. App.).....	974	Goldstein v. Union Nat. Bank (Tex. Civ. App.) .....	409
Estman v. United Rys. Co. of St. Louis (Mo.) .....	526	Goodman, Thornton v. (Tex. Com. App.)..	147
Eureka Coal & Mineral Co. v. Johnson (Ky.) .....	91	Goodman Drilling Co., Grimes v. (Tex. Civ. App.).....	202
Eureka Paving Co. v. Barnett (Tex. Civ. App.).....	903	Gordon, Interstate Coal Co. v. (Mo. App.)	783
Evans, Bassham v. (Tex. Civ. App.).....	446	Gordon v. State (Tex. Cr. App.).....	184
Evans v. Cornett (Ky.).....	58	Gowing, Harger v. (Ark.).....	1118
Evans v. Hudson (Tex. Civ. App.).....	491	Grandberry v. State (Tex. Cr. App.).....	164
Evans, Leffingwell v. (Ky.).....	58	Grayson, Consolidation Coal Co. v. (Ky.)	848
Eversmeyer v. Broyles (Mo.).....	317	Gregory v. South Texas Lumber Co. (Tex. Civ. App.).....	420
Ewing v. McClanahan (Ky.).....	592	Green v. State (Tex. Cr. App.).....	1117
Fath, Paris Transit Co. v. (Tex. Civ. App.)	482	Green, Zenor v. (Ark.).....	697
Faucette v. Patterson (Ark.).....	300	Greene, Gilbert v. (Ky.).....	105
Feibelman v. Hill (Ark.).....	702	Gregg, Holden v. (Ark.).....	1118
Fidelity & Columbia Trust Co. v. Grommes & Ullrich (Ky.).....	1078	Gribble, Buchanan v. (Tex. Civ. App.)....	899
Field, McCulloch v. (Ky.).....	1071	Griffin v. State (Ark.).....	34
Field v. Viraldo (Ark.).....	8	Griffith v. State (Tex. Civ. App.).....	469
Fielder, Lawrence v. (Ky.).....	1068	Grimes, Ex parte (Tex. Civ. App.).....	251
Fields v. Fields (Tex. Civ. App.).....	195	Grimes v. Goodman Drilling Co. (Tex. Civ. App.).....	202
First Nat. Bank v. Allen (Ark.).....	1039	Grommes & Ullrich, Fidelity & Columbia Trust Co. v. (Ky.).....	1078
First Nat. Bank, Lane v. (Tex. Civ. App.)	490	Groves v. Bryant (Ky.).....	964
First Nat. Bank, Reed v. (Ark.).....	306	Guana, State v. (Tex. Civ. App.).....	687
Florence, Massachusetts Bonding & Insurance Co. v. (Tex. Civ. App.).....	471	Gulf, C. & S. F. R. Co. v. Culwell (Tex. Civ. App.).....	457
Flores v. State (Tex. Cr. App.).....	170	Gulf, C. & S. F. R. Co., Hufstutler v. (Tex. Civ. App.).....	495
Flores v. State (Tex. Cr. App.).....	185	Gulf, C. & S. F. R. Co. v. Sanderson (Tex. Civ. App.).....	286
Flummer's Adm'r v. Tri-State Tel. Co. (Ky.) .....	133	H. A. Dougherty Motor Co., Missouri Lumber Co. v. (Ark.).....	1118
Flurry v. Thomas (Ark.).....	302	Hall, American Forest Co. v. (Mo.).....	740
Fore v. Rodgers (Mo. App.).....	566	Hallman, Gilleylen v. (Ark.).....	15
Ft. Smith Commission Co., Chiles v. (Ark.)	11	Hanes v. Hanes (Tex. Civ. App.).....	272
Ft. Smith Light & Traction Co., Freer v. (Ark.) .....	31	Hanley & Kinsella Coffee Co., Baldwin v. (Mo. App.).....	998
Foster, Cannon v. (Ark.).....	698	Hanson, Hanson's Guardian ad Litem v. (Ky.) .....	613
Fourmentin v. Scott (Tex. Civ. App.).....	901	Hanson's Guardian ad Litem v. Hanson (Ky.) .....	613
Francis v. West Plains (Mo. App.).....	808	Hardison, Sutton v. (Ky.).....	609
Frank v. Sufford (Tex. Civ. App.).....	283	Harger v. Gowing (Ark.).....	1118
Fraternal Aid Union v. Barringer (Ark.)	1118	Harmon, Perkins v. (Ky.).....	90
Freeman v. State (Tex. Cr. App.).....	878	Harp, Brookshire v. (Ky.).....	379
Freer v. Ft. Smith Light & Traction Co. (Ark.) .....	81	Harris, Galveston, H. & S. A. R. Co. v. (Tex. Civ. App.).....	430
Freeze, Southern Exp. Co. v. (Ark.).....	303	Harris, Neal v. (Ark.).....	6
Freshman, Runge v. (Tex. Civ. App.)....	254	Hart v. Brown (Mo. App.).....	532
Friedberg & Co., Eskew v. (Ky.).....	1076	Hartwig v. Southern Surety Co. (Tex. Civ. App.) .....	455
Galloway v. Hodnett (Tex. Civ. App.)...	239	Harville, De Queen Lumber Co. v. (Ark.)..	1118
Galveston, H. & S. A. R. Co. v. Bell (Tex.)	390	Havens, El Paso & S. W. R. Co. v. (Tex. Civ. App.).....	444
Galveston, H. & S. A. R. Co. v. Harris (Tex. Civ. App.).....	430	Haverbekken v. State (Tex. Cr. App.)....	397
Galveston, H. & S. A. R. Co. v. State (Tex.) .....	393	Haverbekken v. State (Tex. Cr. App.)....	398
Galveston, H. & S. A. R. Co. v. White (Tex. Civ. App.).....	265	Hawkins, Cabbie v. (Ky.).....	345
Gamble, Wm. Cameron & Co. v. (Tex. Civ. App.) .....	459	Hayes v. Bishop (Ark.).....	298
Gandy v. Cornelius (Tex. Civ. App.).....	467	Haynes, Ellis v. (Tex. Civ. App.).....	249
		Hayti Development Co. v. Barnes (Mo.)..	733

	Page		Page
Hazen Street & Sidewalk Imp. Dist., Stock v. (Ark.).....	506	J. I. Case Threshing Mach. Co. v. Street (Tex. Civ. App.).....	426
Healer, Texas Power & Light Co. v. (Tex. Civ. App.).....	241	J. L. Collins Piano Co. v. Adams & Allcorn (Tex. Civ. App.).....	420
Hedges, General Cooperage & Timber Co. v. (Ark.).....	712	Johnson, Eureka Coal & Mineral Co. v. (Ky.).....	91
Hedrick v. Matthews (Tex. Civ. App.).....	424	Johnson v. Johnson (Mo.).....	913
Helena Water Co. v. Helena (Ark.).....	26	Johnson v. Leazenby (Mo. App.).....	49
Helmer, Parks v. (Ark.).....	1118	Johnson v. State (Tex. Cr. App.).....	192
Hensley v. Woods (Ark.).....	1118	Johnson County, Bost v. (Ark.).....	1117
Hernandez v. Garcia (Tex. Civ. App.).....	477	Jones v. Commonwealth (Ky.).....	867
Hess & Skinner Engineering Co. v. Turney (Tex.).....	621	Jones v. Nichols (Mo.).....	962
Heydt, Traw v. (Mo. App.).....	1009	Jones, Noel v. (Ky.).....	98
H. Friedberg & Co., Eskew v. (Ky.).....	1076	Jones v. State (Tex. Cr. App.).....	183
Highleyman v. McDowell Motor Car Co. (Mo. App.).....	52	Jones v. State (Tex. Cr. App.).....	884
Hill v. Elliott (Ark.).....	1118	Juhan v. State (Tex. Cr. App.).....	873
Hill, Feibelman v. (Ark.).....	702	Kansas City, M. & O. R. Co. of Texas v. Cliett (Tex. Civ. App.).....	682
Hill, Meily v. (Mo. App.).....	546	Kansas City Southern R. Co., Tull v. (Mo. App.).....	572
Hill, Shellenberger v. (Mo. App.).....	542	Keen v. Ross (Ky.).....	605
Hill, Yazoo & M. V. R. Co. v. (Ark.).....	1054	Kelley v. State (Tex. Cr. App.).....	188
Hilton v. Universal Const. Co. (Mo. App.).....	1034	Kemper, Ex parte (Tex. Cr. App.).....	172
Hodnett, Galloway v. (Tex. Civ. App.).....	239	Kennedy v. State (Tex. Cr. App.).....	1086
Hoffman Distilling Co., Paxton v. (Ky.).....	1079	Kentucky Public Elevator Co., White's Adm'r v. (Ky.).....	837
Holcker, Berkshire v. (Mo. App.).....	556	Kentucky Traction & Terminal Co. v. Roschi's Adm'r (Ky.).....	579
Holden v. Gregg (Ark.).....	1118	Kerr v. Hume (Tex. Civ. App.).....	908
Holguin v. Woodlawn Real Estate & Improvement Co. (Tex. Civ. App.).....	899	Kershner v. Kershner (Mo. App.).....	547
Holtzman, Milton v. (Mo. App.).....	828	King v. Oklahoma Gypsum Co. (Mo. App.).....	992
Home Life & Accident Co. v. Corsey (Tex. Civ. App.).....	464	King v. State (Tex. Cr. App.).....	1091
Hornbuckle v. State (Tex. Cr. App.).....	880	Kinser v. Kinser (Ky.).....	121
Hornsby v. Hornsby (Ky.).....	88	Kirlicks, Decker v. (Tex.).....	385
Hodges v. Ramsey (Mo. App.).....	568	Kirsch, Vordick v. (Mo.).....	519
Hooks, Spivey v. (Tex. Civ. App.).....	486	Kitchen, State v. (Mo. App.).....	981
Hoover, Millers' Mut. Casualty Co. v. (Tex. Civ. App.).....	475	Kline, Matlack v. (Mo.).....	323
Hoover v. St. Louis Electric Terminal R. Co. (Mo. App.).....	984	Knowlan Machine & Supply Co., Pittman & Harrison Co. v. (Tex. Civ. App.).....	678
Hot Springs Savings, Trust & Guaranty Co., Sumpster v. (Ark.).....	311	Knox v. Knox (Ky.).....	844
Houston Heights Water & Light Ass'n v. Gerlach (Tex. Civ. App.).....	634	Koger v. Clark (Tex. Civ. App.).....	434
Houston Installment Co., Van Velzer v. (Tex. Civ. App.).....	469	Koontz v. Smith (Ark.).....	1042
Howard v. State (Tex. Cr. App.).....	168	Krinard v. Westerman (Mo.).....	948
Huckabee, Panhandle & S. F. R. Co. v. (Tex. Civ. App.).....	666	Kuehn v. Neugebauer (Tex. Civ. App.).....	259
Hudson, Evans v. (Tex. Civ. App.).....	491	Lacey, Dodge v. (Tex. Civ. App.).....	400
Hufstutler v. Gulf, C. & S. F. R. Co. (Tex. Civ. App.).....	495	Laclede Lumber Co. Mobile & O. R. Co. v. (Mo. App.).....	798
Huggins v. Smith (Ark.).....	1	Ladd, State v. (Mo. App.).....	1004
Hume, Kerr v. (Tex. Civ. App.).....	908	Lady, Jackson v. (Ark.).....	505
Hunter v. McLeod (Ark.).....	1118	Laiblan, Clarkson v. (Mo. App.).....	1029
Hunter, Missouri, K. & T. B. Co. v. (Tex. Civ. App.).....	1107	Lamm, State ex rel. Lamm v. (Mo. App.).....	332
Hunter v. State (Tex. Cr. App.).....	871	Lane v. First Nat. Bank (Tex. Civ. App.).....	490
Hurst v. Crawford (Tex. Civ. App.).....	284	Langhan v. Louisville (Ky.).....	1082
Hurst, Taylor v. (Ky.).....	96	Lawrence v. Fielder (Ky.).....	1068
Hurst Automatic Switch & Signal Co. v. Trust Co. of St. Louis (Mo.).....	954	Lay v. Commonwealth (Ky.).....	123
Hurst Home Ins. Co., Thomas v. (Ky.).....	368	Leazenby, Johnson v. (Mo. App.).....	49
Husbands v. Paducah & I. R. Co. (Ky.).....	840	Leber v. Dibrell (Tex. Civ. App.).....	477
		Leeper-Curd Lumber Co. v. Barbuzza (Tex. Civ. App.).....	216
Hiams v. Mager (Tex. Civ. App.).....	422	Leffingwell v. Evans (Ky.).....	58
Ingle v. Sovereign Camp, W. O. W. (Mo. App.).....	787	Leonard v. Benford Lumber Co. (Tex.).....	382
Ingraham, Baum v. (Ark.).....	704	Leslie, Burchett v. (Ky.).....	850
Interstate Coal Co. v. (Ark.).....	783	Levels, Wilhelm v. (Ark.).....	1119
		Lexington & E. R. Co. v. Robinson (Ky.).....	86
Jackson, Allen v. (Mo. App.).....	539	Lindhorst, Boyers v. (Mo.).....	536
Jackson v. Lady (Ark.).....	505	Loeke v. Woodman (Mo. App.).....	1006
Jackson, Smith v. (Ark.).....	1119	Lohmann v. Lohmann (Mo.).....	518
Jackson v. State (Tex. Cr. App.).....	866	Lomax v. Cramer (Mo. App.).....	575
Jackson, Vaughn v. (Mo. App.).....	331	Lombard, Crews v. (Mo.).....	512
James T. McMahon Const. Co., McCoy v. (Mo.).....	770	Long v. State (Ark.).....	306
Jarvis, Drew v. (Tex.).....	618	Lorton v. Trail (Mo. App.).....	54
Jefferson City Bridge & Transit Co., Rice v. (Mo.).....	746	Loudermilk, Russell v. (Ark.).....	1118
Jegglin v. Sovereign Camp, W. O. W. (Mo. App.).....	815	Louisiana & Texas Lumber Co. v. Southern Pine Lumber Co. (Tex. Civ. App.).....	281
Jenkins v. State (Tex. Cr. App.).....	183	Louisville & N. R. Co. v. Nield (Ky.).....	62
		Louisville & N. R. Co. v. Pugh's Adm'r (Ky.).....	69
		Louisville & N. R. Co. v. Smith's Adm'r (Ky.).....	1063
		Lucas v. State (Tex. Cr. App.).....	396
		Luck v. Schabell (Ky.).....	1066



# CASES REPORTED

(116 S.W.)

xiii

Page	Page		
Ludlow, City of Ludlow v. (Ky.).....	596	Milton v. Holtzman (Mo. App.).....	828
Lufkin Foundry & Machine Co., Mardex		Mince v. State (Tex. Cr. App.).....	884
Lumber Co. v. (Tex. Civ. App.).....	493	Miners' Bank v. Churchill (Ark.).....	695
Luman v. State (Tex. Cr. App.).....	395	Minor v. State (Tex. Cr. App.).....	864
Lusk, Starks v. (Mo.).....	1119	Missouri, K. & T. R. Co. v. Hunter (Tex.	
		Civ. App.).....	1107
McClanahan, Ewing v. (Ky.).....	592	Missouri Lumber Co. v. H. A. Dougherty	
McClendon v. Board of Health of City of		Motor Co. (Ark.).....	1118
Hot Springs (Ark.).....	289	Missouri Pac. Co. v. Ault (Ark.).....	3
McClure v. Baker (Mo. App.).....	1018	Missouri Real Estate & Loan Co. v. Burri	
McCord v. Schaff (Mo.).....	320	(Mo. App.).....	570
McCormick v. State (Tex. Cr. App.).....	871	Missouri State Life Ins. Co. v. California	
McCormick v. Warman (Mo. App.).....	330	State Bank (Mo.App.).....	783
McCoy v. James T. McMahon Const. Co.		Mitchell's Heirs, State Highway Depart-	
(Mo.).....	770	ment v. (Mo. App.).....	336
McCullers v. State (Tex. Cr. App.).....	182	Mobile & O. R. Co. v. Laclede Lumber Co.	
McCulloch v. Field (Ky.).....	1071	(Mo. App.).....	798
McCullough v. W. H. Powell Lumber Co.		Moeller, Varn v. (Tex. Civ. App.).....	234
(Mo. App.).....	803	Monroe, Texas Midland R. R. v. (Tex.).....	388
McCullough Bros., Wilson v. (Ky.).....	74	Moore, Morris v. (Tex. Civ. App.).....	890
McDonald v. State (Tex. Cr. App.).....	166	Moore v. Shiffett (Ky.).....	614
McDowell Motor Car Co., Highleyman v.		Morris, American Freehold Land Mortg.	
(Mo. App.).....	52	Co. of London v. (Ark.).....	1117
McElhinney, State ex rel. Brinkman v.		Morris v. Moore (Tex. Civ. App.).....	890
(Mo.).....	521	Morrow v. State (Tex. Cr. App.).....	1100
McGhee v. Shely (Tex. Civ. App.).....	422	Moss v. Mayfield (Ky.).....	842
McGregor & Henger v. Escajeda (Tex. Civ.		Moss v. State (Tex. Cr. App.).....	165
App.).....	392	Moye v. Park (Tex. Civ. App.).....	205
McLeod, Des Arc Oil Mill Co. v. (Ark.).....	1040	Murphy, Smith v. (Ark.).....	719
McLeod, Hunter v. (Ark.).....	1118	Music v. Commonwealth (Ky.).....	116
McMahon Const. Co., McCoy v. (Mo.).....	770		
Mager, Iiams v. (Tex. Civ. App.).....	422	National Bank of Commerce, Troll v. (Mo.)	923
Malone v. Sebastian State Bank (Ark.).....	1118	Nave v. Clarendon (Tex. Civ. App.).....	1110
Manhattan Life Ins. Co. v. Stubbs (Tex.		Neal v. Harris (Ark.).....	6
Civ. App.).....	896	Neugebauer, Kuehn v. (Tex. Civ. App.).....	259
Manila Special School Dist., Bliss v. (Ark.)	700	Newell v. Boatmen's Bank (Mo.).....	918
Manning, Melton v. (Tex. Civ. App.).....	488	Newsom, Tackitt v., two cases (Ky.).....	376
Mardex Lumber Co. v. Lufkin Foundry &		New York Life Ins. Co., Alford v. (Mo.).....	754
Machine Co. (Tex. Civ. App.).....	493	Nichols, Jones v. (Mo.).....	962
Marion Hotel Co. v. Dickinson (Ark.).....	1049	Nield, Louisville & N. R. Co. v. (Ky.).....	62
Martha Inv. Co., Godfrey v. (Mo. App.).....	822	Nix, Dietz v. (Mo. App.).....	791
Martin, Baxter Realty Co. v. (Ky.).....	110	Noble, American Indemnity Co. v. (Tex.	
Martin v. Price's Adm'r (Ky.).....	362	Civ. App.).....	441
Martinez v. Bruni (Tex. Civ. App.).....	655	Noel v. Jones (Ky.).....	98
Massachusetts Bonding & Insurance Co. v.			
Florence (Tex. Civ. App.).....	471	Offer, Zoeler v. (Tex. Civ. App.).....	1113
Masucci, Thornhill v. (Mo. App.).....	819	Oil Trough Gin Co. v. Director General of	
Matheny, Cochran v. (Ark.).....	1118	Railroads (Ark.).....	310
Matthaei v. Clark (Tex.).....	856	O'Kain v. Davis (Ky.).....	354
Matthews, Barton v. (Ark.).....	693	Oklahoma Gypsum Co., King v. (Mo. App.)	992
Matthews, Hedrick v. (Tex. Civ. App.).....	424	Osborn v. Roberts (Ky.).....	359
Matlack v. Kline (Mo.).....	323	Osborne, State v. (Mo. App.).....	970
Maud, Clark v. (Tex. Civ. App.).....	257	Owensboro City R. Co. v. Owensboro Fuel	
Mayhew & Isbell Lumber Co. v. Valley		Co. (Ky.).....	72
Wells Truck Growers' Ass'n (Tex. Civ.		Owensboro Fuel Co., Owensboro City R.	
App.).....	225	Co. v. (Ky.).....	72
Meadows v. Western Union Tel. Co. (Tex.			
Civ. App.).....	211	Paducah & I. R. Co., Husbands v. (Ky.)..	840
Medford v. State (Tex. Cr. App.).....	175	Palmer, Shores-Mueller Co. v. (Ark.).....	295
Meeker v. Union Electric Light & Power		Panhandle & S. F. R. Co. v. Huckabee	
Co. (Mo.).....	923	(Tex. Civ. App.).....	666
Meeker v. Union Electric Light & Power		Paris Transit Co. v. Fath (Tex. Civ. App.)	482
Co. (Mo.).....	933	Park, Moye v. (Tex. Civ. App.).....	205
Meily v. Hill (Mo. App.).....	545	Park v. Rich (Tex. Com. App.).....	146
Melton v. Manning (Tex. Civ. App.).....	488	Parker, Cobb & Gregory v. (Tex. Civ.	
Meredith v. Claycomb (Mo. App.).....	794	App.).....	214
Messerli v. Bantrup (Mo. App.).....	825	Parker v. State (Tex. Cr. App.).....	178
Meuly, Westervelt v. (Tex. Civ. App.).....	680	Parks v. Helmer (Ark.).....	1118
Middleton v. Beasley (Ky.).....	501	Parr, Chittim v. (Tex. Civ. App.).....	638
Midland Mercantile Co., Midland & N. W.		Patterson, Faucette v. (Ark.).....	300
R. Co. v. (Tex. Civ. App.).....	627	Payne v. Road Imp. Dist. No. 1, of Marion	
Midland & N. W. R. Co. v. Midland Mer-		County (Ark.).....	1047
cantile Co. (Tex. Civ. App.).....	627	Paxton v. Hoffman Distilling Co. (Ky.).....	1078
Miller v. Bandera Independent Tel. Co.		Paxton v. Trabue (Tex. Civ. App.).....	399
(Tex. Civ. App.).....	900	Peay v. Southern Surety Co. (Ark.).....	722
Miller v. Brown (Tex. Civ. App.).....	452	Peebles v. Walker (Ark.).....	1118
Miller, Buie v. (Tex. Civ. App.).....	630	Perkins v. Harmon (Ky.).....	90
Miller, Bush v. (Mo. App.).....	989	Perry, Teat v. (Tex. Civ. App.).....	650
Miller, State v. (Mo. App.).....	571	Peterson v. Appleton Nat. Bank (Tex.	
Millers' Mut. Casualty Co. v. Hoover (Tex.		Civ. App.).....	1114
Civ. App.).....	475	Petterson v. State (Tex. Cr. App.).....	186
Milliken-James Hardwood Lumber Co.,		Petty v. State (Tex. Cr. App.).....	807
American Hardwood Lumber Co. v.		Pfeiffer, City of San Antonio v. (Tex. Civ.	
(Ark.).....	23	App.).....	207

	Page		Page
Phillips v. Broach (Ky.).....	80	Scott, Fourmentin v. (Tex. Civ. App.)....	901
Pinkerton v. State (Ark.).....	716	Sebastian State Bank, Malone v. (Ark.)....	1118
Pinkston v. Watkins (Ky.).....	852	Security Bank & Trust Co., Robinson v. (Ark.).....	717
Pittman & Harrison Co. v. Knowlan Machine & Supply Co. (Tex. Civ. App.)....	678	Security Mortg. Co. v. Western Union Tel. Co. (Ark.).....	10
Poldrack v. State (Tex. Cr. App.).....	170	Security Mortg. Co. v. Western Union Tel. Co. (Ark.).....	1043
Potter v. State (Tex. Cr. App.).....	886	Sedita, Bering Mfg. Co. v. (Tex. Civ. App.)	639
Potter v. Webb (Ky.).....	66	Seeley, Colonization Realty Co. v. (Mo.)..	530
Powell Lumber Co., McCullough v. (Mo. App.).....	803	Sentney Wholesale Grocery Co. v. Thompson (Mo. App.).....	780
Price's Adm'r, Martin v. (Ky.).....	362	Shellenberger v. Hill (Mo. App.).....	542
Prindible v. Prindible (Ky.).....	583	Shely, McGhee v. (Tex. Civ. App.).....	422
Provident Sav. Life Assur. Soc., Choate v. (Ky.).....	1073	Shifflett, Moore v. (Ky.).....	614
Puckett, Caldwell v. (Ky.).....	844	Shores-Mueller Co. v. Palmer (Ark.).....	295
Pugh's Adm'r, Louisville & N. R. Co. v. (Ky.).....	69	Shotwell v. Crier (Tex. Civ. App.).....	262
Purcel v. Lexington (Ky.).....	599	Shuffield v. State (Ark.).....	695
Quinney v. State (Tex. Cr. App.).....	882	Shumaker v. Byrd (Tex.).....	862
Ramsey, Hodges v. (Mo. App.).....	568	Sims, Royal Neighbors of America v. (Tex. Civ. App.).....	240
Reader v. Williams (Mo.).....	733	Singleton v. State (Tex. Cr. App.).....	1094
Reece, Ambrose v. (Ky.).....	341	Sleet v. Atwood (Ky.).....	352
Reed v. First Nat. Bank (Ark.).....	306	Smarr, City of Plattsburg v. (Mo. App.)..	638
Reese v. St. Louis (Mo.).....	315	Smith, Huggins v. (Ark.).....	1
Reister, Clifton Land Co. v. (Ky.).....	342	Smith v. Jackson (Ark.).....	1119
Reynolds, State ex rel. Smith v. (Mo.)...	773	Smith, Koontz v. (Ark.).....	1042
Rice, Clift v. (Ky.).....	101	Smith v. Murphy (Ark.).....	719
Rice v. Jefferson City Bridge & Transit Co. (Mo.).....	746	Smith's Adm'r, Louisville & N. R. Co. v. (Ky.).....	1063
Rich, Park v. (Tex. Com. App.).....	46	Smoot, Wilson v. (Ky.).....	129
Richards v. State (Tex. Cr. App.).....	888	Southern Exp. Co. v. Freeze (Ark.).....	303
Richardson, Burress v. (Mo. App.).....	800	Southern Gas & Gasoline Engine Co. v. Richolson (Tex. Com. App.).....	158
Richolson, Southern Gas & Gasoline Engine Co. v. (Tex. Com. App.).....	158	Southern Pine Lumber Co., Louisiana & Texas Lumber Co. v. (Tex. Civ. App.)..	281
Riggs, Southwestern Telegraph & Telephone Co. v. (Tex. Civ. App.).....	403	Southern R. Co. v. Vann (Tenn.).....	727
Ritter Lumber Co., Vanover v. (Ky.).....	366	Southern Surety Co., Hartwig v. (Tex. Civ. App.).....	455
Road Imp. Dist. No. 1, of Marion County, Payne v. (Ark.).....	1047	Southern Surety Co., Peay v. (Ark.).....	722
Road Imp. Dist. No. 4, Prairie County, Booe v. (Ark.).....	500	South Texas Lumber Co., Gregory v. (Tex. Civ. App.).....	420
Robbins v. Union & Mercantile Trust Co. (Ark.).....	689	Southwestern Portland Cement Co. v. Bustillos (Tex. Civ. App.).....	268
Roberta Coal Co., Commonwealth v. (Ky.)..	584	Southwestern Telegraph & Telephone Co. v. Riggs (Tex. Civ. App.).....	403
Roberts, Osborn v. (Ky.).....	359	Sovereign Camp, W. O. W., Ingle v. (Mo. App.).....	787
Robinson, Lexington & E. R. Co. v. (Ky.)..	86	Sovereign Camp, W. O. W., Jegglin v. (Mo. App.).....	815
Robinson v. Security Bank & Trust Co. (Ark.).....	717	Sovereign Camp, W. O. W., v. Wernette (Tex. Civ. App.).....	669
Rodgers, Fore v. (Mo. App.).....	566	Spears & Sons, Caldwell v. (Ky.).....	83
Rogers, Cress v. (Ark.).....	1118	Spicer v. Garrison (Ark.).....	1119
Rogers, Emerson-Brantingham Implement Co. v. (Mo. App.).....	994	Spiller, Delta Land & Timber Co. v. (Tex. Civ. App.).....	414
Rogers, Stark v. (Tex. Civ. App.).....	473	Spivey v. Hooks (Tex. Civ. App.).....	486
Roschi's Adm'r, Kentucky Traction & Terminal Co. v. (Ky.).....	579	Staebler & Gregg v. Anchorage (Ky.)....	348
Ross, Keen v. (Ky.).....	605	Standard Oil Co., Collett's Guardian v. (Ky.).....	356
Royal Neighbors of America v. Sims (Tex. Civ. App.).....	240	Stark v. Rogers (Tex. Civ. App.).....	473
Runge v. Freshman (Tex. Civ. App.)....	254	Starks v. Lusk (Mo.).....	1119
Russell v. Loudermilk (Ark.).....	1118	State, Adams v. (Tex. Cr. App.).....	863
Sager, Barber v. (Ark.).....	36	State, Alsobrook v. (Tex. Cr. App.).....	167
St. Francis County Road Imp. Dist. No. 1, Wilkinson v. (Ark.).....	304	State, Armstrong v. (Tex. Cr. App.).....	1098
St. Louis Electric Terminal R. Co., Hoover v. (Mo. App.).....	984	State v. Asher (Mo. App.).....	1013
St. Louis-San Francisco R. Co. v. State (Ark.).....	1119	State, Axtell v. (Tex. Cr. App.).....	394
St. Louis Southwestern R. Co. of Texas v. Watts (Tex.).....	391	State, Bargas v. (Tex. Cr. App.).....	172
St. Louis & E. St. L. Electric R. Co., State ex rel. Hagerman v. (Mo.).....	763	State, Bargas v. (Tex. Cr. App.).....	173
Saunders v. State (Tex. Cr. App.).....	870	State, Bartlett v. (Ark.).....	33
Sanderson, Gulf, C. & S. F. R. Co. v. (Tex. Civ. App.).....	286	State, Beatty v. (Ark.).....	1117
Sauzeda v. State (Tex. Cr. App.).....	1098	State, Beck v. (Ark.).....	497
Schabell, Luck v. (Ky.).....	1066	State, Bell v. (Tex. Cr. App.).....	879
Schaff, McCord v. (Mo.).....	320	State, Biscoe v. (Tex. Cr. App.).....	174
Schkade v. Western Union Tel. Co. (Tex. Civ. App.).....	1113	State, Black v. (Tex. Cr. App.).....	181
Scobee v. Brent, two cases (Ky.).....	76	State, Boyer v. (Ark.).....	17
Sconyers v. Sconyers (Ark.).....	1045	State, Bradford v. (Tex. Cr. App.).....	165
		State, Brooks v. (Ark.).....	705
		State v. Cantrell (Mo.).....	48
		State, Carneal v. (Tex. Cr. App.).....	626
		State, Cassi v. (Tex. Cr. App.).....	1099
		State, Chadwick v. (Tex. Cr. App.).....	397
		State, Chadwick v. (Tex. Cr. App.).....	1117
		State, Cleveland v. (Tex. Cr. App.).....	1117

CASES REPORTED

(216 S.W.)

XV

	Page		Page
State, Coffee v. (Tex. Cr. App.).....	1117	State ex rel. Kansas City Theological	
State, Cone v. (Tex. Cr. App.).....	190	Seminary v. Ellison (Mo.).....	967
State, v. Crayne (Mo.).....	47	State ex rel. Lamm v. Lamm (Mo. App.)..	332
State, Curry v. (Tex. Cr. App.).....	165	State ex rel. Smith v. Reynolds (Mo.)....	773
State, Davidson v. (Tex. Cr. App.).....	624	State ex rel. Smith v. Williams (Mo.)....	533
State, Davis v. (Ark.).....	292	State Highway Department v. Mitchell's	
State, Dixon v., three cases (Tex. Cr.		Heirs (Tenn.).....	336
App.).....	1097	Stephens, State v. (Mo. App.).....	550
State, v. Dolan (Mo. App.).....	334	Stock v. Hazen Street & Sidewalk Imp.	
State, Dollar v. (Tex. Cr. App.).....	1087	Dist. (Ark.).....	505
State, Dollar v. (Tex. Cr. App.).....	1089	Stratton v. Cole (Mo. App.).....	976
State, Dugan v. (Tex. Cr. App.).....	181	Street, J. I. Case Threshing Mach. Co. v.	
State, v. Eslick (Mo. App.).....	974	(Tex. Civ. App.).....	426
State, Flores v. (Tex. Cr. App.).....	170	Strong v. Strong (Mo. App.).....	543
State, Flores v. (Tex. Cr. App.).....	185	Stuart v. Clements (Ky.).....	136
State, Freeman v. (Tex. Cr. App.).....	878	Stubbs, Manhattan Life Ins. Co. v. (Tex.	
State, Galveston, H. & S. A. R. Co. v.		Civ. App.).....	896
(Tex.).....	393	Sufford, Frank v. (Tex. Civ. App.).....	283
State, Gerlich v. (Tex. Cr. App.).....	164	Sumpter v. Hot Springs Savings, Trust &	
State, Gipson v. (Tex. Cr. App.).....	870	Guaranty Co. (Ark.).....	311
State, Gleghorn v. (Ark.).....	1118	Sutherland, Orider v. (Ky.).....	57
State, Goad v. (Ark.).....	1118	Sutton v. Hardison (Ky.).....	609
State, Gordon v. (Tex. Cr. App.).....	184	Sutton v. Sutton (Ark.).....	1052
State, Grandberry v. (Tex. Cr. App.).....	164	Swift v. Central Union Fire Ins. Co.	
State, Green v. (Tex. Cr. App.).....	1117	(Mo.).....	935
State, Griffin v. (Ark.).....	34	Tackitt v. Newsom, two cases (Ky.).....	376
State, Griffith v. (Tex. Civ. App.).....	469	Taylor v. Hurst (Ky.).....	95
State, v. Guana (Tex. Civ. App.).....	687	Teague v. State (Ark.).....	694
State, Haverbekken v. (Tex. Cr. App.).....	397	Teat v. Perry (Tex. Civ. App.).....	650
State, Haverbekken v. (Tex. Cr. App.).....	398	Texarkana Tel. Co. v. Blisard (Tex. Civ.	
State, Hornbuckle v. (Tex. Cr. App.).....	880	App.).....	213
State, Howard v. (Tex. Cr. App.).....	168	Texas County Bank v. Whitman (Mo. App.)	835
State, Hunter v. (Tex. Cr. App.).....	871	Texas Co-op. Inv. Co. v. Clark (Tex. Civ.	
State, Jackson v. (Tex. Cr. App.).....	866	App.).....	220
State, Jenkins v. (Tex. Cr. App.).....	183	Texas Fidelity & Bonding Co. v. General	
State, Johnson v. (Tex. Cr. App.).....	192	Bonding & Casualty Ins. Co. (Tex. Com.	
State, Jones v. (Tex. Cr. App.).....	183	App.).....	144
State, Jones v. (Tex. Cr. App.).....	884	Texas Mexican R. Co. v. Garcia (Tex.	
State, Juhan v. (Tex. Cr. App.).....	873	Civ. App.).....	1108
State, Kelley v. (Tex. Cr. App.).....	188	Texas Midland R. R. v. Monroe (Tex.)..	388
State, Kennedy v. (Tex. Cr. App.).....	1086	Texas Power & Light Co. v. Healer (Tex.	
State, King v. (Tex. Cr. App.).....	1091	Civ. App.).....	241
State, v. Kitchen (Mo. App.).....	981	Third Nat. Bank, Troll v. (Mo.).....	922
State, v. Ladd (Mo. App.).....	1004	Thomas, Flurry v. (Ark.).....	302
State, Long v. (Ark.).....	306	Thomas v. Hurst Home Ins. Co. (Ky.)....	368
State, Lucas v. (Tex. Cr. App.).....	396	Thompson, Sentney Wholesale Grocery Co.	
State, Luman v. (Tex. Cr. App.).....	395	v. (Mo. App.).....	780
State, McCormick v. (Tex. Cr. App.).....	871	Thompson v. State (Tex. Cr. App.).....	1117
State, McCullers v. (Tex. Cr. App.).....	182	Thornhill v. Masucci (Mo. App.).....	819
State, McDonald v. (Tex. Cr. App.).....	186	Thornton v. Goodman (Tex. Com. App.)...	147
State, Medford v. (Tex. Cr. App.).....	175	Tines v. Tines (Mo. App.).....	563
State, v. Miller (Mo. App.).....	571	Tipton, Walb v. (Ark.).....	1119
State, Mince v. (Tex. Cr. App.).....	884	Town of Anchorage, Staebler & Gregg v.	
State, Minor v. (Tex. Cr. App.).....	864	(Ky.).....	348
State, Morrow v. (Tex. Cr. App.).....	1100	Town of Highland Park v. Wilson (Ky.)..	370
State, Moss v. (Tex. Cr. App.).....	165	Town of Lonoke v. W. Y. Bransford & Son	
State, v. Osborne (Mo. App.).....	970	(Ark.).....	38
State, Parker v. (Tex. Cr. App.).....	178	Trabue, Paxton v. (Tex. Civ. App.).....	399
State, Petterson v. (Tex. Cr. App.).....	186	Trail, Lorton v. (Mo. App.).....	54
State, Petty v. (Tex. Cr. App.).....	867	Traw v. Heydt (Mo. App.).....	1009
State, Pinkerton v. (Ark.).....	716	Tri-State Tel. Co., Flummer's Adm'r v.	
State, Poldrack v. (Tex. Cr. App.).....	170	(Ky.).....	133
State, Potter v. (Tex. Cr. App.).....	886	Troll v. National Bank of Commerce	
State, Quinney v. (Tex. Cr. App.).....	882	(Mo.).....	923
State, Richards v. (Tex. Cr. App.).....	888	Troll v. Third Nat. Bank (Mo.).....	922
State, St. Louis-San Francisco R. Co. v.		Troll v. United Rys. Co. of St. Louis	
(Ark.).....	1119	(Mo.).....	923
State, Saunders v. (Tex. Cr. App.).....	870	Trust Co. of St. Louis, Hurst Automatic	
State, Sauzada v. (Tex. Cr. App.).....	1098	Switch & Signal Co. v. (Mo.).....	954
State, Shuffield v. (Ark.).....	695	Tucker v. Angelina County Lumber Co.	
State, Singleton v. (Tex. Cr. App.).....	1094	(Tex. Com. App.).....	149
State, v. Stephens (Mo. App.).....	550	Tucker, Wendt v. (Ky.).....	61
State, Teague v. (Ark.).....	694	Tull v. Kansas City Southern R. Co. (Mo.	
State, Thompson v. (Tex. Cr. App.).....	1117	App.).....	572
State, Walker v. (Tex. Cr. App.).....	1085	Turbeville, Armstrong v. (Tex. Civ. App.)..	1101
State, Washington v. (Tex. Cr. App.).....	869	Turner, Turner's Heirs v. (Ark.).....	44
State, Webb v. (Tex. Cr. App.).....	865	Turner's Heirs v. Turner (Ark.).....	44
State, West v. (Tex. Cr. App.).....	186	Turney, Hess & Skinner Engineering Co. v.	
State, Williams v. (Tex. Cr. App.).....	881	(Tex.).....	621
State, Wilson v. (Tex. Cr. App.).....	881	Union Electric Light & Power Co., Meeker	
State, v. Wright (Mo. App.).....	545	v. (Mo.).....	923
State ex rel. Brinkman v. McElhinney			
(Mo.).....	521		
State ex rel. Hagerman v. St. Louis & E.			
St. L. Electric R. Co. (Mo.).....	763		

	Page		Page
Union Electric Light & Power Co., Meeker v. (Mo.).....	933	Western Union Tel. Co., Security Mortg. Co. v. (Ark.).....	10
Union Nat. Bank, Goldstein v. (Tex. Civ. App.).....	409	Western Union Tel. Co., Security Mortg. Co. v. (Ark.).....	1043
Union & Mercantile Trust Co., Robbins v. (Ark.).....	689	Westervelt v. Meuly (Tex. Civ. App.).....	680
United Rys. Co. of St. Louis, Esstman v. (Mo.).....	526	White, Galveston, H. & S. A. R. Co. v. (Tex. Civ. App.).....	265
United Rys. Co. of St. Louis, Troll v. (Mo.).....	923	White's Adm'r v. Kentucky Public Elevator Co. (Ky.).....	837
United States Auto Co. v. De Shong (Ark.).....	1119	White River Drainage Dist. of Phillips and Desha Counties, White River Lumber Co. v. (Ark.).....	1043
United States Tire Co., Camp v. (Tex. Civ. App.).....	1115	White River Lumber Co. v. White River Drainage Dist. of Phillips and Desha Counties (Ark.).....	1043
Universal Const. Co., Hilton v. (Mo. App.).....	1034	Whitman, Texas County Bank v. (Mo. App.).....	835
Valley Wells Truck Growers' Ass'n, Mayhew & Isbell Lumber Co. v. (Tex. Civ. App.).....	225	Whitworth v. Davey (Mo.).....	736
Vann, Southern R. Co. v. (Tenn.).....	727	Whittenberg, Craven v. (Tex. Civ. App.).....	251
Vanover v. W. M. Ritter Lumber Co. (Ky.).....	366	W. H. Powell Lumber Co., McCullough v. (Mo. App.).....	803
Van Velzer v. Houston Installment Co. (Tex. Civ. App.).....	469	Wigginton v. Burns (Mo.).....	756
Varn v. Moeller (Tex. Civ. App.).....	234	Wilhelm v. Levels (Ark.).....	1119
Vaughn v. Jackson (Mo. App.).....	331	Wilhelmina Drainage Dist., In re (Mo.).....	530
Vaughn, Watkins v. (Tex. Civ. App.).....	480	Wilkinson v. St. Francis County Road Imp. Dist. No. 1 (Ark.).....	304
Virardo, Field v. (Ark.).....	8	Wilkinson v. Wilkinson (Mo. App.).....	1015
Virginia Iron, Coal & Coke Co. v. Combs (Ky.).....	846	Wm. Cameron & Co. v. Gamble (Tex. Civ. App.).....	459
Vordick v. Kirsch (Mo.).....	519	Williams, Reader v. (Mo.).....	738
Walb v. Tipton (Ark.).....	1119	Williams v. State (Tex. Cr. App.).....	881
Walker, Peebles v. (Ark.).....	1118	Williams, State ex rel. Smith v. (Mo.).....	535
Walker v. State (Tex. Cr. App.).....	1085	Wilson v. McCullough Bros. (Ky.).....	74
Wamsanz v. Blanke-Wenneker Candy Co. (Mo. App.).....	1025	Wilson v. Smoot (Ky.).....	129
Warman, McCormick v. (Mo. App.).....	330	Wilson v. State (Tex. Cr. App.).....	881
Washington v. State (Tex. Cr. App.).....	869	Wilson, Town of Highland Park v. (Ky.).....	370
Wathen v. Wathen (Ky.).....	93	Windle v. Citizens' Nat. Bank (Mo. App.).....	1020
Watkins, Pinkston v. (Ky.).....	852	Windle v. Citizens' Nat. Bank (Mo. App.).....	1023
Watkins v. Vaughn (Tex. Civ. App.).....	480	W. M. Ritter Lumber Co., Vanover v. (Ky.).....	366
Watson v. Boydatun (Ark.).....	721	Wisdom, Chicago, R. I. & G. R. Co. v. (Tex. Civ. App.).....	241
Watts, St. Louis Southwestern R. Co. of Texas v. (Tex. Civ. App.).....	391	Wofford v. De Queen Real Estate Co. (Ark.).....	710
Webb, Potter v. (Ky.).....	66	Woodard, Bishop v. (Ark.).....	1117
Webb v. State (Tex. Cr. App.).....	865	Woodlawn Real Estate & Improvement Co., Holguin v. (Tex. Civ. App.).....	899
Weinhaus, Ex parte (Mo. App.).....	548	Woodman, Locke v. (Mo. App.).....	1006
Wellington Railroad Committee v. Crawford (Tex. Com. App.).....	151	Woods, Hensley v. (Ark.).....	1118
Wells, Avero v. (Mo. App.).....	802	Wright, Brooker v. (Tex. Civ. App.).....	196
Wendt v. Tucker (Ky.).....	61	Wright, State v. (Mo. App.).....	545
Wernette, Sovereign Camp, W. O. W., v. (Tex. Civ. App.).....	669	W. Y. Bransford & Son, Town of Lonoke v. (Ark.).....	38
West v. State (Tex. Cr. App.).....	186	Yates, Chenault v. (Mo. App.).....	817
Westchester Fire Ins. Co. v. Biggs (Tex. Civ. App.).....	274	Yazoo & M. V. R. Co. v. Hill (Ark.).....	1054
Westerman, Krinard v. (Mo.).....	938	Yonts v. Adams (Ky.).....	82
Western Union Tel. Co., Meadows v. (Tex. Civ. App.).....	211	Young, Chandler v. (Tex. Civ. App.).....	484
Western Union Tel. Co., Schkade v. (Tex. Civ. App.).....	1113	Zenor v. Green (Ark.).....	697
		Zoeller v. Offer (Tex. Civ. App.).....	1113
		Zucht v. Brooks (Tex. Civ. App.).....	684

THE  
SOUTHWESTERN REPORTER  
VOLUME 216

HUGGINS v. SMITH et al. (No. 80.)

(Supreme Court of Arkansas. Dec. 1, 1919.)

**1. SALES ⚡440(2)—EVIDENCE OF GUARANTY OF INVOICE ON SALE OF PARTNERSHIP INTEREST.**

In action on note given for balance due on purchase of interest in drug store partnership, where defense was that plaintiff guaranteed that the stock and fixtures would invoice at a higher figure than they in fact invoiced, testimony of his representations as to invoice of stock at the time of buyer's prior purchase of another partner's interest was admissible upon issue of whether plaintiff guaranteed invoice.

**2. APPEAL AND ERROR ⚡1001(1)—REVIEW OF VERDICT.**

On appeal the verdict of a jury will be sustained if there is any substantial legal evidence to support it.

**3. SALES ⚡441(1)—EVIDENCE OF WARRANTY OF INVOICE ON SALE OF PARTNERSHIP INTEREST.**

In action on note given for partner's interest in drug store business, where defense was that plaintiff guaranteed the stock and fixtures to invoice at a higher figure than the actual invoice, evidence held to sustain verdict for defendants.

**4. LIMITATION OF ACTIONS ⚡100(6)—ACCRUAL OF COUNTERCLAIM FOR DAMAGES FROM SELLER'S GUARANTY.**

In action on note given for partner's interest in drug store business, damages counterclaimed from seller's guaranty that stock and fixtures would invoice at certain figure accrued upon discovery of shortage in invoice value.

**5. LIMITATION OF ACTIONS ⚡41—COUNTERCLAIM GOOD FOR DEFENSIVE PURPOSES THOUGH BARRED BY LIMITATIONS.**

Although counterclaim, by way of cross-bill, for breach of guaranty of invoice value of stock of partnership goods, in so far as it sought a judgment over against the plaintiff suing for the balance due on the purchase of his partnership interest, must, as respects the statute of limitations, be treated as an independent suit, yet it was good for defensive purposes even if the statutory bar had attached when the cross-bill was filed, being good for recoupment only as long as plaintiff's cause of action existed.

Appeal from Circuit Court, Perry County;  
G. W. Hendricks, Judge.

Suit by R. H. Huggins against C. C. Smith and others. Judgment for named defendant against plaintiff, and plaintiff appeals. Reversed, with directions.

Calvin Sellers, of Morrilton, for appellant.

J. H. Bowen and John L. Hill, both of Perryville, for appellees.

HUMPHREYS, J. Appellant instituted suit against appellees on the 14th day of August, 1917, in the Perry circuit court, to recover \$300 and interest at the rate of 10 per cent. per annum from November 15, 1914, on a promissory note executed on the latter date by appellees for a balance due on the purchase price of appellant's one-half interest in a drug store owned by appellant and appellee C. C. Smith, as partners, at the time of the sale and purchase of said interest.

Appellees answered, admitting the execution of the note, but denying liability on the ground that appellant had guaranteed the stock and fixtures would invoice \$3,000, whereas they only invoiced \$2,200, making a difference of \$800, which amount was pleaded as a counterclaim against appellant.

Appellant filed a reply, denying any guaranty as to the invoice value of the stock, and pleading the statute of limitations against recovery on the counterclaim.

The cause was submitted to a jury upon the pleadings, instructions of the court, and evidence. The jury returned a verdict against appellees on the note for \$300 and interest at the rate of 10 per cent. per annum from maturity and against appellant for \$700 on the counterclaim. A difference was struck, and judgment rendered against appellant in favor of appellee, O. C. Smith, for \$306, from which judgment an appeal has been duly prosecuted to this court.

Appellant and J. J. Hunter owned as equal partners a drug store in the town of Casa. On the 1st day of May, 1914, appellee C. O. Smith purchased Hunter's interest for \$1,100. Over the objection of appellant, said appellee was permitted to testify that appellant induced him to buy Hunter's interest by showing him an entry of date January 6, 1916, in the books of the former partnership, to the effect that the stock invoiced \$3,615.10, and

stating that, after the invoice, more goods had been put in than sold out of the stock. The business was continued by the new firm, with appellant as the principal manager, and appellee C. C. Smith as helper on Saturdays and rainy days, and occasionally when his farm duties would permit, until November 15th of the same year, at which time appellant sold appellee his one-half interest in the assets of the partnership for \$300 cash, and a note signed by appellees for \$300, due January 1, 1916, with interest at the rate of 10 per cent. per annum, with the understanding that appellee C. C. Smith should pay the indebtedness of the firm. Appellee C. C. Smith testified that the note bore interest from maturity, and that appellant guaranteed the stock had not been reduced more than \$500 below the invoice of \$3,615.10, entered in the former partnership book of date January 6, 1914. Appellant testified that the note bore interest from date, and that he made no representation or guaranty as to the invoice value of the stock. Soon after the execution of the note, it was lost, found, and given to appellee C. C. Smith, who carried it in his pocket until nearly worn out, and then destroyed it. Appellant demanded the note from appellee C. C. Smith, who refused to give it to him. On December 27, 1915, appellant sent said appellee a statement, demanding payment of the note and 13 months' interest, to which said appellee replied that he did not owe the note. He made no specific denial of the correctness of the interest demanded. Ralph McBride testified that a short time after the sale appellant, in the presence of himself and others, said either that he had guaranteed, or would guarantee, it to invoice about \$3,000; that when Smith was asked what the stock would invoice, his reply was, "Search me." The stock invoiced \$2,200.

[1] It is insisted that the court erred in permitting appellee to testify that appellant represented the invoice value of the stock at \$3,615.10 to him when he purchased Hunter's interest. The contention is made that the statement was incompetent because not pleaded as matter of damages in the counterclaim. We think it competent as a circumstance tending to corroborate the testimony of appellee to the effect that appellant guaranteed the stock had not been diminished more than \$500 below the invoice of \$3,615.10. The cross-bill clearly tendered the issue of whether such a guaranty was made by appellant, and we think the evidence tended to establish the issue.

[2, 3] It is next insisted that the verdict sustaining the counterclaim to the extent of \$700 is not supported by the evidence. Appellee testified that appellant induced him to make the purchase upon the guaranty that the stock would invoice about \$3,100. His

testimony was corroborated in a measure by that of Ralph McBride. The weight and effect of the evidence is a question within the exclusive province of the jury. On appeal the verdict of a jury will be sustained if there is any substantial legal evidence to support it. The evidence just detailed, in our opinion, is sufficient to sustain the verdict.

[4, 5] Lastly, it is contended that the counterclaim was barred by the statute of limitations, and that it was error to render judgment over against appellant for \$306. The damages resulting from the guaranty accrued immediately upon the discovery of the shortage in the invoice value, which was ascertained shortly after the sale, on the 15th day of November, 1914, and a claim for it was not asserted until December 14, 1917, at the time appellees filed their cross-bill. More than three years had elapsed from the accrual of the cause of action before suit was instituted thereon, so the counterclaim, by way of cross-bill, in so far as it sought a judgment over against appellant, must be treated as an independent suit. The cause of action for a judgment over was therefore barred when the cross-bill was filed. This suit was instituted, however, on the 31st day of August, 1917, about 2½ months before the statutory bar attached. The counterclaim was good for defensive purposes even if the statutory bar had attached when the cross-bill was filed. It was said in the case of *State v. Arkansas Brick & Mfg. Co.*, 98 Ark. 125, 135 S. W. 843, 33 L. R. A. (N. S.) 376, that—

"A breach by the plaintiff, though barred as an independent cause of action, continues to exist for defensive purposes available to the defendant so long as the plaintiff may sue upon any breach by defendant."

At the time the decision was rendered from which the above quotation is taken, the law restricted the matter in a counterclaim to that which arose out of the contract or transaction sued upon, and that accounts for the use of the word "breach" in the quotation. Since the passage of Act No. 267, Acts of the Legislature of 1917, amending section 6099 of Kirby's Digest, that restriction is eliminated, and counterclaims may consist of any matter arising either out of contract or tort, whether it arose out of the contract or transaction sued upon or not. *Coats v. Milner*, 134 Ark. 311, 203 S. W. 701; *Smith v. Glover*, 135 Ark. 531, 205 S. W. 891. So a counterclaim arising out of tort, even if barred by the statute of limitations, may be used by way of recoupment against a suit for the recovery of money. It was error, therefore, for the court to render judgment over against appellant for any sum, as the counterclaim was barred when the cross-bill was filed, and also error not

to grant the demand made by appellant to reduce the amount of the counterclaim recovered against appellant to the amount recovered by appellee C. C. Smith against him. The counterclaim was available for recoupment only. For that purpose, it existed as long as appellant's cause of action existed.

For the error indicated, the decree is reversed, and decree is directed here, reducing the amount of the counterclaim to the amount of recovery by appellant against appellees, with direction that the costs be adjudged against appellees.

**MISSOURI PAC. R. CO. et al. v. AULT.**  
(No. 216.)

(Supreme Court of Arkansas. Nov. 17, 1919.  
Rehearing Denied Dec. 8, 1919.)

**1. MASTER AND SERVANT ⇨83—PENALTY FOR NONPAYMENT OF WAGES; JURY QUESTION.**

In an action against a railroad for wages and for penalty for nonpayment thereof under Kirby's Dig. § 6649, as amended by Laws 1905, p. 537, where defendant claimed a breach of contract by refusal to work on Sunday, the question whether an agreement had been made, whereby employé might substitute at his own expense some one else to work on Sunday, held for the jury.

**2. MASTER AND SERVANT ⇨83—PENALTY FOR NONPAYMENT OF WAGES ON DISCHARGE.**

A railroad's refusal to permit a freight trucker to continue to work in such capacity and an offer to retain him as porter at a reduced wage was tantamount to a discharge within Kirby's Dig. § 6649, as amended by Laws 1905, p. 537, § 1, giving a penalty for nonpayment of wages.

**3. MASTER AND SERVANT ⇨83—PENALTY FOR NONPAYMENT OF WAGES; REQUEST FOR PAYMENT.**

Where a discharged railroad employé, who demanded wages from his immediate employer and timekeeper, was told that money would be at the station in seven days, this was equivalent to a request by the employé to send the money to the station so as to entitle him, where money was not so sent, to the penalty imposed by Kirby's Dig. § 6649, as amended by Acts 1905, p. 537, § 1, for nonpayment of wages.

**4. RAILROADS ⇨5½, New, vol. 6A Key-No. Series—FEDERAL CONTROL; LIABILITY FOR PENALTY FOR NONPAYMENT OF WAGES; "CARRIER."**

The word "carriers," in Act Cong. March 21, 1918 (U. S. Comp. St. 1918, §§ 3115¼a-3115¼p), subjecting carriers under federal control to all laws and liabilities as common carriers does not refer to the Director General who took possession of railroads under President's Proclamation of December 28, 1917, pursuant to Act Aug. 29, 1916 (U. S. Comp. St. 1918, § 1974a), and, so far as a suit under the state statute for nonpayment of wages is concerned,

the railroad occupied same status after having been taken over by the government as before. [Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Carrier.]

**5. CONSTITUTIONAL LAW ⇨299—DUE PROCESS OF LAW; LIABILITY OF OWNERS OF RAILROADS OPERATED BY DIRECTOR GENERAL.**

Act Cong. March 21, 1918 (U. S. Comp. St. 1918, §§ 3115¼a-3115¼p), making carriers, while under federal control, subject to all laws and liabilities as common carriers, is not unconstitutional upon ground that it authorizes the taking of private property without due process of law in authorizing judgment to be rendered against the corporation for a liability incurred by an act of the federal authorities operating the road, since under Act March 21, 1918, the corporation is guaranteed immunity from loss and a reasonable return upon investment.

Appeal from Circuit Court, Hot Spring County; J. C. Ross, Judge.

Action by H. A. F. Ault against the Missouri Pacific Railroad Company and another. Judgment for plaintiff, and defendants appeal. Affirmed.

E. B. Kinsworthy and W. R. Donham, both of Little Rock, for appellants.

D. D. Glover and Jabez M. Smith, both of Malvern, for appellee.

HUMPHREYS, J. Appellee brought suit against the Missouri Pacific Railroad Company, before D. M. Noble, a justice of the peace in Fenter township, Hot Spring county, Ark., to recover the sum of \$50 as wages, and a penalty prescribed by Act 210 of the Acts of the Legislature of 1905, amending section 6649 of Kirby's Digest. The act, in so far as it relates to this case, is as follows:

"That section 6649 of Kirby's Digest shall be amended so as to read as follows: Section 6649. Whenever any railroad company or corporation or any receiver operating any railroad engaged in the business of operating or constructing any railroad or railroad bridge, shall discharge with or without cause or refuse to further employ any servant or employé thereof, the unpaid wages of any such servant or employé then earned at the contract rate, without abatement or deduction, shall be and become due and payable on the day of such discharge or refusal to longer employ; any such servant or employé may request of his foreman or the keeper of his time to have the money due him, or a valid check therefor, sent to any station where a regular agent is kept, and if the money aforesaid, or a valid check therefor, does not reach such station within seven days from the date it is so requested, then as a penalty for such nonpayment the wages of such servant or employé shall continue from the date of the discharge or refusal to further employ, at the same rate until paid."

Default judgment was rendered in favor of appellee in the magistrate's court for \$50 and \$2.50 per day as a penalty for nonpay-

ment of the wages from July 9, 1918, until the payment of said sum. An appeal was taken from that judgment to the circuit court in said county, and on the 20th day of January, 1919, the Missouri Pacific Railroad Company filed an answer, denying the indebtedness or liability for a penalty, the discharge or refusal to continue appellee in its employment, any request or demand by appellee on his foreman or timekeeper to send the amount claimed to be due him as wages, or a valid check therefor within seven days to the agent at Malvern, or that appellee applied to said agent, after seven days, for his wages, or a valid check therefor. On the 29th day of January, following, appellee filed a motion to substitute in his place, as defendant, Walker D. Hines, Director General of Railroads. Over the objection of appellant, the court refused to make the substitution, but made the Director General a party defendant. The cause then proceeded to trial and was submitted to a jury upon the pleadings, evidence, and instructions of the court. The jury returned the following verdict:

"We, the jury, find for the plaintiff in the sum of \$50 as debt for labor; also \$2.50 per day as penalty from the 28th day of July, 1918, until the present date.

"J. M. Caldwell, Foreman."

Thereupon a judgment was rendered against appellants for \$50 debt, and \$390 penalty. From that judgment, an appeal has been duly prosecuted to this court.

[1] Appellants first insist that the undisputed evidence showed that appellee voluntarily quit the service of appellants, and that it was error to render judgment against them for a statutory penalty on the theory of a discharge or refusal to further employ appellee. It is said that, because the contract required appellee to work on Sunday, his failure to work in person on the Sabbath day amounted to a breach of his contract. The evidence tended to show that appellee and his employer had agreed that he might substitute, at his own expense, some one else to work on the Sabbath day. Under such an arrangement, a failure to report in person and work on the Sabbath day would not constitute a voluntary cessation of appellee's duties under the contract. It was a question for the jury to say whether or not such an arrangement was made under the contract of employment. Again, it is said that, because appellee refused to accept employment as a porter or baggageman at \$45 per month, therefore, he voluntarily quit the service of said railroad company. The evidence disclosed that in the month of July, 1918, appellee was employed by W. W. Jones, station agent at Malvern, as a freight trucker at the rate of 25 cents an hour, or \$2.50 a day for a 10-hour day; that, after about ten days, W. W. Jones entered the army and was suc-

ceeded by E. B. Williams; that, on or about the 27th day of July, appellee received information that Williams had placed him on the roll as porter, or baggageman, at a salary of \$45 a month, and intended to pay him only \$1.50 per day for the entire time he had worked; that he went to see Williams, who turned to the record, under the heading "porter," and told appellee he could not allow him more than \$45 a month, and that it was up to him to accept or refuse that money; that appellee contended he had not been working as porter and could not support his family on that amount; that Williams responded he could not allow more, whereupon appellee informed him he might have the job as soon as he paid him off; that the agent sent a man to take his place, but appellee refused to let the new man go to work until he received his pay.

[2] The appellee then consulted an old employé, who advised him that he could not keep the new man from going to work; that on the next day, Sunday, his substitute was displaced by the new man. We think the refusal of appellants to allow appellee to work longer in the capacity of freight trucker, at 25 cents an hour, and their offer to retain him as porter or baggageman, at a salary of \$45 per month, was tantamount to a discharge from and a refusal to further employ appellee in his original position, within the meaning of section 1, Act 210 of the Acts of the Legislature of 1905. Under this construction of said act, as applied to the facts in this case, it cannot be said that appellee voluntarily quit the service of appellants.

[3] It is next insisted that appellee was not entitled to a penalty because the undisputed evidence showed that he did not bring himself within that provision of said act which required the employé, when discharged or when refused employment, to request his foreman or keeper of his time to send the money due him, or a valid check therefor, to a station agent, at a station where a regular agent is kept. Appellee testified that, after he made up his mind not to prevent the new man from taking his place, he demanded the wages due him from E. B. Williams, his immediate employer, and the man who kept his time; that Williams responded that the money would be here in seven days. The undisputed evidence also showed that this conversation occurred in the Malvern depot, where appellee had been working and where E. B. Williams was employed as the regular station agent. This court held, in the case of *Biggs v. St. L., I. M. & S. R. Co.*, 91 Ark. 122, 120 S. W. 970 (quoting the sixth syllabus) that—

"Where, at the time a servant was discharged by a railway company, his foreman notified him that his money would be sent to a station named where a regular agent was kept, to which the servant acquiesced, this was equivalent to a re-



quest by the servant to have the money due him sent to the station, and sufficient to entitle him to recover the statutory penalty for failure to send the money."

We think the evidence in this case brings it clearly within the rule laid down in *Biggs v. St. L., I. M. & S. R. Co.*, supra.

[4] Lastly, appellant insists that it was erroneous to render any judgment against the Missouri Pacific Railroad Company, for the reason that the undisputed evidence showed that at the time of the employment and discharge of appellee the railroad was being operated by Walker D. Hines, Director General of Railroads in the United States of America, and not by said railroad company. Under authority granted by Congress on August 29, 1916 (chapter 418, 39 Stat. 645), the President issued a proclamation on December 28, 1917 (U. S. Comp. St. 1918, § 1974a), for the Director General to take possession of certain railroads in the United States, including the Missouri Pacific Railroad Company. On March 21, 1918, thereafter, Congress passed a statute to the effect that—

"Carriers while under federal control shall be subject to all laws and liabilities as common carriers, whether arising under state or federal laws or at common law, except in so far as may be inconsistent with the provisions of this act or any other act applicable to such federal control or with any order of the President. Actions at law or suits in equity may be brought by and against such carriers and judgments rendered as now provided by law; and in any action at law or suit in equity against the carrier, no defense shall be made thereto upon the ground that the carrier is an instrumentality or agency of the federal government." Chapter 25, § 10, 40 Stat. 456 (U. S. Comp. St. 1918, § 3115½j).

If the word "carriers" used in this act had reference to the Director General, who was operating said railroad, then it was improper to render a judgment against the Missouri Pacific Railroad Company. We are unable to find anything in the language or context used that indicates that the word "carriers" refers to the Director General. On the contrary, the plain meaning is that, so far as suing and being sued is concerned, the railroad occupied exactly the same status after being taken over by the government as before. The case of *Rutherford v. Union Pacific Rd. Co.* (D. C.) 254 Fed. 880, cited by ap-

pellant in support of its position that the statute in question had reference to the Director General, and not to the original corporation, argued that the Director General occupied the same position with reference to the railroad as receivers do. We do not think the position occupied by the Director General is analogous to that of a receiver. The attitude of a receiver is that of a trustee for the benefit of creditors. The attitude of the Director General is that of an agent of the government taking over the railroads as a necessity of war, under congressional and presidential authority. A receivership implies insolvency; the operation of the railroad under a Director General does not carry such an implication. We think the later case of *Jensen v. Lehigh Valley Rd.* (D. C.) 255 Fed. 795, is the better reasoned case. It was said by Judge Hand in the latter case:

"It appears to me that Congress pretty clearly meant, by the term 'carriers,' the corporations themselves, and that the right to sue them must remain certainly till it is changed by some valid provision."

[5] It may be contended that the statute in question is unconstitutional, because, if the claim is reduced to a judgment and enforced against the property of the corporation, it would amount to a taking of private property without due process of law from the corporation to pay a liability incurred by the act of the federal authorities operating the road. We do not understand that such would be the effect of the act. Immunity from loss, as well as assurance of a reasonable return upon the investment, was guaranteed the railroad corporations by the Government. Act March 21, 1918, c. 25, 40 Stat. 451. Under such a guaranty, the enforcement of judgments against the property of the railroad corporations during the control by federal authorities could not have the effect of confiscating their property. Immunity from loss and assurance of gain are a complete answer to any contention that the enforcement of such judgments would be the taking of private property without due process of law, or the taking of private property for public purposes without just compensation. We think the act constitutional.

No error appearing in the record, the judgment is affirmed.

## NEAL v. HARRIS et al. (No. 6.)

(Supreme Court of Arkansas. Nov. 24, 1919.)

## 1. LANDLORD AND TENANT §86(1)—PROVISION FOR EXTENSION OF TERM.

Where, instead of a covenant in a lease for renewal, there is provision for extension of the term at the lessee's option, on exercise of the option by the lessee, there is granted a present lease for the full term to which it may be extended, and not a lease for the lessor period, with a privilege of new lease for the extended term.

## 2. FRAUDS, STATUTE OF §58(2)—LANDLORD AND TENANT §86(1)—OPTION TO EXTEND TERM.

Where the lessor of a farm for a year agreed to give the lessee the refusal of the place for the two following years at the same rental per acre, on exercising his option, the lessee, without any execution of a new lease, became entitled to an extended term of two additional years; no question of the application of the statute of frauds arising.

## 3. LANDLORD AND TENANT §86(2) — ORAL NOTICE OF EXERCISE OF OPTION TO EXTEND LEASE.

Where lease of a farm for a year gave the lessee option to extend the term for the two following years, not specifying whether the option should be exercised orally or by writing, it could be shown either way, like any other fact not required to be in writing, and the lessee's oral notice was sufficient.

## 4. EVIDENCE §400(4)—FRAUDS, STATUTE OF §158(3)—PAROL EVIDENCE AIDING DESCRIPTION OF LEASE.

Parol evidence is admissible to apply the description of a lease in order to show that there are lands of the particular description, but is inadmissible to supply or add to the description to make it comply with the statute of frauds.

## 5. LANDLORD AND TENANT §24(3)—CERTAINTY IN DESCRIPTION OF LAND LEASED.

Lease of a "place about ten miles west of M. for the year 1918, and situated in sections 4 and 9, township 2 north, range 2 east, containing about 275 acres in cultivation," aided by parol evidence, held not unenforceable as describing the land with insufficient certainty.

Appeal from Circuit Court, Lee County; J. M. Jackson, Judge.

Action of unlawful detainer by W. F. and V. M. Harris against J. N. Neal. Judgment for plaintiffs, and defendant appeals. Reversed, and cause remanded for new trial.

This is an action of unlawful detainer. The lease upon which the action is based is as follows:

"For and in consideration of the sum of one dollar cash in hand paid, said party of the first part (W. F. Harris) agrees to rent to said party of the second part (J. E. Neal) his place about ten miles west of Marianna for the year of 1918, and situated in sections 4 and 9, town-

ship 2 north, range 2 east, containing about 275 acres in cultivation for the price of \$7 per acre, said acreage being subject to survey, and said survey to include yards and garden.

"Said party of the first part agrees to put all houses and cabins in first-class condition, also to put all fences in good repair, and said party of the first part agrees to have wells with water at the various houses on the above mentioned lands.

"Said party of the first part agrees to give party of the second part the refusal of the above place for the years 1919 and 1920, at the above price, \$7 per acre.

"Said party of the second part agrees to put in all new ground possible for a crop for the year 1918, and said party of the first part agrees to pay said party of the second part the sum of \$5 per acre for what new ground he clears up and puts in, also crop for 1918, and if said party of the second part clears up said new ground and fails to cultivate same, then said party of the first part is under no obligations to said second party.

"Said party of the second part agrees not to permit any waste upon said land and to cut no timber therefrom, except for necessary firewood and repairs, without written consent of the party of the first part.

"Said party of the first part agrees to give said party of the second part possession of the above lands on or about January 1, 1918, and said party of the second part agrees to keep said premises, fences, etc., in the same repair and condition that the same are in when said second party takes possession."

In February 1919, J. E. Neal, the lessee, having failed to vacate the premises, W. F. Harris, the lessor, gave him a written notice to quit, and Neal refused to vacate the premises on the ground that he had exercised his option to extend the lease and for that reason was in lawful possession of the premises. Neal offered to prove that he gave Harris verbal notice to extend the lease for the years 1919 and 1920 at the price of \$7 per acre as provided in the lease.

The court was of the opinion that the lessee was required to give written notice before the lease could be extended, and refused to allow the offered testimony to go to the jury. At the conclusion of the testimony, the court instructed the jury to return a verdict for the plaintiff Harris for the possession of the land mentioned in the complaint. Other facts will be referred to or stated in the opinion.

Judgment was rendered upon the verdict, and the defendant has appealed.

R. D. Smith and R. B. McCulloch, both of Marianna, and R. J. Williams, of Forrest City, for appellant.

Daggett & Daggett, of Marianna, for appellees.

HART, J. (after stating the facts as above). In the first clause of the lease, W. S. Harris rented his place 10 miles west of Marianna

to J. E. Neal for the year 1918. A subsequent clause of the lease is as follows:

"Said party of the first part agrees to give party of the second part the refusal of the above place for the years 1919 and 1920, at the above price, \$7 per acre."

[1] The correctness of the decision of the court below depends upon the construction to be given that section of the lease which we have just copied. Both the text-writers and the adjudicated cases make a distinction between a covenant in a lease for a renewal and a provision therein for the extension of the term at the option of the lessee. In the latter case, upon the exercise of the option by the lessee, there is granted a present lease for the full term to which it may be extended, and not a lease for the lesser period with the privilege of a new lease for the extended term. In discussing the difference between the extension of a lease and the renewal thereof in *Underhill on Landlord and Tenant*, vol. 2, par. 803, it is said:

"The question is always one of construction, depending wholly upon the language of the lease in each particular case. No general rule can be gathered from the cases by which one can distinguish between a present demise which shall determine at a fixed date or shall endure for a further period thereafter at the option of the tenant, and a lease for a definite term with an agreement to make a new lease when it shall have ended. Thus a lease for a term of five years, with a privilege of renting for another term, requires a new lease to be executed, and a mere holding over by the tenant is not a renewal. But in the same state it has been held that a lease for three years, with a privilege of five years, does not require any renewal for the exercise of the option by continuing in possession extends the lease. The lessee can either go out or stay in at the end of three years. So, where a lease gives the lessee a renewal at his election, and he elects to continue, a present demise is created which is subject to all the conditions and covenants of his former lease and it is not necessary that a new lease should be executed. In the absence of an express provision that a new lease is intended to be executed, the presumption is that no new lease is intended, but that the lessee is to continue to hold under the original lease. The lease must clearly and positively show that the making of a new lease was intended. This must appear from the express language of the parties. The reason for the presumption is the fact that the making of a new lease will involve trouble and expense which should be avoided by the courts, if possible, unless it is very clear that the parties had expressly agreed to incur such trouble and expense."

To the same effect, see 16 R. C. L. § 389, p. 885; *Tiffany on Landlord and Tenant*, vol. 2, pars. 218, 219, and pages 1517, 1518; *Jones on Landlord and Tenant*, § 340; and 24 Cyc. 1019. The rule itself is well settled, and the only difficulty is in the application of it to a given lease.

In *Kramer v. Cook*, 7 Gray (Mass.) 550, there was a lease for three years at a certain rent and at the election of the lessee for the further term of two years next after the term of the three years at an increased rent. This was held to be an extension and not a renewal. The court said:

"The provision in the lease is not a mere covenant of the plaintiff for renewal; no formal renewal was contemplated by the parties. The agreement itself is, as to the additional term, a lease de futuro, requiring only the lapse of the preceding term and the election of the defendant to become a lease in presenti. All that is necessary to its validity is the fact of election."

In *Montgomery v. Board of Commissioners of Hamilton County*, 76 Ind. 362, 40 Am. Rep. 250, the lease describing the duration of the term is as follows:

"The term of three years, \* \* \* with the privilege of five years at the same rate, at the option of the said board of commissioners."

The court held that the termination of the lease depended upon the option of the lessee, and that if the option was exercised the term continued for five years. The court said that there was to be no renewal, as the term was for either three or five years; its duration depending upon the lessee.

[2] So in the present case no new contract was provided for in the lease itself. The formal covenant of renewal usually provides specifically for the execution of a new lease. The extended term in the lease under consideration was fixed by and was a part of the original lease. When the lessee exercised his option and gave the required notice, the parties were bound for the two additional years. No question as to the application of the statute of frauds arises, and the court was wrong in so holding. If the lessee did not give a notice such as the law would enforce, his estate terminated at the end of the first period of one year; if he did give such a notice, it would continue to the end of the second period of two years. In either event, the lease itself created and defined the term, and the statute of frauds had nothing to do with the case. *McClelland v. Rush*, 150 Pa. 57, 24 Atl. 354, and the authorities above cited.

[3] This brings us to a consideration of the character of the notice. The lessee offered proof of the giving of a verbal notice of his intention to extend the lease to the lessor. There was no agreement contained in the lease as to how the lessee should exercise his option of extending the lease, whether orally or by writing. It might therefore be shown either way, the same as any other fact not required to be in writing. This view is supported by the case of *Bluthenthal v. Atkinson*, 93 Ark. 252, 124 S. W. 510. In that case the lease provided for 60 days' notice,

but did not state whether it should be given orally or in writing. The notice was given by a letter which miscarried in the mail and was not received by the lessor. The lessee sought relief in a court of equity on the ground that the failure to get the notice to the lessor was unavoidable. The court denied the relief and in discussing the question said:

"The attempt to give the notice by letter was not a mistake on the part of appellant. He intended to give it this way, but he knew he could give it orally or by sending notice through a messenger, or officer. He chose the mails. This was not a mistake at all, or, if so, certainly not one that a court of chancery will correct. It was the duty of appellant under the contract to give the lessor notice. Nothing short of the information which the contract specified, communicated in some manner to the lessor, would fulfill the requirements of the law. Appellant, having choice of a number of agencies to make the communication, is responsible if through the agency chosen he fails to make it. The failure in such case is but the failure at last of the one making the selection of methods, and equity cannot relieve from the consequences of such failure on the ground of accident or mistake."

Other cases holding that in cases of this sort, where no particular form of notice is prescribed by the lease, oral notice is sufficient, are the following: *Broadway & Seventh Ave. R. Co. v. Metzger* (Com. Pl.) 15 N. Y. Supp. 662; *Darling v. Hoban*, 53 Mich. 599, 19 N. W. 545; *Stone v. St. Louis Stamping Co.*, 155 Mass. 267, 29 N. E. 623; *Quinn v. Valiquette*, 80 Vt. 434, 68 Atl. 515, 14 L. R. A. (N. S.) 962; and *Delashman v. Berry*, 20 Mich. 292, 4 Am. Rep. 392.

[4, 5] It is also claimed that the lease does not describe the land with sufficient certainty and for that reason unenforceable. The contract states that Harris leased "his place about ten miles west of Marianna for the year 1918 and situated in sections 4 and 9, township 2 north, range 2 east, containing about 275 acres in cultivation for the price of \$7 per acre, said acreage being subject to survey, and said survey to include yards and gardens."

It is indispensable that the premises leased should be properly described in apt words and clear terms so as to be capable of identification. Parol evidence is admissible for the purpose of applying the description contained in the writing in order to show that there are lands of the description contained in it; but such evidence is not admissible for the purpose of supplying or adding to the description, in order to make it comply with the requirements of the statute of frauds. *Underhill on Landlord and Tenant*, vol. 1, § 237; *Tiffany on Landlord and Tenant*, vol. 1, § 266; and *Jones on Landlord and Tenant*, §§ 98, 99. See, also, *Miller v. Dar-*

*gan*, 136 Ark. 237, 206 S. W. 319. The language used in the lease shows that it was understood that Neal was to have the place owned by Harris in sections 4 and 9, township 2 north, range 2 east. Oral evidence was admissible to show what was the place owned by Harris there. The lands were particularly described by section, township, and range, and the oral testimony was admissible for the purpose of further identifying the lands described.

It follows that the court erred in directing the jury to return a verdict for the plaintiff. For that error the judgment must be reversed, and the cause remanded for a new trial.

### FIELD v. VIRALDO. (No. 19.)

(Supreme Court of Arkansas. Dec. 1, 1919.)

#### 1. DAMAGES $\S$ 131(1)—INJURIES FROM VICIOUS BULL.

Where plaintiff was knocked down and rendered unconscious by defendant's bull, and suffered pain and inconvenience for a considerable time, verdict in her favor for \$300 was warranted.

#### 2. ANIMALS $\S$ 74(5)—EVIDENCE OF VICIOUSNESS OF BULL AND KNOWLEDGE THEREOF.

In an action for injuries inflicted by defendant's bull, evidence held sufficient to sustain finding that the bull was vicious, and that its propensities were known to defendant.

#### 3. ANIMALS $\S$ 70—KNOWLEDGE OF VICIOUS PROPENSITIES OF BULL.

Plaintiff could recover from defendant, who had knowledge of the vicious propensities of his bull, for injuries inflicted upon her, on her own premises, whether or not defendant was negligent in the manner of keeping the bull; the general rule being that an owner is liable for damage by a trespassing animal whether or not he knows of its vicious propensities, and liable for injuries by a vicious animal not trespassing only if he knows of its propensities.

#### 4. ANIMALS $\S$ 53—LIABILITY FOR INJURIES BY ANIMALS AT LARGE.

Kirby's Dig. § 7897, changes the law with respect to liability for damages committed by certain animals mentioned, when allowed to run at large, and to the extent of such animals only.

Appeal from Circuit Court, Pulaski County; Guy Fulk, Judge.

Action by Mrs. Mattie Viraldo against O. B. Field. From judgment for plaintiff, defendant appeals. Affirmed.

J. A. Watkins, of Little Rock, for appellant.

Geo. W. Hays and Gardner K. Oliphint, both of Little Rock, for appellee.

McCULLOCH, C. J. This is an action instituted by Mrs. Mattie Viraldo, the appellee, against appellant to recover compensation for personal injuries received by being attacked and knocked down by a bull owned by appellant and alleged to be vicious. The issues were tried before a jury, and the trial resulted in a verdict in favor of appellee for recovery of damages in the sum of \$300.

[1] Appellee and her husband resided on a farm in Pulaski county, near appellant's farm. There were no fences in that locality, except such as were maintained by farmers to inclose yards, lots, and pastures. The house in which appellee lived was not inclosed by any fence. Appellant owned the bull in question, and it attacked appellee one night at her home immediately in front of the house. Appellee testified in her own behalf, and described the attack made by the bull and the extent of her injuries. She testified that the bull came to her house one night and attacked a mare belonging to her husband, and hooked the mare down. That occurred about ten days before the incident which forms the basis of this litigation. She testified that she was awakened about 12 o'clock at night by a noise in front of the house, and she found that the bull was "bothering" her cow, which was chained to a post, and she immediately dressed herself and went out and drove the bull away, using a switch with dry leaves on it, which made a noise when threshed against the ground which scared the bull. She untied the cow and started to the barn with it, and the bull came with a rush and butted her down, and seriously injured her. She was unconscious, and was carried to the house, and suffered pain and inconvenience for a considerable length of time. There is no doubt that the injuries received were sufficient to warrant the amount of damages assessed by the jury. Appellee testified that after the injury occurred she went up to appellant's house and had a conversation about it, in which appellant admitted that the bull was unruly and vicious; that "it took six men to get it home on his place," and "hooked everything down; hooked his own mules down."

The court instructed the jury, in substance, that if the bull had vicious propensities, known to appellant, there was liability on the part of appellant for the injuries inflicted, "regardless of whether or not the defendant was negligent in the manner in which the animal was kept by him." The court refused an instruction requested by appellant, which would have declared the law to be that if the owner of the bull "exercised over said bull that degree of care and caution that a reasonably prudent and experienced person would have exercised under like circumstances," there was no liability for the injuries inflicted.

[2] The evidence was, we think, legally

sufficient to sustain the finding that the bull was vicious, and that its propensities in that respect were known to appellant. Appellee testified about the vicious acts of the bull on two different occasions, and the testimony of another witness tends to show that the bull, while at large, showed vicious tendencies. The admissions of appellant made to appellee, according to the latter's testimony, were sufficient to sustain a finding that appellant was advised of those vicious propensities of the bull. The testimony adduced by appellant tended to show that he usually kept the bull in a pasture, and did not allow the bull to run at large. The jury might have found, therefore, if the issue had been submitted, that appellant was not guilty of negligence in allowing the bull to get at large.

[3] This brings us to the question whether or not the court erred in its instruction in telling the jury that if the bull was vicious, and that those propensities were known to appellant, he would be liable for the injuries inflicted by the bull. There is not entire accord in the authorities on this question, but this court is committed to the rule expressed in the recent case of *Holt, Receiver, v. Leslie*, 116 Ark. 483, 173 S. W. 191, that if one knowingly keeps a vicious or dangerous domestic animal, he is liable for injuries inflicted by such animal without proof of negligence as to the manner in which the animal was kept. We said in that case:

"The mere keeping of such an animal, knowing its vicious and dangerous qualities, is at the risk of the owner (except as to trespassers), and renders him liable in damages to one injured by such animal."

This was said with respect to a vicious dog, and many of the authorities on the subject relate to the keeping of dogs or animals wild by nature. However, the turning point of the question of liability in such cases rests upon the known vicious propensities of the animal, and not to the kind of animal in other respects. The rule established by the weight of authority is that the owner is liable for a trespassing animal whether he knows of the vicious propensities or not, and is liable for injuries inflicted by a vicious animal not trespassing only in case of knowledge on the part of the owner of such propensities of the animal. The liability in one case rests on the fact that the animal is trespassing, and in the other on the known vicious propensities of the animal, the law placing on the owner the duty of restraining the animal of known vicious propensities, likely to result in injury to others. *Johnston v. Mack*, 65 W. Va. 544, 64 S. E. 841, 24 L. R. A. (N. S.) 1189, 131 Am. St. Rep. 979; *Harris v. Carstens Packing Co.*, 43 Wash. 647, 86 Pac. 1125, 6 L. R. A. (N. S.) 1164, 1 R. C. L. p. 1089.

[4] Appellant relies on the case of *Briscoe v. Alfrey*, 61 Ark. 197, 32 S. W. 505, 30 L. R.

A. 607, 54 Am. St. Rep. 203, but that was a case where liability was sought to be imposed under a statute of this state (Kirby's Digest, § 7897), which prohibits the running at large of stallions and unaltered mules. We held in construing that statute that running at large meant the permissive or negligent act of the owner in allowing the animal to run at large. The later case of *Fraser v. Hawkins*, 208 S. W. 290, deals with the same statute. The statute referred to changes the law with respect to liability as to the animals mentioned, and to that extent only. It places liability on the owner of those animals who permits them to run at large whether the animals are trespassing or whether such animals possess known vicious propensities. The statute, in other words, singles out animals of that character, and imposes liability on the owner for vicious acts of the animal, but only in case they are allowed to run at large.

We are of the opinion that the court instructed the jury in accordance with the law as announced by this court, and that there was no error in the proceedings.

The judgment is therefore affirmed.

#### SECURITY MORTGAGE CO. v. WESTERN UNION TELEGRAPH CO. (No. 27.)

(Supreme Court of Arkansas. Dec. 1, 1919.)

##### 1. TELEGRAPHS AND TELEPHONES ¶65(2)—RECOVERY OF LOSS OF PROFITS AS DEPENDENT UPON PLEADING IN ACTION FOR MISTAKE.

In an action by the sender of a telegram, offering a client a loan on real estate at \$3,000, but erroneously transmitted by defendant as \$3,000, no recovery for loss of profits could be had, where it was not alleged that the sendee would have accepted the loan had the message been correctly transmitted.

##### 2. TELEGRAPHS AND TELEPHONES ¶67(3)—DAMAGES FOR ERROR IN TELEGRAM RELATING TO NEGOTIATIONS MERELY.

In a broker's action against a telegraph company for erroneously transmitting a message, offering a client a \$3,000 loan instead of an \$8,000 one, as intended, only nominal damages could be recovered; the message constituting but a step in proposed negotiations for the loan.

McCulloch, C. J., and Humphreys, J., dissenting.

Appeal from Circuit Court, Miller County; Geo. R. Haynie, Judge.

Action by the Security Mortgage Company against the Western Union Telegraph Company. From a judgment sustaining a demurrer to the complaint, plaintiff appeals. Affirmed.

Gustavus G. Pope, of Texarkana, Ark., and Francis R. Stark, of New York City, for appellant.

Charles S. Todd, of Texarkana, Tex., and Rose, Hemingway, Cantrell & Loughborough, of Little Rock, for appellee.

SMITH, J. This case is here on an appeal from a judgment sustaining a demurrer to the following complaint:

"That on or about January 13, 1918, the Security Mortgage Company delivered to the office of the Western Union Telegraph Company, at Texarkana, Ark., for transmission to J. B. Montgomery, at Springfield, Mo., the following telegram, to wit:

"Do you want a choice \$3,000.00, 7 per cent loan, 3 years, secured by Texarkana Broad Street property, best located in the city, conservative value \$20,000.00. Well rented and insured for \$6,000. Payment guaranteed by us if you desire. Answer.

"[Signed] Security Mortgage Company."

"That through the negligence of the employees and servants of said Western Union Telegraph Company said telegram, when delivered by said telegraph company to said J. B. Montgomery, at Springfield, Mo., erroneously gave the amount of said loan at \$3,000 instead of \$8,000, as contained in the original telegram delivered to said telegraph company at Texarkana, Ark., for transmission.

"That said J. B. Montgomery, upon receipt of said telegram giving the amount of the loan as \$3,000 wired acceptance, without giving the amount of the loan according to the telegram delivered to him, and the Security Mortgage Company, the plaintiff, relying upon the defendant Western Union Telegraph Company to correctly transmit said message, accepted the loan from the customer in the sum of \$8,000, and prepared the necessary papers and advanced the money, and that said Security Mortgage Company would not have made said \$8,000 loan as set out in the telegram copied herein if same had not been accepted by J. B. Montgomery as herein alleged. That they had no other purchaser agreeing to take such loan. That the loan was closed with the customer in Texarkana before the plaintiff knew that an error had been made in the transmission of said telegram as alleged. That the plaintiff borrowed the money to close the loan with the customer, and was not able to dispose of said loan until March 8, 1918; and paid out \$69.33 interest on such borrowed money; paid out brokerage fees in handling said loan, attorney's fees, etc., \$160; telegrams over wires of defendant company trying to sell said loan to some other purchaser, \$6. That said loan was sold for \$8,000 flat, and the purchaser to have accrued interest up to March 8, 1918, and that said J. B. Montgomery buys all loans from plaintiff herein at a sufficient premium to net him 6 per cent. on the money invested, and said plaintiff thereby lost an additional sum of \$240, which plaintiff would have received if the loan had been sold to J. B. Montgomery.

"The said J. B. Montgomery refused to make the \$8,000 loan, and plaintiff was compelled to find another purchaser for this mortgage, which

they did at a loss of \$485; and that this loss is the direct result of the negligence of said telegraph company as hereinbefore set out and alleged; and that said defendant was duly notified of plaintiff's claim for said loss.

"Wherefore plaintiff prays judgment against the Western Union Telegraph Company in the sum of \$475, together with interest from January 13, 1918, at the rate of 7 per cent. per annum until paid, and costs of suit and all proper relief."

It will be observed that judgment is asked both on account of actual expenses incurred in the making of the loan and for profit lost on account of not consummating a sale of the loan to the sendee of the message.

[1] All of the judges are of the opinion that no recovery can be had on account of lost profits, for the reason that it was not alleged that the sendee would have accepted the loan had the message been correctly transmitted. The contrary is affirmatively alleged. The \$3,000 loan referred to in the message as sent was tendered to the sendee and declined by him.

[2] The majority of the court are also of the opinion that only nominal damages can be recovered, and that there can be no recovery of the items of expense mentioned in the complaint. We arrive at this conclusion because in our opinion the telegram, had it been correctly transmitted, would have been only a step in the negotiations. The rule in such cases is stated in 37 Cyc. p. 1760, par. 2, as follows:

"Where the message relates to a proposed contract between plaintiff and another person, but is neither an acceptance of a previous offer nor itself a definite offer, but only an invitation to submit an offer or to meet or correspond with the sender for the purposes of further negotiation, the failure duly to deliver the message is not, as a matter of law, the proximate cause of the failure of the negotiations to result in a binding contract; and, damages for the loss of a contract which might or might not have resulted from further negotiations being too remote and uncertain, only nominal damages can be recovered. This rule applies to messages not containing a definite offer, but merely inquiring whether the addressee will accept a certain price, or will accept a certain position, or desires a position or employment, or requesting a quotation of prices, and particularly to a message which is in effect a discontinuance of pending negotiations."

Upon a somewhat similar state of facts in the case of *Western Union Telegraph Co. v. Caldwell*, 133 Ark. 184, 202 S. W. 232, L. R. A. 1918D, 121, we denied the right of recovery upon the ground that an answer to the message would not have completed the contract, as either party might have changed his mind before entering into a binding contract. So here no reply that could have been given to the telegram as sent would have constituted a binding contract. An affirma-

tive reply that the sendee did desire to buy such a loan as that described in the message as sent would have required further negotiations to consummate it, and either party might have changed his mind before the event was accomplished. After the transmission of an affirmative reply one party might have demanded a premium and the other a discount, and each would have had the legal right to do so without being liable to the charge of having breached the contract; these essential details not being covered by the telegraphic correspondence.

It follows, therefore, that the demurrer was properly sustained, and the judgment is therefore affirmed.

MCCULLOCH, C. J., and HUMPHREYS, J., dissent. See 218 S. W. 1043.

# CHILES et al. v. FT. SMITH COMMISSION CO. et al. (No. 98.)

(Supreme Court of Arkansas. July 14, 1919.)

## 1. PLEADING $\S$ 8(17)—CONCLUSIONS OF LAW INSUFFICIENT.

Allegations of negligence which are mere conclusions of law are insufficient.

## 2. NEGLIGENCE $\S$ 111(1)—COMPLAINT ALLEGING EXPLOSION FROM UNKNOWN CAUSE SUFFICIENT.

Under doctrine of *res ipsa loquitur*, not limited to contractual or any particular relations, a cause of action is stated by complaint alleging the blowing up, by causes unknown to plaintiffs, of a four-story business house, which, with all gas and ammonia fixtures therein, was in the exclusive control of defendants, killing plaintiffs' intestate, rightfully in the building at the time, but having no duties to perform in connection with the instrumentalities occasioning the accident.

Appeal from Sebastian Circuit Court; Paul Little, Judge.

Action by Eliza Chiles and others against the Ft. Smith Commission Company and others. From judgment sustaining demurrer and dismissing the complaint, plaintiffs appeal. Reversed and remanded, with directions.

T. J. Wear, of Ft. Smith, for appellants. Hill, Fitzhugh & Brizzolara and Dally & Woods, all of Ft. Smith, for appellees.

SMITH, J. Appellants are the widow and children of J. C. Chiles, and brought this suit as such to compensate the loss sustained by them in the death of their intestate. For their cause of action the following facts are alleged: That the defendants were conducting a mercantile business at No. 119 Rogers avenue, in the city of Ft. Smith, in a four-

story brick building, of which they had joint control and management. Other allegations of the complaint are as follows:

"That said defendants were in joint control of all of the pipes, pumps, tanks, machinery, and all other appliances that were used by defendants in their businesses in furnishing the gas and ammonia that was used for the various purposes of the defendants in said building.

"That there was large amounts of ammonia used by said defendants in said building, and by reason thereof they had large amounts or quantities of ammonia stored in pipes, tanks, and vats in the basement of said building, and they also had large amounts and quantities of natural gas circulating through and into said building by means of large pipes.

"That on or about 1:50 p. m., on the 22d day of October, 1918, through the negligence of the defendants, their agents, servants, and employees, in some manner unknown and unexplained to plaintiffs, the gas and ammonia that was being used by said defendants in said building was exploded, and was set on fire, and said building was wrecked and burned up and demolished, and the said J. C. Chiles, deceased, who was in said building at the time of said explosion, and when said gas and ammonia was set on fire, was killed by reason of said explosion and fire by the gas, ammonia, and by fire which suddenly filled said building, before he was able to make his escape from the fourth floor of said building, where he was at work as an employé of the W. J. Echols Company, wholesale grocers.

"That at the time of the said explosion and fire the said J. C. Chiles, deceased, was in the employ of the W. J. Echols Company, wholesale grocers, and when the explosion and fire occurred he was in a room or on the fourth floor of the said building of the defendants aforesaid, which room or floor the said W. J. Echols Company, wholesale grocers, had rented or reserved from the defendants, and into which the said W. J. Echols Company, wholesale grocers, had the right, under its contract with the defendants, to enter with its employés to transact its business on said fourth floor of said building, and it also had the right of ingress and egress to said building, and the said defendants, by reason of their said contract with the said W. J. Echols Company, wholesale grocers, owed it and its employés a contractual duty and ordinary care not to injure or kill them by reason of an explosion of the said gas and ammonia, or the burning of the gas and ammonia in said building, which was used in their building, by their negligence or by the negligence of either of them.

"That at the time that said J. C. Chiles, deceased, was killed by said explosion and by the burning of said gas and ammonia in said building, he was at work for the said W. J. Echols Company, wholesale grocers, and was in the due scope or course of his employment, and was using due and proper care and caution for his own safety and protection at the time he was killed, and that it was through no fault of his that said explosion occurred, or that said gas and ammonia was set on fire, or that he was killed.

"That the defendants owed the said J. C. Chiles, deceased, a contractual duty, as afore-

said, not to injure or kill him by their negligence in the manner as aforesaid.

"That plaintiffs do not know the exact act or acts of negligence of the defendants that caused said explosion and caused said gas and ammonia to be set on fire, and they are unobtainable by these plaintiffs, as said building, pipes, pumps, tanks, vats, machinery, and appliances in, and being used in, said building were in the sole and exclusive control and management of the defendants, their agents, servants, and employés, as was also the gas and ammonia that was in said building, and that was being used by said defendants in their business in said building at the time.

"That it was through the negligence of the defendants that said explosion occurred, and said gas and ammonia was set on fire, and that said building was wrecked and burned up and demolished, and that said J. C. Chiles, deceased, was killed.

"That said explosion would not have occurred and said gas and ammonia been set on fire, and said building would not have been wrecked and burned up and demolished, and the said J. C. Chiles, deceased, been killed, if the defendants had used due and proper care in the management and control of the pipes, pumps, tanks, vats, machinery, and appliances that were used by said defendants in their business in furnishing the gas and ammonia that was used for the various purposes of the defendants in said building, and if they had used due and proper care in the storing and handling of the said gas and ammonia that was used by said defendants in said building.

"That the act or acts of negligence upon the part of the defendants that caused said explosion, and caused said gas and ammonia to be set on fire, and said building to be wrecked, burned up, and demolished, and caused the said J. C. Chiles, deceased, to be killed, were and are known to the defendants."

A demurrer was filed on the ground that the complaint did not state facts sufficient to constitute a cause of action against the defendants or either of them. The demurrer was sustained, and the complaint dismissed, and this appeal has been prosecuted to review that action.

[1, 2] Appellants first insist that negligence on the part of the defendants is sufficiently charged to constitute a cause of action; and the second contention is made that, if this be not true, sufficient facts are alleged to make applicable the maxim *res ipsa loquitur*.

We do not agree with the first contention. The allegations in regard to negligence are in effect conclusions of law, and if the maxim *res ipsa loquitur* is not applicable the complaint is demurrable. *Ballard v. Kansas City & Memphis Farm Co.*, 131 Ark. 83, 198 S. W. 527; *Hollis v. Hogan*, 126 Ark. 207, 190 S. W. 117; *Phillips v. Southwestern Tel. & Tel. Co.*, 72 Ark. 478, 81 S. W. 605; *Northern Construction Co. v. Johnson*, 132 Ark. 528, 201 S. W. 510; *Keller v. Vowell*, 17 Ark. 445; *C. R. I. & P. R. Co. v. Smith*, 94 Ark. 524, 127 S. W. 715; *Wood v. Drainage Dist. No. 2*, 110 Ark.



416, 161 S. W. 1057; Southern Orchard Planting Co. v. Gore, 83 Ark. 78, 102 S. W. 709.

So far from alleging the cause of the explosion or the particular act or acts of negligence which occasioned it, the complaint contains the affirmative recital that the plaintiffs do not know the cause of the injury, consequently there could be no specific allegations concerning it. When analyzed, the complaint is found to contain substantially the following allegations: That a four-story business house was blown up and plaintiff's intestate killed; that the building, and all gas and ammonia fixtures and appliances therein, were in the exclusive control of the defendants; that the intestate was rightfully in the building at the time of the explosion, but had no duty to perform in connection with the instrumentalities which occasioned the injury; and that the cause of the explosion was unknown to plaintiffs. The concurrence of these conditions makes applicable the doctrine of *res ipsa loquitur*.

This doctrine does not dispense with the requirement that the party who alleges negligence must prove the fact, but relates only to the mode of proving it. *Stewart v. Van Deventer Carpet Co.*, 138 N. C. 60, 50 S. E. 562.

As applied to railroads, the rule is stated in 4 Elliott on Railroads, § 1644, as follows:

"The true rule would seem to be that when the injury, and circumstances attending it, are so unusual, and of such a nature, that it could not well have happened without the company being negligent, or when it is caused by something connected with the equipment or operation of the road, over which the company has entire control, a presumption of negligence on the part of the company usually arises from proof of such facts, in the absence of anything to the contrary, and the burden is then cast upon the company to show that its negligence did not cause the injury."

We quoted and approved this statement of the law in the case of *Biddle et al., Recvrs., v. Riley*, 118 Ark. 218, 176 S. W. 134, L. R. A. 1915F, 992; *Choctaw, O. & G. Rd. Co. v. Doughty*, 77 Ark. 9, 91 S. W. 768; *Price v. St. L., I. M. & S. R. Co.*, 75 Ark. 491, 88 S. W. 575, 112 Am. St. Rep. 79; and *St. L., I. M. & S. R. Co. v. Armbrust*, 121 Ark. 351, 181 S. W. 131, Ann. Cas. 1917D, 537.

In the *Riley* and *Price* Cases the persons injured were passengers upon trains; and in the *Doughty* Case a fireman on a freight train, while in the *Armbrust* Case the party injured was a traveler at a railroad crossing who was hit by a piece of coal falling from the train. But there is nothing in the opinion in any one of the cases which makes the doctrine applicable only to railroads. There are cases which apparently treat the doctrine as applicable only against carriers, and it is no doubt true that the doctrine has been more frequently applied in cases against carriers of passengers than in any other class of cases. But there appears to be no valid reason for

thus limiting the doctrine. A leading case on the subject, and one well considered is that of *Judson v. Giant Powder Co.*, 407 Cal. 549, 40 Pac. 1020, 29 L. R. A. 718, 48 Am. St. Rep. 146. That was a case where property was destroyed by an explosion of nitroglycerine in process of manufacture into dynamite, and Mr. Justice Garoutte, speaking for the Supreme Court of California, said:

"All courts agree that where contractual relations exist between the parties, as in cases of common carriers, proof of the accident carries with it the presumption of negligence, and makes a *prima facie* case. This proposition is elementary and uncontradicted. Therefore the citation of authority is unnecessary. Yet we know of no sound reason, and have found none stated in the books, why this principle of presumptions should be applicable to cases involving contractual relations, and inapplicable to cases where no contractual relations exist. It is intimated in some Indiana case that the presumption arises upon proof of the accident by reason of the carrier's contract to safely deliver the passenger at his destination, but there is no such contract. The carrier is not an insurer of his passenger. If he were, this presumption of negligence arising from the accident, aside from the act of God, would be conclusive and irrebuttable; but such is not the fact, for it is only *prima facie*, and always disputable. As was well said by the court in *Rose v. Stephens & C. Trans. Co.* [C. C.] 11 Fed. Rep. 438: 'Undoubtedly the presumption has been more frequently applied in cases against carriers of passengers than in any other class, but there is no foundation, in authority or in reason, for any such limitation of the rule of evidence. The presumption originates from the nature of the act, not from the nature of the relations between the parties.' The carrier's contract with his passenger is simply to exercise a certain degree of care in his transportation. It is a duty which the law enjoins upon him; but the law also enjoins the duty upon this appellant and all others, in the conduct of their business, to exercise a certain degree of care towards this respondent and all mankind. The duty which the law enjoins in the two cases only differs in the degree of care to be exercised. The principle of law involved is wholly the same; and, as has been said, the reason of the rule is not found in the relations existing between the party injuring and the party injured. The presumption arises from the inherent nature and character of the act causing the injury. Presumptions arise from the doctrine of probabilities. The future is measured and weighed by the past, and presumptions are created from the experience of the past. What has happened in the past under the same conditions will probably happen in the future, and ordinary and probable results will be presumed to take place until the contrary is shown. Based upon the foregoing principles, a rule of law has been formulated, bearing upon a certain class of cases, where damages either to person or property form the foundation of the action. This rule is well declared in *Shearman and Redfield on Negligence* (section 60): 'When a thing which causes injury is shown to be under the management of the defendant, and the accident is such as in the ordinary course of things

does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendant, that the accident arose from a want of care.' Tested by this rule, no question of contractual relation could ever form an element in the case. With the same reason it might as well be said that cases of contract were excluded from the effect of the rule as that cases of pure tort were excluded; but, upon the contrary, it is plainly evident that both classes of actions come equally within its provisions. In speaking on this question, it is said in Cooley on Torts (page 799): "The rule applied to carriers of passengers is not a special rule, to govern only their conduct, but is a general rule, which may be applied wherever the circumstances impose upon one party alone the obligation of special care." The author then cites the case of a householder engaged in repairing his roof. A piece of slate falls therefrom, and injures a traveler upon the street. He then says: "True, the act of God, or some excusable accident, may have caused the slate to fall, but the explanation should come from the party charged with the special duty of protection."

In support of the statement of the law thus quoted a large number of cases are there cited and reviewed. There is also an extended case note.

In the article on Negligence in 20 R. C. L. § 156, it is said:

"More precisely, the doctrine *res ipsa loquitur* asserts that whenever a thing which produced an injury is shown to have been under the control and management of the defendant, and the occurrence is such as in the ordinary course of events does not happen if due care has been exercised, the fact of injury itself will be deemed to afford sufficient evidence to support a recovery, in the absence of any explanation by the defendant tending to show that the injury was not due to his want of care. \* \* \* The presumption of negligence herein considered is, of course, a rebuttable presumption. It imports merely that the plaintiff has made out a *prima facie* case, which entitles him to a favorable finding, unless the defendant introduces evidence to meet and offset its effect. And, of course, where all the facts attending the injury are disclosed by the evidence, and nothing is left to inference, no presumption can be indulged—the doctrine *res ipsa loquitur* has no application."

And in section 157 of the same article it is said:

"\* \* \* It has been held in some cases that the maxim applies only where the relation of carrier and passenger exists, or where there is a contractual relation between the parties to the transaction producing the injury; but the prevailing view is that a presumption of negligence may be indulged in many other cases, and independently of any contractual relation between the person injured and him who is charged with responsibility for the injury. \* \* \*"

At section 158 of the same article it is said that this doctrine has found frequent application in cases of injuries from falling objects

and substances, and that the rule has been applied in many instances to injuries produced by the fall of awnings, signs, walls, buildings, parts of buildings, building materials, tools, electric wires, and many other objects. Annotated cases are cited in the notes to the text, which collect a very large number of cases. Among the annotated cases there cited are our own cases of *St. L., I. M. & S. R. Co. v. Hopkins*, 54 Ark. 209, 15 S. W. 610, annotated in 12 L. R. A. 189, and the case of *Hall v. Gage*, 116 Ark. 50, 172 S. W. 833, annotated in L. R. A. 1915C, 704.

The litigation in the case of *Hall v. Gage*, supra, arose from the falling of a wall which had been left standing after a fire, and in holding that the trial court had erred in refusing to charge the jury that the falling wall was *prima facie* evidence of negligence, which imposed upon the owner the burden of showing that the accident happened without his negligence, we said:

"In the case of *Earl v. Reid*, 18 Am. & Eng. Ann. Cases, p. 1, 21 Ontario Law Reports, 545, Teetzel, J., said:

"I think it is the plain duty of every owner of land to keep the buildings or structures thereon in such a condition that they shall not, by falling or otherwise, cause injury to persons lawfully on adjoining lands. In other words, every owner of a building is under a legal obligation to take reasonable care that his building shall not fall in the street or upon his neighbor's land and injure persons lawfully there.

"While the owner cannot be charged for injuries caused by inevitable accident, the result of *vis major*, or of the willful act or negligence of some one for whom he is not responsible, he is liable for injuries caused by the failure on his part to exercise reasonable care."

"The fact that the wall fell is *prima facie* evidence of negligence in conformity with the maxim *res ipsa loquitur*. Thompson's Commentaries on the Law of Negligence, vol. 1, par. 1213. See, also, paragraph 1060 of the same volume. To the same effect see *Earl v. Reid*, supra."

In the case of *Gurdon & Ft. Smith Ry. Co. v. Calhoun*, 86 Ark. 76, 109 S. W. 1017, an employé working on the railroad track was injured by the falling of a tie-jack weighing 300 pounds, from a work car, and it was there contended by the railway company that the injury complained of was not caused by the running of a train, in the sense of the Constitution and statute making railroads liable for damage done by the running of trains; but the court expressly pretermitted the decision of that question for the reason there stated, that the uncontradicted facts raised the presumption of negligence, and in so holding the court said:

"Appellee was in a place where he had a right to be. It was a safe place until made dangerous by the presence and operation of the train over which appellant railway company had the exclusive management and control. The falling of a 'tie-jack,' weighing three hundred

pounds, from the car could not well have happened in the usual course, unless there had been some negligence in loading it on the car in the first place, or in the manner in which the train was operated and the car was moved in the second place. Such an implement, if handled with ordinary care, could not fall from the car in the usual and ordinary method of its use, as shown by the proof. The fact, then, that it did fall raises the presumption of negligence."

In the case of *Southwestern Telegraph & Telephone Co. v. Bruce*, 89 Ark. 581, 117 S. W. 564, the telephone company strung a wire across a vacant lot, which broke and left the end on the foundation of a house where the plaintiff was working. Plaintiff picked up the wire to throw it aside, and was shocked and burned.

The court applied the doctrine of *res ipsa loquitur* in fact, but not *eo nomine*, and in doing so said:

"And where the defendant owes a duty to plaintiff to use care, and an accident happens causing injury, and the accident is caused by the thing or instrumentality that is under the control or management of the defendant, and the accident is such that in the ordinary course of things it would not occur if those who have control and management use proper care, then, in the absence of evidence to the contrary, this would be evidence that the accident occurred from the lack of that proper care. In such case the happening of the accident from which the injury results is *prima facie* evidence of negligence, and shifts to the defendant the burden of proving that it was not caused through any lack of care on its part."

Another case which applied the doctrine in fact, but not *eo nomine*, is that of *Jacks v. Reeves*, 78 Ark. 426, 95 S. W. 781. The complaint there alleged that as plaintiff was driving along the road the top of her carriage was caught by defendant's telephone wire and torn off, causing the horse to become frightened and run away and injure the plaintiff. The court charged the jury "that the plaintiff, in order to entitle her to recover damages under this action, is required to prove that the accident occurred through the negligence of W. D. Reeves." Discussing that instruction, the court said it was abstractly correct; that no liability rested upon the defendant except through negligence; but that the instruction was misleading, under the facts of that case, in not being qualified or coupled with another one explaining that the evidence of the accident and injury following therefrom, when the occurrence was one out of the usual course, was *prima facie* evidence of negligence, and shifted the burden onto the defendant to prove that it was not caused by any want of care on his part.

See, also, *Arkansas Telephone Co. v. Rattee*, 57 Ark. 429, 21 S. W. 1059; *St. L. I. M. & S. R. Co. v. Steele*, 129 Ark. 532, 197 S. W.

288; *Thompson on Negligence*, vol. 1, § 1213.

In the case of *Barnowski v. Helson*, 89 Mich. 523, 50 N. W. 989, 15 L. R. A. 33, the facts were that the roof of a house slipped and tipped to one side and fell while being raised by jackscrews. There was no showing that the house had been sufficiently braced, nor other explanatory proof offered, and the Supreme Court of Michigan held there was a presumption of negligence which entitled the plaintiff to go to the jury. Appended to this case is an extended note, in which a large number of cases are collected.

We conclude, therefore, that a cause of action was stated in the complaint, and, if testimony is offered which supports these allegations, a case will be made entitling plaintiffs to go to the jury to have decided whether such testimony, considered together with any other testimony which may be offered, discharges the burden of proof resting upon the plaintiff.

The judgment of the court below sustaining the demurrer is therefore reversed, and the cause will be remanded, with directions to overrule the same.

GILLEYLEN et al. v. HALLMAN. (No. 23.)

(Supreme Court of Arkansas. Dec. 1, 1919.)

1. EXECUTORS AND ADMINISTRATORS ⇨216(2)  
—LIABILITY OF ESTATE AND ADMINISTRATOR  
FOR EMPLOYMENT OF ATTORNEY.

An attorney employed by an administrator of an estate to render services for it has no claim against the estate, though his services may have inured to its benefit, but must look for compensation to the administrator who employed him.

2. EXECUTORS AND ADMINISTRATORS ⇨435—  
CIRCUIT COURT WITHOUT JURISDICTION OF  
ATTORNEY'S LIEN ON FUNDS OF ESTATE.

In view of Const. 1874, art. 7, § 34, giving the probate court exclusive jurisdiction of the estates of decedents, etc., the fact that an administrator is authorized by the probate court to institute suit to recover in the circuit court an amount due the estate does not give the circuit court jurisdiction to distribute or administer the funds adjudged by it to belong to the estate, by declaring a lien thereon in favor of the attorneys employed by the administrator, who have prosecuted the litigation successfully.

3. EXECUTORS AND ADMINISTRATORS ⇨435—  
AUTHORIZATION TO EMPLOY COUNSEL NOT A  
DISTRIBUTION OF FUNDS RECOVERED.

Order of the probate court, authorizing an administrator to employ counsel to sue to recover money for the decedent's estate on a fixed or contingent fee, is not tantamount to a distribution in advance by the probate court of funds so recovered, and a separation of the

funds from the general assets of the estate, to authorize the circuit court, in which the attorneys employed successfully prosecuted litigation, to enforce a lien in favor of the attorneys on such funds.

Appeal from Pulaski Chancery Court; Jno. E. Martineau, Chancellor.

Suit by Otis Gilleylen and others against K. E. Hallman, administrator. From decree dismissing the complaint, plaintiffs appeal. Affirmed.

Verne McMillen and Chas. T. Coleman, both of Little Rock, for appellants.

Edward B. Downie, of Little Rock, for appellee.

WOOD, J. On the 8th day of January, 1918, W. R. Fisher and J. E. Fisher, father and son, were assassinated in Montgomery county, Ark. W. R. Fisher carried a policy of life insurance in the Home Life & Accident Company in the sum of \$5,000. H. L. Watkins was appointed administrator of the estate of W. R. Fisher and K. E. Hallman administrator of the estate of J. E. Fisher, by the probate court of Pike county, Ark. During the time that H. L. Watkins was acting as administrator of the estate of W. R. Fisher and K. E. Hallman, as administrator of the estate of J. E. Fisher, the insurance company interpleaded in the Pulaski chancery court, making both the administrators parties to his interplea, and deposited in the registry of said court the proceeds of the policy of W. R. Fisher, and asked that the administrators of the respective estates be required to litigate as to who was entitled to the money due on the policy. At this juncture it was suggested that since the death of the Fishers occurred in Montgomery county, the administrators should be appointed by the probate court of that county, which in due form was done.

Before the trial was had on the issue raised on the interplea in the Pulaski chancery court a petition was filed by K. E. Hallman in the probate court of Montgomery county, praying that he, as administrator of the estate of J. E. Fisher, deceased, be authorized and directed to employ Otis Gilleylen and Carmichael & Brooks, as lawyers, to represent him in Pulaski chancery court either upon a contingent or fixed fee as might be agreed upon and approved by the court.

On the 10th day of April, 1919, the probate court of Montgomery county entered an order, reciting that K. E. Hallman as administrator of the estate of J. E. Fisher, had on the 9th day of June, 1918, filed a petition, asking authority to employ the above attorneys for the purpose mentioned. The order recites that the granting of the petition was overlooked, but is granted now for then; that the attorneys, however, had done the work under a contract with the administrator, be-

lieving that the petition had been granted. The decree was rendered in the original cause in the Pulaski chancery court between the administrators, directing that the money in the registry of the court should be paid to K. E. Hallman, the administrator or his attorneys of record, and this court affirmed the decree of the Pulaski chancery court.

This suit was instituted by the appellants in the Pulaski chancery court against the appellee, setting up, in substance, the above facts, and alleging that they had been employed by the appellee who had agreed to pay them a contingent fee of one-third the amount recovered, and that they had faithfully performed the services, and had recovered for the estate of J. E. Fisher the sum of \$4,709.84. They alleged that the order of the probate court of the 10th of April, 1919, approved, ratified, and confirmed the employment of the appellants, and that such order was made as an allowance to the administrator for expenses in administering the estate, and was made as a partial distribution of the moneys collected. They alleged that the appellee refused to perform its contract, and prayed that they have judgment for the amount due them and the sum of \$15, which they had paid out for costs, and that their fee be declared a lien on the funds in the hands of the court.

To the complaint the appellee demurred on the ground that the chancery court of Pulaski county was without jurisdiction to render judgment in the cause, because exclusive jurisdiction over the subject-matter was in the Montgomery probate court.

The court sustained the demurrer, and plaintiffs below, appellants here, declined to plead further, whereupon the court entered a decree dismissing the complaint, from which is this appeal.

[1] In the case of Carpenter v. Hazel, 128 Ark. 416, 194 S. W. 225, one Phillips, administrator of the estate of Mary Person, employed one Carpenter, an attorney, to enter suit against a railroad company to recover damages sustained by the estate of Mary Person on account of the alleged negligent killing of Mary Person by the agents of the receivers, who were operating the railroad. The contract specified that the attorney was to receive a certain portion of the amount recovered. The attorney entered suit in the circuit court and recovered, and the amount of the judgment was paid to the clerk of the court where the judgment was rendered. At a subsequent term of the circuit court the attorney filed a petition, asking that a lien be declared on, and that the clerk be required to pay over to the attorney his portion of the amount recovered. Hazel, at that time the administrator of the estate of Person, resisted the petition. The circuit court decided that it had no jurisdiction of the subject-matter, and entered an order directing the clerk to pay over

the funds in his hands to the administrator of the estate of Person. From that order an appeal was prosecuted to this court, and we held that—

"The circuit court was correct in holding that it had no jurisdiction to adjudicate the amount payable to the attorney and to declare a lien on the amount recovered from the defendants in the original action."

We quoted the following from *Tucker v. Grace*, 61 Ark. 410, 33 S. W. 530:

"An administrator has no power to enlarge, by his contract, the liability of the estate that he represents. Whether he contracts as an administrator or not, it is his own undertaking, and not that of the decedent, and he incurs a personal liability. An attorney employed by the administrator of an estate has no claim against the estate, although his services may have inured to the benefit of the estate. He must look for compensation to the administrator who employed him."

But counsel for appellants contend that in the case at bar the probate court authorized the administrator to employ the attorneys (appellants) to bring suit to recover the sum due on the insurance policy for the estate of J. E. Fisher. The allegations of the complaint show that the administrator was not authorized by the probate court to employ counsel to bring suit, but that court only "approved, ratified and confirmed the employment" after "the services had been rendered and the money collected."

[2] However, that fact is wholly immaterial. The fact that an administrator is authorized by the probate court to institute suit to recover in the proper forum an amount due the estate which he represents does not give the tribunal in which the suit is instituted jurisdiction to distribute or administer the funds adjudged by it to belong to the estate. For the funds when recovered become the property of the estate, and must be administered by the probate court, which has exclusive jurisdiction of "the estates of deceased persons," "administrators" etc. Article 7, § 34, Const. 1874.

As we said in *Carpenter v. Hazel*, *supra*:

"An amount paid to an attorney for conducting litigation for the benefit of an estate is a part of the expenses of administration, and payment of the amount is a distribution of a part of the assets of the estate. It is necessarily a part of the jurisdiction of the probate court which is exclusive over that subject, and no other court can invade that jurisdiction."

[3] We cannot agree with learned counsel for appellant in the contention that an order of the probate court, authorizing the administrator to employ counsel to bring suit to recover money for an estate upon a contract for a fee fixed at a definite sum, or contingent

upon recovery and for a certain per cent. of the amount recovered, is tantamount to a distribution in advance by the probate court of the funds so recovered, and a separation of these funds from the general assets of the estate. We have no such case before us, but, if we had, counsel are mistaken in the position assumed.

The recovery of funds is one thing; their distribution when recovered is an entirely different matter.

This case is ruled by *Carpenter v. Hazel*, *supra*. There is no distinction in principle between them.

Affirmed.

### BOYER v. STATE. (No. 28.)

(Supreme Court of Arkansas. Dec. 1, 1919.)

#### 1. STATUTES $\S$ 141(1)—AMENDMENT BY REFERENCE TO TITLE.

The amendment of Acts 1915, p. 338, creating the Northwest Arkansas tick eradication district by Acts 1917, p. 195, § 1, providing that the original act "be amended so as to include the following named counties," did not violate Const. art. 5, § 22, providing that no law shall be revised, amended, or extended by reference to its title only.

#### 2. ANIMALS $\S$ 36—EVIDENCE OF EFFICACY OF DIPPING IN PROSECUTION UNDER TICK ERADICATION LAW.

In a prosecution for violation of the tick eradication law by failing to dip cattle, evidence that cattle dipped at the vat in question were killed and greatly damaged as the result of being dipped, and that dipping throughout the county had the same effect, was properly excluded; the efficacy of dipping not being a proper subject of inquiry.

#### 3. ANIMALS $\S$ 36—EVIDENCE AS TO DIPPING MIXTURE IN PROSECUTION UNDER TICK ERADICATION LAW.

In a prosecution for violation of the tick eradication law, by failing to dip cattle, evidence that the mixture in which defendant was ordered to dip his cattle did not conform to the formula prescribed by the state board of control was improperly excluded.

Appeal from Circuit Court, Little River County; James S. Steel, Judge.

D. T. Boyer was convicted of violating the tick eradication law, and he appeals. Reversed and remanded.

Jno. N. Cook, of Texarkana, Ark., and Mahaffey, Keeney & Dalby, of Texarkana, Tex., for appellant.

Jno. D. Arbuckle, Atty. Gen., and Robert C. Knox, Asst. Atty. Gen., for the State.

SMITH, J. Appellant was convicted of violating the tick eradication law by failing to

dip his cattle, and has prosecuted this appeal to review that judgment.

The trial was had in Little River county, and it is first insisted that the tick eradication law was not properly passed, in so far as by the amendments thereto it was made to include Little River county. The General Assembly, by Act No. 86, Acts 1915, p. 338, created the Northwest Arkansas cattle tick eradication district, and section 1 named the counties there embraced. Sections 1 and 6 of this act were amended by Act No. 39 of the Acts of 1917. Acts 1917, p. 195. Section 1 of this amendatory act reads as follows:

"Section 1. That section 1 of Act 86 of the Acts of 1915 be amended so as to include the following named counties in the Northwest Arkansas cattle tick eradication district, namely: \* \* \* Little River. \* \* \*"

[1] It is said this method of extending the provisions of the act of 1915 offends against section 22 of article 5 of the Constitution, which provides that no law shall be revived, amended, or the provisions thereof extended or conferred, by reference to its title only, but that so much thereof as is revived, amended, extended, or conferred shall be re-enacted and published at length. A decision adverse to appellant's contention was rendered by this court in the case of *Hermitage Special School District v. Ingalls Special School District*, 133 Ark. 157, 202 S. W. 26, where a substantially identical objection was made to the act there upheld.

[2] The court excluded testimony to the effect that cattle dipped at the vat in question were killed and greatly damaged as the result of being dipped, and that dipping throughout the county had the same effect. No error was committed in this ruling, as the efficacy of dipping was not a proper subject of inquiry by the court, as that is a question which has been passed upon by a board especially appointed to pass upon it and one presumptively especially qualified to decide that question.

This is a police regulation, enacted for the general good. We held in the case of *Davis v. State*, 126 Ark. 260, 190 S. W. 436, that noncompliance with the requirement to dip could not be excused by a showing that particular cattle were not tick-infested, as this was a police regulation with which all persons affected by it must comply. So now it must be held that the duty to dip and the wisdom and benefits of doing so are not subjects to be inquired into upon the trial of one charged with a violation of that duty.

[3] Appellant offered testimony, however, which was excluded by the court, to the effect that the mixture in which he was ordered to dip his cattle did not conform to the formula prescribed by the state board of

control for use in the tick eradication work, and in this respect we think error was committed. The legislation on this subject confers on the board of control of the agricultural experiment station the power and authority to promulgate the necessary rules and regulations to make the work of tick eradication successful, and pursuant to this authority the board has adopted a formula for use in dipping. It was essential that the board do so to make the regulation effective, and it is only because the board has done so that it is not permissible to excuse a failure to dip by a showing that injury, rather than benefit, would have resulted from doing so. Only the board of control has authority to promulgate rules and regulations, and it was manifestly not contemplated that each inspector appointed to enforce the act might order and require the use of any mixture which appeared to him to be efficacious.

The action of the court below is defended upon the ground that presumptively the mixture was a proper one to use, and there is such a presumption; but there was offered here a witness who would have testified that he knew the formula prescribed by the board of control, and that the mixture which it was here proposed to use did not substantially comply therewith. This testimony was competent, and for the error in excluding it the judgment will be reversed, and the cause remanded for a new trial.

#### A. L. CLARK LUMBER CO. v. EDWARDS. (No. 17.)

(Supreme Court of Arkansas. Dec. 1, 1919.)

##### 1. TRIAL $\S$ 260(1)—REFUSAL OF INSTRUCTIONS COVERED BY THOSE GIVEN.

There was no prejudice in refusal to give defendant's requested instructions, which were substantially covered by another instruction given at its request.

##### 2. TRIAL $\S$ 251(8)—LIMITING INSTRUCTIONS TO NEGLIGENCE CHARGED.

The use of the word "any" in an instruction authorizing recovery for injury to a brakeman if injury was found to be due to negligence of defendant or "any of its servants," held not to render instruction objectionable as failing to limit the consideration to acts of negligence alleged; the language being understood as referring to the negligence in the particulars charged.

##### 3. TRIAL $\S$ 240—INSTRUCTION ON NEGLIGENCE CAUSING INJURY NOT ARGUMENTATIVE.

Instruction that if plaintiff brakeman "was employed by the defendant company as alleged in his complaint, and was working on its railroad under orders and directions of its fore-

man, and while in the exercise of ordinary care for his own safety, and when he did not assume the risk," was injured on account of the negligence of the defendant or any of its agents, servants, or employes, verdict should be for plaintiff, was not argumentative and misleading.

**4. TRIAL  $\Leftarrow$  295(7)—INSTRUCTIONS NOT ERRONEOUS AS IGNORING ASSUMED RISK.**

Where an instruction related only to one kind of assumed risk, the ordinary hazards of the service, contention that it ignored the question of assumption of risk, based on patent dangers known to plaintiff brakeman, submitted in another instruction given at defendant's request, cannot be sustained; the instructions not being conflicting, but to be considered in harmony with each other.

**5. TRIAL  $\Leftarrow$  296(4, 5)—INSTRUCTIONS IGNORING CONTRIBUTORY NEGLIGENCE FAVORABLE TO APPELLANT.**

Where other instructions given made plaintiff's right of recovery depend on his own freedom from negligence, the instructions being in this respect too favorable to defendant, it was unnecessary to incorporate the question of contributory negligence in instruction on measure of damages.

Appeal from Circuit Court, Pike County; Jas. S. Steel, Judge.

Action by Elisha Edwards against the A. L. Clark Lumber Company. Judgment for plaintiff, and defendant appeals. Affirmed.

T. D. Wynne, of Fordyce, for appellant.

D. D. Glover, of Malvern, and Langley & Johnson, of Murfreesboro, for appellee.

MCCULLOCH, C. J. The plaintiff, Elisha Edwards, was an employe of the defendant as brakeman on a railroad operated by defendant, and he instituted this action to recover damages on account of personal injuries received while he was working in the line of his employment.

The circumstances attending the injury, stating them as established by proof adduced by the plaintiff, are as follows:

The train on which plaintiff worked the day he was injured was composed of an engine and caboose, and stopped at a spur track to bring out three flat cars loaded with ties and rails, which were standing on the spur. Ties were loaded crosswise on the cars, and the rails were loaded lengthwise on top of the ties. One of the rails on the front car extended over the end of the car, and a steel or iron angle bar loaded on top of that car also extended over the end. The automatic coupler on the front car was out of order so it would not make the coupling automatically, and plaintiff had previously notified his superior of that fact and repairs had been promised.

When the train came to a stop for the pur-

pose of going on the spur track, plaintiff got out of the caboose and walked to the switch and opened it, and then walked on to the end of the front car, which was to be coupled to the caboose, and signaled the engineer to back up for the coupling to be made. While the engine was being slowly backed up, plaintiff noticed that the coupling was not working properly, and he stepped in to adjust it. On attempting to make the adjustment, he found that the coupling would not work, and he signaled the engineer by motion of his hand to stop; but the engineer failed to obey the signal and backed the caboose violently against the end of the standing car. Plaintiff was caught between the ends of the two cars, and the protruding end of the rail on top of the car, or the angle bar, struck his head and crushed his skull. Plaintiff was very seriously injured, the extent of his injury being abundantly sufficient to warrant the assessment of damages (\$2,500) made by the trial jury. The engine could have been stopped within two or three feet, if the signal had been obeyed, and the injury could have thus been avoided.

Negligence of the defendant is charged in three particulars: The improper loading of the cars so as to allow the rail and the angle bar to extend over the end of the car; allowing the coupler to remain out of repair so that it would not work automatically; and backing the caboose against the end of the standing car after the signal was given to stop.

Defendant denied each of the charges of negligence and pleaded contributory negligence on the part of plaintiff and assumption of the risk.

The testimony adduced by defendant tended to show that plaintiff did not give the stop signal, as he claims to have done, but that, on the contrary, plaintiff signaled the engineer to back up, and just as the caboose reached the end of the other car he suddenly stepped between them to make the coupling, and that his injury was caused by his own act of negligence in that respect. The testimony also tended to refute the other alleged acts of negligence. These issues were submitted to the jury, and the verdict settled them in favor of plaintiff's contention. The evidence was sufficient to support the verdict.

[1] The court gave numerous instructions requested by each party, but refused to give three requested by defendant, one of which was a direction to find for the defendant. The other two refused instructions were, we think, substantially covered by another instruction given at defendant's request, and there was no prejudice in the court's refusal to give them. Further discussion on that subject is unnecessary.

[2, 3] Error is assigned in giving instruc-

tion No. 1, requested by plaintiff, which reads as follows:

"The court instructs the jury that if you find from the evidence in this case that the plaintiff was employed by the defendant company as alleged in his complaint and was working on its railroad under orders and directions of its foreman, and while in the exercise of ordinary care for his own safety, and when he had not assumed the risk, that he was injured on account of the negligence of the defendant company, or any of its agents, servants, or employes, you will find for the plaintiff in this case."

The point made against this instruction is that it submitted acts of negligence by "any" of defendant's servants, without limiting the consideration to acts of negligence set forth in the complaint and supported by testimony. This objection is wholly unfounded, for the language must necessarily have been understood by the jury as referring to negligence in the particulars charged.

It is also contended that the instruction is argumentative and misleading, but we do not so consider it. Similar objections are made to other instructions, but the criticism is equally unfounded.

Complaint is also made that several of the instructions assumed the existence of disputed facts, but we do not so construe any of the instructions.

[4] The following instruction is assigned as erroneous:

"You are instructed that, when the servant enters the employment of the master, he only assumes the usual and ordinary risks of his employment, and you are further instructed that 'usual' means such as occur in ordinary practice or in the regular course of business; that which is customary, ordinary, or frequent. And you are further instructed that 'ordinary' means that which usually occurs."

The argument made against this instruction is that it ignored the question of assumption of risk based on patent dangers which were known to plaintiff, or which he would have observed by the exercise of ordinary care. This instruction related only to one kind of assumed risk—the ordinary hazards of the service—and did not ignore the others, which were submitted in another instruction given at defendant's request. Those instructions were not conflicting, but are to be considered in harmony with each other.

[5] Objection is urged to the following instruction on the measure of damages:

"You are instructed that, if you find for the plaintiff in this case, you will assess his damages at a sum of money which will fairly compensate him for the pain and suffering, both mental and physical, endured by him, if you find any such resulted from the injury complained of, also for his loss of time, if any was

caused by the injury complained of, also for his impaired capacity to earn money, if any such resulted from the injury complained of, from the date of his injury to the present time, and if you find from the evidence that his injury is permanent for the future of his life."

It is said that this instruction ignored the question of contributory negligence of the plaintiff in reduction of the damages. This is not true, for the reason that all of the instructions given by the court made plaintiff's right of recovery depend on his own freedom from negligence. In this respect the instructions were too favorable to defendant, but they made it unnecessary to incorporate the question of contributory negligence in the instruction on the measure of damages, for the jury was told, in effect, that plaintiff could not recover if he "failed to exercise ordinary care for his own personal safety in going between the cars to make the coupling."

Judgment affirmed.

#### ARKADELPHIA MILLING CO. v. CAMPBELL. (No. 18.)

(Supreme Court of Arkansas. Dec. 1, 1919.)

##### 1. PRINCIPAL AND AGENT §101(4)—APPEARANCE AUTHORITY OF BUILDING CONTRACTOR'S AGENT.

That an agent of a building contractor was sent to a town to superintend the construction there of buildings for a client of the contractor, and to purchase the labor and material therefor, did not give him authority, actual or apparent, to enter into a contract for the construction of another building of a different character and for another person.

##### 2. PRINCIPAL AND AGENT §194(3)—INSTRUCTIONS SUBMITTING RATIFICATION OF AGENT'S AUTHORITY.

In an action for damages due to the faulty construction of a warehouse by defendant's alleged agent wherein defendant pleaded that the agent was alone a party to the contract, an instruction, when considered as a whole, held sufficient to submit to the jury the question of ratification by defendant.

##### 3. TRIAL §244(6)—INSTRUCTIONS INVADING PROVINCE OF JURY BY SINGLING OUT CIRCUMSTANCES.

In an action for damages due to the faulty construction of a warehouse by defendant's alleged agent wherein defendant pleaded absence of agency, an instruction that, if the agent was defendant's foreman in the construction of another building and purchased the material therefor, such fact alone was not sufficient evidence of his authority to bind defendant in the construction of the warehouse, held not erroneous as invading the province of the jury by singling out circumstances established at trial.



**4. APPEAL AND ERROR ¶1064(1)—HARMLESS ERROR IN INSTRUCTIONS SINGLE OUT ESTABLISHED CIRCUMSTANCES.**

The Supreme Court will not reverse a judgment because instructions single out circumstances established in the trial of a case, where the principles of law declared therein are correct.

Appeal from Circuit Court, Clark County; Geo. R. Haynie, Judge.

Action by the Arkadelphia Milling Company against A. O. Campbell. Judgment for defendant, and plaintiff appeals. Affirmed.

McMillan & McMillan, of Arkadelphia, for appellant.

Callaway & Hule, of Arkadelphia, and Cockrill & Armistead, of Little Rock, for appellee.

MCCULLOCH, C. J. This is an action instituted by appellant against appellee to recover damages on account of alleged faulty construction of a warehouse for appellant. It is alleged in the complaint that appellee, A. O. Campbell, acting through his agent, W. L. Campbell, entered into a written contract with appellant for the construction of the warehouse and undertook to perform the contract, but that some of the work was so defective that it had to be done over again at a cost to appellant of \$750, the amount sued for.

The written contract is exhibited with the complaint and shows on its face that it was executed, not by A. O. Campbell, but by W. L. Campbell. The body of the contract recites that it is the undertaking of W. L. Campbell, who subscribed his own name to it. It is, however, alleged in the complaint that, although the contract was executed by W. L. Campbell in his own name, he was acting as the authorized agent of A. O. Campbell, the appellee. The answer of appellee contains denials of all the allegations of the complaint. There was a trial of the issues before a jury which resulted in a verdict in favor of appellee.

The building in question was constructed in the year 1914. Appellee resided in Oklahoma City, but was engaged in taking contracts for constructing buildings, and entered into a contract to construct certain additional buildings for Henderson-Brown College at Arkadelphia. W. L. Campbell was sent to Arkadelphia as appellee's agent to superintend the construction of those buildings with authority to purchase material, employ labor, and do everything to further the construction of the buildings. Appellant was engaged in the manufacturing business in Arkadelphia, and through its Little Rock agent, Mr. Nowlin, sought a contract or furnishing some of the millwork for the Henderson-Brown College buildings. The bill for that material amounted to the sum of \$5,200. Appellant

planned the construction of a warehouse, and procured estimates of the cost, one from W. L. Campbell, who signed the letter or memoranda submitting a bid in the name of A. O. Campbell, by him as agent. When this matter was submitted to A. O. Campbell, he declined to have anything to do with the construction of the warehouse, and W. L. Campbell thereupon proceeded to enter into a contract with appellant in his own name for the construction of the warehouse for the price of \$5,200, the same as the amount of the bill for material to be furnished by appellant for construction of the Henderson-Brown College buildings. The contract between appellant and W. L. Campbell contained the following clause:

"Said first party is to charge second party on account of all millwork now being furnished by said second party to first party on the Administration Building and Girls' Dormitory for Henderson-Brown College, at Arkadelphia, should there be a balance due either party after the completion of this contract same shall be paid in cash to the other party."

Appellee was not a party to this contract so far as it appears on the face of it, but it is conceded that he was advised of the existence of the contract between W. L. Campbell and appellant, and that he paid to W. L. Campbell the price of the material furnished by appellant, with the knowledge that W. L. Campbell was paying for the material under his contract for constructing the warehouse. According to the undisputed evidence, W. L. Campbell had not, prior to his being sent to Arkadelphia to superintend the construction of the Henderson-Brown College buildings, acted as the agent of A. O. Campbell in any way for the past 20 years, and that he has not, subsequent to that transaction, acted for A. O. Campbell in any way. In constructing the warehouse for appellant, W. L. Campbell used some of the construction machinery owned by A. O. Campbell and used in the construction of the Henderson-Brown College buildings, and also employed the same labor and the same bookkeeper and timekeeper. Appellee and W. L. Campbell each testified that the contract was that of W. L. Campbell alone, and that he was not acting as the agent of appellee, and that appellee was not interested in that contract. Appellant's manager testified that he thought when he entered into the contract that W. L. Campbell was the man who had the contract to construct the Henderson-Brown College buildings. The evidence tended to show that there was faulty construction of the warehouse building and that appellant expended the sum of \$750 in repairing the defects.

The court submitted to the jury the question of alleged agency of W. L. Campbell and his authority to act for appellee, and that issue must be treated as properly settled by

the jury; there being sufficient evidence to sustain the verdict.

[1] The court refused to give an instruction submitting the question of apparent authority of W. L. Campbell to act for appellee, or rather the court gave an instruction which excluded that question from the consideration of the jury. We think there was no error of the court in this respect for there was no evidence to justify the submission of the question whether or not the contract entered into by W. L. Campbell with appellant was within the apparent scope of his authority as the agent of appellee. In the first place, W. L. Campbell did not pretend to act for appellee in the transaction. The contract shows on its face that he was acting for himself, and this necessarily excludes the idea that he was acting within the apparent scope of his authority as agent for some one else. That fact did not prevent appellant from showing that, notwithstanding W. L. Campbell executed the contract in his own name, he was in fact acting as agent for appellee; but it cannot be said that the contract executed in his own name was within the apparent scope of his authority as agent for some one else. In the next place, there is no proof to justify a finding that, if there was no actual authority, the contract for the construction of the warehouse was within the apparent scope of authority. W. L. Campbell was sent to Arkadelphia for the purpose of superintending the construction of the buildings for Henderson-Brown College and to purchase the material and employ labor for that purpose. This did not give him authority, either actual or apparent, to enter into a contract for the construction of another building of a different character and for another person. So we think that the trial court was correct in holding that the question of apparent authority was not an issue in the case.

It is next contended that the court erred in refusing to properly submit the issue of ratification by appellee of the contract between W. L. Campbell and appellant. The court refused to give an instruction on this subject, requested by appellant, but gave instruction No. 2 at the request of appellee, which reads as follows:

"You are instructed that the plaintiff in suing the defendant on a written contract, which is not signed by the defendant, but which is signed by one W. L. Campbell, alone, and plaintiff admits that A. O. Campbell did not sign the contract, but it is contending that W. L. Campbell when he signed it, although he signed his own name, yet in reality he was acting as the agent of A. O. Campbell, the defendant. Before you can consider any question of the violation of the contract or as to any damage with reference thereto, you must find from a preponderance of the evidence that A. O. Campbell authorized W. L. Campbell to sign the contract as his agent. The burden of proof is on the plaintiff to show by a preponderance

of the evidence that A. O. Campbell authorized W. L. Campbell to sign the contract as his agent, or afterwards ratified the same as his contract, and that he (A. O. Campbell) was the party contracting to erect the warehouse and not W. L. Campbell; and, unless you are convinced by a preponderance of the evidence that this is true, your verdict will be for the defendant."

[2] This instruction is illy framed, but it certainly is sufficient to submit to the jury the question of ratification by appellee. The first sentence omits the question of ratification, but it is clearly embraced in the second sentence, and both of the sentences were to be read together and must have been considered by the jury as submitting the issue of ratification of the contract. There was only a general objection made to it by appellant, and the defects ought to have been called to the attention of the court by a specific objection. It is doubtful, to say the least of it, whether the question of ratification is properly in this case under the proof adduced. The real issue in the case is whether or not W. L. Campbell had actual authority to enter into the contract and was acting for his principal in the transaction. There was no direct proof of the existence of such authority, but there were certain circumstances in the case which would have warranted the jury in so finding. But, if there was no actual authority, there was no ratification. W. L. Campbell was not holding himself out as the agent of appellee in the transaction, and it cannot be said that appellee ratified the transaction by allowing W. L. Campbell to hold himself out as such agent. Neither is there any proof that appellee received any benefit from this contract. He purchased and paid for the material used in the Henderson-Brown College buildings, and the fact that the payment was made to W. L. Campbell under his contract with appellant did not confer any benefit on appellee so as to make him a party to the contract for the construction of the warehouse.

The court gave the following instruction over appellant's objection:

"You are instructed that if you believe from the evidence that W. L. Campbell was the foreman and agent of A. O. Campbell in the construction of Henderson-Brown College, and acting as such agent purchased the necessary material for Henderson-Brown College, this fact alone is not sufficient evidence that he had any authority to enter into a contract binding A. O. Campbell to build a warehouse for the plaintiff as payment for any material purchased."

[3, 4] It is argued that this instruction invaded the province of the jury, but we do not think this is true, for the reason that it is correct to say that the facts recited in the instruction were not of themselves, when standing alone, sufficient to constitute the creation of the relation of agency in the

transaction between appellant and W. L. Campbell. Appellee was therefore entitled to a declaration of law on that subject. It is not good practice to single out circumstances established in the trial of a case and make them the subject-matter of separate instructions, but we do not reverse judgments on account of the giving of such instructions where the principles of law declared are correct. *Hogue v. State*, 93 Ark. 316, 124 S. W. 783, 130 S. W. 167.

There are assignments of error with respect to other rulings of the court which we do not find of sufficient importance to discuss.

Finding no error in the record, the judgment is affirmed.

**AMERICAN HARDWOOD LUMBER CO. v. MILLIKEN-JAMES HARDWOOD LUMBER CO. (No. 211.)**

(Supreme Court of Arkansas. Nov. 17, 1919.  
Rehearing Denied Dec. 8, 1919.)

**1. SALES ⇨92—RESCISSION OF CONTRACT; JURY QUESTION.**

In seller's action for price of lumber, whether seller's letter and telegram of same date, to buyer, sent upon buyer's complaint that the lumber received did not conform to contract, rescinded the contract, or made an unaccepted offer to rescind on buyer reloading and rebilling lumber, as directed, *held* for jury.

**2. SALES ⇨168(1)—RIGHT TO INSPECT GOODS.**

Generally in case of an executory contract of sale the buyer is entitled to a fair opportunity to inspect or to examine the goods tendered to see if they conform to the contract, and if they do not do so buyer may reject them.

**3. SALES ⇨168(4) — BUYER'S RIGHT TO UNLOAD LUMBER FOR INSPECTION.**

Where seller wrote buyer that carload of lumber was being loaded for shipment, and that seller would be glad to have buyer look lumber over carefully when it was unloaded in buyer's yards, buyer had the right, before acceptance, to unload the lumber for inspection, but if buyer knew by examination of lumber in car that it did not conform to contract, the unloading of lumber constituted acceptance.

**4. SALES ⇨176(4)—ACCEPTANCE OF INFERIOR GOODS; RECOVERY OF DAMAGES.**

Where seller of carload of lumber gave buyer right to unload lumber before acceptance for purpose of inspection, buyer had the right to accept lumber without inspecting it, in reliance upon its right to recover damages in case lumber was of a quality inferior to that specified in contract.

**5. SALES ⇨364(7) — INSTRUCTIONS NOT INCONSISTENT.**

In action for price of carload of lumber, instruction that buyer had right to unload car

to inspect it and to hold lumber for freight and unloading charges, if material portion was not in accordance with order, *held* not inconsistent with instructions that unloading of car with knowledge that lumber did not conform to contract constituted acceptance.

**6. TRIAL ⇨253(1)—INSTRUCTIONS.**

Court cannot be required to cover every phase of the case in one instruction.

Appeal from Circuit Court, Clark County; Geo. R. Haynie, Judge.

Action by the Milliken-James Hardwood Lumber Company against the American Hardwood Lumber Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Appellee sued appellant to recover \$537.64 alleged to be due it for a car of lumber. Appellant defended the suit on the ground that the car of lumber did not conform to the contract of purchase, and that on that account it did not accept the lumber. The facts are as follows:

The Milliken-James Hardwood Lumber Company, appellee herein, is a corporation located at Arkadelphia, Ark., and operates a mill which saws hardwood timber. The American Hardwood Lumber Company is a foreign corporation engaged in the business of buying and selling hardwood lumber by the wholesale, and is located at St. Louis, Mo. It has an office and yard at Benton, Ark., and has complied with the laws of the state with regard to foreign corporations doing business in this state. In May, 1918, by telegrams and letters, a contract was entered into whereby appellee agreed to ship to appellant a car of two-inch edged hickory fitches two inches thick No. 2 common and better at \$45 per thousand f. o. b. Arkadelphia, Ark. Appellee was directed to load and ship the same to appellant at St. Louis, Mo. On May 21, 1918, appellee wrote to appellant, stating that the car of hickory was now being loaded for shipment, and that it would be glad to have appellant look the lumber over carefully when it was unloaded in its yards. The car of lumber was duly shipped by appellee and delivered by appellee and delivered by the carrier to appellant at its yards in St. Louis, Mo. In relation thereto on June 6, 1918, appellant wrote to appellee as follows:

"Gentlemen: The car of hickory is in and inspected by the National Hardwood Lumber Association's inspector and we inclose said inspector's report. Car No. 14786. When the car first was opened our foreman reported back that it was 'kindling wood,' and not even worth the freight; but we of course unloaded the stock, and the report shows this is about right.

"We bought No. 2 common and better, log run stock, but you will note that you have no doubt shipped the good stock out and this practically No. 2 and No. 3 common.

"We have paid your draft for 80 per cent. because we have dealt with you gentlemen be-

fore and felt that you were very honorable. We feel sure some mistake has been made. We cannot use the stock. Out of 11,000 feet over 4,600 is No. 3 common, and less than 800 feet of No. 1 common. Balance No. 2 common, No. 1, and seconds  $\frac{3}{4}$ . It is quite evident the best has been shipped elsewhere or else you cut up the cull and mill cull logs. Kindly send us check for the draft we have paid and we will hold the car here for you until you can make some disposition of it, without cost to you.

"Thanking you for prompt compliance with this request, we remain."

On June 10, 1918, appellee wrote to appellant the following:

"We received your letter Saturday, too late to answer same. We are certainly surprised for we cannot understand why you wanted to unload the car if it looked bad to you. We have the lumber sold. You should not unload any lumber for us because we are not going to stand for any shuffling up and if you do not want the car just like we loaded it for you, then rebill. We really did not have the hickory to spare, but we felt like we were accommodating you. Now if you will rebill the car we will get out of your way."

On the same day appellee also sent to appellant the following telegram:

"Without waiving any of our rights, if you do not want car of lumber will ask that you reload same and consign to J. W. Black Lbr. Co., Minneapolis, Minn."

According to the testimony of I. W. Milliken, the manager of appellee, he entered into a contract on May 20, 1918, to sell a car of hickory lumber to appellant for appellee. There was nothing less than No. 2 common that went from the mill out to the piles from which the car was loaded. The demurrage on a car of lumber is \$3 for the first three days, \$6 for the next four days, and \$10 a day thereafter. After the present suit was brought by appellee against appellant, appellant attached the car of lumber in a suit before a justice of the peace in St. Louis for the freight and cost of loading and unloading the lumber, and the lumber was sold for these items.

Dave Hughes was lumber inspector for appellee, and testified that he inspected the car of lumber as it was loaded, and that the lumber placed in the car strictly came up to the specifications of the contract. On cross-examination he stated that he could not step in a car where it was loaded and grade it without examining every piece of it. The reason given was that you could not tell what was in a board by looking at a load of lumber in a car. A board might be good at the end and be rotten three feet from the end. He stated that there was nothing in the car below the grade of No. 2. His testimony was corroborated by that of R. C. Cessor, another employé of appellee. He edged the lumber

and helped load it in the car, and said that the grade of lumber put in the car was No. 2 and better.

According to the testimony of Geo. H. Cottrill, secretary of appellant, his company had purchased lumber from time to time from appellee. Appellant had had a branch office and yard at Benton, Ark., for 14 or 15 years. Appellant advanced the freight charges on the car of lumber in question in the sum of \$133.08. This was according to the rules of the Terminal Association on whose tracks appellant's lumber yard is located, and appellant paid the freight in the ordinary course of business on this account. Cottrill was familiar with the grades of hardwood lumber, having had 20 years' experience. He saw the car of lumber in question, and said the lumber was not of the grade specified in the contract.

Appellant did not reload and rebill the lumber, because the railroad would not accept it without payment of the freight charges, and appellee refused to pay this, as well as the cost of unloading and reloading the car of lumber.

Other witnesses who had had experience in inspecting hardwood lumber testified that it did not come up to the grade specified in the contract.

The jury returned a verdict for appellee, and to reverse the judgment rendered upon the verdict appellant prosecutes this appeal.

McMillan & McMillan, of Arkadelphia, for appellant.

Callaway & Huie, of Arkadelphia, for appellee.

HART, J. (after stating the facts as above). It is earnestly insisted by counsel for appellant that the court should have given a peremptory instruction for it. The court submitted to the jury under proper instructions the question of whether or not the lumber shipped came up to the grade specified in the contract, and the jury decided that question in favor of appellee. Counsel for appellant concede that there was sufficient testimony to support the verdict in this respect, but claim that appellant was entitled to a directed verdict because the correspondence between the parties resulted in a contract rescinding the original agreement under which the lumber was sold. They rely on the letter written by appellee to appellant on June 10, 1918. In that letter appellee stated that it was surprised at appellant unloading the car if it looked bad to it. It further stated that appellee had the lumber sold, and that if appellant did not want the car, to rebill it. On the same day appellee sent to appellant a telegram as follows:

"Without waiving any of our rights, if you do not want car of lumber will ask that you reload same and consign to J. W. Black Lbr. Co., Minneapolis, Minn."

[1] This telegram must be read in connection with the letter of the same date. When this is done, the jury might have found that the appellee did not offer to rescind the contract unless appellant reloaded the lumber and rebilled it as directed, and that appellant did not comply with the offer so made by appellee. Hence the court properly submitted to the jury the question of whether or not there was a rescission of the contract, and there was testimony sufficient to support the finding of the jury that there was no rescission of the contract.

It is next insisted that the court erred in giving instruction No. 3 for appellee and in modifying instruction No. 4 asked by appellant. These assignments of error relate to the same thing, and may be considered together. Instruction No. 3 reads as follows:

"You are instructed that, if you find from the evidence that the defendant, when it first opened the car, saw and knew that it did not come up to the contract, defendant had no right to unload the car; and, if it did unload the car thereafter, it amounted to an acceptance, and you will find for the plaintiff."

Instruction No. 4 as modified reads as follows:

"The court further instructs you that when the car of lumber reached the defendant the defendant had the right to inspect same and to unload the car, and the court instructs you that by paying the freight on the car and unloading same and inspecting same the defendant will not be held to have accepted the car, unless you further find that defendant, before unloading the car, knew that the lumber was not of the kind and quality provided for in the contract."

[2] The modification consisted in adding the qualification at the end of the instruction so as to make it conform to instruction No. 3. As a general rule, in case of an executory contract of sale the buyer is entitled to a fair opportunity to inspect or to examine the goods tendered to see if they conform to the contract, and, if they do not do so, may reject them. *Deutsch v. Dunham*, 72 Ark. 141, 78 S. W. 767, 105 Am. St. Rep. 21.

[3] In the case at bar the contract was made by telegrams and letters. On the 21st of May, 1918, appellee wrote to appellant that the car was being loaded for shipment, and stated that appellee would be glad to have appellant look it over carefully when it was unloaded in its yard. This of itself gave appellant the right to inspect the lumber in the car and to unload it for the purpose of inspection if necessary to do so. Appellee had already inspected the lumber as it was loaded in the car. The inspection at appellant's yards was therefore entirely for the benefit of appellant and it might accept the lumber with or without inspection, or by making such inspection as it saw fit to make. In its letter of June 6, 1918, appellant stated to ap-

pellee that when the car was first opened its foreman reported back that the lumber was "kindling wood," and not even worth the freight. If appellant knew by the examination of the lumber in the car that it did not conform to the contract, it was in a position to decide whether or not it would accept the lumber, and the court properly instructed the jury that, if it saw and knew that the lumber did not come up to the contract, it had no right to unload the car, and, if it did unload it, this amounted to an acceptance. Knowledge that the lumber did not conform to the contract was all that was necessary to enable appellant to exercise its right to refuse or accept the shipment on that account.

It is next insisted that instruction No. 3 is erroneous because the letter of May 21st, from appellant to appellee says:

"In regard to the car now being loaded for you, we should be glad to have you look over it carefully when it is unloaded in your yards."

As above indicated, this letter was a part of the contract between the parties, and gave appellant the right to inspect the car of lumber before accepting it, and to unload it for that purpose if necessary. However, as above stated, the appellant might accept the lumber without inspecting it at all, or after giving it such an inspection as it deemed necessary. If it knew after its foreman had inspected the lumber in the car that it did not conform to the contract, it was in possession of all facts necessary for it to determine whether or not it would accept the car of lumber, and the court was right in instructing the jury that if appellant, when it first opened the car, saw and knew that the lumber did not come up to the contract, it had no right to unload the car, and if it did unload the car thereafter, it amounted to an acceptance.

[4] It is also suggested that appellant had a right to unload the car for the purpose of inspecting the lumber, because an inspector for appellee, Dave Hughes, testified that a man of his experience could not step in a car of loaded lumber and grade it without examining every piece of it, because you cannot tell what is in a board by looking at a load of it; that it might be good at the end and rotten three feet from the end. It was not necessary for appellant to grade the lumber if it already knew that the lumber did not come up to specifications, and that it was not going to accept it on that account. The lumber was in a box car, and an examination of the lumber in the car showed the condition of the lumber on the top and from the bottom to the top on the side of the car when the doors were open. So while each piece of lumber could not be graded without unloading it, it was not possible that the foreman of the appellant could tell by examining the lumber in the car that it did not conform to the contract. Appellant admitted in its letter to ap-

pellee that it knew the lumber did not conform to the contract before it unloaded the same, and this, together with the attendant circumstances, constituted evidence upon which to predicate the instruction. Appellant might have accepted the lumber without asserting its right of inspection, and have relied on its legal right to ask for a reduction of the price in case the lumber was of inferior quality; that is to say, it might have recovered such damages in a cross-action if it had already paid the purchase price, or it might have set such damages up by way of recoupment if suit was brought by appellee for the price of the lumber.

The court at the request of appellant gave instruction No. 2, which is as follows:

"The court instructs you that the defendant had the right to unload the car to inspect it, and if you find that a material portion of the lumber was not in accordance with the order, the defendant would have the right to hold the lumber until the freight and unloading charges were paid the defendant."

[5, 6] It is claimed that the instruction is inconsistent with instructions No. 3 and 4, above set out and considered. We do not think so. It is well settled in this state that the court cannot be required to cover every phase of the case in one instruction. In instruction No. 2 the court was submitting to the jury appellant's theory of the case. Under the contract appellant had the right to inspect the lumber before accepting it and to unload it for that purpose. Then if appellant found that the lumber did not come up to grade it would have the right to reject it, and it need not have returned the lumber, but might have held it until the freight advanced by it and the cost of unloading were paid.

On the other hand, the right of inspection being to enable appellant to ascertain if the lumber conformed to the contract before accepting it, if it knew by examining the lumber while in the car that it was so defective that it did not conform to the contract, appellant was then put to its election, and if it unloaded the lumber such act amounted to an acceptance of it. If appellant accepted the lumber it could not hold it for the freight and cost of unloading, but, on the other hand, it was its duty to have paid the purchase price. Of course, as explained above, it might have accepted the lumber although of an inferior grade, and have set off the damages in a suit for the purchase price. No such issue was made in this case. It was the claim of appellee that the lumber came up to grade, and the jury was expressly told that appellee was not entitled to recover anything unless the lumber was of the kind and grade specified in the contract.

We find no prejudicial error in the record, and the judgment will be affirmed.

## HELENA WATER CO. et al. v. CITY OF HELENA. (Nos. 4, 15.)

(Supreme Court of Arkansas. Nov. 24, 1919.)

### 1. STATUTES $\S$ 283(2)—VALIDITY; PRESUMPTIONS OF REGULARITY.

The presumption that where an act is duly signed by the Governor, deposited with the Secretary of State, and published as a law, every requirement was complied with in its passage, is not conclusive, and the courts in determining the validity of the statute may look to the journals and other records of the Legislature to ascertain whether the constitutional requirements have been observed.

### 2. STATUTES $\S$ 283(2)—SILENCE OF RECORD INSUFFICIENT REBUTAL OF PRESUMPTION OF REGULARITY.

Mere silence of the legislative records concerning the successive steps in the passage of a bill, except as to matters of which the Constitution requires a record on the journals, is not sufficient to overcome the presumption of regularity in the passage of a bill arising from the enrolled copy signed by the Governor and deposited with the Secretary of State.

### 3. EVIDENCE $\S$ 387(2)—PAROL EVIDENCE CONTRADICTION LEGISLATIVE RECORDS.

In determining the validity of a statute, evidence outside of the record is inadmissible to overcome the presumption of regularity arising from the fact that the enrolled copy has been signed by the Governor and deposited with the Secretary of State.

### 4. STATUTES $\S$ 283(2)—PRESUMPTION OF REGULARITY OF PASSAGE OF STATUTE.

The presumption that Acts 1919, p. 411, creating the Arkansas Corporation Commission, was regularly passed by the Legislature, is not overcome by recitals of the Senate journal that two amendments were adopted, where they did not appear on the enrolled statute signed by the Governor and deposited with the Secretary of State.

### 5. PUBLIC SERVICE COMMISSIONS $\S$ 3—ABOLITION OF RAILROAD COMMISSION AND TRANSFER OF POWERS TO CORPORATION COMMISSION CONSTITUTIONAL.

The purpose of Const. Amend. 4, being to provide for the correction of abuses, unjust discriminations, and excessive charges by transportation companies, and not the creation of any particular offices or commissions, legislative power thereunder was not exhausted by the creation of the Railroad Commission, and Act 1919, p. 411, subsequently passed, abolishing the Railroad Commission and transferring its powers and duties to the Arkansas Corporation Commission created by that act, is not unconstitutional as being in excess of the legislative power.

Hart and Wood, JJ., dissenting.

Appeal from Phillips Chancery Court; A. L. Hutchins, Chancellor.

Action by the City of Helena against the Helena Water Company and others. Judg-

ment for plaintiff, and defendants appeal. Reversed, and cause dismissed.

Pink & Dinning, P. R. Andrews, and J. G. Burke, all of Helena, for appellants.

T. W. Campbell, of Little Rock, for appellee.

**McCULLOCH, C. J.** This action was instituted by the city of Helena attacking the validity of Act No. 571 of the General Assembly of 1919 (regular session), creating the Arkansas Corporation Commission and defining its duties, and abolishing the Railroad Commission and transferring its powers and duties to said Arkansas Corporation Commission.

There are two points of attack involved in the action: (1) That the statute was not legally enacted by the two houses of the General Assembly, in that the same bill was not voted on by the two houses; and (2) that it is not within the power of the General Assembly to abolish the Railroad Commission or to transfer its powers and duties to another commission.

The bill for the enactment of the statute originated in the Senate as "Bill No. 133," and on second reading 17 amendments were offered, 15 of which, according to the journal entries, were adopted, and the bill as thus amended was ordered engrossed. The engrossing committee reported the bill on February 24, 1919, as properly engrossed; but the engrossed bill which we find on file in the office of the Secretary of State does not contain two of the amendments which, according to the recitals of the journal, has been adopted. One of these was an amendment to section 7 of the bill adding a provision, in substance, that the commission was empowered, when deemed proper, to require the filing of an additional bond by a corporation whose schedule of increased rates for public service has been temporarily suspended by the commission. The other amendment was to section 31 of the bill providing that the Railroad Commission should be abolished on January 1, 1921, and perform all the specified duties of the Arkansas Corporation Commission until that date, instead of the original provision of the bill to the effect that the Railroad Commission should be abolished on April 1, 1919, and its powers and duties then transferred to the new commission. The journal of the Senate does not affirmatively show that the Senate at any time receded from either of those two amendments, and it recites the passage of the bill by the Senate February 25, 1919, on yea and nay vote duly recorded. The House journal recites the receipt of the bill on February 25th, the reading of it the first and second times February 28th, on suspension of the rules, and the third reading and final passage on March 7, 1919. Nothing appears on the journal of the House concerning any amendments. The bill as enrolled by the proper committee of

the Senate and signed by the presiding officers of the two houses and by the Governor does not contain those two amendments.

It is settled by an unbroken line of decisions of this court that where an act was duly signed by the Governor, deposited with the Secretary of State, and published as a law, it will be presumed that every requirement was complied with in its passage. *Glidewell v. Martin*, 51 Ark. 559, 11 S. W. 882; *Mechanics' Building & Loan Association v. Coffman*, 110 Ark. 269, 162 S. W. 1090; *Perry v. State*, 214 S. W. 2.

[1] This presumption is not, however, a conclusive one, and the courts, in determining the validity of a statute, may look to the journals and other records of the Legislature to ascertain whether or not the constitutional requirements with respect to the passage of bills have been observed. *Chicot County v. Davies*, 40 Ark. 200; *Webster v. Little Rock*, 44 Ark. 536; *Rogers v. State*, 72 Ark. 565, 82 S. W. 169; *Butler v. Kavanaugh*, 103 Ark. 109, 146 S. W. 120; *Mechanics' Building & Loan Association v. Coffman*, *supra*.

[2] Mere silence of the legislative records concerning the successive steps in the passage of a bill, except as to matters of which the Constitution requires a record on the journals, is not sufficient to overcome the presumption of regularity in the passage of a bill arising from the enrolled copy which has been signed by the Governor and deposited with the Secretary of State. *Smithee v. Garth*, 33 Ark. 17; *Harrington v. White*, 131 Ark. 291, 199 S. W. 92; *Perry v. State*, *supra*.

[3] And evidence outside of the record is not admissible to overcome that presumption. *State v. Dorsey County*, 28 Ark. 378; *State Fair Association v. Hodges*, 120 Ark. 131, 178 S. W. 936, Ann. Cas. 1917C, 829; *Greene County v. Clay County*, 135 Ark. 301, 205 S. W. 709.

The question now under consideration was, we think, definitely settled against the contention of the plaintiff, in the recent case of *Perry v. State*, *supra*, where the records of the passage and enrollment of the statute were not materially different from the facts of the instant case. In that case the bill for the statute under consideration originated, as in the present case, in the Senate, and the journal showed an amendment which was duly engrossed by the committee and reported back. The only difference between the facts of the two cases is that in the *Perry* Case the committee engrossed the amendment into a copy of the original bill and the indorsement of the Secretary of the Senate showing the final passage of the bill was on the original bill; whereas in the instant case the committee engrossed into the original bill the 15 amendments now found in the enrolled statute—omitting the 2 not shown in the enrolled statute—and the indorsement of the secretary showing passage is on the back of

the original bill as so engrossed. In discussing the question in that case we said:

"It does not appear affirmatively that the bill, as engrossed, was read a third time and passed. The indorsement appears on the original bill and not on an engrossed bill. After being engrossed, it was within the province and power of the Senate to have ordered the bill placed back on its second reading for amendment and to have receded from the amendment engrossed into the bill, or to have stricken the amendment from the bill, and, should such course have been taken, it would not have been necessary to its validity to have entered these steps, concerning the amendment, on the journal. The silence of the record in this regard would not conflict with the presumption that such course was pursued by the Senate. The silence of a legislative journal, on matters not required to be entered on the journal, cannot conflict with the presumption of the regularity of the passage of a bill. It is only in matters where the journal does speak, or where it is required to speak, that it could conflict with such presumption. \* \* \* The journals in the instant case only go so far as to show that the amendment was adopted and engrossed in the bill. It does not affirmatively appear that the engrossed bill passed, or that the Senate did not recede from the amendment. Under the rule announced in the cases referred to, the court must indulge the presumption that the Senate did recede from the amendment, and, for that reason, the amendment adopted in the Senate did not appear in the enrolled bill."

[4] So, in adhering to the rule announced in the case just cited, and in applying it to the present case, we must say that the presumption arising from the enrolled statute is not overcome by the recitals of the Senate journal that the two amendments in question were adopted; but, on the contrary, we must indulge the presumption that the Senate receded from those amendments before the bill was finally passed. Indeed, the omission of those amendments from the engrossed bill as it now appears in the office of the Secretary of State, and its acceptance by the Senate as thus engrossed, raised the presumption that those amendments were withdrawn or receded from before the bill went to the engrossing committee.

[5] The next question with which we have to deal is whether or not the Legislature exceeded its powers in attempting to abolish the Railroad Commission or to transfer its powers to the newly created Corporation Commission.

The people of the state adopted, in the year 1898, an amendment to the Constitution which reads as follows:

"The General Assembly shall pass laws to correct abuses and prevent unjust discrimination and excessive charges by railroads, canals and turnpike companies for transporting freight and passengers, and shall provide for enforcing such laws by adequate penalties and forfeitures, and shall provide for the creation of such offices and commissions and vest in them such authority

as shall be necessary to carry into effect the powers hereby conferred." Amendment No. 4 to Const.

The argument in this case is that the amendment to the Constitution restricts the powers of any office or commission created thereunder to those therein enumerated, viz., to the regulation of "excessive charges by railroads, canals and turnpike companies," and that it is beyond the authority of the Legislature to impose any further duties on any offices or commissions created for that purpose.

It will be observed that the Constitution does not specify by name the office or commission to be created. It primarily provides for the correction of abuses, unjust discriminations, and excessive charges by transportation companies, and authorizes the creation of "such offices and commissions" and the investment in them of "such authority as shall be necessary to carry into effect" that provision. It constituted a command to the law-makers to carry out the provision to create such offices or commissions as might be found necessary. It is a grant, not a limitation of power, and the rule of exclusion of those things not expressed does not apply. It is, in other words, the power to correct abuses by transportation corporations, which is conferred by the Constitution, and not the creation of any particular offices or commissions, and the Legislature could, in the first instance, have created the present commission, and conferred on it the enumerated powers and others. The fact the Legislature first created a commission under the name of Railroad Commission did not exhaust its powers in that respect, and the power to create a commission under another name, with the authority enumerated and more, still, existed.

We have decided that section 9, art. 19, of the Constitution, prohibiting the creation of permanent offices, was directory to the law-makers, so far as concerned a determination that the creation of a temporary office was necessary, and that the legislative decision that the office created was temporary and not permanent was conclusive on the courts. *Greer v. Merchants' & Mechanics' Bank*, 114 Ark. 212, 169 S. W. 802.

It may be that the people adopted amendment No. 4 under the belief that the constitutional provision referred to above is mandatory and that it was deemed necessary to grant express authority for the creation of offices or a commission to carry out the provisions of the amendment. Even if that be the case, it does not warrant the interpretation of the language of the amendment that the powers of the commission created were to be restricted to those enumerated.

The conclusion of the majority of the court is therefore that the attack on the statute is unfounded.



The decree of the chancery court is reversed, and the cause is dismissed.

WOOD and HART, JJ., dissent.

HART, J. (dissenting). On account of our respect for a co-ordinate department of the government, and as well for the opinion of our brother judges and of those who have without question accepted office under the act creating the Arkansas Corporation Commission, Judge WOOD and the writer have deemed it proper, not merely to voice our dissent on the record on the ground that the act is unconstitutional, but to give our reasons therefor in writing. It is a judicial saying that the Constitution is the paramount law of the land, and is the fortification within which the people have entrenched themselves for the preservation of their rights and privileges. In *Rison v. Farr*, 24 Ark. 161, 87 Am. Dec. 52, it was further said:

"The Constitution fixes limits to the exercise of legislative authority, and prescribes the orbit within which it must move. In short, the Constitution is the sun around which all legislative, executive and judicial bodies must revolve; and that, whatever may be the case in other countries, yet in this there can be no doubt, that every act of the Legislature repugnant to the Constitution is null and void."

This principle has been upheld in every decision since that time. In *Greer v. Merchants' & Mechanics' Bank*, 114 Ark. 212, 169 S. W. 802, the court had under consideration article 19, § 9, of the Constitution, prohibiting the creation of permanent state offices not expressly provided for by the Constitution, and held that it did not apply to the act creating the state bank department. The court said:

"We attach little, if any, importance to the provision of the statute limiting the time to 12 years, for we think that the Legislature has the power to determine whether an office to be created is permanent or temporary, whether expressly declared in the act or not. If it is created as a temporary office, we must assume that the Legislature found it to be such. The creation of the office implies a determination that it is temporary, and not permanent."

In concluding this branch of the discussion, the court said:

"We are of the opinion, therefore, that this provision of the Constitution, when rightly interpreted, constitutes a command to the Legislature, with authority to determine when temporary offices are needed, and that the determination of that question by the Legislature will be observed by the courts. It would be a usurpation of power by the courts to assume authority which had been delegated to the Legislature itself."

If the section of the Constitution as declared by the court in the language just quoted constitutes a command to the Legislature,

it is plain that the section is mandatory and not merely directory. If the section is mandatory, it is equally clear that the Legislature could not create a permanent office in contravention of its provisions. Therefore it is manifest from the language used that the court upheld the statute on the ground and the Legislature regarded the state bank department as a temporary office, and that its decision was conclusive on the courts. The practical effect of the majority opinion in the case at bar is that a constitutional office may be abolished, and that its duties, although specifically defined by the clause of the Constitution providing for the creation of the office, may be attached to a temporary office. Such is not the law.

Section 10, art. 17, of the Constitution is amended by what is known as amendment No. 4 to read as follows:

"The General Assembly shall pass laws to correct abuses and prevent unjust discrimination and excessive charges by railroads, canals and turnpike companies for transporting freight and passengers, and shall provide for enforcing such laws by adequate penalties and forfeitures, and shall provide for the creation of such offices and commissions and vest in them such authority as shall be necessary to carry into effect the powers hereby conferred."

The amendment consists in adding the words—

"And shall provide for the creation of such offices and commissions and vest in them such authority as shall be necessary to carry into effect the powers hereby conferred."

Pursuant to this amendment, the Legislature of 1899 created the Railroad Commission of Arkansas, and defined its duties in accordance with the mandate of the Constitution. Three members were provided for and the office was made elective.

The Legislature of 1919 created the Arkansas Corporation Commission. Section 1 provides that it is created for 30 years, and that it shall consist of three members, who shall be elected by the people. The act gives the commission jurisdiction to regulate the rates of all public utilities in the state. Section 31 provides in express terms that the present Railroad Commission shall be abolished, and that the Corporation Commission shall exercise all the powers and duties possessed by the Railroad Commission. In short, the Legislature expressly abolished the Railroad Commission and transferred its duties to the Corporation Commission, which the Legislature expressly declares is created for 30 years; and which, as we have already seen, must, according to the previous decisions of this court be a temporary office.

It will be observed that it is the amendment to the Constitution which commands the Legislature to provide for an office or commission to carry into effect the powers

conferred in the amendment, and these powers are enumerated. The Legislature could give the office a different name and vary the duties as by increasing or lessening the penalties, but the office itself being expressly provided for in the Constitution, when created, becomes a constitutional office; and its duties, being expressly and specifically provided for in the Constitution itself, cannot be enlarged, diminished, or taken away by the Legislature. If this were not so and the office could be abolished and the duties attached to another office, then the authority of the Constitution would be subject to the authority of the Legislature. The grant of the office is expressly fixed by the Constitution, its duties are specifically prescribed by the Constitution, and there is necessarily an implied prohibition against interfering with it in these respects.

The effect of the majority opinion is to change by act of the General Assembly that which is ordained by the Constitution. The Legislature must act in subordination to the Constitution; and it does not do so, if it can abolish a constitutional office with defined duties and attach those duties to a temporary office. It would at least be a very vain and idle provision of a Constitution to secure to the people in mandatory terms an office or commission and to specifically define its duties, and at the same time leave it to the Legislature to abolish the office, or to attach its duties to a statutory office which might be abolished at any time. Such an intention should not be ascribed to the people in adopting the amendment in question. In short, when the Constitution expressly provides for an office and in specific terms defines its powers and duties, the Legislature is powerless to abolish, modify, enlarge, or diminish that which is established by the paramount law of the land.

In recognition of this principle, in *Smith v. Askew*, 48 Ark. 82, 2 S. W. 349, the court held that the Legislature was powerless to enlarge or abridge the constitutional term of an office, and that any attempt to do so would be a plain usurpation. The principle was also recognized in *Falconer v. Shores*, 37 Ark. 386, where the court held that the office of collector of taxes was under legislative control because the Constitution provided that the sheriff should be collector of taxes until otherwise provided by law.

In the *Board of Equalization Cases*, 49 Ark. 518, 6 S. W. 1, the court said that the office of assessor was a constitutional office, and that the Legislature could not abolish or make it a sinecure, for that would make the selection of the officer—a right guaranteed to the electors—an empty form. It was further held that the duties of the office might be varied by the Legislature because the Constitution creating the office provid-

ed that he might discharge "such duties as are now or may be prescribed by law."

Again in *Hutton, Collector, v. King*, 134 Ark. 463, 205 S. W. 296, an assessment statute which provided for two taxpayers to assist the assessor in making assessments was sustained on the theory that the act allowed the assessor to participate in making the primary assessment, and that because the provision of the Constitution providing for the office of assessor did not define its duties, but left it to the Legislature to define them, the act was not unconstitutional. Judge WOOD and the writer dissented in that case on the ground that the office of assessor existed and its duties were well known at the time of the adoption of the Constitution, and that the framers of that instrument evidently intended that the assessor should make the primary or original assessment. We recognized the principle laid down in *Hutton, Collector, v. King*, supra, that unless the Constitution otherwise expressly provides the Legislature has power to increase or vary the duties of an office; but, when the Constitution defines in specific terms the duties of an office, it has spoken, and to allow the Legislature to change or vary those duties would be to make the creator yield to its creature.

It is equally well settled that every constitutional officer derives his power from the Constitution, and that, where the Constitution specifically defines his powers and duties, it is not within the power of the Legislature to change or add to them unless the power to do so is expressly or by necessary implication conferred by the Constitution itself. *Cooley on Constitutional Limitation* (7th Ed.) p. 98, and *State v. Douglass*, 33 Nev. 92, 110 Pac. 177.

The result of our views is that the Legislature under the authority of *Greer v. Merchants' & Mechanics' Bank*, supra, might have created the Arkansas Corporation Commission with power to regulate water, gas, street car, and telephone companies, and might have transferred to it the duties of any or all of the commissions now constituting a part of the executive department of the state except that of Railroad Commissioners.

In regard to that office, or commission, as above stated, it could only change the name and vary the duties within the limits prescribed in the amendment to the Constitution providing for the office; but, because the Constitution has specifically defined its duties, the Legislature cannot abolish the office, nor add to it other duties than the power to carry into effect the laws passed to correct abuses and prevent unjust discrimination and excessive charges by railroads, canals, and turnpike companies, nor can it abridge the duties of the office or commission in respect

to the power ordained by the Constitution. It is manifest that the only object of specifically defining the duties of an office in a Constitution is to limit or restrict the power of the Legislature in this respect; otherwise, the amendment might just as well not have been adopted.

It was evidently intended by defining the duties of the office or commission to make them fixed and permanent, and thus to place the subjects to which they relate altogether beyond legislative control. If the Legislature has the power to abolish a constitutional office and add its duties to another office with other and foreign duties, it is evident that the Legislature could take away all or a part of the duties that naturally belong to the office. Under the majority opinion, if the next or any succeeding Legislature should repeal the statute creating the Arkansas Corporation Commission, without reviving by express words the statute creating the Railroad Commission, the latter office or commission would be abolished although it is a constitutional office with well-defined duties. Thus, indeed, by indirection, would the organic law of the land be superseded by the Legislature. It is no answer to this to say that no Legislature will likely do this, for we are dealing with the question of power, and not that of the mind or will of the Legislature; and that no man may know.

**FREER et al. v. FT. SMITH LIGHT & TRACTION CO. et al. (No. 18.)**

(Supreme Court of Arkansas. Dec. 1, 1919.)

**STATUTES §284—NO REBUTTAL BY PAROL OF PRESUMPTION OF REGULARITY OF STATUTE.**

In determining the validity of a statute, evidence outside the record, consisting of the oral testimony of the secretary of the Senate and its journal clerk, that the Senate did not recede from two amendments which according to the records were adopted, but do not appear in the engrossed bill or the enrolled statute, is inadmissible to overcome the presumption of regularity arising from the enrolled statute.

Appeal from Sebastian Chancery Court; J. V. Bourland, Chancellor.

Suit between B. Wayne Freer and others and the Ft. Smith Light & Traction Company, the Arkansas Corporation Commission, and others. From decree for the latter, the former appeals. Affirmed.

Covington & Grant, of Ft. Smith, for appellants.

Tom W. Campbell, of Little Rock, and Hill & Fitzhugh, of Ft. Smith, for appellees.

**PER CURIAM.** The sole question involved in this case relates to the validity of the act

of 1919 creating the Arkansas Corporation Commission—the same question decided in the case of Helena Water Co. v. City of Helena, 216 S. W. 28. The only difference in the two cases is that in the present one appellant introduced as witnesses the secretary of the Senate and the journal clerk of the Senate to prove orally that the Senate did not recede from the two amendments, which, according to the records, were adopted by the Senate, but do not appear in the engrossed bill nor the enrolled statute.

We decided in the other case that testimony outside of the record is not competent to overcome the presumption of regularity arising from the enrolled statute.

Decree affirmed.

**DEAN v. CALDWELL. (No. 20.)**

(Supreme Court of Arkansas. Dec. 1, 1919.)

**1. COMMERCE §40(1)—CORPORATIONS §642 (1)—TRADE CAMPAIGN AS DOING BUSINESS WITHIN THE STATE.**

A transaction between a foreign corporation and a dealer in the state, whereby the corporation undertook to carry on for the dealer's benefit what was designated as a "trade campaign," the amount of compensation to be received by the corporation being dependent on the amount of increase in the dealer's sales, constituted the doing of business within the state and not interstate commerce, although the sale of certain articles of merchandise, as premiums, was an incident.

**2. CORPORATIONS §661(3)—ASSIGNEE OF CORPORATION FAILING TO FILE ARTICLES CANNOT SUE.**

Where a foreign corporation, doing business within the state, fails to file its articles of incorporation not only the offending corporation, but its assignee, is prohibited from maintaining suit in the state without having first complied with the laws of the state.

Appeal from Circuit Court, Sebastian County; Paul Little, Judge.

Action by F. W. Dean, trustee, against W. O. Caldwell. Judgment for defendant, and plaintiff appeals. Affirmed.

T. P. Winchester and W. R. Martin, both of Ft. Smith, for appellant.

Warner, Hardin & Warner, of Ft. Smith, for appellee.

**McCULLOCH, C. J.** This is an action instituted by appellant on negotiable notes executed by appellee to Partin Manufacturing Company, a foreign corporation which has not complied with the laws of this state with respect to filing copies of articles of incorporation, etc. Appellant is trustee for the assignees of Partin Manufacturing Company.

The notes were executed by appellee pursuant to a written contract between him and Partin Manufacturing Company, as follows:

"Exclusive Drug Contract for Ft. Smith. Form 10.

"Partin Manufacturing Company.

"Chicago. (Incorporated) Des Moines. "General Offices, Bank of Commerce and Trust Building, Memphis, Tennessee.

"Date, 3-27-17.

"Partin Manufacturing Company—Gentlemen: Please ship to us at your earliest convenience, f. o. b. factory, the following goods as described below:

"Capital Prize, automobile, 2 passenger, 4 cylinder roadster. The purchaser is to deliver winner in this trade campaign the winner's choice of one of the following automobiles: \* \* \* [Here follow articles to be used as prizes, including one automobile, and various articles of jewelry and silverware.]

"Printed and Advertising Matter.

"Twenty-five two color large, illustrated banners; one thousand handbills; one set of display sign cards; one set of campaign rules for conducting campaign; one set of nominating letters; one set of follow up letters; one thousand trade cards; forty thousand certificates.

"2-11-17.

"(1) The undersigned purchaser warrants that his sales for the past twelve months were \$21,906.29. On this warranty of sales, Partin Manufacturing Company hereby agrees to increase the purchaser's sales and collections not less than \$15,000.00 in the next twelve months. Partin Mfg. Co. agrees to refund six cents on every dollar the purchaser falls short of the \$15,000.00 increase and agrees to send their bond to purchaser's bank in the sum of \$900.00 to guarantee this agreement. Partin Mfg. Co. reserves the right to increase the number of premiums without cost to the purchaser, if in their opinion it is necessary to bring about the above guaranteed increase. Partin Mfg. Co. reserves the right to require a first and second choice of cars. Partin Mfg. Co. agrees to send a personal representative to assist in getting candidates and helping start this trade campaign.

"(2) To make this contract binding on Partin Mfg. Co. and as conditions precedent to any recovery under the provisions of paragraph (1) the undersigned purchaser agrees to accept the goods described above promptly on arrival; keep the goods well displayed in his place of business, to pay all obligations entered into under this contract at maturity; to report every thirty days his gross sales for one year; follow out instructions and furnish such other information as Partin Mfg. Co. may desire, including verified final reports furnished by Partin Mfg. Co.

"(3) Terms: All the above named goods are to be included in the purchase price of \$900.00. Three per cent. off, cash in ten days. By special agreement the above can be paid in four installments of two hundred and twenty-five dollars (\$225.00) each, in one, two, four, six, eight months, if notes attached hereto properly signed accompanying this contract, and Partin Mfg. Co. is authorized to detach same on acceptance of same. If contract is not accepted

notes are to be canceled and returned to purchaser.

"(4) In consideration of the special methods set forth in your plan and the terms and agreements herein contained, this contract cannot be countermanded, but to stand as given on day and date hereof. Any verbal or written agreement not embraced herein will not be binding on Partin Mfg. Co. This contract is given with a full and complete understanding of the conditions herein and after reading same.

"Campaign closes [Club] each 40 days."

The trial court gave to the jury a peremptory instruction in favor of appellee on the ground that Partin Manufacturing Company was a foreign corporation which had, without having complied with the laws of this state, transacted the business in the state out of which appellee's obligation arose. The contention of appellant is that the transaction between appellee and Partin Manufacturing Company constituted interstate commerce, and was not within the control of state laws.

[1] The decision of the case turns, therefore, on the question whether or not the transaction was interstate commerce. It seems clear to us that the contract was not interstate commerce. It was not for the sale of goods to be shipped from another state. The sale of certain articles of merchandise was a mere incident to the main purpose of the contract, which was one whereby Partin Manufacturing Company undertook to carry on, for appellee's benefit, what is designated in the writing as a "trade campaign." Appellee was a merchant in the city of Ft. Smith, and his sales for the previous year had been \$21,926.29, and Partin Manufacturing Company undertook in the contract, for a consideration, to provide a plan and the means to increase appellee's annual sales not less than \$15,000. Partin Manufacturing Company agreed to furnish the articles for the prices and the printed literature for advertising purposes, and to "send personal representative to assist in getting candidates and helping start this trade campaign." The campaign was to be carried on in Ft. Smith, where appellee was doing business, and the amount of compensation to be received by Partin Manufacturing

Company was dependent on the amount of increase in appellee's sales. The transaction was purely local. The business was intra and not inter state, and the sale of goods was merely an incident. The contract did not necessarily imply a shipment from outside of the state, but even if it did, that would not alter the character of the main transaction, to which the sale of goods was a mere incident.

This conclusion is supported by the decisions of the Supreme Court of the United States in *Browning v. Waycross*, 233 U. S. 16, 34 Sup. Ct. 578, 58 L. Ed. 828, and *General Railway Signal Co. v. Virginia*, 246 U. S.

500, 38 Sup. Ct. 360, 62 L. Ed. 854. The question arose in a different form in those cases, but the principles announced are the same as in the instant case.

The case of York Manufacturing Co. v. Colley, 247 U. S. 21, 38 Sup. Ct. 430, 62 L. Ed. 963, on which learned counsel for appellant rely, is not applicable.

[2] Under our statutes, not only the offending corporation, but its assignee, is prohibited from maintaining suit in this state without having first complied with the laws of the state. Hogan v. Intertype Corporation, 136 Ark. 52, 206 S. W. 58.

Judgment affirmed.

#### BARTLETT v. STATE. (No. 212.)

(Supreme Court of Arkansas. Nov. 17, 1919.)

##### 1. CRIMINAL LAW §1144(3)—PRESUMPTION AS TO VARIANCE IN EVIDENCE OF OWNERSHIP OF BUILDING ENTERED.

In burglary prosecution where variance, if any, between allegation that building broken into, and property defendant had intended to steal belonged to M. Railway Company, and proof showing owner to be M. Railroad Company was waived by defendant's counsel, it will be assumed on appeal, as against objection that only defendant himself could have waived objection, that if point had not been waived proof could and would have been offered that the two companies would have been recognized as the same corporation in the community.

##### 2. CRIMINAL LAW §792(3)—PERSON AIDING AND ABETTING BURGLARY A PRINCIPAL.

In burglary prosecution, instruction to convict if accomplice entered the building and stole the property, and "defendant was present, aiding and abetting, or ready and willing to aid and abet," held proper as against objection that it authorized conviction under testimony constituting defendant an accessory, since defendant, if present aiding and abetting, or ready and willing to aid and abet, was in fact a principal under Kirby's Dig. § 1563.

##### 3. CRIMINAL LAW §780(3)—INSTRUCTION ON CORROBORATION OF ACCOMPLICE.

In burglary prosecution, instruction as to corroboration of testimony of accomplice held to meet requirement of statute.

##### 4. BURGLARY §16—GUILT WITHOUT ENTERING OF BUILDING.

One who stayed outside of building and watched while his accomplice entered the building and carried away the stolen goods was guilty of burglary.

##### 5. CRIMINAL LAW §552(3), 814(17) — INSTRUCTION AS TO CIRCUMSTANTIAL EVIDENCE PROPERLY REFUSED.

Guilt of accused is not required to be established to exclusion of every other hypothesis than that accused committed the charged of-

fense, even if testimony is circumstantial and instruction as to circumstantial evidence was properly refused, where testimony was not wholly or chiefly of circumstantial character.

##### 6. CRIMINAL LAW §1170(2)—EXCLUSION OF EVIDENCE HARMLESS ERROR.

Exclusion of testimony as to statement by defendant's accomplice to officers at time of his arrest was harmless, where the accomplice himself testified to what he had told the officers, giving substantially same testimony as that excluded.

Appeal from Circuit Court, Howard County; Jas. S. Steel, Judge.

Wayne Bartlett was convicted of burglary, and he appeals. Affirmed.

D. B. Sain, of Nashville, for appellant.

Jno. D. Arbuckle, Atty. Gen., and Robert C. Knox, Asst. Atty. Gen., for the State.

SMITH, J. Appellant seeks by this appeal to have reversed the judgment of the Howard circuit court sentencing him to a term of 3 years in the penitentiary upon a charge of burglary. The indictment charged that the property which appellant intended to steal was an iron chest of the value of \$10 and \$125 in gold, silver, and paper money, all being the property of the Missouri Pacific Railway Company, a corporation, and one gun, the property of the United States government, of the value of \$25. The indictment also alleged that the building broken into was "a certain station house owned and occupied by the Missouri Pacific Railway Company, a corporation."

In stating the case to the jury instruction No. 1 referred to the stolen chest and money as the property of the Missouri Pacific Railway Company, whereas the testimony showed that this was the property of the Missouri Pacific Railroad Company, and objection is made that there was a variance between the allegation and the testimony. The objection was made at the trial, but was waived at the time by counsel representing appellant at the trial, but it is now insisted that only the appellant himself could waive the point.

In the case of Brown v. State, 108 Ark. 336, 157 S. W. 934, the indictment alleged that the stolen property belonged to the St. Louis Southwestern Railroad Company, and the proof showed that at the time of the larceny the goods were in the possession of the St. Louis Southwestern Railway Company, and it was there insisted that there was a fatal variance between the allegation of ownership and the proof thereof. It was shown by the testimony, however, that the alleged owner was sometimes spoken of as the railroad and at other times as the railway, and that persons living in the community understood what company was used when it was referred to by either designation. We there said that—

"The alleged variance \* \* \* between 'railway company' and 'railroad company' did not prejudice the substantial rights of the defendant on the merits. The allegation was sufficient to advise appellant of the name of the owner of the goods which he is alleged to have received."

[1] So here if the difference between the allegation and the proof constituted a variance it must be assumed that, if the point had not been waived at the trial, proof could and would have been offered that the alleged owner of the goods would have been recognized in that community, as the same corporation, under the designation of a "railway company" or as a "railroad company."

The testimony shows appellant to be a boy 17 years old, and his accomplice was a boy named Shillings who was about the same age. Shillings became a witness, and admitted his own guilt, and testified that appellant assisted him in the commission of the crime.

Over appellant's objection the court gave an instruction No. 2, which reads as follows:

"If you find, beyond a reasonable doubt, that Charles Shillings entered the depot and stole the property alleged in the indictment, and that the defendant was present, aiding and abetting or ready and willing to aid and abet, you will convict the defendant."

[2] The objection to this instruction is that it directs the jury to find appellant guilty under testimony which would only constitute him an accessory when he was indicted as a principal and when the testimony shows that, if guilty at all, he was a principal. But persons present aiding and abetting or ready and willing to aid and abet are in fact principals, and are indictable as such. Kirby's Digest, § 1563; Harris v. State, 215 S. W. 620.

It is insisted that the jury was not fully and properly instructed as to the corroboration of an accomplice necessary to sustain a conviction. On that branch of the case, however, the court gave at appellant's request an instruction No. 5, which reads as follows:

"You are instructed that the accused could not be convicted on the uncorroborated testimony of an accomplice, and that the testimony must be corroborated by other evidence, direct or circumstantial, tending to connect the defendant with the commission of the offense charged, and unless the state does so prove you will acquit the defendant."

[3] We think this instruction meets the requirement of the statute in regard to the corroboration of an accomplice.

Error is assigned in the refusal of the court to give the following instruction:

"You are further instructed that unless you believe beyond a reasonable doubt that the defendant entered the depot of the Missouri Pacific Railroad Company in the nighttime, and at the time he entered the said depot it was

with the felonious intent of committing a felony, then your verdict will be for the defendant."

[4] It was not error to refuse this instruction because it directed a verdict for defendant, unless it was shown that he entered the depot when in fact and in law he would have been guilty had he stayed outside the depot and watched while his accomplice entered the building and carried away the stolen goods.

[5] An instruction No. 10, which is predicated upon the idea that the testimony in the case is of a circumstantial nature, told the jury that before they could convict they must believe beyond a reasonable doubt and to the exclusion of every other hypothesis that appellant committed the offense as charged in the indictment. But this instruction was properly refused because the testimony was not wholly nor chiefly of a circumstantial character. Nor would it have been proper had this been the case. A similar instruction was condemned by us in the recent case of Bost v. State, 215 S. W. 615, where we said that the law did not require that the guilt of the accused be established to the exclusion of every other hypothesis than that of guilt.

[6] Objection is made to the admission of the testimony of the officers who made the arrests, and who detailed what the Shillings boy said at the time. This could not have been prejudicial, as the Shillings boy substantially repeated that testimony at the trial.

Other errors are assigned, but we think it unnecessary to discuss them.

No error appearing, the judgment is affirmed.

#### GRIFFIN v. STATE. (No. 21.)

(Supreme Court of Arkansas. Dec. 1, 1919.)

##### 1. CRIMINAL LAW §1172(1)—HARMLESS ERROR IN INSTRUCTION IGNORING ISSUE.

In a prosecution for incest, where defendant was asked when he was married, to which he gave the date, and as to what his family consisted of, to which he specified his wife and children, an instruction, stating that the only issues were whether defendant physically had committed the offense in the county within the statutory period, was not prejudicially erroneous, as ignoring the issue whether he was a married man.

##### 2. CRIMINAL LAW §1172(3)—HARMLESS INSTRUCTION ASSUMING DEFENDANT'S MARRIAGE.

In a prosecution for incest, instruction that the only issues were whether defendant physically committed the offense in the county within the statutory period held harmless, if in effect assuming that defendant was a married man; his own testimony having proved so conclusively.

**3. CRIMINAL LAW §822(14)—INSTRUCTION ON DISREGARD OF TESTIMONY OF FALSE WITNESS.**

In a prosecution for incest, an instruction that if the jury believed that any witness had willfully sworn falsely to any material fact, they were at liberty to disregard his testimony in whole or in part, or to believe it in part and disregard it in part, *held* not erroneous, taking instruction as a whole as authorizing the jury to disregard any part of a witness' testimony, though believing it to be true, if they also believed he had sworn falsely to some other fact.

**4. CRIMINAL LAW §1043(2)—DUTY TO OBJECT SPECIFICALLY TO INSTRUCTION.**

If counsel for defendant conceived on trial that an instruction was erroneous in a certain respect urged against it on appeal, he should have called the attention of the trial judge to such construction of the charge by a specific objection.

**5. CRIMINAL LAW §785(16) — INSTRUCTION AS TO CREDIBILITY OF WITNESSES.**

In a prosecution for incest, instruction on the jury's right to disregard in whole or in part the testimony of a witness who had testified falsely to any material fact *held* not so inherently defective as to be erroneous and misleading.

**6. CRIMINAL LAW §814(17) — INSTRUCTION AS TO CIRCUMSTANTIAL EVIDENCE.**

In a prosecution for incest, there was no error in refusing a requested instruction on circumstantial evidence, when the state did not rely wholly on circumstantial evidence.

**7. CRIMINAL LAW §784(7)—INSTRUCTION AS TO CIRCUMSTANTIAL EVIDENCE.**

In a prosecution for incest, requested instruction on circumstantial evidence that the state must prove beyond a reasonable doubt that the commission of the crime could not be explained away on any hypothesis other than that of defendant's guilt *held* improper, as omitting the word "reasonable" before "hypothesis."

Appeal from Circuit Court, Lonoke County; Geo. W. Clark, Judge.

J. F. Griffin was convicted of incest, and he appeals. Affirmed.

J. B. Reed, of Lonoke, and House, Rector & House, of Little Rock, for appellant.

Jno. D. Arbuckle, Atty. Gen., and Robert C. Knox, Asst. Atty. Gen., for the State.

WOOD, J. [1] The appellant was convicted of the crime of incest. The indictment alleged that he was a married man. One of the grounds urged for reversal is that the court erred in ignoring the issue as to whether appellant was a married man. The appellant was asked, "When were you married?" He answered, "1890." He was asked, "What does your family consist of?" He answered, "My little boy, my wife, my daughter Jossie, and little boy about ten years old." The above testimony was undis-

puted. It shows conclusively that appellant was a married man. There was no prejudicial error, therefore, in the instruction which told the jury that the only issues were, Did the appellant have sexual intercourse in Lonoke county, Ark., within the statutory period?

[2] Counsel for appellant argue that the instruction in effect told the jury that it was unnecessary for the state to establish that appellant was a married man, and that the instruction was therefore contrary to the holding of this court in *Martin v. State*, 58 Ark. 3, 22 S. W. 840, and *Knowles v. State*, 113 Ark. 257, 168 S. W. 148, Ann. Cas. 1916C, 568. But not so. Since the testimony of the appellant himself proved conclusively that he was a married man, no prejudice could have resulted to him because of the instruction which assumed as a matter of law that appellant at the time of the incestuous adultery was a married man.

[3] Counsel for appellant contend that the court erred in giving the following instruction:

"If you believe that any witness has willfully sworn falsely to any material fact in the case, you are at liberty to disregard the testimony of that witness either in whole or in part, or believe it in part and disregard it in part, taking into consideration all of the facts and circumstances of the case."

There was no specific objection to the instruction. Counsel say that the instruction in this form authorized the jury to disregard any part of a witness' testimony, although they might believe same to be true, provided they also believed that the witness had willfully sworn falsely to some other material fact in the case.

In *Johnson v. State*, 127 Ark. 524, 192 S. W. 895, 898, speaking of a prayer for instruction which the court refused because it contained inaccurate language, we said:

"In other words under the latter part of the instruction it might appear to the jury that if any witness had willfully testified falsely concerning any material fact, it was their duty to disregard his whole testimony unless corroborated by other evidence, regardless of the fact of whether they might believe the remaining part of his testimony. The jury had the right to believe such portions of any witness' testimony as they believed to be true, regardless of the fact of whether they believed other portions of it. In short, it was their duty to accept such portions of the witness' testimony as they believed to be true, and reject that part of it they believed to be false."

See *Frazier v. State*, 56 Ark. 242, 19 S. W. 838; *Taylor v. State*, 82 Ark. 540, 102 S. W. 367; *Bruder v. State*, 110 Ark. 402, 161 S. W. 1067.

While the instruction is not aptly worded and is not as clear in its statement of the

law as it should have been, we do not think it susceptible of the construction which counsel give it. Taking the instruction as a whole, its purpose, as we view it, was to tell the jury that if they believe that any witness had willfully testified falsely to any material fact in the case they were at liberty to disregard the whole of such testimony if they believed the same to be false, or any part of the same which they believed to be false. But it does not tell the jury that they were at liberty to disregard any part of the witness' testimony which they believe to be true, notwithstanding that there were other parts of the testimony which they believed to be willfully false.

[4] To say the least, if the counsel conceived at the trial of the cause that the instruction is open to the suggestion which he here urges against it, it was his duty to have called the attention of the trial judge to such construction by a specific objection. If they had done this, the court doubtless would have so framed the instruction as to have contained the exact language, the omission of which they now insist renders the instruction erroneous.

[5] The instruction is not one so inherently defective as to fall under the condemnation of being an erroneous and misleading declaration of law. In the absence of specific objection, the giving of the instruction as written was not a reversible error. *Bruder v. State*, supra; *Reinman v. Worley*, 125 Ark. 567, 188 S. W. 1175.

Appellant complains that the court erred in one of its instructions in singling out the testimony of the defendant and subjecting it to a different test concerning credibility from that applied to other witnesses.

It is unnecessary to set out the instruction. We have examined it and find that it is in conformity with the law in all essential particulars as announced by this court in many cases, beginning with *Vaughan v. State*, 58 Ark. 853, 24 S. W. 885, and as recent as *Whitener v. State*, 120 Ark. 30, 178 S. W. 394.

[6, 7] It is insisted that the court erred in refusing to give the following instruction:

"You are instructed that the state relies upon circumstantial evidence for a conviction in this case. Circumstantial evidence is legal and competent evidence in this case, but before you would be justified in convicting the defendant on this evidence, the state must prove beyond a reasonable doubt that the commission of the crime charged in the indictment cannot be explained away on any other hypothesis other than the guilt of the defendant."

The prayer for instruction was erroneous for two reasons: First, because it assumes that the state relied wholly upon circumstantial evidence which is not borne out by the record. Second, because it omits the word "reasonable" before the word "hypothesis."

This word was necessary to make the instruction a correct declaration of law. *Davis v. State*, 117 Ark. 296, 174 S. W. 567; *Bost v. State*, 215 S. W. 615; *Bartlett v. State*, 216 S. W. 33.

The evidence was sufficient to sustain the verdict, and there was no prejudicial error in the instructions.

Judgment affirmed.

#### BARBER v. SAGER et al. (No. 10.)

(Supreme Court of Arkansas. Nov. 24, 1919.)

##### 1. JUDGMENT ¶656 — CONCLUSIVENESS OF DECREE SUSTAINING DEMURRER.

A decree, sustaining a demurrer in a suit for specific performance, after the time for correction of mistake under Kirby's Dig. § 4432, has expired, is, in a subsequent suit to set it aside, final and conclusive as to all the allegations in the complaint, but is not conclusive of other matters.

##### 2. JUDGMENT ¶443(1)—ALLEGATIONS AS TO FRAUD IN PROCUREMENT AUTHORIZING VACATION.

In a suit to set aside a decree in a specific performance action at a previous term, allegations that the decree was rendered in plaintiff's absence, sustaining a demurrer which had been filed two weeks before the term and after a withdrawal of the answer without plaintiff's knowledge, plaintiff having been led to expect a trial on the merits, held not to show fraud practiced upon the court in the procurement of the decree under Kirby's Dig. § 4431, subd. 4.

Appeal from Arkansas Chancery Court; Jno. M. Elliott, Chancellor.

Action by C. L. Barber against William Sager and others, to enforce specific performance of a contract and to vacate a decree. Decree for defendants, and plaintiff appeals. Affirmed.

Jas. E. Hogue and Geo. M. Heard, both of Little Rock, for appellant.

Jno. W. Moncrief and C. L. O'Daniel both of De Witt, for appellees.

SMITH, J. This suit was brought by appellant Barber for the purpose of enforcing the specific performance of a contract to convey land and for vacating a decree previously pronounced in another suit between Barber and William Sager and his wife under the provisions of section 4431 of Kirby's Digest. This previous suit had itself been brought for the purpose of compelling the Sagers to specifically perform a contract to convey land to Barber.

The first complaint against appellee Sager and his wife was filed on June 24, 1917. Wil-



Ilan Sager filed an answer to this complaint in vacation on July 14, 1917, but his wife filed no answer. No notice of the filing of this answer was given, and Barber and his attorney were not advised of that fact until about two weeks before the beginning of the term of court to which the suit was brought, and which convened on September 24th. As soon as Barber's attorney was advised that this answer had been filed, he took up by correspondence with Sager's attorney the question of obtaining an agreement by which the testimony on both sides might be taken in open court and the cause heard at the September term. No agreement had been reached when court convened, and on that day Sager appeared through other attorneys, and withdrew his answer and filed a demurrer and also a separate motion to dismiss the complaint for want of a bond for costs.

On the second day of the term appellees Devore and Sanders, who had not been made parties to the first suit (but were made defendants in this), appeared, through still other attorneys, and filed an intervention, which was in the nature of an answer to the complaint and cross-complaint, against both Barber and Sager and his wife. This pleading contained an allegation that Barber was a nonresident of the state, and that he refused to give a bond for costs, and that Barber had not and would not prosecute his suit, and that the complaint did not state a cause of action.

On the day this intervention was filed a decree was rendered, sustaining the demurrer and granting the interveners the relief prayed by them against the Sagers; the intervention being in the nature of a suit for specific performance to compel the conveyance of the same lands described in Barber's complaint.

On March 18, 1918, Barber filed his second complaint, making the Sagers and Devore and Sanders defendants, which recited the facts set out above, and in this complaint he asked that the decree rendered at the preceding term be vacated, and that the Sagers be compelled to specifically perform by conveying him the lands described.

On May 1, 1918, the defendants in the last complaint filed separate demurrers, which were sustained on February 3, 1919, and this last complaint dismissed for want of equity. From this decree Barber has prosecuted this appeal. The pleadings and the decree in the first suit are made exhibits to the complaint in the second suit.

All the proceedings referred to were had in the chancery court for the Southern district of Arkansas county. The court in that district convenes on the first Monday in February and the fourth Monday in September of each year.

Appellant Barber insists that the decree which he seeks to vacate was procured by

fraud practiced upon the court. His insistence is that his first complaint was filed on June 24th, 1917, and under the Pleading and Practice Act (Kirby's Digest §§ 5976-6381) the answer was due to be filed by noon of the first day of the court after the service of the summons and no trial could have been had, except by consent, until ninety days after the pleadings were completed, and that in any event he could not have demanded a trial until long after the time for the court to meet. That the answer of Sager was filed with the clerk in vacation on July 14, 1917, but to make it effectual, as if filed in court on that date, it was necessary for Sager to give the notice called for by section 6118 of Kirby's Digest, and that the filing of this answer made up the issues so far as Sager was concerned and, in the absence of any time being fixed by the court for taking depositions, appellant had 40 days after the answer was filed in court, or after notice that it had been filed in vacation, in which to take his proof. And, further, that the title to this land was in Mrs. Sager, who had not answered, and she had until noon of the first day in which to answer, in which event appellant would have had 40 days from the filing of her answer in which to take his proof.

Appellant says these facts led him to believe that the complaint was deemed sufficient, not to be demurrable, and that the case would come to trial on its merits, and that it was a fraud to file an answer which led him to believe that the case would be tried upon the issues made by the complaint and answer, and to thereafter file a demurrer and to take a decree sustaining the demurrer, in the absence of the plaintiff, and without notice to him that this would be done.

The concession is made that "there were no agreements in this case as to when the case should be taken up, nor for any notice to be given by one party to the other of any desire to call it up for trial," but the contention is made that "the law itself spoke the rights of the parties in plain and unmistakable terms, and that after the pleadings had been made up and the issues joined the statute itself gave the parties time in which to take their proof," and that it was a fraud in law to disappoint this expectation without giving notice that the answer would be withdrawn and the demurrer filed.

In opposition to granting the relief prayed it is pointed out that the motion to dismiss for want of a bond for costs had been filed for two months before the sitting of the court, and that it is recited in the last complaint that Barber was advised on October 1, 1917, that the demurrer had been sustained, and his complaint adjudged not to state a cause of action.

Appellees also say that appellant is precluded by section 4432 of Kirby's Digest from saying that the decree on the demur-

rer was prematurely rendered. That section reads as follows:

"Sec. 4432. The proceedings to correct misprisions of the clerk shall be by motion, upon reasonable notice to the adverse party, or his attorney in the action. The motion to vacate a judgment because of its rendition before the action regularly stood for trial can be made only in the first three days of the succeeding term."

The decree was rendered September 25, 1917, and the next ensuing term of the court convened on the first Monday in February, and the complaint and motion to vacate were filed March 8th thereafter. So that if relief is to be granted it must be granted upon the ground that fraud was practiced upon the court in obtaining the decree.

Appellees discuss the allegations of the first complaint, and insist that it was demurrable for the reason that the contract sued on was void under the statute of frauds, and that the demurrer was properly sustained. Attention is also called to the fact that the complaint alleges that before court convened appellant's solicitor wrote to counsel who had filed the answer for the Sagers and received no reply to this letter, whereupon appellant's counsel called the other attorney over the telephone, and was advised by that attorney that he no longer represented Sager, but that other counsel had been employed, who had filed a demurrer and perhaps other pleadings.

[1] It is unnecessary to determine here whether the demurrer was properly sustained or not; any error committed in that respect could have been cured by appeal. On the other hand, only those matters are concluded by the decree on the demurrer which were within the allegations of the complaint. The decree in so far as it adjudged the relative rights of the Sagers and the interveners under the intervention was not, and is not, binding on Barber, as he was not properly made a party to any controversy between them; but the decree is final and conclusive as to all the allegations contained in the complaint against the Sagers. *Luttrell v. Reynolds*, 63 Ark. 254, 37 S. W. 1051; *Stewart v. Wood*, 86 Ark. 504, 111 S. W. 983. In the case of *Stewart v. Wood*, supra, a syllabus is as follows:

"Kirby's Digest, § 4431, subd. 4, providing that: 'The court in which a judgment or final order has been rendered shall have power, after the expiration of the term, to vacate or modify such judgment or order. \* \* \* Fourth, for fraud practiced by the successful party in the obtaining of the judgment or order'—does not authorize the court at a subsequent term to set aside a judgment duly rendered for mere errors of law committed by the court."

[2] We are therefore powerless to grant relief, except upon a finding that fraud was

practiced upon the court in procuring the decree; and we think the allegations of the complaint insufficient to support that finding. Appellant was advised that the Sagers had changed attorneys, and that a demurrer and possibly other pleadings had been filed. There is no allegation that any agreements were broken or deception practiced. Sager had the legal and moral right to file a demurrer and to press it to a decision, and that decision was rendered at the regular term of the court then being held pursuant to the statute.

The decree of the court below is therefore affirmed.

#### TOWN OF LONOKE v. W. Y. BRANSFORD & SON. (No. 14.)

(Supreme Court of Arkansas. Nov. 24, 1919.)

#### 1. WATERS AND WATER COURSES ⇨203(5) — CONTRACTS "AT THE SAME STIPULATED PRICE" MEANING AT AGREED PRICE.

A contract with a municipal corporation to furnish water "at the same stipulated price" held, in view of the evidence, to fix the rates at what they had been in the past; "price" implying value usually in money, "stipulated price" ordinarily meaning an agreed or fixed amount of money for a commodity, and, when preceded by the word "same," necessarily meaning a definite amount or rate prevailing in the past.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Price; Same.]

#### 2. WATERS AND WATER COURSES ⇨203(3)—DUTY OF CORPORATION TO FURNISH WATER AT RATES "UNIFORM AND WITHOUT DISCRIMINATION."

The phrase "uniform and without discrimination" as used in a charter given by a municipal corporation to persons who were to furnish water to the city and inhabitants held, in view of the evidence, to mean that every residence and business house using water must pay the same amount per month for water, irrespective of the amount used.

#### 3. WATERS AND WATER COURSES ⇨203(11) — RATES TO BE INCREASED ONLY BY MUTUAL AGREEMENT.

Contracts between municipal corporations and public utilities such as waterworks companies are placed in the same category as contracts between individuals, and the enforcement thereof cannot be interrupted upon the ground that they will result in the bankruptcy of the utility, the only remedy for such a condition being a modification of the rates by mutual agreement. Kirby's Dig. §§ 5445-5448, only conferring the power upon a municipal corporation to revise downward an unreasonable rate established in a franchise without the consent of the public utility.

Smith, J., dissenting.

Appeal from Lonoke Chancery Court; Jno. E. Martineau, Chancellor.

Suit by W. Y. Bransford & Son against the Town of Lonoke. Decree for plaintiff, and defendant appeals. Reversed and remanded, with directions.

Trimble & Trimble and Chas. A. Walls, all of Lonoke, for appellant.

J. B. Reed, of Lonoke, and Carmichael & Brooks, of Little Rock, for appellee.

HUMPHREYS, J. Appellee instituted this suit against appellant in the Lonoke chancery court to enjoin the city and its officers from enforcing a water rate of \$1 per month for residences, \$1.50 for livery stables, and \$2 for hotels and inns, upon the grounds: First, that appellee had not entered into a contract with appellant to furnish water at the rates specified; second, that, if such a contract was made, it was inconsistent with the franchise granted to the predecessors of appellee; and, third, that, if such a contract were made, and was consistent with the franchise, it was confiscatory of appellees' property, and not enforceable as a contract. Appellant filed answer, denying each material allegation in the complaint.

The cause was submitted to the court upon the pleadings, Ordinance No. 33, granting a water franchise to A. J. Edmondson and W. H. England, predecessors of appellee, the written contract between appellee and appellant pertaining to the water rate, certain minutes and records of the town, and the testimony of certain witnesses, upon which the issues were found for appellees, and a judgment rendered by the court, perpetually enjoining the enforcement of the rates fixed by the town council of Lonoke. From the findings and decree of the chancery court, an appeal has been prosecuted to this court, and the cause is before us for trial de novo.

It is first insisted by appellant that, according to the weight of the evidence, the predecessors of appellee entered into a contract with the town of Lonoke to furnish the inhabitants thereof water at the rate of \$1 for residences, \$1.50 for livery stables, and \$2 for hotels and inns, and that appellee renewed the contract at the same rate in 1905. The written contract entered into between appellant and appellee in 1905 contains the following provision:

"It is further agreed that said parties of the second part will continue to furnish water at the same stipulated price until the termination of their franchise."

R. L. Sawyer, serving as an alderman when the water franchise was granted to Edmondson and England, appellee's predecessors, testified that the rate was fixed by resolution at \$1 per month for residences, and later amended by fixing the rate on livery stables and hotels at \$1.50 per month.

Charles G. Miller, who procured the franchise for Edmondson and England, testified that it was procured on the understanding that the public utility would furnish water at the rate of \$1 per month for residences and business houses, and \$1.50 per month for hotels and livery stables; that the town refused to grant the franchise on any other condition; that he subsequently negotiated the sale of the plant to Bransford and Daniels for \$1,000 less than the original price asked, on account of the low water rate theretofore agreed upon.

T. M. Fletcher, mayor in 1905, 1906, and 1907, testified that the town council owned the plant at the time he was mayor, and fixed the rate at \$1 a month to the consumer; that about three years after he retired as mayor the town sold the plant; that after the change the rate remained the same, except for livery stables and hotels.

J. M. Gates, mayor of Lonoke for five years, testified that he was familiar with the water rates fixed by the council, the same being \$1 per month for residences and business houses, and \$1.50 per month for livery stables and hotels.

The mayor of Lonoke at the time he gave his evidence testified that W. Y. Bransford discussed the question of raising the water rates with him in June, 1918; that the rate had always been \$1 per month for residences.

According to the record, the plant was originally owned by the town until 1900. In that year it passed by sale from the city to Edmondson and England; then to Bransford and Daniel; then to Bransford and Hicks; then to appellee, a partnership. From 1895 until the institution of this suit, each successive owner furnished water to residences at the rate of \$1 per month.

E. M. Spencer, Charles G. and Jesse Miller, all testified that the clause "at the same stipulated price," used in the Bransford and Daniels contract of 1905, had reference to the rate agreed upon and fixed by resolution of the town council at the time the franchise was granted, and as amended thereafter. The minutes and records of the town, prior to 1905, were destroyed.

W. Y. Bransford testified that no rate was ever agreed upon or fixed by resolution or ordinance; that, at the time the contract of 1905 was entered into, the rate of \$1 per month for residences was inserted in the original draft, but was stricken out before he signed the contract.

The franchise contained the following provision:

"A. J. Edmondson and W. H. England shall furnish free of cost, to said town of Lonoke any and all water it may need for use, and furnish water to the citizens of the town of Lonoke at a uniform rate and without discrimination between persons."

[1] We think it established by the weight of evidence that the clause "at the same stipulated price," used in the contract of April 24, 1906, related to some fixed, definite amount theretofore existing. Price implies value, usually in money. The ordinary meaning of the words "stipulated price" is an agreed or fixed amount of money for a commodity, and, preceded by the word "same," necessarily mean a definite amount or rate prevailing in the past. No specific or definite amount was fixed in the franchise. Free water must necessarily be without price, and a uniform, nondiscriminatory rate lacks the element of an amount certain, indicated by the use of the words "stipulated price." So we think the only reasonable conclusion deducible from the evidence is that the clause "at the same stipulated price," as used in the Bransford and Daniels contract, related to the rates fixed in the lost resolution or ordinance and amendments thereto. According to the evidence, that rate was \$1 per month for residences and business houses, and \$1.50 per month for livery stables and hotels.

[2] Appellee, however, upholds the decree of injunction on the theory that such a contract is unenforceable as being in conflict with the provision of the franchise requiring water to be furnished at a uniform rate and without discrimination. The record disclosed that the amount of water used by the consumers ranged from 500 to 55,000 gallons per month. From the fact that one citizen might obtain 500 gallons and another 55,000 gallons per month for \$1, the conclusion is drawn by appellee that the rate is not uniform, but discriminatory. According to the evidence of Charles G. Miller, the town council refused to amend the franchise until the rate of \$1 for residences and business houses was agreed upon, and granted the charter upon that condition only. His statement in this regard is supported by the great weight of the evidence. The phrase "uniform and without discrimination," used in the charter, must be read in the light of this evidence. When so read, it clearly means that every residence and business house using water must pay \$1 per month for water, irrespective of the amount used. In other words, that the public utility could not discriminate in price between consumers on account of the quantity of water used by each. We are unable to find anything in the record from which an inference may be drawn that the words were used in the franchise in contemplation of metering the town.

[3] An attempt is made by the appellee to sustain the injunction on the ground that it would work a confiscation of appellee's property. Appellee is not sustained in this position by the adjudications in this state. Under the adjudications of this state, contracts between municipal corporations and public

utilities are placed in the same category as contracts between individuals. The enforcement thereof cannot be interrupted upon the ground that they will result in the bankruptcy of the utility any more than the enforcement of contracts by individuals could be interrupted on such ground. *Lackey v. Fayetteville Water Co.*, 80 Ark. 108, 96 S. W. 622; *Little Rock Ry. & Elec. Co. v. Dowell*, 101 Ark. 223, 142 S. W. 165, Ann. Cas. 1913D, 1086; *Arkansas Light & Power Co. v. Cooley*, 211 S. W. 664.

The only remedy for such a condition is a modification of the rate by mutual agreement or consent by the municipal corporation and public utility. Sections 5445-5448, inclusive, of Kirby's Digest, only confer the power upon a municipal corporation to revise downward an unreasonable rate established in a franchise without the consent of the public utility. It therefore follows that the public utility must acquiesce in the water rates agreed upon in its contract with the city, unless it can obtain relief by application to the proper authorities.

For the error indicated, the decree is reversed, and the cause is remanded, with directions to dissolve the injunction and dismiss the petition.

SMITH, J., dissents.

#### DRURY v. ARMOUR & CO. (Nos. 172, 184.)

(Supreme Court of Arkansas. Nov. 3, 1919.  
Rehearing Denied Dec. 8, 1919.)

#### 1. SALES $\S$ 255—NO WARRANTY OF WHOLE-SOMENESS AVAILABLE TO ULTIMATE CONSUMER.

Where a packing company sold sausage to an intermediate retail dealer, who sold to plaintiff, there was no warranty by the company, of the wholesomeness of the food product, available to plaintiff, who could not maintain action for damages for its breach.

#### 2. FOOD $\S$ 25—MANUFACTURER OF FOOD NOT LIABLE FOR NEGLIGENCE TO PURCHASER FROM RETAIL DEALER.

Where food products are prepared by a manufacturer for sale of retail dealers for consumption by ultimate purchasers, such a purchaser has a right of action against the manufacturer for injury resulting to him from negligence in the preparation of the food.

#### 3. PLEADING $\S$ 369(1) — ELECTION BETWEEN ALLEGATIONS OF BREACH OF WARRANTY AND OF NEGLIGENCE.

In an action against a packing company to recover for death of plaintiff's wife through eating sausage prepared by defendant and purchased by plaintiff from intermediate retail dealer, court properly required plaintiff to elect either to prosecute action on his allega-

tion of breach of implied warranty, or on allegation of negligence in preparation of sausage.

#### 4. FOOD ~~25~~—NEGLIGENCE IN PREPARATION A JURY QUESTION.

In an action against a packing company for the death of plaintiff's wife through having eaten sausage prepared by the company and sold to plaintiff by an intermediate retail dealer, whether the wife was made sick and killed by the poisonous condition of the sausage, and whether defendant packing company was negligent in preparing the sausage and putting it on the market held for the jury.

#### 5. WORDS AND PHRASES—"PTOMAININE."

"Ptomaine" is a putrefactive alkaloid generally found in the form of malignant poison in canned meats or fish, and sometimes found in less harmful form in preserved vegetable matter.

[Ed. Note.—For other definitions, see Words and Phrases, Ptomaine.]

Hart and Humphreys, JJ., dissenting in part.

Appeal from Circuit Court, White County; J. M. Jackson, Judge.

Action by A. A. Drury, administrator, against Armour & Co. From judgment for defendant, plaintiff appeals. Reversed, and cause remanded for new trial.

Brundidge & Neely, of Searcy, and G. G. McKay, of Bald Knob, for appellant.

Rose, Hemingway, Cantrell & Loughborough, of Little Rock, and Cul L. Pearce, of Bald Knob, for appellee.

McCULLOCH, C. J. Minnie Drury, the wife of appellant, died on March 23, 1918, and appellant instituted this action against appellee to recover damages accruing by reason of the death of his wife, which is alleged to have resulted from eating poisoned sausage prepared and sold by appellee. It is alleged in the complaint that appellee prepared the sausage for sale by retail dealers for immediate consumption, and that appellee "maintains a place of business in Helena, Ark., and other towns in said state, representing and holding out to the general public that its goods are wholesome, pure, and fit for food." It is further alleged in the complaint that appellee "was guilty of negligence in manufacturing and preparing said sausage so purchased in that the same contained a nauseating poisonous substance." Appellant sues in his own right for damages sustained by him on account of the death of his wife, and also sues as administrator of his wife's estate.

Appellee filed a motion to require plaintiff to elect whether he would prosecute the action upon the alleged breach of implied warranty or on the allegation of negligence in the preparation of the sausage. The court sustained the motion, over appellant's objection, and he thereupon elected to try the case

on the allegation of negligence contained in the complaint. Appellee answered, denying that it was guilty of negligence in preparing the sausage, and denied that the sausage contained any poisonous substance, or that Minnie Drury was made sick or died from eating the sausage. The case proceeded to trial before a jury, but at the conclusion of appellant's introduction of testimony the court gave a peremptory instruction in favor of appellee, and judgment was rendered accordingly in appellee's favor.

[1] It is contended, in the first place, that the court erred in requiring appellant to make an election as to the cause of action in the complaint he would stand upon. It is argued that, notwithstanding the fact set forth in the complaint that the sausage was not purchased by the consumer directly from appellee, but through an intermediate retail dealer, there was a warranty of the wholesomeness of the food product, and that plaintiff could maintain an action for the damages resulting from a breach of the warranty. This question is decided against appellant's contention in the case of *Nelson v. Armour Packing Co.*, 76 Ark. 352, 90 S. W. 238, 6 Ann. Cas. 237, where Judge Battle, speaking for the court, said:

"In the sale of provisions by one dealer to another in the course of general commercial transactions, the maxim caveat emptor applies, and there is no implied warranty or representation of quality or fitness."

Liability was denied in that case on the ground that—

"There was no privity of contract between appellant and appellee, and no warranty passed with the property from appellee to appellant through his vendor."

The doctrine of that case has been approved by this court in *Colyar v. Little Rock Bottling Works*, 114 Ark. 140, 169 S. W. 810, and *Heinemann v. Barfield*, 136 Ark. 500, 207 S. W. 62. We adhere to the doctrine now and treat the question as settled.

[2, 3] The complaint in the case of *Nelson v. Armour Packing Co.*, supra, contained an allegation of negligence, but the subject was not treated in the opinion, which dealt solely with the question of the plaintiff's right of action on a breach of implied contract of warranty. In the later cases cited above we held that there is a right of action in favor of the ultimate consumer under such circumstances against the manufacturer upon allegations and proof of negligence in the preparation of foods; this being upon the theory that, where food products are prepared by a manufacturer for sale to retail dealers for consumption by the ultimate purchaser, it is to be reasonably anticipated that injury will result to the consumer from the

use of the unwholesome food thus placed on the market. Many of the cases cited on the brief of counsel for appellant sustain that view. *Salmon v. Libby*, 219 Ill. 421, 76 N. E. 573; *Park v. Yost Ple Co.*, 93 Kan. 334, 144 Pac. 202, L. R. A. 1915C, 179; *Tomlinson v. Armour & Co.*, 75 N. J. Law, 748, 70 Atl. 314, 19 L. R. A. (N. S.) 923; *Craft v. Parker*, 96 Mich. 245; 55 N. W. 812, 21 L. R. A. 139; *Haley v. Swift*, 152 Wis. 570, 140 S. W. 292; *Wilson v. Ferguson*, 214 Mass. 265, 101 N. E. 381. The court did not err in requiring the election.

[4, 5] The remaining question for our consideration is whether or not there was evidence legally sufficient to go to the jury as to the cause of Mrs. Drury's sickness and death, and on the charge of negligence against appellee in preparing the sausage and putting it on the market for purchase by consumers. Appellee maintained a place of business at Helena, Ark., for distribution of its food products throughout the adjacent commercial territory, and the sausage alleged to have been eaten by Mrs. Drury came from that place of business maintained by appellee, who sold it to C. M. Parham, a retail merchant at Bald Knob, Ark., who in turn sold it to appellant for family consumption. Appellant resided with his family at a lumber camp a few miles distant from Bald Knob, and on Saturday, March 23, 1918, he purchased from Parham several articles of food, including two sticks of bologna sausage, each weighing about 4½ pounds. The purchase was made for appellant by Mr. Bridgeman, one of his neighbors, who returned from Bald Knob with the purchased foodstuffs about 8 o'clock on the evening of the day mentioned. When the bill of goods was being purchased from Parham, Bridgeman called for the sausage, and was informed by Parham that he had none in stock, but that there was a consignment due, which was perhaps then at the railroad station, and he sent down to the station, and the box containing the sausage was brought to the store and opened in Bridgeman's presence. The box contained four sticks of equal size and weight, two of which were, as before stated, sold to Bridgeman for appellant. When Bridgeman delivered the goods to appellant, the latter's family had eaten the evening meal about 6 o'clock, which, according to the testimony, consisted of fried potatoes, rice, bread, coffee, mince pie and home grown strawberries and apple butter. Appellant and his wife had two children, the oldest about seven years old, and the whole family partook of all of the above-mentioned articles at the evening meal. Mrs. Drury became ill about 10:30 o'clock that night, and began vomiting about 1 o'clock, and continued ill until the following Sunday, when she died. She was treated by a physician during her illness, and the physician testified as a witness in the case.

There is no direct testimony that Mrs. Drury ate any of the sausage, but there are circumstances relied on by appellant as sufficient to establish that fact. There was no one in the house that night except appellant and his family, and he testified that the next morning when he went out to prepare breakfast for himself and children he found that one of the sticks of sausage had been cut through and a portion of the meat had been used, and he also testified that after his wife began vomiting he examined the discharge in the bucket in which she vomited, and saw particles which he identified as undigested bits of the sausage. He testified that he cooked some of the sausage for breakfast the next morning, which was eaten by himself and children, and also for dinner, and that none of them became sick. He testified that when he began the preparation of the meal the next day he cut some of the sausage from one of the severed parts of the stick found in the kitchen, and when he cut into it he discovered "a green, slimy piece about as big as your thumb" which was wet and soggy, and that there was a bad odor from it. The physician who attended Mrs. Drury testified that her illness resulted from ptomaine poisoning. Other physicians testified as experts, and their testimony tended to show that Mrs. Drury's illness and death were caused by ptomaine poisoning.

It is earnestly and very forcefully argued by counsel for appellee that the proof falls short of establishing either the fact that Mrs. Drury ate the sausage and was poisoned on account of it, or that appellee was guilty of negligence in the preparation and handling of the sausage, but we are of the opinion that the testimony, when analyzed and given its strongest probative force, is sufficient to warrant a submission of the issues to the jury. It is argued that, notwithstanding appellant's testimony that he discovered bits of the sausage in the vomit discharged by his wife from her stomach, this could not be true, for the reason that, sausage being made of ground meat, it could not be identified in a mass of other matter which came from the stomach. This is indeed a strong argument against the truth of appellant's testimony, but it cannot be said as a matter of law that the testimony is irreconcilably in conflict with the physical fact, and must be wholly disregarded as untrue. It may seem improbable that there was an identification of the bits of sausage in the vomit, and yet it might be true; at least, it cannot be said that the witness stated an impossibility. The testimony warrants a conclusion that the sausage was eaten, if at all, at least two hours after any other food was taken into the stomach, and, while we know that sausage is made of ground meat, it is compressed into a compact mass, and when it has not been properly masticated and remains undigested in the stom-

ach, it might be identified. At least we cannot say that it is absolutely impossible to identify it under those circumstances. There are other circumstances tending to show that Mrs. Drury ate some of the sausage that night. It was, according to the testimony, eaten by some one, and there was no one else in the house to get it except appellant and one of the small children. The testimony of appellant also was sufficient to warrant a finding that the sausage contained a poison, and the testimony of the attending physician and other experts tended to establish the fact that this caused Mrs. Drury's sickness and death. Ptomaine is a putrefactive alkaloid generally found in the form of malignant poison in canned meats or fish, and sometimes found in less harmful form in preserved vegetable matter. The testimony of the experts is to the effect that the poison in preserved meats results either from the diseased condition of the slaughtered animal caused by the bacteria in the live animal or resulting from the improper preparation or handling of the meat. One of the witnesses, Dr. Pace, states in his testimony that the diseased condition of the animal which caused putrefaction could be detected by proper inspection, and that the bacteria which produced the alkaloid could not get into preserved meat if properly prepared and handled.

We think the testimony as a whole is sufficient to warrant a submission of the question of negligence to the jury. This is not building a presumption or an inference of fact upon a presumption, but the circumstances are such as fairly warrant the inference that Mrs. Drury ate the sausage, that the sausage contained a poison, and that it caused her sickness and death, and that appellee was negligent either in failing to discover the disease which produced the poisonous alkaloid or in failing to properly prepare or handle the meat, thereby causing it to become a poisonous substance. The proof practically excluded any idea of the meat becoming contaminated after it left the possession of appellee. It was received by the local dealer from the public carrier and taken from the original package on the day it was eaten by Mrs. Drury, and then contained a poisonous substance. These facts are established, not by positive testimony, but by proof of circumstances which fairly and reasonably warrant this inference. These facts then being established by circumstantial proof, and not merely by indulging presumptions, a state of facts is established which warrants a further inference that appellee was negligent in either failing to discover the diseased condition of the slaughtered animal from which the meat was taken or in failing to properly prepare the meat and handle it. In other words, we have presented a chain of circumstances which show that Mrs. Drury's

illness was caused from eating sausage; that the sausage remained in the control of appellee up to a short space of time before it was consumed by Mrs. Drury, the proof excluding any probability of it having become contaminated after it left the hands of appellee, and that the presence of the poisonous substance in the sausage could not have occurred in the ordinary course of things if appellee had exercised proper care in its preparation. Appellee's method of slaughtering animals and preparing and packing meat for distribution and sale were matters entirely within the knowledge of its own employés, and the circumstances proven in this case were at least sufficient to make a prima facie case and shift to appellee the burden of proving that there was no negligence in this respect. It is not a case where the thing speaks for itself so as to create a presumption of negligence, but there are circumstances which warrant such an inference and casts upon appellee the burden of clearing itself of the charge by showing that ordinary care was observed in the preparation and distribution of the food, the consumption of which caused the injury complained of. *Southwestern Tel. & Tel. Co. v. Bruce*, 89 Ark. 581, 117 S. W. 564; *Commonwealth Public Service Co. v. Lindsay*, 214 S. W. 9; *Chiles v. Ft. Smith Commission Co.*, 216 S. W. 11.

Our conclusion, therefore, is that the court erred in taking the case from the jury, and the judgment is reversed, and the cause remanded for a new trial.

HART, J. I dissent from that part of the opinion which holds that there is no privity of contract between the manufacturer of canned goods and of those put up in sealed packages and the ultimate consumer. Canned goods and sealed packages prepared by the manufacturer for use of the consumer are in such common and universal use at the present time that we may judicially know that the contents are sealed up not to be opened until they are used, and they are not then susceptible to any practical test except the one of eating. When the manufacturer puts such goods upon the market for sale and consumption, he in effect represents to each purchaser that the contents of the can or sealed package are sound and fit for food. Under these circumstances there is no room for the fundamental condition upon which the common-law doctrine of caveat emptor is based; for the buyer has no opportunity to look out for himself. It is obvious that in cases of this kind the retailer is generally free from fault, and sound public policy, with due regard to the public good, demands that when an article of food or medicine is prepared by a manufacturer in sealed packages and thrown into the current of trade on the faith of the public that it is what the manufacturer

represents it to be, there is an implied warranty that it is sound and fit for the purpose sold, and that this covenant runs with the property through any number of hands and inures to the benefit of the ultimate consumer. It is true this rule is opposed to one laid down in *Nelson v. Armour Packing Co.*, 76 Ark. 352, 90 S. W. 288, 6 Ann. Cas. 237, but a careful consideration of that opinion leads one to the conclusion that it is unsound, and the rule laid down is wholly unsuited to the conditions existing at the present time. There is no rule of property in that case, and no reason exists why it should not be overruled if unsound. The opinion itself shows that the line of cases directly in point on the subject were not considered.

I also think the opinion is cloudy upon what is necessary for the plaintiff to prove in an action for negligence in such cases. The federal act of June 30, 1906, prohibits interstate shipments of adulterated foods or drugs and makes a violation of the act a misdemeanor. One section of the act defines adulteration in the case of meats as consisting "in whole or in part of a filthy, decomposed, or putrid animal or vegetable substance, or any portion of an animal unfit for food, whether manufactured or not, or if it is the product of a diseased animal, or one that has died otherwise than by slaughter."

The federal act of March 4, 1907 (34 Stat. 1265, c. 2907), provides that any person who shall "sell or offer for sale or transportation for interstate or foreign commerce any meat or meat food products which are diseased, unsound, unhealthful, unwholesome, or otherwise unfit for human food, knowing that such meat food products are intended for human consumption, he shall be guilty of a misdemeanor." This statute was passed for the protection or benefit of the ultimate consumer, and the manufacturer is liable to him for damages resulting from his failure to comply with the statute. Therefore a prima facie case is made out for the plaintiff by proof that the meat was sold in the original package, was diseased, and caused the death of plaintiff's wife.

HUMPHREYS, J., concurs.

#### TURNER'S HEIRS v. TURNER et al. (No. 22.)

(Supreme Court of Arkansas. Dec. 1, 1919.)

#### 1. JUDGMENT $\S$ 910(4)—PRO RATA ALLOWANCE A "JUDGMENT," WITHIN STATUTES OF LIMITATION.

While a pro rata allowance of creditors' claims against the estate of a decedent is a

"judgment," within Kirby's Dig.  $\S$  5073, requiring an action on "judgment" to be commenced within 10 years after accrual of cause of action, the statute does not operate to bar such a judgment while the estate is in the course of administration and before an order of payment is made.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Judgment.]

#### 2. EXECUTORS AND ADMINISTRATORS $\S$ 324—SALE OF LAND TO PAY DEBTS BARRED BY LIMITATION.

Kirby's Dig.  $\S$  5073, requiring action on judgment to be commenced within 10 years after accrual of cause of action, did not bar administrators from having land sold for payment of debts allowed against the estate more than 10 years prior to filing of petition for sale of the land, where administration was still pending and no order for payment of claims had been made under sections 142 to 159.

#### 3. EXECUTORS AND ADMINISTRATORS $\S$ 329(2)—SALE OF HOMESTEAD.

Under the Constitution, creditors of deceased husband have no right to subject homestead to payment of debts until homestead rights of widow and minor children have ceased.

#### 4. EXECUTORS AND ADMINISTRATORS $\S$ 334—SALE OF LAND FOR PAYMENT OF DEBTS NOT BARRED BY LACHES.

Where the only land available for payment of debts was valueless, if sold separate and apart from the homestead and dower tracts, and where the sale of the reversion in the homestead and dower tracts would not have yielded sufficient proceeds to pay the debts, administrators were not barred by laches from having the land sold upon petition filed 8 months after widow's death, though more than 20 years had elapsed since the claims were probated.

Appeal from Circuit Court, Izard County; J. B. Baker, Judge.

Petition in probate court by S. H. Turner and another, administrator of the estate of T. P. Turner, deceased, for sale of land for payment of debts against the estate and expenses of administration, opposed by certain heirs of the deceased. On appeal from judgment of probate court denying the petition, circuit court entered judgment directing sale of the lands, and the heirs appeal. Affirmed.

John O. Ashley, of Calico Rock, for appellants.

Woods & Sherrill, of Calico Rock, and Elbert Godwin, of Melbourne, for appellees.

WOOD, J. T. P. Turner died about the year 1894. He left surviving him a widow and several children by her and of former marriages. S. H. Turner and George Turner, two of his children, were appointed ad-



ministrators of his estate. He was seized of 250 acres of land, and 190 acres of this were set apart to the widow as her homestead and dower. The remaining 60 acres were barren and rocky land, which separate and apart from the other lands were of little, if any, value. Turner also left some personal property.

In 1895 and 1896 claims were presented and allowed against the estate in the sum of \$535.15. The personal assets were duly administered. There were certain debts owing the estate, but only the sum of \$50 was collected which came into the hands of the administrators in 1918. The other debts were worthless, and the administrators took credit for them in their account current. The last account current which was approved by the probate court in 1899 showed a balance of \$57.50 of doubtful notes due the estate in the hands of the administrators. Nothing was paid on the debts probated and allowed against the estate, for the reason that there were no assets in the hands of the administrators at the time to pay the same. The administrators made no effort to sell the 60 acres, which alone were subject to the debts, for the reason that, in the judgment of the administrators, separate and apart from the other tract, if put up and sold, it would not have brought enough to have paid the expenses of the sale.

In July, 1918, the widow of T. P. Turner died. No effort was made by the creditors or the administrators until the death of the widow to have the claims which had been probated against the estate paid. In September, 1918, after the death of the widow, the administrators filed a petition in the probate court, asking for a sale of all the land of the estate for the payment of the debts which had been probated against the same. Certain heirs of Turner resisted the petition, setting up the statute of limitations and laches. The probate court rendered judgment, denying the petition of the administrators, and on appeal to the circuit court the cause was tried anew, and that court entered a judgment directing that the lands be sold for the purpose of paying the debts probated against the estate and for paying costs of administration, from which judgment is this appeal.

The only question for our determination is whether or not the appellees were barred, either by limitations or laches, from having the land described in their petition sold for the payments of the debts of the estate. In *Mays v. Rogers*, 37 Ark. 159, we said:

"And as payment of claims can be enforced only as directed by the statute, and after the court has found, upon a settlement of the administrator, that there is money in his hands for the payment of them, and has ordered their payment in full, or pro rata, as it shall suffice,

the allowance cannot be barred by the statute of limitations."

The statute applicable to the settlement of administrators and payment of claims is found in sections 142 to 159, inclusive, of Kirby's Digest.

[1, 2] It does not appear from the record that there has been any order of the probate court showing the settlement of the administrators, at which it was found that there was any money in their hands sufficient to pay the claims probated and allowed against the estate, and an order made by the probate court for their payment in full or pro rata, et cetera. The administration is still pending. While a pro rata allowance is a judgment, within the meaning of section 5073, Kirby's Digest, requiring that an action on all judgments and decrees shall be commenced within 10 years after the cause of action shall accrue and not thereafter, yet under the above decision this statute does not operate to bar such a judgment while the estate is in course of administration and before an order of payment is made. *Brown v. Hanauer*, 48 Ark. 227-282, 3 S. W. 27.

In *Mays v. Rogers*, supra, we also said:

"The heirs should not be forever deterred from making improvements on the property, or prevented from selling it, by the possibility that it may be sold for the debts of the estate. The power of the administrator must be exercised in a reasonable time, and will be lost by gross laches or unreasonable delay."

See, also, *Stewart v. Smiley*, 46 Ark. 373; *Graves v. Pinchback*, Adm'r, etc., et al., 47 Ark. 470, 1 S. W. 682.

[3] So the next question is: Were the administrators of the estate of T. P. Turner, or the creditors, barred by laches? The homestead provisions of our Constitution suspend the right of creditors to subject lands constituting the homestead to the payment of their debts until the homestead right of the widow and minor children have ceased. *Abramson v. Rogers*, 97 Ark. 189, 133 S. W. 836.

It appears that the widow of Turner occupied the lands constituting the homestead until her death in July, 1918, and that the proceedings to subject these lands were begun the following September. Whether or not the administrators and creditors have waited an unreasonable time must depend upon the circumstances. It is manifest from the undisputed facts of this record that the 60 acres not constituting a part of the homestead were of little, if any, value considered separate and apart from the homestead and dower tract, and it is equally clear that the sale of the reversion in the homestead and dower tracts would not have yielded sufficient proceeds to pay the debts, and, so far as results are concerned, would have been a fruitless proceeding. As was said in *Killough*

v. Hinton, 54 Ark. 65, 14 S. W. 1092, 26 Am. St. Rep. 19:

"To have sold them before her death would have been a sacrifice of the interests alike of the creditors and heirs."

In Roth v. Holland, 56 Ark. 633, 20 S. W. 521, 35 Am. St. Rep. 126, we held that a delay "for more than 7 years is not reasonable, and therefore defeats the right of a creditor, or an administrator in his behalf, unless there is something to excuse the delay." The delay of more than 20 years after claims were probated and allowed against the estate before the proceedings were commenced to

enforce their payment would defeat the lien of creditors on the ground of laches or unreasonable delay, "unless there be something to excuse the delay." Brogan v. Brogan, 63 Ark. 405, 39 S. W. 58, 58 Am. St. Rep. 124.

[4] But here the fact that the only asset of the estate in the hands of the administrator for the payment of debts was a piece of land valueless if sold separate and apart from the homestead and dower tracts, and that these were occupied by the widow and could not be sold until within 3 months before these proceedings were begun, constitutes a sufficient excuse for the delay of appellees.

Affirmed.

## STATE v. CRAYNE. (No. 20951.)

(Supreme Court of Missouri, Division No. 2.  
Dec. 23, 1918.)

## 1. GAMING §90(2)—INFORMATION MUST DESCRIBE DEVICE.

Information, charging that defendant "set up a gambling table or gambling device, commonly called a poker table, adapted, devised, and designed for the purpose of playing a certain game of chance, commonly called poker," etc., was insufficient to charge a crime under Rev. St. 1909, § 4750; it being essential where device is not of the kind named in statutes to describe it, so as to bring it within class of named devices.

## 2. CRIMINAL LAW §1134(3) — INFORMATION BEING INSUFFICIENT, OTHER POINTS WILL NOT BE PASSED UPON.

Since there is no sufficient information, assignment of error concerning sufficiency of evidence and admissibility of certain evidence will not be discussed, since discussion of points other than sufficiency of information would rise to no higher standard than mere dictum.

Appeal from Criminal Court, Jackson County; Ralph S. Latshaw, Judge.

Jesse Crayne was convicted of setting up and operating a gambling device, and he appeals. Reversed and remanded.

George A. Neal and Clinton A. Welsh, both of Kansas City, for appellant.

Frank W. McAllister, Atty. Gen., and George V. Berry, Sp. Asst. Atty. Gen., for the State.

WILLIAMS, J. Upon a trial in the criminal court in Jackson county, defendant was convicted of setting up and operating a gambling device, commonly called a poker table, and his punishment was assessed at 2½ years' imprisonment. Defendant has duly appealed.

The amended information upon which trial was had was (formal parts omitted) as follows:

"In the Criminal Court of Jackson County, Mo., at Kansas City, Mo., April Term, A. D. 1917.

"Now comes Hunt C. Moore prosecuting attorney for the state of Missouri, in and for the body of the county of Jackson, and upon his oath informs the court that Jesse Crayne, whose

Christian name in full is unknown to said prosecuting attorney, late of the county aforesaid, on the 28th day of March, 1917, at the county of Jackson, state of Missouri, unlawfully and feloniously set up a gambling table or gambling device, commonly called a poker table, adapted, devised, and designed for the purpose of playing a certain game of chance commonly called poker, for money and did then and there unlawfully and feloniously entice, induce, and permit divers persons whose names to said prosecuting attorney aforesaid are unknown, to play and bet at and upon said table and gambling device, against the peace and dignity of the state."

[1] The sufficiency of the above information is challenged by appellant on the ground that it does not contain averments sufficient to charge a crime under the gambling device statute, viz. section 4750, R. S. 1909. The learned Attorney General in his brief confesses error in the above regard. Upon an inspection of the information we find that the above assignment of error is well taken. The reasons therefor having been so recently and fully stated in the cases of *State v. Wade*, 267 Mo. 249, 183 S. W. 598, and *State v. Morris*, 272 Mo. 522, 199 S. W. 144, further treatment of the subject is now deemed unnecessary. For the reasons stated in the *Wade* and *Morris* Cases, supra, we hold that the information is fatally defective, and that the judgment below cannot stand.

[2] Appellant makes further assignment of error concerning the sufficiency of the evidence to support the verdict, and the admissibility of certain evidence.

Since there is no sufficient information in the case, it becomes at once apparent that we are left without a proper standard to measure the sufficiency of the evidence, or to pass upon the relevancy of admitted testimony. Neither can we foreknow the contents of a new information, if the prosecuting officer should find it advisable to proceed further in the case. That being true, any discussion of the other points raised would necessarily be based upon a supposed, or hypothetical, case, and would rise to no higher standard than mere dictum. For that reason we decline further discussion of the case.

The judgment is reversed, and the cause is remanded.

All concur.

**STATE v. CANTRELL. (No. 21883.)**

(Supreme Court of Missouri, Division No. 2.  
Oct. 31, 1919.)

**CRIMINAL LAW §1088(20)—DISMISSAL OF APPEAL FOR FAILURE TO FURNISH COMPLETE TRANSCRIPT.**

Where the indictment in a murder case has been lost, on appeal it is defendant's duty to perfect his appeal during the 12 months provided by Rev. St. 1909, § 5313, by supplying such lost indictment, and if he fails to do so, the appeal will be dismissed because of the appellant's failure to furnish a complete transcript of the records, as required by section 5309.

Appeal from Circuit Court, Wright County; C. H. Skinker, Judge.

Robert Cantrell was convicted of murder in the second degree, and he appeals. Appeal dismissed.

George C. Murrell, of Hartville, and L. O. Nieder, of Willow Springs, for appellant.

The Attorney General and Henry B. Hunt, Asst. Atty. Gen., for the State.

FARIS, J. Defendant, convicted in the circuit court of Wright county of murder in the second degree, for that, as it was alleged, he had shot and killed one Samuel McAlister, has after the usual motions appealed. The state by the Attorney General, prosecuting in this behalf its pleas, has filed its motion to dismiss this appeal.

The circumstances of the homicide of which defendant was convicted are therefore not material to the question confronting us, which is: Should this appeal be dismissed for the failure of the defendant to perfect it within 12 months after it was granted? Section 5313, R. S. 1909. In full the section of the statute relied on by the state reads thus:

"If any person taking an appeal to the Supreme Court, on a conviction for a felony, other than those wherein the defendant shall have been sentenced to suffer death, shall fail to perfect the appeal within twelve months from the time the appeal is granted, the Attorney General may file his motion before the Supreme Court asking that the appeal may be dismissed, whereupon the court shall make an order that the appeal be dismissed, unless the defendant shall show to the satisfaction of the court good cause for not perfecting his appeal."

The Attorney General, invoking the application of the statute supra, moves the dismissal of defendant's appeal upon the facts below: The appeal was granted on the 4th day of April, 1918. On the 22d day of March, 1919, defendant caused to be filed in this court (sections 5308, 5309, R. S. 1909; State v. Pleski, 248 Mo. 715, 154 S. W. 747) a certified copy of the bill of exceptions.

Neither "a full transcript of the record in the case," nor the "judgment and sentence," as the statute requires (section 5309, supra), was included among the documents so caused to be filed. This status inured till after the expiration of the 12 months period limited by section 5313, supra, upon which, and on the 14th day of April, 1919, the Attorney General filed his said motion to dismiss the appeal. Pending this motion, and evidently being spurred to some action thereby, defendant suggested diminution of the record, and prayed for our order in certiorari to the circuit court of Wright county to send up a true, complete, and correct copy of the record in this cause. This writ issued, and in return thereto the clerk of the Wright county Circuit court certified and sent up to us the entire record proper in this case, save and except the "original files" as his return shows, all of which files, including (so far as is lacking for the uses of this review) the indictment, the return says are lost and cannot be found, and therefore are not included in the record sent up to us. Other orders, not pertinent to the point before us, were made by this court, and which therefore, lest they obscure the one salient question, it is not necessary to set down here.

Thus stand the record and the facts on the record before us. Upon these facts, should the motion of the state to dismiss this appeal be sustained?

It is obvious, we think, that the question in the final analysis resolves itself into the query whether the duty incumbent upon defendant of perfecting his appeal in 12 months (section 5313, supra), and of causing a full transcript of the record to be filed here within that time, carries with it the further duty of supplying lost documents which are vital to an appeal. We have reached the conclusion that it does include such a duty, in a criminal case, in the light of the provisions of sections 5309 and 5313, supra. State v. Pleski, supra. There is no doubt any longer existing as to the inherent power of the circuit court to permit the supplying of a lost indictment, which, as we have seen, is the only pertinent document missing in the instant case. Nor is there any doubt that the circuit court which tries a case subsequently appealed has ample power to supply lost papers in the case after the appeal is taken, and while the appeal is pending here, and to such end and extent at least retains jurisdiction in the case. So much being settled law, it is clear that there rests upon some one the duty of supplying this lost indictment, in order that appellate review may be had. Ought this duty to be saddled upon the state, which prevailed below, or upon the defendant, who seeks to nullify the judgment nisi upon the ground of alleged error occur-

ring on the trial? Clearly, we think, upon defendant, who seeks to fasten error upon the trial court, rather than upon the state, which is the prevailing party, and in whose favor the presumption of right action operates.

While by statute the duty rests upon the clerk to make up the transcript, the duty is yet upon the appellant, perforce section 5309 and 5313, supra, to see to it that the clerk acts in a timely way. *State v. Pieski*, 248 Mo. 715, 154 S. W. 747. Moreover, it is plain that the clerk is powerless to supply a lost or destroyed document in the case. *Dougherty v. Ringo*, 7 Ky. Law Rep. 360; *Mayo v. Emery*, 103 Ky. 637, 45 S. W. 1048. Therefore again we say both the reason of the thing and the ruled cases (*Fellheimer v. Eagle*, 79 Ark. 201, 95 S. W. 139; *In re Heywood*, 154 Cal. 312, 97 Pac. 825; *Wolf v. Smith*, 6 Or. 73) saddle this duty upon the party who avers error in the trial nisi. In the case of *Fellheimer v. Eagle*, supra, the Supreme Court of Arkansas said:

"When a part of the record in the cause has been lost or destroyed before a transcript thereof has been made for this court, it is the duty of the appellant, by appropriate proceedings in the trial court, to reinstate the record."

Reading section 5309, supra, as construed by us (*State v. Pieski*, supra), in the light of section 5313, supra, we are constrained to hold that it was the duty of defendant in the instant case to perfect his appeal in the statutory 12 months set out in the section last supra, by supplying the lost indictment; and that, failing to do so, he has thereby failed to perfect his appeal within the time limited by law, and the motion of the state to dismiss ought to be sustained.

We are not saying that defendant could not, by a timely and appropriate proceeding or showing under the broad provisions of said section 5313, save dismissal or obtain time beyond the allotted 12 months within which to supply lost documents and enable him to perfect his appeal. But he has taken no steps, made no showing, and exhibited no diligence or interest whatever in this matter.

So far as our researches have extended, the peculiar facts of the instant case are res integra in this state. A case bearing in remote principle some analogy to the situation now before us is that of *Campbell v. Greer*, 197 Mo. 463, 95 S. W. 226, wherein the case, which was a civil suit, was reversed and remanded here because the pleadings were lost and no efforts had been made to supply them. We think it is enough to say as a reason for distinguishing the *Campbell-Greer Case* from the instant case that in the former there was no statute requiring the

perfecting of the appeal in a fixed time under penalty of dismissal for a failure to do so.

Let the appeal be dismissed.

All concur.

JOHNSON v. LEAZENBY. (No. 12983.)

(Kansas City Court of Appeals. Missouri.  
Nov. 10, 1919.)

WATERS AND WATER COURSES §118—OBSTRUCTION OF SURFACE WATERS.

The right to fight surface water by embanking against it may be exercised regardless of whether the act causes damages to adjoining proprietors.

Appeal from Circuit Court, Harrison County; G. W. Wanamaker, Judge.

Action by Orren L. Johnson against William H. Leazenby. Judgment for plaintiff and defendant appeals. Reversed.

A. S. Cumming, of Bethany, and J. W. Peery, of Albany, for appellant.

J. C. Wilson and Garland Wilson, both of Bethany, for respondent.

ELLISON, P. J. Plaintiff and defendant each own 80 acres of land. These tracts adjoin. This action was instituted to recover damages alleged to have accrued to plaintiff by defendant erecting an embankment on his own land near the line dividing the two tracts, so that it obstructed the flow of surface water off of plaintiff's land onto defendant's, causing such water to back up over plaintiff's land and destroy his crops. The judgment in the trial court was for plaintiff.

It is charged in the petition that the topography of the land belonging to these parties was such that the surface water falling upon, or coming upon, plaintiff's would naturally flow off of it onto the tract owned by defendant, and that defendant recklessly erected and maintained the embankment, dike, or dam on his own tract, near the dividing line between the two owners, so that it obstructed the flow of the surface water just mentioned, preventing it from going upon or over defendant's premises, and causing it to back upon plaintiff's tract and destroy his crops, consisting of wheat, corn, and hay.

At the close of the evidence defendant offered a peremptory instruction that the jury return a verdict for him. It was refused by the trial court. The effect of the theory whereby plaintiff seeks to justify his recovery is that, while an owner of land may protect it from surface water coming from adjoining lands by embankments, yet he must not do so in a "reckless" manner. The theory of defendant, sought to be applied by his peremptory instruction, is that he had an

absolute common-law right to protect his own premises from surface water coming from plaintiff's land. We do not understand it to be a part of his contention that in embanking against such surface water he may do so in a reckless manner, or that he may gather surface water in a body and discharge it on his neighbor. Confined to words only, plaintiff's theory recognizes defendant's right to protect his premises from surface water, provided he does not do it recklessly; but in applying this theory he destroys such right by insisting that if the effect of the embankment is to cause the water which formerly flowed over defendant's land to spread over plaintiff's land, the building of the embankment was a reckless act. In other words, plaintiff's position comes to this: that defendant has a right to dam against surface water coming off of plaintiff's land, but if he exercises such right it is a reckless act for which he may be enjoined or required to pay damages. A right, becoming a wrong if exercised, is a right denied, and, of course, is a worthless thing.

The right to fight surface water by embanking against it may be exercised regardless of whether the act causes damages to adjoining proprietors. In *Goll v. Railroad*, 271 Mo. 855, 685, 197 S. W. 244, 246 (which case really controls this), the following quotation from Angell on Water Courses is stated to be the law:

"A conterminous proprietor may change the situation or surface of his land by raising or filling it to a higher grade, by the construction of dikes, the erection of structures, or by other improvements which cause water to accumulate from natural causes on adjacent land and prevent it from passing off over the surface. Such consequences are the necessary result of the lawful appropriation of land, whatever may be its nature, and although they may cause detriment and loss to others."

In *Beauchamp v. Taylor*, 132 Mo. App. 92, 96, 111 S. W. 609, 611, the St. Louis Court of Appeals through Bland, J., quoted from *McCormick v. Railroad*, 57 Mo. 437, that—

"Persons may so occupy and improve their land, and use it for such purposes as they may see fit, either by grading or filling up low places, or by erecting buildings thereon, or by making any other improvement thereon, to make it fit for cultivation or other profitable or desirable enjoyment; and it makes no difference that the effect of such improvement is to change the flow of the surface water accumulating or falling on the surrounding country, so as to either increase or diminish the quantity of such water, which had previously flowed upon the land of the adjoining proprietors to their inconvenience or injury."

There is no evidence to show that the embankment was unnecessary. In fact, plaintiff's petition and case made at the trial show surface water formerly flowed off of

plaintiff's land across defendant's, and that the embankment stopped this flow. Nor was there any evidence to show any negligence or recklessness in the manner of construction. In *Goll v. Railroad*, supra, the Supreme Court said that—

"It has been said that one proprietor cannot collect the surface water on his premises and turn it in a stream onto his neighbor's land. But it has never been held to be negligence or unskillfulness at common law for one proprietor to embank against surface water flowing onto his land from the adjoining land, but, on the contrary, his right to so protect himself has been uniformly vindicated by that law."

It will not be necessary to comment on cases cited by plaintiff, since, rightly construed, they are not opposed to the views we have stated, but, if they were, we would be governed by the *Goll Case* as the latest utterance by the Supreme Court.

Defendant's peremptory instruction should have been given. The judgment should be reversed.

All concur.

### GIBSON v. CITY OF ST. JOSEPH. (No. 13337.)

(Kansas City Court of Appeals. Missouri.  
Nov. 10, 1919.)

#### 1. MUNICIPAL CORPORATIONS ⇨845(5)—NEG- LIGENCE OF CITY IN CONSTRUCTION OF SEWER JURY QUESTION.

In action against city for damages from overflow of surface water caused by alleged negligent construction of sewer, question of city's negligence held for jury.

#### 2. MUNICIPAL CORPORATIONS ⇨845(2)—AC- TION FOR NEGLIGENCE; NECESSITY OF BRING- ING IN OTHER PARTY.

In action against city for damages from overflow of surface water caused by alleged negligent construction of sewer, where school board had filled in grounds near point of overflow as protection against water in times of flood, court properly refused to require that school board be made a party, under Rev. St. 1909, § 8862, the school board not having been negligent, having merely exercised its rights to protect its property from overflowing surface water.

#### 3. WATERS AND WATER COURSES ⇨118— RIGHT TO PROTECT PROPERTY AGAINST OVER- FLOW OF SURFACE WATER.

Owner of land near point of overflow of surface waters caused by city's negligent construction of sewer was not negligent in filling in land as a protection against the water, but merely exercised its right to protect its property from overflowing surface water.

#### 4. MUNICIPAL CORPORATIONS ⇨831(2)—LIA- BILITY OF CITY FOR NEGLIGENT EXECUTION OF GOVERNMENTAL PLAN.

Where the proximate cause of damage to the citizen is not the governmental plan adopted

by the city, but is the negligent carrying out of such plan, the city is liable, not for adopting or carrying out the plan, but for the negligent execution of it.

**5. TRIAL §251(2)—APPLICABILITY TO ISSUES OF INSTRUCTIONS AS TO INJURIES FROM SEWER.**

Where the negligent manner in which a city brought a sewer to an end and in which provision was made for reception of water in a creek was relied on, a requested instruction, based on size and sufficiency of sewer as such, was properly refused.

**6. TRIAL §253(1)—PLAINTIFF'S INSTRUCTION DIRECTING VERDICT OMITTING DEFENSIVE MATTERS.**

Plaintiff's instruction, directing a verdict, was not objectionable by reason of omission of parts of defendant's defense; the rule being that no part of plaintiff's case can be omitted.

Appeal from Circuit Court, Buchanan County; Thos. B. Allen, Judge.

"Not to be officially published."

Action by Ernest R. Gibson against the City of St. Joseph. Judgment for plaintiff, and defendant appeals. Affirmed.

Stigall, Meyer & Hamm, of St. Joseph, for appellant.

Sam Wilcox and L. E. Thompson, both of St. Joseph, for respondent.

ELLISON, P. J. Plaintiff's action is based on alleged negligence of defendant city in the construction of a sewer along Black Snake creek in said city, whereby the water (especially after rainfall), which formerly had flowed along said creek, was caused to overflow onto adjoining lots. Plaintiff charged that such overflow destroyed his personal property. He recovered judgment in the trial court for \$400.

There was evidence to show that before the construction of the sewer the creek had sufficed for proper drainage for that immediate section of the city. The sewer, while built along the general course, did not follow the meandering of the creek. There were points of intersection, and about 600 feet from the last of these, the sewer came to a closed end, and at this point an opening, or intake, was negligently made on the side of the sewer to receive the water flowing down the creek to that point. There was evidence tending to show that the lower side of the intake was about six feet higher than the bottom of the creek, forming a "swimming hole" in the summer and a "skating pond" in the winter. There was likewise evidence tending to show that the intake was not of sufficient size to receive the water, the result being that in heavy rains overflows followed. The negligence of which complaint is made relates to the intake as thus constructed.

[1-3] We are fully satisfied that the foregoing synopsis of plaintiff's case entitled him to the opinion of the jury; and we have only to ascertain if there was a proper trial. It seems that there were public school grounds near the point of overflow over which the water would pass, and the school board filled in these grounds as a protection against the water in time of flood. Defendant claims that this act of the school board was the primary negligence causing the overflow which damaged plaintiff's property, and that therefore plaintiff should have made the school board a party defendant, and the city filed a motion to require plaintiff to make it such party as provided by section 8862, R. S. 1909. The court properly overruled this motion. In filling in its ground the board was not guilty of negligence, but exercised a right it had to protect its own property from overflowing surface water. *Goll v. Railroad*, 271 Mo. 655, 197 S. W. 244; *Johnson v. Leazenby*, 216 S. W. 49, decided this term.

The chief point made by the city in support of its nonliability is stated by counsel in these words:

"The construction of a sewer requires the exercise of judgment as to the time when and the mode in which it shall be undertaken and the best plan which the means at the disposal of the corporation renders it practicable to adopt, and is a quasi judicial act, for which the city is not liable."

An examination of the authorities cited shows that the courts have not agreed on the liability of a city when the case made is of the character suggested by this proposition of defendants. But in this state, beginning with *City of St. Louis v. Gurno*, 12 Mo. 414, the rulings (several not made without dissent) have shown that the adoption of a general plan of public improvement by the city authorities is a quasi judicial matter, which, though the carrying out of the plan will cause loss, is *damnum absque injuria*. See Judge Wagner's separate opinion in *Thurston v. City of St. Joseph*, 51 Mo. 510, 517, 11 Am. Rep. 463.

[4] But when the proximate cause of damage to the citizen is not the governmental plan adopted by the city, but is the negligent carrying out of such plan, the city is liable, not for adopting or carrying out the plan, but for the negligent execution of it. *Rychlicki v. City of St. Louis*, 98 Mo. 497, 501, 11 S. W. 1001, 4 L. R. A. 594, 14 Am. St. Rep. 651; *Gallagher v. Tipton*, 133 Mo. App. 557, 560, 113 S. W. 674. See case as to railroad embankments referred to in *Jones v. Railway Co.*, 84 Mo. 151.

Defendant has cited us to *Gulath v. City of St. Louis*, 179 Mo. 38, 77 S. W. 744, and *Ely v. St. Louis*, 181 Mo. 723, 81 S. W. 168. But the qualification to the rule we have stated is noted at page 56 of the first of these

cases (77 S. W. 748) and at page 730 of the last one (81 S. W. 169).

[5] Objection is urged that the trial court refused defendant's instruction B. It is addressed to the question of extraordinary flood, and is to the effect that if the sewer was adapted to carrying off all water and sewage under ordinary conditions there could be no recovery. The instruction is so worded as to leave a false issue to the jury. Plaintiff is not complaining as to the size and sufficiency of the sewer as such, but rather to the negligent manner in which it was brought to an end, and in which provision was made for the reception of water flowing in the creek. There are several superfluous allegations in the petition, but it states a cause of action along the lines we have considered the case.

[8] Objection to plaintiff's first instruction is that it directs a verdict and yet omits parts of defendant's defense. To this we respond with what we said in *Wyatt v. Central Coal & Coke Co.*, 209 S. W. 585, 586, viz.:

"In this connection defendant insists that there was error in plaintiff's first instruction, in that it purported to cover the whole case and directed a verdict thereon without including the hypothesis that the damage was done by the act of God. The rule is that nothing which is a part of plaintiff's case and necessary to its maintenance can be omitted from his instruction directing a verdict, even though the defendant has such omitted matter submitted in an instruction in his own behalf. *Hall v. Coal & Coke Co.*, 260 Mo. 351, 367, 168 S. W. 927, Ann. Cas. 1916C, 375; *Bellows v. Ins. Co.* (Sup.) 203 S. W. 978; *Delfosse v. Railway Co.* (Sup.) 201 S. W. 860; *Kerr v. Bush*, 198 Mo. App. 607, 617, 200 S. W. 672.

"Applying this, we find defendant's objection to the instruction not to be well founded. For the absence of the act of God is not a part of plaintiff's case. It is a matter of defense, and, as we have stated, was incorporated in defendant's instructions; and this notwithstanding it was not set up in the answer."

We find no error justifying a reversal, and hence affirm the judgment.  
All concur.

#### HIGHLEYMAN v. McDOWELL MOTOR CAR CO. (No. 13216.)

(Kansas City Court of Appeals. Missouri.  
Nov. 10, 1919.)

#### 1. BILLS AND NOTES §467(2)—PLEADING INDORSEMENT FOR VALUE AND WITHOUT NOTICE.

In action on note, petition, alleging that defendant "sold the said note to this plaintiff, and duly assigned same on the back thereof," and that "defendant is liable to this plaintiff as in-

dorser on said note," held, as against contention that plaintiff was a mere assignee, to allege that notes were indorsed to plaintiff for value and without notice; the inference being, since no date of indorsement was alleged, that indorsement was before maturity.

#### 2. PLEADING §34(6)—CONSTRUCTION AFTER VERDICT.

Petition must be liberally construed after verdict.

#### 3. BILLS AND NOTES §301—JUDGMENT FOR MAKER NOT A "DISCHARGE" OF PAYEE'S LIABILITY TO INDORSEE.

Judgment for maker in action by indorsee did not discharge payee indorser from liability to indorsee, under Rev. St. 1909, § 10090, cl. 3, providing that a person secondarily liable on the instrument is discharged by "discharge of a prior party, except when such discharge is had in bankruptcy proceedings," such statute referring to a discharge by some act or neglect of the creditor, and not a discharge by operation of law.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Discharge.]

#### 4. BILLS AND NOTES §301—JUDGMENT FOR MAKER NOT A DISCHARGE OF PAYEE'S LIABILITY TO INDORSEE; "RELEASE."

Judgment for maker in action by indorsee did not discharge payee indorser from liability to indorsee under Rev. St. 1909, § 10090, cl. 5, providing that a party secondarily liable on the instrument is discharged by a "release of the principal debtor, unless holder's right of recourse against the party secondarily liable is expressly reserved"; such statute referring to a release by creditor and not by operation of law.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Release.]

#### 5. BILLS AND NOTES §126—ATTORNEY'S FEE AND COSTS OF FORMER ACTION.

Indorsee, suing indorser on note providing for payment of "attorney's fee" "in case suit is brought," could not recover attorney's fee and costs of prior unsuccessful suit against maker, since note confines recovery to a "suit," meaning one suit, and to an "attorney's fee."

#### 6. BILLS AND NOTES §534—RECOVERY OF ATTORNEY'S FEE IN FORMER ACTION.

In indorsee's action on note against indorser, attorney's fee, paid by indorsee in unsuccessful suit against maker, cannot be recovered on strength of agreement whereby indorsee, who had been made party to former action, had been dismissed; the instant action being on note and not such agreement.

Appeal from Circuit Court, Pettis County; H. B. Shain, Judge.

Action by W. H. Highleyman against the McDowell Motor Car Company. Judgment for plaintiff, and defendant appeals. Affirmed on condition.



Fyke & Snider and Fenton Hume, all of Kansas City, for appellant.

R. S. Robertson, of Sedalia, for respondent.

BLAND, J. This is an action in three counts. The first and second seek to recover the amount of two promissory notes executed by one O. L. Boss to the McDowell Motor Car Company, and by it indorsed to the plaintiff. Prior to this action the plaintiff brought suit on the same notes against Boss and the defendant herein in the circuit court of Pettis county, Mo., where Boss lived, the Motor Car Company being a resident of Jackson county, Mo. An agreement in writing was entered into between plaintiff, Highleyman, and the defendant, Motor Car Company, that if plaintiff dismissed that suit as to the latter and proceeded against the maker, Boss, alone, and should fail to recover against Boss for any reason that did not discharge the Motor Car Company, and thereafter desired to prosecute an action against the Motor Car Company on account of any rights accruing to him under said notes, he could do so, and it would not be claimed as a defense thereto that a previous action had been brought against Boss to which the Motor Car Company was not a party, and that such subsequent action could be maintained in Pettis county. Plaintiff dismissed said suit as to the Motor Car Company, and proceeded against Boss alone. The jury, however, found that there were certain equities existing between Boss and the Motor Car Company which discharged Boss, and that plaintiff had knowledge of these equities when he purchased the notes. The jury returned a verdict for Boss, and the judgment in his favor became final.

Thereupon, pursuant to the agreement aforesaid, plaintiff brought the present action against defendant. Each of the notes was dated April 17, 1917; each was for the sum of \$100. The note mentioned in the first count was due on September 1, 1917, and the one covered by the second count became due October 1, 1917. Each of said notes contained a provision that—

"In case suit is brought to enforce payment hereof we hereby agree to pay to the payee reasonable attorney's fee, and such attorney's fee shall be included and taxed in the cost of suit."

And each of said counts sought to recover also \$50 as a reasonable attorney's fee for bringing the suits. The third count was to recover \$38.95, the costs of the suit against Boss.

The defendant set up the other suit and the fact that judgment was therein rendered in favor of the maker whereby he was discharged, and that the subject-matter thereof was the same as involved herein, and to which plaintiff herein was a party, and that thereby plaintiff's rights concerning the sub-

ject-matter of that, and also of this, suit were finally fixed, adjudicated, and determined, and that plaintiff was bound thereby, and the note and the maker thereof were discharged, and that by the same action this defendant was discharged and is not liable in this action.

The plaintiff, in reply, set up the agreement in writing heretofore mentioned. A jury was waived, and the cause was tried by the court, and a judgment rendered for plaintiff on all three counts, for \$115 and \$50 attorney's fee on each of the first and second counts, and for \$38.95 on the third count.

[1, 2] Defendant urges that the petition alleges that plaintiff took the notes from defendant as a mere assignee, and that therefore the assignment gave plaintiff nothing more than the assignor received from the maker, and, as the assignor's interest in the notes was worthless (the Boss case showing that there were equities that discharged the notes), that plaintiff took nothing by the assignment, whether or not he had notice of the equities. We need not pass upon the soundness of this contention, for the reason that we think the petition by fair inference alleges that the notes were indorsed to plaintiff for value and without notice. The petition must be liberally construed after verdict. It alleges:

"That on the — day of —, 1917, defendant, the McDowell Motor Car Company, for a valuable consideration sold the said note to this plaintiff, and duly assigned same on the back thereof, said note with said assignment on the back thereof being attached hereto, marked 'Exhibit A' and made a part hereof; that said note, among other things, provided that the indorsers, sureties, and guarantors severally waive presentment, demand, protest, and nonpayment. \* \* \* Plaintiff states that defendant is liable to this plaintiff as indorser on said note."

An allegation that the notes were assigned on the back thereof is equivalent to an allegation that they were indorsed. *Mundy v. Whittemore*, 15 Neb. 647, 19 N. W. 694; *Andrews v. Whitehead* (Tex. Civ. App.) 60 S. W. 800, 801, 802; *Davidson v. Powell*, 114 N. C. 575, 19 S. E. 601; *Sears v. Lantz et al.*, 47 Iowa, 658; *Henderson v. Ackelmire*, 59 Ind. 540; *Markey v. Corey*, 108 Mich. 184, 66 N. W. 493, 36 L. R. A. 117, 119, 120, 62 Am. St. Rep. 698. There being no date of the indorsements alleged, the inference from the allegation is that they were made before the maturity of the notes, and that the indorsee acquired the notes for value and in good faith. *Crawford v. Johnson*, 87 Mo. App. 478; *Eyermann v. Piron*, 151 Mo. 107, 116, 52 S. W. 229.

It is urged by defendant that, by virtue of clauses 3 and 5 of section 10090, R. S. 1909, it is discharged. Said section reads as follows:

"A person secondarily liable on the instrument is discharged: \* \* \* (3) By the discharge of a prior party, except when such discharge is had in bankruptcy proceedings; \* \* \* (5) by a release of the principal debtor, unless the holder's right of recourse against the party secondarily liable is expressly reserved."

[3, 4] It is contended that the judgment in the Boss case in his favor discharged him (the person primarily liable), and by virtue of clause 3, § 10080, R. S. 1909, defendant is likewise discharged. Clause 3 of said statute is merely declaratory of the law theretofore existing, and the discharge therein mentioned does not mean a discharge by operation of law, but a discharge by some act or neglect of the creditor. *Phillips v. Solomon*, 42 Ga. 192; *Post v. Losey*, 111 Ind. 74, 84, 12 N. E. 121, 60 Am. Rep. 677; *Guild v. Butler*, 122 Mass. 498, 23 Am. Rep. 378; 8 O. J. 617. Defendant is not released by virtue of clause 5 of the statute, for it is apparent that the release under that section is likewise to be made by the creditor and not by operation of law.

[5] However, it seems plain to us that there can be no recovery in this suit of attorney's fee and costs in the Boss case. The provision in the notes relating to the recovery of an attorney's fee confines the recovery to a "suit," that is, one suit, and the recovery is to be an "attorney's fee." Evidently the recovery of an attorney's fee is to be confined to the fee earned in the prosecution of the present suit, and not other suits, whether or not they be successfully prosecuted. Of course, there is no authority to tax in this case the court costs in the Boss case.

[6] Something is said by plaintiff about the agreement of dismissal of defendant in the Boss case affecting the liability of this defendant for attorney's fee in that case. It is sufficient to say in reply to this contention that this is not a suit on that agreement, but a suit on the notes, and the point must be decided in view of the contents of the notes alone.

If plaintiff shall within ten days remit the sum of \$88.95, to cover \$50 of the attorney's fee, which the evidence shows was incurred in the Boss case, and \$38.95, the amount of costs in that case, the judgment will be affirmed; otherwise it will be reversed, and the cause remanded.

All concur.

LORTON et al. v. TRAIL. (No. 13299.)  
(Kansas City Court of Appeals. Missouri.  
Nov. 10, 1919.)

1. BROKERS ⇨46—SALE TO PURCHASER PROCURED THROUGH THIRD PARTY.

Where land was not sold to procured purchaser by brokers' principal, but was sold to

third party and by third party to procured purchaser, brokers cannot recover commission without showing that brokers' principal, after having actually sold land to procured purchasers, fraudulently conveyed it to third party as a mere blind to deprive brokers of their commission.

2. BROKERS ⇨88(3)—FRAUD OF OWNER AFFECTING COMPENSATION JURY QUESTION.

In brokers' action for commission against owner, who instead of selling land to procured purchaser had sold it to third party, who in turn sold it to such procured purchaser, evidence held insufficient to warrant submission to jury of question of whether owner fraudulently sold land to third party as blind to deprive brokers of commissions.

3. EVIDENCE ⇨317(15)—DECLARATIONS NOT IN PRESENCE OF PARTY.

In brokers' action for commissions involving question of whether owner's sale to third party instead of to procured purchaser, who subsequently bought land from third party, was a blind for fraudulent purpose of depriving brokers of commission, statements of third party were not admissible to show fraud, where neither owner nor his agent was present at time statements were made.

4. BROKERS ⇨53—PROCURING CAUSE OF SALE ELEMENT OF RIGHT TO COMMISSIONS.

Before an agent is entitled to his commission, his endeavors must have been the procuring cause of the sale.

5. BROKERS ⇨82(4)—RECOVERY IN ACTION FOR COMMISSION LIMITED BY CONTRACT PLEADED.

Brokers suing for commission, having pleaded a contract, could not recover on another contract, entered into subsequently to that pleaded.

6. PLEADING ⇨381(1) — TRIAL ⇨251(1)—VARIANCE IN EVIDENCE AND INSTRUCTIONS.

Evidence and instructions should not be broader than the pleadings.

7. APPEAL AND ERROR ⇨171(1)—THEORY OF CASE ADOPTED IN LOWER COURT CONTROLLING.

Plaintiffs, having tried case in lower court on theory that new contract was entered into during conversation testified to, are bound by such theory and cannot claim, on appeal, that the conversation was merely language interpreting the contract pleaded.

Appeal from Circuit Court, Adair County; James A. Cooley, Judge.

"Not to be officially published."

Action by George Lorton and another against James Trail. Judgment for plaintiffs, and defendant appeals. Reversed and remanded.

Higbee & Mills, of Kirksville, for appellant. Weatherby & Frank, of Kirksville, for respondents.

BLAND, J. This is a suit for a real estate commission. Defendant was the owner of 80 acres of farm land and 10 acres of timber land in Adair county, Mo. Defendant, being anxious to sell his land, employed plaintiffs to find a buyer for his farm, and agreed with them that they should receive a cash commission of \$200 and the 10 acres of timber land for their services. The next day one of the plaintiffs showed the farm to one Alec Farr, and shortly thereafter defendant and Farr were introduced to each other by one of the plaintiffs in plaintiffs' office. Several conversations were had in plaintiffs' office between defendant and Farr in reference to the sale of the farm. Shortly after the negotiations had started defendant and Farr went to plaintiffs' office, and told one of them that Farr was very anxious to buy the farm, but that he wanted the 10 acres of timber land along with the farm if he made the deal, and defendant asked plaintiffs at the time to release the 10 acres so that Farr could get it. This was agreed to by plaintiffs, and thereupon an understanding was had between plaintiffs and the defendant that if Farr or either of his sons purchased the farm, plaintiffs were to have \$200 for their commission. This agreement was made for the reason that defendant told plaintiffs that Farr was trying to beat plaintiffs out of their commission, and that, "You boys was selling the farm, and you will get your \$200 regardless of which Farr gets it." Alec Farr was anxious to buy the farm, but his wife, who was to furnish a portion of the money, did not like it, as disclosed by defendant's evidence, and for this reason, according to defendant's evidence, Alec Farr did not buy the farm. All of the foregoing transactions occurred during the months of September and October, 1916.

Defendant introduced evidence tending to show that in November, 1916, John C. Mills, hearing that defendant had a farm for sale, entered into a written contract for the sale of the farm and timber land to Mills for the sum of \$7,000. On Thanksgiving Day Mills' son was hunting near the farm of Harry Farr, Alec Farr's son. Harry Farr testified that his farm was rough, and that he wanted a place to send his boys to school, and that Mills' son told him of his father's, John C. Mills' place, and that it was near a good school, and he asked Harry Farr to come and see his father in reference to it. Harry Farr afterwards looked at the place, and then went to see John C. Mills about buying it. A written contract was made between Mills and Harry Farr on December 9, 1916, wherein the farm and timber land was sold to Harry Farr by Mills for the sum of \$7,200. Harry Farr had no cash. He borrowed \$400 of the purchase price from the bank, \$1,200 of his father and \$2,400 of his mother, for which he gave notes, and gave a mortgage

back for \$3,200 to cover the balance of the purchase price. Harry Farr did not know defendant at the time he looked at the farm. Plaintiffs never made any effort to sell the land to Mills or Harry Farr. John C. Mills testified that at the time he sold the land to Harry Farr he had not yet received a deed from defendant, and for convenience and the saving of expense he asked defendant to convey the farm directly to Harry Farr, which defendant did on the 10th day of January, 1917. Thereafter Alec Farr, who had sold his own place, and his wife moved on the farm under an agreement to pay to Harry Farr rent therefor, which was paid. Alec Farr and his wife were living upon the place at the time of the trial of this case, which was on February 7, 1919. The Farris, Mills, and defendant denied that there was any collusion in any of these transactions.

The petition in the case alleges that defendant employed plaintiffs to sell the farm and timber lands, and to pay them for their services a commission of \$200, provided that they should find or produce a man to whom defendant could sell his said lands, and that thereafter plaintiffs found and produced a man to whom the defendant thereafter sold his said farm lands; that plaintiffs had demanded their commission of defendant, and defendant has refused to pay the same. The answer was a general denial. The jury found a verdict in favor of plaintiffs in the sum of \$200, and defendant has appealed.

[1] It is contended by the defendant that the evidence fails to prove the cause of action alleged, and among the reasons assigned for this contention is that there was no fraud proven. The undisputed evidence in this case shows that the land was not sold to Alec Farr or to one of his sons, but to John C. Mills; and, unless plaintiffs have shown some fraud practiced by the defendant, wherein defendant, after having actually sold the property to Alec Farr, or one of his sons, conveyed the land to Mills as a mere blind or form for the purpose of making it appear that the land was not so sold, so that plaintiffs could be deprived of their commission, then plaintiffs have failed to prove a case. There is no contention that plaintiffs attempted to sell the lands to Mills.

Plaintiffs urge that the following facts developed in the evidence tend to show fraud; that defendant's original price for his farm land was \$7,200, which price was quoted to Alec Farr; that the property was sold to Mills for \$7,000, or \$200 less than was demanded of Alec Farr; that Mills afterwards sold the farm for \$7,200, the same price that defendant was demanding of Alec Farr; that Harry Farr had no money to buy defendant's farm, but borrowed the money, \$3,600 of it, from his parents to pay most of that part of it which was to be paid in cash; that Alec Farr had sold his farm in another part

of the county, and immediately moved upon defendant's farm after his son bought it; that although defendant's evidence shows that Harry Farr borrowed \$1,200 of his father and gave a note therefor, his father did not list the same in his tax assessment, assigning as an excuse that he was not in possession of the note when the assessment was made; that Alec Farr stated in the presence of one Bragg that "it took good ones to beat him and John Mills," and "it takes a smart man to head off him and John C. Mills."

[2, 3] We think that the evidence in this case fails to make out a case of fraud for the jury. At most it merely raises a suspicion of fraud. There is no evidence whatever of a substantial nature to show that the buying of the farm by Mills and the selling of the same to Harry Farr had any element of fraud connected with it. The evidence shows no ground for anything but a mere suspicion of bad faith in the transaction. It might be a suspicious circumstance that defendant conveyed the land to Mills for \$200 less than he offered it to Farr, and that Harry Farr had no money, and was required to borrow the money, a portion of which came from his parents, to buy the place, and that Alec Farr and his wife moved upon the farm and occupied the same. Failure to list notes in tax assessment lists is unfortunately an extremely common occurrence. The statement of Alec Farr to Bragg that "it took good ones to beat him and John Mills," and "it takes a smart man to head off him and John C. Mills," was made by Alec Farr after the purchase of the land by Harry Farr, and at a time when Bragg was discussing with Alec Farr the matter of commission to plaintiffs. The evidence does not disclose in what way these remarks were made by Alec Farr, or in what connection they were made in reference to the commission, except that the commission was being discussed at the time the remarks were made, but how the matter came up and what was meant is not explained, but is left to conjecture. The statements were not made in the presence of defendant or his agent, and were not admissible had they been objected to. They are in evidence without objection. It is apparent from the circumstances that they are of little, if any, probative force, and, taken in connection with all the other facts, do not make out a case of fraud. The presumption of fair dealing cannot be overcome by such unsubstantial evidence. While the facts re-

lied upon by plaintiffs to show fraud may raise some suspicion that there was fraud actually committed, they are all perfectly consistent with honest dealing, and, standing alone, without any evidence of a substantial nature to show that fraud was actually committed, were not sufficient to authorize the submission of the case to the jury by the court, and the court should have sustained defendant's demurrer to the evidence at the close of all the evidence. *Priest v. Way*, 87 Mo. 16; *Savings Bank v. Kingsbury Bros.*, 84 Mo. App. 82.

[4-7] We think instruction No. 1 should not be given. Before an agent is entitled to his commission, his endeavors must have been the procuring cause of the sale. Instruction No. 2 does not have the jury find that Harry Farr or his father, through a fraudulent transaction, purchased the farm from the defendant, and that plaintiffs were the procuring cause of the sale. The instruction directs a verdict in the event the contract claimed by plaintiffs was made without requiring a finding of any other facts. Plaintiffs may not show under the petition that they were to get their commission whether the land was sold to Alec Farr or any of his sons. The conversation in which defendant told plaintiffs that they were to get their commission in case the farm was sold to Alec Farr or any of his sons might be construed as language interpreting the contract of employment, and not a new contract, and for that reason competent evidence to show that, under the contract first made, the parties considered that, should Alec Farr or any of his sons purchase the land under the circumstances existing, plaintiffs would be the procuring cause of the sale. However, plaintiffs did not try their case upon any such theory. Plaintiffs' instructions show that they treated the conversation wherein they were to get the commission if either Farr or any of his sons bought the land as a contract within itself. It is apparent that this is not the contract pleaded (*Whitelock v. Beach*, 174 Mo. App. 428, 160 S. W. 815; *State ex rel. v. Ellison*, 270 Mo. 645, 195 S. W. 722), and the evidence and instructions were broader than the pleadings, which is not allowed (*Degonia v. St. Louis, I. M. & S. R. Co.*, 224 Mo. 564, 589, 123 S. W. 807). Plaintiffs have placed their construction upon the agreement, and are bound by the same.

The judgment is reversed, and the cause remanded.

All concur.

## CRIDER v. SUTHERLAND et al.

(Court of Appeals of Kentucky. Oct. 14, 1919.  
Rehearing Denied Dec. 18, 1919.)

1. JUDGMENT  $\S$ 518 — WHAT CONSTITUTES COLLATERAL ATTACK.

Attack on judgment is collateral where plaintiff in ejectment replies that judgment relied on by defendants as link in title was void for want of jurisdiction.

2. JUDGMENT  $\S$ 497(1)—TO WARRANT COLLATERAL ATTACK, WANT OF JURISDICTION MUST APPEAR ON RECORD.

To warrant collateral attack on judgment of a court of general jurisdiction, want of jurisdiction must appear on the record; and this in case of judgments against infants or lunatics, as well as those against adults of sound mind.

3. JUDGMENT  $\S$ 949(2)—PLEADING COLLATERALLY ATTACKING JUDGMENT MUST ALLEGE WANT OF JURISDICTION SHOWN BY RECORD.

A pleading collaterally attacking a judgment of a court of general jurisdiction is insufficient if merely alleging absence of a jurisdictional fact; it must allege that the record affirmatively shows such absence.

4. PLEADING  $\S$ 8(15)—DEEDS OBTAINED BY FRAUD CONCLUSION OF LAW.

Pleading merely that deeds were obtained by fraud, without alleging the facts, is a conclusion of law, which is insufficient.

5. JUDGMENT  $\S$ 418—DIRECT ATTACK FOR ABSENCE OF JURISDICTIONAL FACT NOT APPEARING IN RECORD.

Where absence of jurisdictional fact rendering judgment void does not appear in the record of the suit in which it was rendered, proper remedy is suit to set aside the judgment, or resort to other form of direct attack; it being enough to allege and show such absence.

Appeal from Circuit Court, Graves County.

Action by Mrs. Nannie Crider against T. J. Sutherland and others. Judgment for defendants, and plaintiff appeals. Affirmed.

Webb & Weaks, of Mayfield, for appellant.  
W. J. Webb, of Mayfield, for appellees.

CLAY, C. Nannie Crider brought this suit against T. J. Sutherland and others to recover a small tract of land situated in Graves county. The defendants pleaded in substance that they acquired plaintiff's title to the property by a commissioner's deed executed pursuant to a judgment rendered against her. Plaintiff replied that she had been adjudged and was of unsound mind at the time of the rendition of the judgment against her; that at said time she had no committee, nor father, nor guardian, but was a married woman and had a husband; that

no summons was ever executed on her husband, or on any other person for her, except on the plaintiff herself; that no guardian ad litem was ever appointed to make defense, nor did any guardian ad litem ever make any defense for her; and that by reason of these facts the judgment and the deed executed pursuant thereto were void and passed no title to the defendants. In another paragraph, she alleged that the deeds, through which the defendants claimed title, were obtained by fraud. The defendants demurred to the reply, and the demurrer was sustained, and judgment rendered in favor of defendants. Plaintiff appeals.

[1] This being an action in ejectment, and defendants having relied on the judgment in question as constituting a link in their chain of title, and plaintiff having replied that the judgment was void for want of jurisdiction, the attack on the judgment was collateral and not direct. *Dennis v. Alves*, 132 Ky. 345, 113 S. W. 483; *Id.*, 117 S. W. 287.

[2, 3] Judgments rendered in a court of general jurisdiction cannot be collaterally attacked unless the want of jurisdiction appears on the record, and this rule applies to infants and lunatics as well as to adults and persons of sound mind. Furthermore, a pleading making such an attack is not sufficient, which merely alleges the absence of the jurisdictional fact; it must go further and allege that the record affirmatively shows the absence of such fact. Hence, a pleading such as the reply in this case, which did not allege what the record showed on the question but relied solely on facts outside of the record to show a want of jurisdiction, was not sufficient. *Ratliff v. Childers*, 178 Ky. 102, 198 S. W. 718; *Anderson's Committee v. Anderson's Adm'r*, 161 Ky. 18, 170 S. W. 213, 14 R. A. 1915C, 581; *Bamberger v. Green*, 146 Ky. 258, 142 S. W. 384; *Dennis v. Alves*, *supra*; *Segal v. Relsert*, 128 Ky. 117, 107 S. W. 747, 32 Ky. Law Rep. 901; *Maysville & Big Sandy R. Co. v. Ball*, 108 Ky. 241, 56 S. W. 188, 21 Ky. Law Rep. 1693.

[4] Nor was that paragraph of the reply sufficient which alleged merely that certain deeds were obtained by fraud. This allegation was but a conclusion of law. The facts constituting the fraud should have been alleged.

[5] Where the absence of the jurisdictional fact does not affirmatively appear in the record in which the judgment was rendered, the proper remedy is to bring a suit for the purpose of setting aside the judgment, or to resort to other forms of direct attack. *Sublett v. Gardner*, 144 Ky. 190, 137 S. W. 864. In such a case it is only necessary to allege and show the absence of the jurisdictional fact.

Judgment affirmed.

## LEFFINGWELL et al. v. EVANS.

## EVANS v. CORNETT.

(Court of Appeals of Kentucky. Oct. 14, 1919.  
Rehearing Denied Dec. 19, 1919.)

1. CORPORATIONS ⇨86—INCREASE OF CAPITAL STOCK ON FAILURE TO COMPLY WITH STATUTE VOID.

Where the whole authorized capital stock of a corporation had been issued, and was then outstanding and held by its officers, an issue of additional shares without compliance with Ky. St. § 553, requiring the signing of the minutes on the books, the vote, or consent of the stockholders representing two-thirds of the capital stock after notice of proposed increase, etc., was void.

2. CORPORATIONS ⇨108—HOLDER OF STOCK WRONGFULLY ISSUED MAY SUE CORPORATION OR OFFICERS.

Shares of corporate stock are choses in action, and one who receives and transfers them in good faith warrants only his own title, and not the legality of their issue, and the holder in good faith, whether immediate or remote, may maintain an action against the corporation or its officers for damages sustained by the wrongful issuance of the stock, but cannot recover from his bona fide transferor.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Chose in Action.]

3. CORPORATIONS ⇨108—DAMAGES RECOVERABLE BY PURCHASER OF UNLAWFULLY ISSUED STOCK.

The amount of recovery against a corporation or its officers by a bona fide purchaser of corporate stock, void because an overissue, will depend upon the amount plaintiff had received in dividends or from other sources as the result of his purchasing the stock and upon the value of stock in the corporation at the time of purchase.

4. CORPORATIONS ⇨108 — BONA FIDE PURCHASER OF OVERISSUED STOCK MUST SUE CORPORATION OR OFFICERS PROMPTLY.

A bona fide purchaser of corporate stock, void because an overissue, must not unreasonably delay bringing of an action against the corporation or its officers for relief on account of loss, or his laches will bar his right of recovery.

Appeal from Circuit Court, Rowan County.

Action by B. W. Cornett against Drew Evans, in which the defendant filed answer and cross-petition against D. A. Leffingwell and others, as officers of the Leon Stave Company, a corporation. Judgment was entered against such officers in favor of defendant, and also in favor of plaintiff and against defendant, and both the defendant Evans and the said officers appeal. Judgment reversed.

Dysard & Caldwell, of Ashland, H. M. Collins, of Frankfort, and Clay & Hogs, of Morehead, for appellants.

B. S. Wilson, of Ashland, and C. W. Goodpaster, of Owingsville, for appellees.

SAMPSON, J. The Leon Stave Company was a corporation, organized under the laws of this commonwealth on October 11, 1901, with a capital of \$12,000, divided into 120 shares, of the par value of \$100 each. By its articles of incorporation it was to begin business on Monday, October 21, 1901, and to continue for a period of 10 years. Its business was to be conducted by a board of three directors. In January, 1910, some one suggested that the corporation increase its capital stock from \$12,000 to \$13,000, and issue the \$1,000 increase in capital stock to Drew Evans, who was foreman at the mills, then located in Rowan county. Accordingly a note or minute was made on the books of the company, which reads as follows:

"We also have increased our capital stock from twelve thousand to thirteen thousand. We issue the one thousand increase to Drew Evans, our head man on the grounds."

Some time that year a certificate for 10 shares of stock was issued by the Leon Stave Company to Drew Evans, for which Evans paid the company \$1,000 in cash. Before that time Evans was not a stockholder or an officer of the company, but he was foreman at the mills or yards. Evans continued to manage the mills and to hold the pretended stock for about two years, and until December, 1911, when he sold same to Cornett for the sum of \$1,000, and Cornett superseded Evans as foreman at the mills. For some months after Cornett purchased the stock, the mill continued to operate, although the corporation had expired by the terms of its charter at the time Cornett purchased the stock from Evans. When the corporation began to wind up its business, and it became apparent that there would be no assets, and that the stockholders would receive nothing, Cornett brought an action against Evans to recover the \$1,000 which he had paid for the stock in the company, alleging that Evans had fraudulently misrepresented the value of the stock and the assets of the company, and that Cornett had been deceived and misled by such statements, and induced thereby to purchase the stock.

Issue was joined and evidence taken. While taking the deposition of one of the officers of the corporation, it developed that the corporation had a capital stock of only \$12,000, instead of \$13,000, that its capital stock was never increased, and that the \$1,000 worth of stock issued to Evans and transferred by Evans to Cornett was in fact never authorized, the company not having complied with section 553, Kentucky Statutes,

with reference to increasing its capital stock. Cornett then filed an amended petition, in which he charged that Evans had obtained his money without consideration; that Evans did not own any stock in the Leon Stave Company, but falsely pretended and represented that he did own 10 shares therein, of the value of \$1,000, when in truth and in fact he did not own any stock in said company; that the 10 pretended shares which Evans held, and which he undertook to transfer to Cornett, were overissued stock, and therefore of no force or effect and of no value. Evans answered, admitting that the stock was overissued by the company, but denying his knowledge of that fact at the time of the sale of the stock to Cornett, and also denying any intention to defraud or deceive Cornett. The answer was made a cross-petition against the officers and directors of the stave company, Evans averring that the company had wrongfully and without authority issued the stock to him and obtained from him \$1,000 without consideration. Evans sought to recover of the officers of the corporation the money thus paid it, with interest.

To this answer and cross-petition the officers of the company filed a demurrer, which was overruled by the court, whereupon the cross-defendants filed an answer, setting forth in detail how the 10 shares of capital stock issued to Evans were originally issued, and averred that the stock was regular and valid; that Evans and Cornett, during all the time the stock was held by them, had received and used dividends from the company and enjoyed the privileges and powers of stockholders in the corporation; that the business of the corporation had been finally wound up and closed; that the money paid by Evans for the stock was received by the corporation, placed in its treasury, and used by the company, and not by any of the cross-defendants; and that Evans and Cornett, as stockholders, had received the same benefit from the \$1,000 thus paid for the stock as any other stockholder, including the cross-defendants.

To this answer of the cross-defendants a general demurrer was filed and sustained, and, the cross-defendants declining to plead further, judgment was entered against the officers of the company in favor of Evans for \$1,000, with interest, and also judgment in favor of Cornett against Evans for \$1,000, with interest, and both Evans and the officers of the stave company appeal.

[1] It can hardly be doubted that the overissue of stock made by the officers of the stave company was void. It did not pretend to comply with the requirements of section 553, Kentucky Statutes, in issuing the stock. The minute on the books of the company was not even signed, and, had it been signed, it would not have amounted to a compliance

with the statutes. To increase its capital stock a corporation must proceed much in the same manner as in organizing a corporation. The capital stock of a corporation may be increased only by the vote or consent of the stockholders representing two-thirds of the capital stock, after notice of the proposed increase has been mailed to the address of each stockholder at least 20 days before the meeting is held, provided a statement of the increase shall be signed and acknowledged by the president and a majority of the directors, and filed and recorded in the same manner as the articles of incorporation. None of these things were done by the Leon Stave Company before it issued and sold the 10 shares of its capital stock to Evans for \$1,000. The whole authorized capital stock of the company (\$12,000) had been issued, and was then outstanding and held by the officers of the company, and the 10 shares issued to Evans was an overissue wholly unauthorized and void. *Wilson v. Joplin et al.*, 11 Ky. Law Rep. 308; *Allen v. South Boston R. Co.*, 150 Mass. 200, 22 N. E. 917, 5 L. R. A. 717, 15 Am. St. Rep. 185.

"It is a well-established principle that any issue of stock by a corporation in excess of the amount prescribed or limited by its charter is ultra vires, and the stock so issued is void, even in the hands of a bona fide purchaser for value. \* \* \* Although overissued stock is void, even in the hands of a bona fide holder, yet a right of action may exist against the corporation, and a holder of the certificate, who has taken it for value and without knowledge of any fact tending to show its invalidity, is entitled to reimbursement for any loss he may have incurred in reliance upon the validity of the certificate." 7 R. C. L. p. 218.

See, also, note to case of *First Avenue Land Co. v. Parker*, 87 Am. St. Rep. 847.

Cook on Corporations (5th Ed.) p. 639, says:

"Certificates of stock issued in excess of certificates that represent the full authorized capital stock of a corporation, represent overissued stock. Such stock is spurious and wholly void. This is the settled law, and it prevails equally whether the overissue is the result of accident, or mistake or want of knowledge of the law, or is due to fraud or intentional wrongdoing. \* \* \* Overissued stock, no matter how overissued, represents nothing, and is wholly and entirely valueless and void."

Thompson on Corporations (2d Ed.) vol. 4, p. 135, states the rule as follows:

"The rule is well settled that the certificates of stock issued in excess of the limit fixed by the corporate charter are void, and the holder of them is entitled to none of the rights and subject to none of the liabilities of the holder of authorized stock. The doctrine approved by the Supreme Court of Wisconsin is that overissued stock, no matter how the overissue is made, represents nothing and is entirely valueless and void, and certificates representing such stock are simply so much waste paper, and

the person holding them is not a stockholder. \* \* \* The overissue is void, though the issue was the unanimous act of the stockholders under an honest apprehension as to their powers. \* \* \* All such stock is void, even in the hands of bona fide purchasers for value."

"A." [2] Shares of stock in a corporation are generally held to be choses in action, and one who receives such shares in good faith and transfers them in like manner is held to warrant only his own title, and not the power or authority of the corporation to issue such stock. It has been held that, where the vendor of stock has knowledge of the fact that the stock sold is a part of an overissue, there is no implied warranty, further than that the certificates were in the usual form, regular on their face, and were issued by the duly constituted officers of the company, and were sealed with the genuine seal of the company. The vendor does not impliedly warrant that the stock is not part of a fraudulent overissue by the officers of the company. *People's Bank v. Kurtz*, 99 Pa. 344, 44 Am. Rep. 112.

The rule is different, however, when the vendor of the stock does not act in good faith. In such case the vendee of fraudulent or illegal stock may maintain an action against his vendor, if the latter was a party to the fraudulent issue, and may recover the amount paid. *Fosdick v. Sturges*, 1 Biss. 255, Fed. Cas. No. 4956. In the case of *People's Bank v. Kurtz*, supra, the court said:

"Shares of stock in the corporation are choses in action, giving a right to dividends and an interest in the capital. The certificate is the evidence of such ownership, and there can be no doubt that if the certificate is forged, or the holder is not such bona fide, so that he has no claim on the corporation, the vendor would be liable to his vendee on the implied warranty. \* \* \* Where, however, there has been a fraudulent overissue of stock, evidenced by certificate under the genuine seal of the corporation, the case presented is somewhat different. It has been settled that a corporation is liable to bona fide holders of such fraudulent certificates, because, like individuals, they are responsible for the fraudulent exercise of the power intrusted by them to their officers or agents."

It appears from the record that Evans, in the purchase and transfer of the stock to Cornett, acted in good faith and without knowledge of any defect in his title or want of power in the corporation to issue the stock. Cornett was a bona fide purchaser for value. He had not been connected with the corporation before his purchase of the stock

from Evans, and knew nothing of its financial condition or charter provisions. The stock was regular on its face, and bore the signature of the officers of the corporation and the corporate seal. In such case, the general rule, as stated by text-writers and courts, allows the holder in good faith, whether immediate or remote, to maintain an action against the corporation or its officers issuing or causing stock to issue for the damages sustained by reason of the wrongful issue of the stock, but does not allow the holder of such stock to recover of his bona fide transferor. The general rule is well stated in *Cook on Corporations* (6th Ed.) § 296, as follows:

"In the absence of fraud, the purchaser of overissued and spurious stock cannot hold his vendor liable thereon. The bona fide vendor can be held to warrant only his own title to the shares, not the right of the corporation to issue them. If he came by them honestly, and sells them in good faith, there is no recourse to him, even though they turn out to be spurious."

[3] Applying this rule, Cornett had no cause of action against Evans, but was entitled seasonably to maintain an action for damages against the officers of the corporation, who had issued or allowed to be issued the stock which Evans purchased and transferred to Cornett, if Cornett has sustained damages. The amount of his recovery will depend upon what sum or sums Cornett has received in dividends or from other sources as a result of his purchase of the stock, and upon the value of stock in the corporation at the time he purchased the same. The trial court erred to the prejudice of appellant Evans in failing to sustain his demurrer to the petition, as amended of Cornett, and in failing to sustain the demurrer of Leffingwell et al. to the cross-petition of Evans.

[4] A plea of limitation was included in the answer of Leffingwell et al. to the cross-petition of Evans, but there was no such plea, so far as the record discloses, made by the cross-defendants to the right of Cornett to maintain an action, nor, indeed, was it necessary, because Cornett was not seeking to recover of the officers of the corporation, but only of Evans. It is therefore unnecessary to consider this plea further than to say that one must not unreasonably delay the bringing of an action for relief on account of loss occasioned through an overissue of stock; if he does, his laches will bar his right of recovery.

Judgment reversed for proceedings consistent with this opinion.



## WENDT et al. v. TUCKER.

(Court of Appeals of Kentucky. Nov. 7, 1919.  
Rehearing Denied Dec. 19, 1919.)

**1. APPEAL AND ERROR ⇨38—JURISDICTION  
OF COURT OF APPEALS ON ENFORCEMENT  
OF STATUTORY LIEN.**

Under Ky. St. § 950, the Court of Appeals has jurisdiction of an appeal in an action to enforce a statutory lien on realty wherein plaintiff has been denied a lien for part of his claim, though the amount of money involved is only \$39.68.

**2. MUNICIPAL CORPORATIONS ⇨282(1)—POWER TO ORDER STREET IMPROVED INCLUDES POWER TO ADOPT PLAN.**

The power to order a street improved carries with it, as a necessary incident, the additional power to adopt such plans and specifications as are reasonably necessary to make the street not only safe and suitable, but substantial and permanent.

**3. MUNICIPAL CORPORATIONS ⇨460—DRAIN AND CATCH-BASINS AS NECESSARY TO STREET IMPROVEMENT.**

Drain and catch-basins constructed by a city as incident to a street improvement adjacent to a ravine held not a separate improvement not provided for by the ordinance, but a necessary and indispensable part of the street itself, so that their cost was properly chargeable to abutting property owners, though the ordinance did not in terms provide for them.

**4. MUNICIPAL CORPORATIONS ⇨460—DRAIN IN PRIVATE PROPERTY ON STREET IMPROVEMENT.**

It is immaterial on the question whether a drain was part of a street improvement, and therefore chargeable to abutting owners, though the ordinance authorizing the improvement did not expressly provide for its construction, that such drain was laid in adjoining property instead of in the street proper.

**5. MUNICIPAL CORPORATIONS ⇨469(1)—DISTRIBUTION OF COST OF IMPROVEMENT AMONG ABUTTING OWNERS.**

The portion of a street ordered to be improved by a city of the fourth class under Ky. St. § 3572, was the unit of the improvement, and its entire cost was chargeable against abutting owners according to the number of their front feet, though the topographical conditions made the cost at some places greater than at others.

Quin, J., dissenting.

Appeal from Circuit Court, Campbell County.

Suit by W. R. Tucker against Louis H. Wendt, the City of Dayton, and others. From judgment for plaintiff, the named defendants' appeal. Reversed and remanded.

Wm. U. Warren and C. W. Yungblut, both of Newport, for appellants.

Hubbard Schwartz, of Newport, for appellee.

CLAY, C. The grade of Terrace avenue in the city of Dayton was quite steep. For a long distance a portion of the east side of the roadway was occupied by a ravine, which also extended beyond the roadway for a few feet. This ravine was several feet in depth, and the width of that portion in the roadway varied from about 3 or 4 feet in certain places to 15 feet or more in other places. The board of council of the city of Dayton passed a resolution declaring the necessity for the improvement of Terrace avenue by original construction, with combined concrete curb and gutter and bituminous macadam roadway and cement sidewalk, and directing the city engineer to report the grade for said street, together with plans and specifications and an estimate of the cost thereof. The plans and specifications prepared by the city engineer provided for a fill or embankment, and for 500 feet of drainpipe to carry off the water. An ordinance was passed approving the plans and specifications, and ordering the improvements. Upon completion of the work, the cost thereof was assessed against the abutting property holders.

W. R. Tucker, one of the abutting property holders, brought suit to enjoin the issue of apportionment warrants by the city to the contractor, Louis H. Wendt. Wendt answered and set up his lien. On final hearing the chancellor adjudged that the cost of the drain and catch-basins could not be assessed against the property owners, but that the city was liable therefor. Following this ruling, Wendt was adjudged a lien on Tucker's property for the sum of \$172.82, and was given judgment against the city for \$39.68. Wendt and the city appeal.

[1] The action being one to enforce a statutory lien on real estate, and Wendt having been denied a lien for a portion of his claim, we have jurisdiction of the appeal, although the amount of money involved is only \$39.68. Section 950, Kentucky Statutes.

[2, 3] In support of the judgment it is argued that the drain was a separate improvement not provided for by the ordinance; that it was not laid in the roadway, but on private property; that it was not built in front of Tucker's property; and that Tucker had already been assessed \$1 per front foot for a sewer theretofore constructed by the city. We may concede that if the drain in question was, as a matter of fact, a part of the sewerage system of the city, and therefore a separate improvement, an ordinance providing for its construction would have been necessary before the cost thereof could have been assessed against the property owners. Manifestly, the power to order a street improved carried with it, as a necessary incident, the additional power to adopt such plans and specifications as are reasonably necessary to make the street not only safe and suitable, but substantial and permanent.

Because of the location of the ravine in and along the street in question, only two plans for the proper construction of the street were possible. One was to fill that portion of the ravine occupied by the roadway, and then build a retaining wall 10 or 12 feet in height. The other was to protect the roadway by a fill or embankment, extending beyond the line of the roadway, and then take such steps as were necessary to prevent the water, which theretofore flowed through the ravine, from undermining and destroying the roadway. The latter plan was adopted and approved by the council because it was much cheaper than the erection of the retaining wall. The plans and specifications called for the drain and 4,000 cubic yards of earth with which to make the fill. This earth was used to make the fill within the line of roadway. No charge was made for the fill extending beyond the roadway. The only charge was for the drainpipe and catch-basins, which were necessary to take the place of the natural drain. Had the city constructed the street in and along the ravine, which was a natural water course, without adopting any means to prevent the water from washing the street away, it would have been guilty of gross negligence. In providing for the drain and catch-basins in the place of the natural water course, its purpose was not to construct either a sanitary or storm water sewer for the benefit of the adjoining property owners, but to provide a means for protecting and preserving the street itself. In view of these circumstances, we do not regard the drain and catch-basins as a separate improvement, but as a necessary and indispensable part of the street itself. *Cone v. City of Hartford*, 28 Conn. 363; *Gates v. City of Grand Rapids*, 134 Mich. 96, 95 N. W. 998; *Kirkland v. Board of Public Works*, 142 Ind. 123, 41 N. E. 374. Though the ordinance did not in terms provide for the construction of the drain, it did provide for the improvement of the street in accordance with the plans and specifications of the city engineer. These specifications provide for the drain, and the catch-basins were necessary to make the drain effective. That being true, we conclude that the cost of the drain and catch-basins was properly chargeable to the abutting property owners, although the ordinance did not in terms provide for their construction.

[4] We do not regard as material the fact that the drain was laid in the adjoining property instead of in the street proper. This was done with the consent of the abutting property owners, who thus dedicated their lands to the public use, and the plan adopted was cheaper and better than if the drain had been laid in the street itself.

[5] Nor is there any merit in the contention that Tucker is not chargeable with any portion of the cost of the drain, because his

property did not abut that portion of the improvement. Dayton is a city of the fourth class, and the board of council had the power to order the improvement of any street or any portion thereof. Section 3572, Kentucky Statutes. Here, Terrace avenue was ordered to be improved from the south line of the C. & O. Railway to the south corporation line. Hence that portion of the street ordered to be improved was the unit, and the entire cost of the improvement was chargeable against the abutting property owners according to the number of front feet owned by them, although the topographical conditions were such as to make the cost at some places greater than at others.

It follows that Wendt should have been adjudged a lien on Tucker's property for the sum of \$212.50, and that no judgment should have been rendered against the city.

Judgment reversed, and cause remanded for proceedings consistent with this opinion.

QUIN, J., dissenting.

#### LOUISVILLE & N. R. CO. v. NIELD.

(Court of Appeals of Kentucky. Oct. 31, 1919.  
Rehearing Denied Dec. 19, 1919.)

#### 1. CORPORATIONS §252—STOCKHOLDERS' LIABILITY ON RECOVERY OF JUDGMENT AGAINST CORPORATION.

Generally a creditor of a corporation cannot have equitable relief against its shareholders until he has prosecuted his demand to a judgment at law against the corporation, unless circumstances existed excusing him from doing so.

#### 2. CORPORATIONS §254—STOCKHOLDERS' LIABILITY ON DE FACTO DISSOLUTION.

A de facto dissolution of a corporation will excuse creditor from exhausting legal remedies and recovering a judgment at law against the corporation before maintaining suit upon the equitable liability of stockholder; a de jure dissolution being unnecessary.

#### 3. CORPORATIONS §252 — LIABILITY OF STOCKHOLDER, FUTILITY OF ACTION AGAINST CORPORATION NECESSARY TO.

Corporation's creditor cannot establish equitable liability of stockholder without showing that a suit at law against the corporation would be futile.

#### 4. APPEAL AND ERROR §917(1)—ON REVIEW OF DEMURRER, TRUTH OF ALLEGATIONS OF PETITION ASSUMED.

Appellate court, in reviewing action of lower court in sustaining demurrers to petition, will assume that the allegations of the petition are true.

**5. CORPORATIONS ¶252 — PRIOR ACTION AGAINST CORPORATION NECESSARY TO ACTION AGAINST STOCKHOLDERS.**

Where there is only one creditor of a corporation and only one stockholder, and the stockholder has by his fraudulent act made an independent action against the corporation an impracticable and vain undertaking, involving circuity of action and unnecessary delay and expense, creditor may sue stockholder on his equitable liability without first bringing action against the corporation.

**6. CORPORATIONS ¶265(6) — CORPORATION PARTY TO SUIT TO ESTABLISH STOCKHOLDERS' LIABILITY.**

In suit by corporation's creditor to establish stockholders' equitable liability, where plaintiff was the only creditor and where defendant, who was the only stockholder, had sold all the assets of the corporation and had converted proceeds to his own use, and by his fraudulent act had rendered corporation incapable of doing business or satisfying obligation, or functioning at all except at behest and in interest of defendant, judgment could be rendered against defendant, in view of Civ. Code Prac. §§ 28, 371, though corporation was not made a party; it not being a necessary party under the circumstances.

Appeal from Circuit Court, Jefferson County, Chancery Branch, First Division.

Action by the Louisville & Nashville Railroad Company against Charles S. Nield. Judgment of dismissal, and plaintiff appeals. Reversed, with directions.

J. J. Donohue, B. D. Warfield, and Moorman & Woodward, all of Louisville, for appellant.

Hugh B. Fleece and Trabue, Doolan & Crawford, all of Louisville, for appellee.

CLARKE, J. The question upon this appeal is whether, in any event, a suit may be maintained in equity against a stockholder for a debt of the corporation before a judgment has been obtained at law against the corporation and a return of "no property," and without the corporation being made a party defendant. That ordinarily and as a general rule the secondary and equitable liability of a stockholder for the corporation debt cannot be enforced until the primary and the legal liability of the corporation has been determined and legal remedies exhausted by obtaining a judgment and a return of "no property" thereon is freely admitted by appellant, which insists, however, that the facts pleaded in its petition bring this case within an exception to the general rule. These alleged facts are that the defendant (now appellee) was an officer and director of the corporation, and acted for it, as its agent, in contracting the debt sued on, amounting to \$11,482.57; that thereafter he acquired all of the capital stock of the corporation, sold all all of its assets, and after paying all corpo-

rate debts except this one, and with knowledge of its existence, fraudulently converted to his own use the balance of the proceeds of the sale of all corporate assets, amounting to more than \$40,000; that the corporation is, and has been for more than four years, insolvent and without officials or agent or business or existence in fact, though not legally dissolved.

The appellee, to sustain the action of the chancellor in sustaining special demurrers to the petition and dismissing the action without prejudice, relies upon the case of *Swan Land & Cattle Co. v. Frank*, 148 U. S. 603, 13 Sup. Ct. 691, 37 L. Ed. 577, and the general rule as stated in 10 Cyc. 728, and as recognized by this court in *C. & O. R. Co. v. Griest*, 85 Ky. 619, 4 S. W. 323, 9 Ky. Law Rep. 177, *L. & N. R. Co. v. Biddell*, 112 Ky. 494, 66 S. W. 34, 23 Ky. Law Rep. 1702, *Harbison-Walker Co. v. McFarland*, 156 Ky. 44, 160 S. W. 798, and *Camden, Interstate Railroad Co. v. Lee*, 84 S. W. 332, 27 Ky. Law Rep. 75, but it is conceded that the facts relied upon here as constituting an exception to the general rule were not present in any of the cited Kentucky cases, and that the precise question involved here is one of first impression in this jurisdiction. We need not therefore review these Kentucky cases as expressions found therein, if any that might be construed as favorable to one side or the other of this controversy were beside the question then before the court and cannot be accepted as authority.

[1] The general rule, as stated in 10 Cyc. 728, is, in substance, that as a rule of equity procedure a creditor of a corporation cannot have equitable relief against its shareholders until he has prosecuted his demand to a judgment at law against the corporation, unless circumstances existed excusing him from doing so. On the next page (729) of the same volume it is stated upon authorities cited that there are two theories as to what will excuse the necessity of exhausting legal remedies against the corporation before a suit can be maintained upon the equitable liability of the stockholder, the first of which is that a de facto dissolution of a corporation is sufficient, while the other is that nothing less than a de jure dissolution will suffice, and in support of this latter theory we find the case of *Swan Land & Cattle Co. v. Frank*, supra, cited; and it is upon this case almost exclusively, stated by the chancellor in his written opinion to be upon all fours with the case at bar, that reliance is had to sustain the judgment dismissing the petition herein. As the question before us is one of practice merely, we do not feel bound to accept as binding authority the majority opinion in the *Swan Case*, which is declaratory only of the practice in federal

courts, where the differences between equity and common-law procedure are more rigidly observed than in this state, where the practice has been liberalized in many respects by the enactment of a code of practice as well as by judicial sanction. Moreover, there are some distinguishing features in the facts of the two cases, especially one affecting the right of the sued stockholder to contribution from other stockholders, but even aside from such distinguishing features the dissenting opinion rendered by Mr. Justice Brown seems to us not only more convincing in its reasoning, but much more consonant with substantial justice and with the provisions and spirit of our Code. Outside of the federal courts the courts of last resort in Massachusetts and Tennessee seem to have taken the position that only a *de jure* dissolution of a corporation will excuse the creditor in failing to prosecute his demand to judgment at law against the corporation before proceeding to charge the shareholders (*Boston Glass Manufactory v. Langdon*, 24 Pick. [Mass.] 49, 35 Am. Dec. 292; *Blake v. Hinkle*, 10 Yerg. [Tenn.] 218), while the courts of New York and Ohio have held that a *de facto* dissolution of a corporation has the same effect (*Shellington v. Howland*, 53 N. Y. 371; *Barrick v. Gifford*, 47 Ohio St. 180, 24 N. E. 259, 21 Am. St. Rep. 798; *Morgan v. Lewis*, 46 Ohio St. 1, 17 N. E. 558). All of the authorities, however, hold that the stockholders may be proceeded against directly and without a prior judgment against the corporation after it has been legally dissolved, and this upon the theory that justice ought not to be defeated because of a failure to do an impossible thing; that is, to recover a judgment against or bring in as a party a corporation which at the time has no legal existence.

[2] The other theory is that justice ought not to be defeated or delayed because of the failure of the plaintiff to do an impractical and vain thing, and this distinction is at best a very narrow and technical one, without real substance, and when allowed it seems to us should be for some satisfactory reason affecting the substantial rights of interested and necessary parties to the transaction involved and not merely because of the strict letter of a general rule of practice.

[3] As the stockholder's liability is only secondary, it cannot, of course, be established without a showing in the action in which it is attempted that a suit at law against the corporation would be futile, but this is as far as the substance of liability goes, and in our judgment as far as the rule of practice finds support in reason. The majority opinion in the *Swan Case* in carrying the rule of practice to the extent that only a *de jure* dissolution of the corporation can excuse a prior judgment at law against the corporation before an equitable and secondary right can be asserted against the stockholder is,

in the final analysis, rested solely upon the theory that equitable and legal remedies cannot be commingled in one action so as to establish the former, but since all of the authorities, even the *Swan Case*, allows this to be done where under the circumstances alleged it is impossible to do otherwise, we cannot understand why in reason and in equity the exception that is made in favor of the impossible ought not also be made in favor of the impractical and futile. Equity has ever been a protest against the potency of unreasonable and inappropriate rules of practice alone to defeat substantial justice as well as an endeavor to prevent multiplicity of actions and to avoid circuity of proceeding. How then, in reason, can a rule of equity procedure, sanctioned only by usage, be sustained when it accomplishes only circuity of action by requiring an impractical and vain, if not impossible, thing to be done? Certainly this was not the purpose of nor the reason for the adoption and use of this rule by courts of equity.

[4, 5] It is, of course, necessary before the stockholder can be held liable for the debt of the corporation that it must be established that the corporation cannot be made to satisfy its primary obligation. This is substantive law. But the manner in which the inability of the corporation to respond must be demonstrated is mere matter of practice; and, while it is undoubtedly the better practice that the demonstration should be by an exhaustion of legal remedies against the corporation where practicable before proceeding against the stockholder, and in many instances, as where there are numerous stockholders and creditors, it is the only practical method of demonstration so as to bind all interested parties of the fact upon which the stockholders' liability depends. So ordinarily and as a general rule legal remedies against the corporation should be exhausted in a prior action before suing the stockholder or stockholders upon the secondary liability, but when, as here, if the allegations of the petition are true, as must be assumed upon this inquiry, there is only one creditor (the plaintiff) and only one stockholder (the defendant), and the latter has by his fraudulent act made an independent action against the corporation an impractical and vain undertaking involving circuity of action and unnecessary delay and expense, it seems to us that the general rule is inapplicable because of the absence of any reason for its application, and that under our practice only one lawsuit should be enjoined upon the creditor, and that the only parties interested in the controversy should be required to litigate in it their respective rights, as they may do without affecting or prejudicing the rights of other persons.

[6] 2. But even so, appellee argues that the corporation was a necessary party, and, not

having been brought into this action by plaintiff, the chancellor was bound to sustain the special demurrer and dismiss the petition without prejudice, as was done. This presents the question of whether the corporation whose primary obligation was the subject of this litigation was, under the facts alleged in the petition, a necessary or only a proper party, a distinction recognized in many decisions of this court. If a necessary party, then under section 371 of the Code the judgment should not be reversed, because that section provides that an action may be dismissed without prejudice to a further action by the court "for the want of necessary parties" and for other reasons not pertinent to this inquiry, and further that, "In all other cases, upon the trial of the action, the decision must be upon the merits." Section 28 of the Code provides:

"The court may determine any controversy between parties before it, if it can do so without prejudice to others; if it cannot do so, it must require such other persons to be made parties, or must dismiss the action without prejudice."

It will be noticed that under section 28 the court may determine any controversy between the parties before it if it can do so without prejudice to others, and that under section 371 the court may dismiss an action without prejudice for the want of necessary parties, but that in all other cases, except as therein enumerated, the decision must be upon the merits upon the trial of the action, so that, construed together, as the two sections must be, the court must determine any controversy between parties before it if it can do so without prejudice to others, and the question that we must now decide narrows to whether or not the controversy between plaintiff and defendant, who were before the court, could have been determined without prejudice to others. That this was not only possible, but entirely feasible, is apparent from the facts alleged that plaintiff is the only creditor of the corporation and defendant its only stockholder, and that the corporation has been reduced to such a shadowy condition by the fraud of defendant that it is not only incapable of doing any business or satisfying its obligations, but is also incapable of defending an action against it except and unless through the defendant. It has no business or assets or officers or agent. It could not employ counsel to make a defense for it, nor could process be served upon it so as to bring it into court unless upon the defendant, in whom is found every attribute of potent corporate existence which he has not extinguished. He is, by his own act, all that is left of the corporation except a mere shadowy, inconsequential thing that cannot be touched or apprehended or brought into court except by service of process upon him, and although the corporation is not legally

dead its existence is even at law in such a state of suspension (Louisville Gas Co. v. Kaufman, 105 Ky. 159, 48 S. W. 434, 20 Ky. Law Rep. 1069) that it is incompetent to act for itself, and utterly incapable of functioning at all, except at the behest and in the interest of the defendant. Under such circumstances we cannot imagine any necessity or reason for its presence in this action that is not fully satisfied and most thoroughly accomplished by the defendant himself, who has literally swallowed the corporation whole; and, while not a necessary party to the action, the corporation, since it has not been legally dissolved, has no doubt such technical though suspended existence as makes it a proper party to the action so that either the plaintiff or the defendant might have gone through the formality of making it a nominal party hereto, but only this and no more. If the defendant desired the presence of this thing, which he has reduced to a mere dummy, capable of acting only at his bidding, he should have revived it sufficiently to bring it into court, but he should not, in equity or reason or good conscience, be permitted to demand of plaintiff as a prerequisite to its right to proceed against him, either that it do the vain and foolish thing of suing it independently, or the equally vain and foolish thing of making it a nominal party to this action, where its presence could serve no purpose whatever unless as a shield for the defendant to hide behind. Although the corporation was not, at the time the contract sued upon was made, a "dummy," acting as the agent of the defendant so as to render him primarily liable for the corporate obligation, as was the case in Postal Telegraph Co. v. Thornton, 153 Ky. 176, 154 S. W. 1100, nevertheless it is now and was when this suit was brought, upon the allegations of the petition, just such a "dummy" and incapable of acting if brought into this action, except as the agent of the defendant, who is its absolute master in the matters involved in this action. At least upon the petition as amended these facts are true, and, if true, sufficient in our judgment to excuse the plaintiff from going through the legal formalities of a separate action against the emasculated corporation, of obtaining a judgment and return of "no property found" before suing the defendant, who alone is able to defend the actions or satisfy a judgment, as well as relieving plaintiff of the necessity of making the corporation a party defendant to this action. If these facts alleged in the petition are not true, the defendant may controvert them, and, if deemed proper or necessary, make the corporation a party to the action, but the petition states a cause of action against the defendant, and, if true, the corporation, although a proper party, was not a necessary party to the determination of the controversy between the parties before the court, and

the chancellor erred both in sustaining the special and the general demurrer to the petition.

Wherefore the judgment is reversed for proceedings consistent herewith.

### POTTER v. WEBB et al.

(Court of Appeals of Kentucky. Nov. 7, 1919.  
Rehearing Denied Dec. 19, 1919.)

#### 1. JUDGMENT ¶518 — COLLATERAL ATTACK.

Suit to quiet title and for partition, involving question of whether a sale, which would have divested plaintiffs of their title, was made and confirmed pursuant to a recorded judgment of sale, was a collateral, and not a direct, attack upon the judgment and record in former case.

#### 2. JUDGMENT ¶470 — PRESUMPTIONS ON COLLATERAL ATTACK.

On a collateral attack upon a judgment and proceedings pursuant thereto, every presumption must be indulged, not only in favor of validity and binding force of the judgment, but also that the customary and necessary proceedings in pursuance thereof were regularly taken to make judgment effective and accomplish the purposes of the action, even though not apparent from the record, unless the contrary affirmatively appears.

#### 3. JUDICIAL SALES ¶47—PRESUMPTIONS ON COLLATERAL ATTACK.

Where, in suit to settle estate, it was adjudged that certain land be sold to satisfy creditors, the presumption that master did his duty and carried out judgment by selling the land and paying proceeds to creditors *held* warranted on collateral attack.

Appeal from Circuit Court, Letcher County.

Suit by Nancy Webb and others against W. H. Potter and others. Judgment for plaintiffs, and the named defendant appeals. Reversed and remanded, with directions.

D. D. Fields, of Whitesburg, Ed. C. O'Rear, of Frankfort, Hager & Stewart, of Ashland, and W. H. May, of Jenkins, for appellant.

Blair & Hawk, of Whitesburg, F. W. Stowers, of Pikeville, and W. G. Dearing, of Whitesburg, for appellees.

CLARKE, J. Appellees, plaintiffs below, the real representatives of John B. Adams, deceased, sued appellant, W. H. Potter, and others in possession, to quiet their title to an undivided one-half interest in certain lands covered by a patent issued to John B. Adams and Benjamin Adams in 1860, and for partition of the land. Potter answered denying plaintiffs' title and asserting title in himself by adverse possession by himself and predecessors in title for more than 40 years. The case was prepared and tried solely upon the

issues between the plaintiffs and the defendant Potter, and the court having adjudged that plaintiffs were the owners of an undivided one-half interest in the land and ordered same to be partitioned, charging Potter with a certain acreage in the possession of one of his codefendants under title from his predecessor in title, Potter appeals.

Manifestly the first question for our consideration is whether or not the plaintiffs were the owners of an undivided one-half interest in the land, for, unless so, they had no right to disturb the admitted possession of Potter, which possession he claims has been held by himself and his predecessors in title adversely to plaintiffs and all the world for more than 40 years, but which possession plaintiffs claim has been amicable through the whole of that period because of their being cotenants as a result of defendant's predecessor in title having purchased the other undivided one-half interest therein from Benjamin Adams in 1874.

That plaintiffs are the only heirs of John B. Adams, who by the patent above mentioned acquired title to an undivided one-half interest in the land in dispute, and that he owned same when he died intestate in 1863, is admitted; but it is insisted by the defendant that plaintiffs were divested of this interest in the land by the proceedings and judgment in an action filed after the death of John B. Adams by his administrator, Randolph Adams, against his heirs and creditors, for the purpose of settling his estate. If this is true, not only would they have no title to the land, but the possession of the defendant and his predecessors in title, which is overwhelmingly established by the evidence, was adverse as to plaintiffs, as it is only upon the theory that Potter and his vendors were their cotenants that they seek to avoid his claim of title by adverse possession. It is not denied that the court had jurisdiction of the subject-matter and of the real representatives of John B. Adams then in existence (some of whom are plaintiffs, and others, having died, are represented by their heirs, in this action) in the suit brought in April, 1866, by Randolph Adams, as administrator of John B. Adams, against his heirs and creditors, to settle his estate; but it is insisted by plaintiffs that the record in that case does not show that their interest in the land now in dispute was sold in that action, though ordered to be sold to pay their ancestor's debts. The records and papers in that old suit that are available at this late date are very meager and obviously incomplete. Not only so, but the record itself furnishes proof positive of great carelessness and frequent failure in recording upon the order book orders that were made in the case, as well as in preserving papers and

written orders which were actually filed or lodged and treated as filed in the case. Reports of commissioners, written orders, etc., are noted of record as having been filed that are not found in the papers, while commissioners' reports and other papers are found with the papers in the case, both with and without indorsement of having been filed, of which there is no record in the order book.

[1] But we must take the record as we find it, and from it decide in this, another action, between different parties, the question upon which depends plaintiffs' rights; and, as we approach this question, we are confronted with a controversy between counsel as to whether or not this is a collateral attack by plaintiffs upon the judgment in that case, which ordered sold the undivided interest in the land now in dispute to pay the debts of their ancestor, from whom they claim to have inherited the land. Unquestionably, if the old record shows affirmatively that the land was sold pursuant to the judgment which is recorded, ordering a sale thereof, and that the sale was confirmed, an attack upon its validity such as this would be a collateral attack upon the judgment in that case; and since the question now before us is whether a sale was made and confirmed of the land ordered therein to be sold, which must be determined from the record alone, there can be no doubt, it seems to us, that this is a collateral attack upon the judgment and record in that case. It is certainly not a direct attack against same. *Harrod v. Harrod*, 167 Ky. 308, 180 S. W. 797. The argument of counsel for plaintiffs that it is not a collateral attack against the judgment in that case, because of the failure of the record to show that the judgment which was entered was enforced, so as to divest them of title, is in our judgment unsound, because it assumes as true the very fact at issue, and which must be determined from the record in the old case.

[2] Considering, then, this action as a collateral attack by plaintiffs upon the judgment and proceedings had in that case, it seems to us every presumption must be indulged not only in favor of the validity and binding force of the judgment entered therein, to sustain which proposition the authorities are abundant, but also that customary and necessary proceedings in pursuance thereof were regularly taken to make the judgment effective and accomplish the purposes of the action. We are unable to find authorities in support of this latter proposition, but it seems a necessary corollary of the thoroughly established proposition that upon collateral attack it will be conclusively presumed in favor of the validity of the judgment that all prerequisite proceedings have been observed, even though not apparent from the record, and unless only the contra-

ry affirmatively appears. *Steel v. Stearns Coal & Lumber Co.*, 148 Ky. 429, 146 S. W. 721; *Baker v. Baker, Eccles & Co.*, 162 Ky. 683, 173 S. W. 109, L. R. A. 1917C, 171; *Caudle v. Luttrell*, 183 Ky. 551, 209 S. W. 497.

This old suit was instituted to settle the estate of John B. Adams and in pursuance of that design and as a necessary incident thereto it was adjudged that the land in dispute, of which he died the owner, be sold to satisfy his creditors, who had filed their claims therein. Even had the record shown nothing thereafter until the action by order of court was stricken from the docket, it seems only reasonable that the presumption would be warranted upon collateral attack that the master did his duty and sold the land and paid the proceeds to the creditors, as was necessary to fully carry out the judgment, and accomplish the purposes of the action, especially when the record itself is proof of the fact that the order book contains but a meager and incomplete record of the proceedings actually had, and that the papers now in the record are but part of those actually before the court. Any other course, following such a judgment, would have been most unusual and extraordinary, and it certainly would be unreasonable to presume that the administrator abandoned his desire to settle his intestate's estate, and the creditors their desire to collect their claims after the judgment ordering a sale of this land for that purpose had been obtained, and that the master failed to perform his duty thereunder.

[3] However, the exigencies of this case, as extreme as they are, do not require us to carry the presumptions so far as above indicated, and we do not, of course, decide that it could be done; but we are quite sure, and do hold, that at least upon this collateral attack such orders as do appear of record following the judgment and order of sale, and which indicate that the land was sold as ordered, and which cannot reasonably be interpreted otherwise, should be so construed under a presumption that the case after judgment proceeded in the usual way to a complete disposition of the matters involved, nothing appearing to the contrary. The record affirmatively shows that the decedent, John B. Adams, left no personal estate, but died the owner and in possession of one tract of land of 400 acres, known as his "home farm," the one-half interest in the 200 acres involved in this action, and an undivided one-ninth interest in his father's farm; that he left debts amounting to more than \$500, excluding the Brashears claim of \$230 hereafter referred to, which were regularly allowed as claims against his estate; that the 400 acres of land known as his home farm was first ordered to be sold to pay his indebtedness; that it was sold by the master commissioner, pursuant to the judgment, to

Enoch Craft, for \$341, for which the purchaser executed purchase money bonds; that the master commissioner was directed to collect these bonds and distribute the proceeds among the creditors; that the master reported he had collected these bonds in full and, after ruled to do so, had made distribution thereof. It was after these sale bonds had been collected and the proceeds applied to paying creditors a 30 per cent. dividend upon their claims that the court adjudged it was necessary to sell decedent's undivided one-half interest in the land involved in this action, and his share in his father's farm to pay the unsatisfied claims against his estate, and directed the master commissioner to sell same, and to take from the purchaser for the purchase price sale bonds having the force and effect of replevin bonds. This judgment was entered at the May term, 1871. Following this judgment, at subsequent terms, are orders with reference to a deed by the master to E. A. Craft, who purchased the 400 acres under the former sale, but there is no report of the commissioner found in the papers showing whether or not he sold decedent's one-half interest in the 200 acres of land and his share in his father's land, pursuant to the judgment so ordering him to do, nor is there any order that could have reference thereto, until at the May term, 1873, when this order was made:

"John B. Adams' Adm'r v. John B. Adams' Heirs. Commissioner's report confirmed, and commissioner is directed to collect the money on the bonds and pay the same to the heirs and creditors."

The commissioner's report that was confirmed by that order is in the record, and refers to a deed to Craft's assignee for the 400 acres sold to Craft; but the order directing the commissioner to collect the money on bonds and pay same to the heirs and creditors could not possibly have referred to the bonds executed by Craft for the 400 acres sold, as the record shows affirmatively that those bonds had theretofore been collected and the money distributed among the creditors, and there could have been no other bonds to be collected, except such as the commissioner was directed to take from the purchaser of the one-half undivided interest in the 200 acres of land involved in this action, and decedent's share in his father's farm, nor could this order have been properly entered unless such sale had been made and confirmed. There was an order made at the May term, 1874, filing a commissioner's report and ordering it to lay over three days for exceptions; but the report is not found in the papers, and this report was presumably in response to the order entered at the May term, 1873, directing him to collect the money on the bonds and pay same to the heirs and creditors, since there is no oth-

er apparent reason for a report from him.

Plaintiffs try to avoid these inferences by assuming that these orders had reference to a sale in that action of a tract of 150 acres located on Thornton creek, as the land of decedent, which, as shown by an order made at the October term, 1873, was conveyed by the master commissioner to Benjamin B. Adams; but this assumption is not warranted, both because there is no judgment and order of sale of this tract of land, and because the administrator in the amended petition, in which he asked a sale of the decedent's one-half interest in the 200 acres of land and his interest in his father's farm, set out the fact that the decedent had no written evidence of title to the Thornton creek land, but held same, if at all, only under a verbal contract from one Brashears, who was dead, and whose heirs were so scattered, and many of them infants, that it would be not only almost impossible to bring them before the court, but, if done, would involve more expense than the land was worth. Hence we cannot presume that this land was ever ordered sold in this action, as the land of decedent, for the benefit of his creditors and heirs, as clearly the court would have had no right so to do. It also appears from this amended petition of the administrator that about \$230 of the indebtedness allowed against decedent's estate was represented by two notes to R. S. Brashears, upon which Benjamin B. Adams was surety, and that the administrator stated, not only that decedent did not own this Thornton creek land, but also recommended that because of that fact the allowance of the Brashears claims should be set aside, and it is almost certain, while, of course, irregular, since Brashears' heirs were not before the court, that the deed was made by the master commissioner to Benjamin B. Adams, who was surety upon the Brashears notes, upon his payment of the notes to Brashears' administrators, in order to relieve John B. Adams' estate of obligation therefor, and upon the idea that, Brashears' estate having received the consideration for the land from Benjamin B. Adams, the latter was entitled to whatever protection a deed from the master in this case, and the payment of the purchase price, would afford him.

This explanation of this deed is much more satisfactory than the wholly unwarranted assumption of plaintiffs that the one-half interest in the 200 acres of land ordered to be sold was never sold, but that the Thornton creek land, for the sale of which there was no judgment, or any request or authority for one, was sold, and the purchase-money bonds which the master was ordered to collect were given therefor. Our explanation is sustained, and plaintiffs' assumption refuted, by the deed itself, which the master made to Benjamin B. Adams for this land, for it is recited therein



that the deed was made "for and on behalf of the heirs of R. S. Brashears, deceased, conveying all their right, title, and interest" in the Thornton creek land to Benjamin B. Adams, who had exhibited "a bond for said title survey" from "R. Brashears to John Adams and transferred or assigned to said Benjamin B. Adams."

We are therefore of the opinion that the old record contains sufficient to warrant the presumption, and nothing to the contrary that the sale was made as ordered, and the sale confirmed, and that the chancellor erred in adjudging plaintiffs the owners of an undivided one-half interest in the land involved in this action.

Wherefore the judgment is reversed, and the cause remanded, with directions to dismiss the petition as against the defendant W. H. Potter.

### LOUISVILLE & N. R. CO. v. PUGH'S ADM'X.

(Court of Appeals of Kentucky. Nov. 14, 1919. Rehearing Denied Dec. 19, 1919.)

#### 1. RAILROADS $\Leftrightarrow$ 856(3) — LICENSEES ON TRACK; DUTY OF RAILROAD.

Use of the tracks of the public at a place where a person was killed by a locomotive held sufficient to put on the railroad company the duty owing to licensees.

#### 2. APPEAL AND ERROR $\Leftrightarrow$ 883 — REFUSAL OF CONTINUANCE; CONSENT TO TRIAL.

Error cannot be predicated on the refusal of continuance to another term, it appearing that by consent of the counsel asking the continuance the trial was fixed for a day certain in the present term, and that on such day trial was begun.

#### 3. TRIAL $\Leftrightarrow$ 26—CONTINUANCE; ABSENCE OF WITNESS.

Refusal to postpone the trial for an hour for arrival of witness, delayed by train accident, or to allow affidavit of what he would say to be read as his testimony, was error; he having been defendant's only eyewitness, and having been in the court the day for which case was set, the day before it was called, and having absented himself without defendant's knowledge or consent.

#### 4. APPEAL AND ERROR $\Leftrightarrow$ 1043(7)—PREJUDICIAL ERROR; REFUSAL OF POSTPONEMENT.

That defendant was prejudiced by refusal to postpone or to allow reading of affidavit of what absent witness, defendant's only eyewitness, would testify, is indicated by reference, in closing argument of plaintiff's counsel, to his failure to testify.

Appeal from Circuit Court, Breathitt County.

Action by Mason Pugh's administratrix against the Louisville & Nashville Railroad

Company. Judgment for plaintiff, and defendant appeals. Reversed, with directions for new trial.

O. H. Pollard, of Jackson, Samuel M. Wilson, of Lexington, and Benjamin D. Warfield, of Louisville, for appellant.

J. M. McDaniel, of Beattyville, R. C. Mulsick, of Jackson, Kelly Kash, of Irvine, and Hobson & Hobson, Hazelrigg & Hazelrigg, and C. C. Turner, all of Frankfort, for appellee.

CARROLL, C. J. Mason Pugh and three companions, one of them being Vaughn, while walking on the track of the railroad company in its yards near Jackson, Ky., were struck by the tender of a backing engine. Three of them, including Mason Pugh and Vaughn, were instantly killed, and the other one badly injured by the collision.

In this suit by the administratrix of Mason Pugh to recover damages for his death, brought in the Breathitt circuit court, there was a verdict and judgment against the railroad company for \$15,000, and on this appeal a reversal is asked on several grounds. The material ones will be noticed in the course of the opinion.

The administrator of Vaughn also brought a suit in the Clark circuit court against the railroad company to recover damages for his death, and, that case having been brought here on the appeal of the railroad company, the opinion affirming the judgment of the Clark circuit court may be found in 183 Ky. 829, 210 S. W. 938.

From that opinion we take the following statement of the facts which are as applicable here as they were in the Vaughn Case:

"The company's yards are situated just south of the town of Jackson, and between Jackson, a city of approximately 2,000 or 3,000 inhabitants, and Quicksand, a city of from 1,000 to 1,500 inhabitants, the cities being about three miles apart. There are some mines in the immediate neighborhood, and bordering on both sides of the company's tracks, leaving Jackson, are several residences and a number of houses belonging to the railroad company.

"Decedent, in company with three companions, while walking in the company's yards, was overtaken by an engine that was backing from the depot southwardly to the roundhouse, and he and two of his companions were killed; the fourth being injured. There is a wagon road, also a plank walk, paralleling the company's tracks for a considerable distance southwardly from the town limits. It appears from the evidence that neither of these ways was much used by pedestrians or vehicles. At a point approximately 295 feet north of the scene of accident is a street crossing. The engine referred to had just a short time previously reached Jackson, had parked its coaches, and was proceeding southwardly to the roundhouse, headlight facing north. The flagman of the train was on the rear of the tender and had

a white lantern and a red lantern, but neither of these gave much light. He did not see the decedent in time to prevent the accident. He gave the signal for the engineer to stop at about the same time as an engineer on a passing train sounded the alarm. The engine was stopped, but not until after it had run over the decedent."

[1] In the Vaughn Case, as in this, it was insisted on behalf of the railroad company that Vaughn was a trespasser, and therefore the company was under no duty to exercise any or ordinary care to discover his presence on the track; but the court overruled this contention and found that the use of the tracks at the place of the accident by the public was sufficient to put on the railroad company the duty it owes to licensees.

The facts in both cases being precisely the same, we adopt the conclusion reached by the court in the Vaughn Case and may pass the argument of counsel for the railroad company upon this point without further comment.

[2] One of the grounds urged for reversal was the refusal of the trial court to grant a continuance on account of the absence of B. R. Juett, an attorney who was connected with the case. On the state of the record we find no error in the action of the trial court in refusing a continuance for this cause.

It appears that, when the motion for continuance to another term of court was made, the court "offered to set this cause for trial on the twentieth day of the present term of this court, which is one week ahead, but by consent of the attorney for defendant it is ordered that said cause be set for trial on the fifteenth day of the present term of this court." It thus appears that the trial by consent of the attorney who asked the continuance was fixed for a day certain in the term, and it further appears that on the day fixed the trial was entered into.

[3,4] Another ground for reversal relied on is the refusal of the trial court to postpone for about one hour the trial so that the personal attendance of Ira Kelly, a witness for the company, could be secured, or to permit an affidavit stating what Kelly would testify to if present to be read on the trial.

It appears that on the eleventh day of the term an order for the personal attendance of Ira Kelly was issued by the court commanding him to be present as a witness on the 15th day of the term when the trial was to commence. When the case was called for trial, this order was made:

"This cause came on for trial and both parties announced ready for trial. Whereupon came the following jury \* \* \* who were accepted and sworn and proceeded to hear the evidence and not having time to complete the trial were admonished by the court and adjourned over until to-morrow at 8 o'clock."

The attorney for the company states in an affidavit that when this order was entered he said to the court that he could not try the case without the presence of Kelly, who he was informed had been delayed by reason of a wreck on the railroad and could not reach Jackson on that day, and only agreed that the trial might be gone into upon the condition that the court would give him an opportunity to procure the attendance of Kelly, and that when the court said that was "all right" he announced ready for trial. But this was controverted by affidavits as well as by recitals of what the trial judge said appearing in the bill of exceptions.

It further appears from an uncontroverted affidavit of the attorney for the company that the order for the personal attendance of Kelly, as well as a subpoena, was executed, and that Kelly "was present as a witness" on the fifteenth day of the term, but that the case was not called until the sixteenth day, and Kelly had left Jackson before the case was called and gone to an adjoining county.

It is also shown by the record that on the second day of the trial the attorney for the company discovered that Kelly was not present as he had agreed to be, and thereupon he procured a forthwith attachment and sent an officer with the attachment to an adjoining county for Kelly to arrest him and bring him to court; that about 4 o'clock on the afternoon of this day, Kelly yet not being present, the attorney moved the court to suspend the trial until the arrival of the Louisville & Nashville train at 4:40 p. m., on which train he expected Kelly to arrive (and on which he did arrive), and in support of this motion the attorney filed his affidavit which, after setting out the circumstances showing the attendance and absence of Kelly that we have related, averred that Kelly would arrive at 4:40 p. m., or in about one hour, and that if present would say as a witness:

"That he was a flagman on the engine that ran over and killed Pugh, and at the time was riding on the rear end of the tank on the left-hand side thereof, with his foot upon the step and his hand upon the handhold; that he signaled said engine at the depot that everything was in readiness for said engine to start to the roundhouse, after the coaches had been disposed of on the coach track and said engine had been returned to the main track; that the fireman on said engine, to wit, John Derickson, placed a red light upon the rear end of said tank before said engine started to back up the main line to the roundhouse, and that said Ira Kelly took his position as aforesaid on said tank, and that said red light remained on said tank and was burning at the time and until after the accident; that there was also a white light on the rear end of said tank, and the said Ira Kelly had said white lantern in his hand; that it was a very dark night; that he did not see Mason Pugh or any of his associates until the engine and tank were within 15 or 20 feet

of said parties; that he at once gave a stop signal to the engineer with his lantern and hollered to the parties in a loud voice to 'look out'; that as said engine was backing up the track there was on the side next to, and adjacent to, said line or track, a long, heavy loaded freight train, to which was attached one engine in front and two engines behind pushing and helping convey said train; that said train was moving, and, about the time said Ira Kelly discovered the said Mason Pugh and his associates on the track, the engine in the rear of said freight trains passed the tank upon which affiant was standing with his lantern; that one of said engines gave a stop whistle; that the said Ira Kelly was on the side of the tank next to the river."

It is further shown that, when the court refused to postpone the trial for the time requested in order that the presence of Kelly might be secured, the attorney for the company at the close of its evidence moved the court to permit him to read the affidavit setting forth what Kelly would testify to if present as a deposition; but the court refused to permit the affidavit to be read, for the following reasons assigned by the court and set out in the record:

"That when the case was called for trial no affidavit was filed for a continuance on account of said witness or any witnesses, and that when the trial commenced the court required both parties to call their witnesses, and, being sworn, they were put under the rule. The court also duly admonished both parties that when the trial begun he would not permit any delay on account of either party not having its witnesses present when they were to testify and to have them ready so as not to delay the trial."

It is also shown by the bill of exceptions that—

The attorney for the company, "before the swearing of the jury herein, stated to the court that Ira Kelly, a material witness for the defendant who was present upon the call of the case for trial on the day previous to the day upon which the jury was impaneled, had without consent of defendant or without its knowledge departed from the court on a temporary visit to Perry county, and that defendant announced ready for trial upon the condition that said Kelly under process of the court would appear and testify for the defendant on the trial of this case."

It is further shown:

"That when the case was called for trial no affidavit was filed for continuance on account of said witness or any witness, and that when the trial commenced the court required both parties to call their witnesses and be sworn and they were put under the rule, and that said Kelly was never called and sworn and was never put under the rule.

"The court also duly admonished both parties that when the trial begun that he would not permit any delay on account of either party not having its witnesses present when they

were called to testify and to have them ready so as not to delay the trial."

The record further shows that the court said, in overruling the motion and grounds for a new trial:

"That he did not know that Ira Kelly was on his way to court under attachment, or that he had been in attendance as a witness in this case, and had left court without defendant's knowledge or consent."

The record, as we have seen, shows that when the case was called both parties announced ready for trial; and also that the statement of the attorney for the company that the court told him in substance that he would give him an opportunity to get the attendance of Kelly before the trial concluded is disputed, but if we should leave this feature entirely out of view, and treat the case as if both parties announced ready for trial without anything being said at the time as to the absence of Kelly, we are yet of the opinion that under all the facts and circumstances of this case it was prejudicial error not to permit the affidavit of Kelly to be read as a deposition.

Kelly was the only person on the tender when the accident happened, and it is plain that he was a very material witness for the company. He was present in court on the day the case was set for trial, but it was not called until the next day, and in the meantime Kelly, without the knowledge or consent of the company or its counsel, left the court on a temporary visit to an adjoining county, and counsel for the company had the right reasonably to, and did, expect that he would return in time to testify as a witness; but, when it appeared he had not returned on the second day of the trial, a postponement was asked for about one hour, or until the arrival of the train on which Kelly was expected to and did come, but this request was denied, as was also the motion to permit the affidavit as to what Kelly would say to be read as a deposition.

We have not overlooked the practice that matters like this are largely in the discretion of the trial court, and its rulings will not be disturbed unless it appears that the discretion was abused. It may also be admitted that when the attorney for the company discovered, at the time the case was called for trial, that Kelly was not present, he should then have asked a continuance or postponement on account of his absence; but the failure of the attorney, under the circumstances, to make this motion, did not, as we think, justify the court in view of the affidavit filed by counsel, in refusing to postpone the trial for one hour or to permit the affidavit of what Kelly would say to be read as his evidence.

We are further persuaded of the prejudicial effect of the absence of Kelly's evidence

either in person or by affidavits by the reference made to his failure to testify by counsel for plaintiff in his closing argument.

Another error assigned is misconduct of counsel for plaintiff in the argument of the case to the jury. This matter, in view of the fact that there must be another trial, we may pass without comment, except to say that the argument of counsel, although perhaps proper exceptions were not saved to it, was in more than one respect highly improper.

Other alleged errors in relation to the admission and rejection of evidence and in giving and refusing instructions are pointed out by counsel, but we do not find that the trial court committed any substantial error in these respects.

Wherefore the judgment is reversed, with directions for a new trial.

### OWENSBORO CITY R. CO. v. OWENSBORO FUEL CO.

(Court of Appeals of Kentucky. Nov. 18, 1919.)

#### 1. APPEAL AND ERROR $\S$ 1040(16)—HARMLESS ERROR; OVERRULING DEMURRER TO INSUFFICIENT PETITION.

Though the petition did not aver the contract sued on with sufficient explicitness, where the amended petition and reply stated plaintiff's cause of action very clearly, issue having been joined by defendant, error of the trial court in overruling demurrer to the petition became harmless.

#### 2. FRAUDS, STATUTE OF $\S$ 45(1)—MONTH TO MONTH CONTRACT; VALIDITY.

Under a contract whereby a street railroad agreed to transport coal for a mining company, the freights falling due and being payable between the 10th and 15th of the month succeeding that of haulage, the railroad had no right to demand freights before the 10th of the succeeding month, the contract was merely one from month to month, and was not within the statute of frauds as not to be performed within a year.

#### 3. APPEAL AND ERROR $\S$ 1068(4)—HARMLESS ERROR IN INSTRUCTION.

In an action by a coal company against a street railroad for breach of contract to haul coal, any error in an instruction through failure to limit the amount of recovery to the number of tons of coal plaintiff coal company might have produced and offered for shipment during the period in which the railroad declined to transport held harmless, in view of the evidence and verdict.

#### 4. APPEAL AND ERROR $\S$ 1026 — HARMLESS ERROR NOT GROUND FOR REVERSAL.

The Court of Appeals is not warranted in reversing a judgment for an error which did not prejudice appellant's rights.

#### Appeal from Circuit Court, Daviess County.

Action by the Owensboro Fuel Company against the Owensboro City Railroad Company. From judgment for plaintiff, defendant appeals. Affirmed.

Funkhouser & Funkhouser, of Evansville, Ind., and E. B. Anderson and W. Foster Hayes, both of Owensboro, for appellant.

Little & Slack and Birkhead & Willson, all of Owensboro, for appellee.

SAMPSON, J. At the time of the commencement of this action, the Owensboro Fuel Company was, and had been for some months previous, engaged in operating a coal mine near the city of Owensboro, to which mine the Owensboro City Railroad Company had projected its track and had been hauling and transporting all the coal which the fuel company produced at its mines to its tipples in the city of Owensboro, and to the various railroad connections in that city. The fuel company had no other means of transporting its product from the mine except over the lines of the street railroad, and the street railroad had some years previous entered into a written contract with a predecessor of the fuel company, agreeing to haul all coal produced at said mine at a given price per ton for a period of 20 years, and this contract had not expired at the time of the commencement of this action. Apparently, the street railroad was carrying the coal for the fuel company under the same arrangement it had with the fuel company's predecessor. This arrangement required the fuel company to pay the freight charges on all coal carried by the city railroad not later than the 10th to the 15th of the month succeeding that in which it was carried. On February 6, 1914, the street railroad had a claim against the fuel company for \$350.71 for freight on coal hauled in the month of January, and it demanded payment of the fuel company on that day, which the fuel company either declined or failed to make, whereupon the street railroad company declined to haul any additional coal for the fuel company until this freight bill was paid. As a result, the mines were closed down, and this action was instituted on February 11th, by the fuel company against the street railroad company, to recover \$25,000 damages for the alleged wrongful refusal of the street railroad company to transport its coal. It will be observed from this brief statement of facts that the freights were not due under the alleged contract until the 10th of February; whereas, the railroad company demanded them on the 6th, and declined to transport the coal on that date until the freights were paid. On the 13th, however, the railroad company gave the following written notice:

"Owensboro, Ky., February 13, 1914.

"Owensboro Fuel Company, Owensboro, Ky.  
—Gentlemen: You are hereby notified that the Owensboro City Railroad Company did not, on the 6th of February, 1914, or at any time, refuse to furnish cars for the transportation of coal, or to transport same from the Fern Hill coal mine, nor has it continuously, or at all, refused to do so, nor is it now refusing to do so.

"You are hereby notified that the Owensboro City Railroad Company is ready and willing to furnish its full equipment for the transportation of all coal mined by you at the Fern Hill mines, and transport the same under your orders and directions upon the payment by you of its freight charges therefor.

"Owensboro City Railroad Company,  
"By W. A. Carson, Gen. Mgr."

In the meantime, it appears that the fuel company, anxious to get its coal transported, went to the offices of the railroad company and tendered to the company \$302.95 in satisfaction of the freights for the month of January, which sum was declined by the company's representative with the statement, "I have orders from Mr. Millican (superintendent) not to haul any more coal." This was on the evening of the 9th of February, and one day before the railroad company was entitled to demand its freight for the previous month. The railroad company filed its answer on March 6th, by which it traversed the material allegations of the plaintiff's petition, and in a second paragraph affirmatively alleged it was not a common carrier of freights for hire, and that it had never held itself out to the public in its dealings or course of business as a carrier of freight for hire, and further that the city of Owensboro had enacted an ordinance some years previous which was then in force under which the street railroad "was prevented from hauling freight in bulk or in any way except in parcels or packages," except, however, "under said ordinance granted the privilege and right to transport coal on said extension, provided the coal is hauled between the hours of 9:00 o'clock p. m., and sunrise."

By the third paragraph of its answer, it averred that during the month of January, 1914, and up to the 10th of February, 1914, at the instance and request of plaintiff, it had furnished plaintiff cars and had transported in them and over its tracks, for plaintiff company, 1,403.1 tons of coal, and, for the services rendered plaintiff by defendant in so furnishing said cars and transporting said coal, the plaintiff agreed and promised to pay defendant 25 cents per ton, or a total sum of \$350.71, and that the fuel company had failed to pay said freights, or any part thereof, and that the same was long past due.

Its fourth paragraph avers that it, on the 13th of February, had given to the fuel company a written notice that it was ready and willing to carry its coal provided the freights

were paid, as set forth in the notice above copied, and it further averred that it was ready and willing at all times to transport all coal produced by the fuel company, if its charges were paid.

By reply, issue was joined, and, the case coming on for trial before a jury, the following verdict was returned: "We of the jury find for the plaintiff the sum of \$600 less the sum of \$339.71,"—upon which judgment was entered, and the railroad company appeals.

Appellant insists that the judgment should be reversed (1) because it is not shown either by the pleadings or the proof that the city railroad was a common carrier of freight for hire; (2) the street railroad was under no contractual obligation to haul the coal for the fuel company; (3) the pleadings were not sufficient to support the verdict, especially in view of the fact that no contract was pleaded; (4) the only contract attempted to be proven was a verbal one, not to be performed within a year, and therefore not enforceable because within the statute of fraud; (5) instructions given by the court were erroneous and prejudicial.

[1] (1) It must be admitted that the petition does not aver the contract with sufficient explicitness, but the amended petition and reply state the plaintiff's cause of action very clearly, and, issue having been joined by defendant, the error of the court in overruling the defendant's demurrer to the petition became a harmless one.

[2] (2, 3, 4) The plaintiff alleged a contract for the hauling of the coal by the street railroad company, and the street railroad company admits it had such an arrangement with the fuel company and was to be paid 25 cents per ton for transporting the coal and certain other sums for carrying water and for extra service performed in one way or another. It follows therefore that there was a contract, although it was not in writing, and this contract required the railroad company to transport the coal produced by the fuel company upon demand. The freights were due and to be paid between the 10th and 15th of the month succeeding that in which the service was performed. The railroad company had no right to demand the freights before the 10th of the succeeding month, but the failure of the fuel company to pay the freights for any given month on or before the 15th day of the succeeding month was a breach of the contract which would have warranted the railroad in declining to receive or carry additional freight. The contract therefore was really one from month to month, though intended to continue in that way for a period of two years. It might have been terminated any time by the fuel company ceasing to produce coal, as it did shortly after this suit was commenced, or by its failure to pay its freights on or before the 15th of the month, and in other ways. Such

a contract is not within the statute of frauds, and it was not necessary to its enforcement that it should have been in writing or signed by the party to be charged.

[3, 4] (5) Complaint is made of the last part of instruction No. 1, concerning the measure of damages. The instruction fails to limit the amount of recovery of the fuel company to the number of tons of coal which the fuel company might have produced and offered for shipment during the period in which the railroad company declined to transport or handle the coal over its line; the only limitation being \$4,000. The evidence, however, on the subject is confined to the number of tons that the company might reasonably have produced and marketed but for the shutdown, and the jury must have so read and understood the instruction, because it confined its verdict to \$600, and subtracting from that the indebtedness of the railroad company, making its verdict only \$260, which appears to be reasonably sustained by the evidence introduced for the fuel company. While the instruction is erroneous, it does not appear to have adversely affected the railroad company, and this court is not warranted in reversing a judgment for an error which did not prejudice the rights of appellant. Upon the whole, we are of opinion that the trial court did not commit reversible error, and that right and justice prevailed. Judgment affirmed.

#### WILSON v. McCULLOUGH BROS.

(Court of Appeals of Kentucky. Nov. 18, 1919.)

##### 1. EXECUTORS AND ADMINISTRATORS ⇨221(5) — EVIDENCE OF INDEBTEDNESS.

In suit by a partnership against a decedent's administrator, evidence held to show that decedent furnished money to the firm, to carry on its business, which in repayment turned over to him the gross receipts of the business, actually in much greater amounts than were lent.

##### 2. COMPROMISE AND SETTLEMENT ⇨23(3) — EVIDENCE; RECEIPT IN FULL.

In suit by a partnership to recover overpayments of money on loans made by a decedent to the firm to finance its business, in view of a receipt of some years back, stating that on settlement in full for money furnished the partnership business the firm found a balance due decedent of \$97.75, the trial court properly confined the right of the firm to recover to a period subsequent to the receipt.

##### 3. WITNESSES ⇨159(1)—COMPETENCY; PERSONAL TRANSACTIONS WITH DECEDENT.

In suit by a partnership against a decedent's estate to recover overpayments on advances made by decedent, the members of plaintiff firm, decedent being dead, could not explain the de-

tails of the several transactions between them and decedent.

##### 4. APPEAL AND ERROR ⇨1009(3)—FINDING OF CHANCELLOR; CONFLICTING EVIDENCE.

The rule of the Court of Appeals, where the evidence is conflicting, is to sustain the chancellor unless his finding appears to be against its weight.

Appeal from Circuit Court, Daviess County.

Action by McCullough Bros. against P. A. Wilson, administrator, etc. From judgment for plaintiffs, defendant appeals. Affirmed.

W. P. Sandidge and J. R. Hays, both of Owensboro, for appellant.

Birkhead & Wilson and R. W. Slack, all of Owensboro, for appellee.

SAMPSON, J. A partnership composed of two colored men, Beve and Jim McCullough, engaged in running a brickyard and manufacturing and selling brick in Owensboro, being short of capital, entered into an arrangement with a business man of that city named W. H. Wilson, who had money, whereby Wilson was to and did furnish to the partnership capital with which to operate the business. The educational qualifications of the colored men were so deficient that they were not prepared to keep a regular set of books, and to obviate this difficulty it was agreed between the partnership and Wilson that the partnership should execute a note or notes to Wilson for certain sums of money, and, as the return from the business came in, the same should be turned over to Wilson, and Wilson should receipt the partnership for the sums thus turned over to him; the partnership to hold the receipts and Wilson to hold the notes until a final settlement should be made. This arrangement was made in 1900 and continued until the death of Wilson in 1915. At that time the partnership held receipts signed by Wilson, showing that they had paid to him at divers times between the date of the agreement, in 1900, and his death in 1915, the sum total of \$55,379.50. In the meantime they had executed to him many different notes for different sums ranging from \$50 up to as high as \$4,000, but most of them were for amounts of \$100 to \$500. When Wilson would receive a payment on a note, he would give a receipt, which read about as follows:

"Owensboro, Ky., Feb. 1, 1904.

"Received from McCullough Bros. \$50 on \$50 note.  
W. H. Wilson."

Or like this:

"Owensboro, Ky., July 4, 1904.

"Received from McCullough Bros. \$100 on \$300 note.  
W. H. Wilson."

Sometimes the amount paid by the partnership to Wilson was more than sufficient to

take up the note, as illustrated by the following receipt:

"Owensboro, Ky., Sept. 20, 1904.

"Received from McCullough Bros. \$250 on \$223 note.  
W. H. Wilson."

On the same \$223 note he received an additional \$100 and gave the following receipt:

"\$100. Owensboro, Ky., Oct. 1, 1904.

"Received from McCullough Bros. \$100 on \$223 note.  
W. H. Wilson."

This makes \$350 received on the \$223 note. Another illustration will suffice to show how they carried on their business. Early in 1903 the partnership executed and delivered to Wilson a note for \$1,640. Afterwards and beginning with March 18th, they paid on said note the following sums: March 18th, \$60; March 25th, \$101; April 2d, \$55; April 10th, \$80; April 15th, \$40; April 24th, \$70; April 29th, \$70; May 6th, \$76; May 18th, \$6; May 27th, \$198; and so on up to November 20th of that year, when they had paid him in all \$3,238.50, on the \$1,640 note, an overpayment of \$1,598.50. Many other instances of overpayment are disclosed by the record. No settlement of the accounts between Wilson and the partnership was had at any time subsequent to the year 1905, if indeed one was made then. After the death of Wilson, his administrator settled with the partnership for the years 1913, 1914, and 1915, and paid the partnership a considerable sum of money; but the personal representative of Wilson declined to settle for the years 1900 to and including 1912, and this suit was instituted by the partnership against the estate of Wilson to recover \$17,177.50, alleged to be due the partnership on account of overpayment of the several notes which they had given to Wilson between the making of the agreement and the end of the year 1912. With the petition was filed a great number of receipts signed by Wilson, showing the sums of money the partnership had paid him. These sums added together amount to \$55,379.50, while the amounts paid by Wilson to the partnership on its account and for its benefit total only \$38,202, leaving a balance of \$17,177.50, as claimed by the partnership.

[1] The administrator challenges the whole transaction, and, denying that the estate is indebted to the partnership in any amount, says that there was no agreement such as averred by the partnership, between Wilson and the colored men. With this contention, however, we cannot agree. From the numerous transactions it plainly appears that Wilson was furnishing money to the partnership, and the partnership was turning over to him the gross receipts of its business. The method employed and the great number of transactions would appear to be sufficient to sustain the contention of the partnership that Wilson had entered into an arrangement

similar to that alleged in the petition and had agreed to provide the money with which to carry on the business, and that the method adopted for keeping the accounts was identical with that stated in plaintiff's petition. In addition to that, however, we find a writing which evidences an identical agreement, which reads:

"July 1, 1905.

"This agreement is between Beve and Jim McCullough. This day I agree to pay them all money that's paid to me over mortgages and notes I hold against them when settled.  
"W. H. Wilson."

On the same day Wilson gave the following receipt:

"July 1, 1905.

"Received of McCullough Bros. \$680 on \$600 note.  
W. H. Wilson"

—which would indicate that as they had made no settlement Wilson, having received \$680 on a \$600 note, was to return the balance whatever it might prove to be on settlement when the exact amount of the overpayment was ascertained.

Issue being joined, the cause was referred to the master to take evidence, settle the accounts between the contending parties, and report his finding to the court. This was done. The evidence of a great number of witnesses was taken. All the notes executed by the partnership to Wilson which could be found, or proven to have existed, were credited to Wilson, and all the receipts given to the partnership and signed by Wilson were credited to the partnership, and the commissioner, after a very careful review of all the evidence, arrived at the conclusion that the partnership had not sued for all that was really due it, which he found to be more than the \$17,177.50, claimed in the petition, but, on account of the state of the pleadings, awarded the partnership only the sum which it claimed, \$17,177.50. When this report was filed, the personal representative of the estate of Wilson filed exceptions to it, and on a trial of the exceptions before a special judge certain items to the credit of the partnership were stricken, and the amount due the partnership was fixed at \$7,260.75, and judgment entered accordingly, and from this judgment the administrator prosecutes this appeal, and the partnership prosecutes a cross-appeal.

[2, 3] Among the receipts and papers filed is one dated September 14, 1905, which reads as follows:

"Upon settlement in full for money furnished us to burn and manufacture brick, we find a balance due W. H. Wilson of ninety-seven dollars and seventy-five cents.

"McCullough Bros.,

"By S. B. McCullough."

This receipt was given about five years after the business started and appears to

show that on that date a full settlement had been made between the parties with reference to the burning and manufacture of brick. The manufacture and selling of brick was the only business which the partnership carried on. The trial court considered this receipt as showing a complete settlement up to that date, and declined to go behind it. While the partnership pointed to certain evidence which would indicate that this receipt was not upon a settlement of the whole affairs between Wilson and the partnership with reference to the money furnished by Wilson, we are of opinion, in the absence of direct and positive proof, that the trial court did not err in confining the right of the partnership to recover to a period subsequent to September 14, 1905, and in treating that settlement as a settlement in full of all the affairs between the partnership and Wilson up to that time. It is true that previous to September 14, 1905, according to the receipts produced, a much larger sum of money was paid to Wilson by the partnership than was paid out by Wilson to or for the partnership so far as the record discloses, but there may have been, and perhaps were, other sums paid out by Wilson for the use and benefit of the partnership, and this conclusion is strongly supported by the receipt of date September 14, 1905. We cannot conceive of the partnership giving to Wilson a receipt showing that "upon settlement in full for money furnished us to burn and manufacture brick, we find a balance due W. H. Wilson of ninety-seven dollars and seventy-five cents," if indeed Wilson was indebted to the partnership at that time for money which the partnership had paid to him. How could there have been a full settlement, as stated in the receipt, unless all the accounts between the parties were taken into consideration? Wilson being dead, and therefore unable to give his version of the controversy, the law compels those with whom he dealt, including the members of this partnership, to hold their peace, and they were not allowed to explain the details of the several transactions. We are therefore compelled to resort to the written evidence alone, of which this receipt is a material part. Giving it its reasonable and fair meaning, we conclude that the parties to it had a full settlement of their accounts on September 14, 1905.

[4] Beginning with that date, the trial court, with a few exceptions, gave to the partnership credit for all the sums which the receipts show were paid by it to Wilson, and charged the partnership with all the sums mentioned in the several notes given by it to Wilson, and, subtracting the latter sum from the former, arrived at the conclusion that the partnership was entitled to recover of Wilson's estate the sum of \$7,260.75 only. While there is some contrariety in the evidence and much confusion, we are

not prepared to say that the chancellor erred in his finding of fact or law. Our rule in such case is to sustain the chancellor, unless his finding appears to be against the weight of the evidence, and, that not appearing here, the judgment must be affirmed both upon the original appeal and cross-appeal. Judgment affirmed.

### SCOBEE v. BRENT (two cases).

(Court of Appeals of Kentucky. Nov. 18, 1919.)

#### 1. PLEADING $\S$ 34(4) — COMPLAINT IN ALTERNATIVE; CONSTRUCTION AGAINST PLEADER.

Where plaintiff alleges two different statements of facts, under and because of which he paid to defendant the money and executed the note in settlement of his breach of contract, for which he seeks to recover, and it cannot be determined from the complaint which alternative statement of facts were the facts of the transaction, it will be assumed on demurrer that the statement of facts alleged, which gives plaintiff no cause of action, is the true state of the case in view of rule that pleading must be construed most strongly against the pleader.

#### 2. PLEADING $\S$ 193(5)—DEMURRER; WHEN ALLOWED.

There is no state of case where one complained of can be required to answer otherwise than by a demurrer, the complaint of another, when, the facts alleged by such other having been conceded, he has no right to relief.

#### 3. PLEADING $\S$ 20 — ALTERNATIVE STATEMENT OF FACTS.

Civ. Code Prac.  $\S$  113, subd. 4, permits an alternative statement of facts where the pleader does not know which fact or set of facts are true; but to make a good cause of action each of the alternative statements must present a case entitling the pleader to relief.

#### 4. CONTRACTS $\S$ 116(3) — MONOPOLIES $\S$ 23—EVIDENCE; CONTRACT IN RESTRAINT OF TRADE.

Contract, whereby plaintiff agreed to sell to defendant a large quantity of blue grass seed, held independent of agreement between defendant and others to suppress and restrain competition in trade of buying and selling blue grass seed, so that, where plaintiff before date fixed for performance confessed breach and agreed on the amount of damages and paid the same, he cannot recover payments made; the contract of sale not being in restraint of trade either at common law or under Ky. St.  $\S$  3918.

#### 5. PAYMENT $\S$ 82(6)—BREACH OF CONTRACT; RECOVERY OF MONEY VOLUNTARILY PAID.

If plaintiff was legally bound for damages for breach of contract, he cannot recover back the damages after having confessed breach of the contract, and paid money, and executed a note as a settlement of the damages.



**6. CONTRACTS — 116(1) — IN RESTRAINT OF TRADE; COMMON LAW APPLICABLE.**

The common law applying to contracts in restraint of trade is in force in Kentucky.

**7. CONTRACTS — 138(1) — IN RESTRAINT OF TRADE; ENFORCEMENT.**

A contract made with an illegal combination or association of persons in restraint of trade will not be enforced when the enforcement will be in furtherance of the illegal purpose of the combination.

**8. CONTRACTS — 102 — IN RESTRAINT OF TRADE.**

The mere intention of a party to a legal contract, formed after the making of the contract, not accompanied by any obligation to do so, to appropriate the property to be received under the contract, when it should be performed, to an illegal purpose, will not make invalid the contract, where the intention is abandoned before the performance and never put into execution.

**9. CONTRACTS — 140 — ENFORCEMENT BY TRUST; REMEDY AT COMMON LAW.**

At common law an illegal combination or trust is not prohibited from maintaining actions upon contracts, which are collateral to and independent of the illegal contract by which the trust or monopoly was created, and which are not in furtherance of the purposes of the combination.

**10. CONTRACTS — 140 — ENFORCEMENT BY TRUST.**

A member of an illegal combination is not precluded from right of recovery upon contract which is independent of the contract by which illegal combination is formed and is not in furtherance of its purpose.

Appeal from Circuit Court, Clark County.

Actions by R. P. Scobee against N. Ford Brent. Actions dismissed, and plaintiff appeals. Affirmed.

J. M. Stevenson, Geo. F. Wycoff, S. T. Davis, and J. M. Benton, all of Winchester, for appellant.

Pendleton & Bush, of Winchester, for appellee.

**HURT, J.** These actions are between the same parties and involve the same questions and are therefore heard and determined together.

A general demurrer was sustained by the trial court to the petition, as amended in each action, and, the plaintiff having declined to plead further, the actions were dismissed, and from the judgments these appeals are prosecuted. The only question before us is whether the petition as amended in each case states a cause of action in favor of the plaintiff against the defendant.

The plaintiff, appellant here, by the petition and amendments to it in the first action, in substance states that prior to the month of June, 1911, he and the defendant, appellee here, N. Ford Brent, entered into a con-

tract by the terms of which he agreed to sell to the defendant a large quantity of blue grass seed, to be delivered to him on the 1st day of August, 1911; that, at the time he agreed to sell the blue grass seed, he did not own any such seed, and this fact was known to the defendant; and that shortly thereafter he ascertained that it would be impossible for him to buy enough seed to comply with his contract of sale with defendant; and that the price of blue grass seed rapidly advanced after he had made the contract; and that on or about the day of June, 1911, the defendant demanded and exacted of him, for his inability to comply with the contract, the sum of \$11,000, of which sum he on that date paid to defendant the sum of \$5,000 in money, and for the remaining \$6,000 he executed his promissory note, payable to the order of defendant within twelve months after date at the Clark County National Bank, and thereafter, on the 29th day of August, 1912, he renewed the note, by executing to defendant a note for \$6,450 due in twelve months, and payable to the order of defendant, at the said bank; and that thereafter, and before the maturity of the note, the defendant, for a valuable consideration, transferred and assigned the note to the Deposit Bank of Paris, and since he has been required to pay the full amount of the note to the bank to which it was assigned; that there was no valid consideration for either of the notes; that, since the latter note was executed, he has learned and avers it to be a fact that "either prior to the time said contract for the sale of said grass seed was entered into between him and defendant," or "after said time and before he executed to defendant the note for \$6,000, and before the date fixed in said contract for the delivery of said seed," "and that one or the other of said states of facts is true, but that he does not know which is true," the defendant and R. B. Hutchcraft, and others, to plaintiff unknown, had entered into an unlawful agreement and combination to suppress and restrain competition in the trade of buying and selling blue grass seed and to control and regulate the market and to fix the price of same, and that said agreement or combination was illegal and a conspiracy, and illegally and unduly suppressed and restrained competition in the trade of buying and selling blue grass seed and was a contract in unreasonable restraint of trade, and therefore void, illegal, and in contravention of the laws and public policy of this state, "and that, in entering into said contract with him for the purchase of blue grass seed, the defendant was acting in pursuance to said agreement and combination and with the purpose of aiding and helping to carry out its unlawful purpose and made said contract in furtherance of and as a part of said plan and pur-

pose of said agreement and combination to contract the blue grass seed market, restrain and suppress competition in the trade of buying and selling blue grass seed, and that said contract of sale was void and unenforceable as to plaintiff."

With relation to whether the alleged combination between the defendant and Hutchcraft and others was made prior to or after the making of the contract between plaintiff and defendant, the plaintiff averred:

"But he says that, in either event, if the said grass seed had been delivered to the defendant under said contract, said grass seed would have been turned over by the defendant to said combination of persons, under and pursuant to said unlawful agreement or combination, and its illegal purpose would have been thereby aided, promoted, and advanced, and he says that such was the purpose of the defendant when he entered into the contract with the plaintiff for the purchase of said seed."

The plaintiff further alleged that, at the time he paid the \$5,000 and executed the notes, he had no knowledge of the unlawful combination, nor of the intention of defendant, as alleged, or otherwise he would not have paid the money nor have executed the notes, but that he did same in ignorance of and under a mistake as to the facts. The plaintiff then prayed for the recovery of the amount of the note.

The petition and amendments in the second action sought the recovery of the \$5,000 paid to defendant in settlement of the contract in June, 1911, and the allegations upon which the cause of action is based are substantially the same as those above stated, as being the averments of the petition and its amendments in the first action except in the petition and its amendments in the last-mentioned action, it is averred by the plaintiff that, when he ascertained that he could not comply with the contract, he notified the defendant, and then in settlement of the damages paid the \$5,000 in money, and executed the note.

[1] It will be observed that the appellant relies, for his cause of action, upon two different statements of facts under and because of which he paid to the appellee the money and executed the note in settlement of the breach of his contract which he now seeks to recover. These statements of facts, which he alleges in the alternative, differ radically, as we view them, in their legal effects, when considered with the other facts alleged. He alleges that the state of case presented by one of the statement of facts is true, but he does not know which state of case is true. If one of the alternative statements of alleged facts presents a state of case in which there was no illegality, either in the contract or in the settlement made of the contract, and nothing therein contrary to law or public policy, it is very clear that the petitions as amended do not set forth a

cause of action in favor of appellant, since no one could know, from the pleading, which alternative statement of facts alleged were the facts of the transaction, as it might as well be considered that the transaction took place according to the state of facts under which there was no illegality, either in the contract or settlement of it, and under which the appellee was entitled to receive the money and note, as that the contract and settlement was made under the other alleged state of case, and, applying the ancient and well-established rule that the pleading must be construed most strongly against the pleader, it would have to be assumed that the state of facts alleged, which give the pleader no cause of complaint, was the true state of case, rather than the other, and the one which the pleader intended to set forth.

[2, 3] There is no state of case where one complained of can be required to answer, otherwise than by a demurrer, the complaint of another, when, the facts alleged by the complaining party having been conceded, he yet has no right to relief. The consequences otherwise would be that the decision of every case would have to be deferred to a hearing upon the evidence, and courts would never know, until such time, whether or not there was any basis for the prosecution or defense of an action, and the courts could not know what they were called upon to decide, nor would the party sued have any notice of what he was called upon to defend, or what defense it was necessary for him to make. Section 113, subsec. 4, Civil Code, permits an alternative statement of facts, where the pleader does not know which fact or set of facts are true, but knows that one or the other is true; but, to make a good cause of action, each of the alternative statements must present a case which entitles the pleader to relief. *Linck's Adm'r v. L. & N. R. R. Co.*, 107 Ky. 370, 54 S. W. 184, 21 Ky. Law Rep. 1097; *L. & N. R. R. Co. v. Coppage*, 7 Ky. Law Rep. 527; *City of Louisville v. Muldoon*, 94 Ky. 426, 22 S. W. 847, 15 Ky. Law Rep. 233; *Hoffman v. City of Maysville*, 123 Ky. 710, 97 S. W. 360, 29 Ky. Law Rep. 1245.

[4, 5] The appellant seeks to recover of the appellee upon the ground that he was under no legal or moral obligation to pay the money as damages for the breach of the contract, and that it was paid without legal consideration, and in good conscience the appellee ought not to retain it, in that, the appellee was a member of an illegal combination in restraint of trade, created for the purpose of suppressing competition in the trade of buying and selling blue grass seed, and fixing the price of same, and for that reason had no legal nor moral right to receive the money or to retain it, and that, when appellant paid the money and executed the note, he did it in ignorance of the fact that appellee was a member of the illegal combination, and

intended to place the seed which was to be delivered under the contract, if it had been performed, into or for the benefit of the combination and in furtherance of its purposes, and that he would not have paid the money nor executed the note if he had known the circumstances. It will be observed, however, that these actions are not defenses to the enforcement of a contract illegal because in restraint of trade, nor is any contract sought to be enforced; but they are actions to recover money paid under an executed contract. Whether a party can have relief from the results of a contract made in restraint of trade, after it has been fully executed, it is not necessary to decide; but, if the appellant was legally bound for the damages for the breach of the contract, it is perfectly safe ground to hold that he cannot recover back the damages after having confessed the breach of the contract and paid the money and executed the note as a settlement of the damages.

Taking one of the alternatives alleged, the petitions as amended aver that, previous to the time of the creation of the illegal combination by appellee Hutchcraft and others, the appellant and appellee entered into a contract under which appellant sold and agreed to deliver the blue grass seed to appellee on the 1st day of August; but, a month before the date fixed for the performance of the contract, the appellee chose not to perform the contract as agreed upon, and confessed the breach long before he was by its terms required to perform it, and agreed with appellee as to the amount of damages, and paid same, a part in money and the remainder, by the execution of his note. It will be observed that this contract is not such a one as is declared by section 3918, Ky. Stats., to be void. The contracts which are by that statute declared to be void are contracts between persons and corporations and associations by which pools, trusts, agreements, confederations, and understandings are created for the purpose of regulating, controlling, or fixing the prices of property, or fixing or limiting the amount of any commodity to be bought, sold, or produced. Section 3918, *supra*, in addition to declaring such contracts to be void, provides that the existence of such an illegal agreement shall be a defense by the purchasers for the price of any property or article from any individual, firm, company, or corporation, transacting business contrary to the provisions of chapter 101, Ky. Stats.

[8, 7] The common law, applying to contracts in restraint of trade, is, however, in force in this state. *Gay v. Brent*, 166 Ky. 834, 179 S. W. 1051. The contract between appellant and appellee not being one of those to which the statutes above named apply, it is controlled by the principles of the common law. There can be no doubt that in this state a contract made with an illegal combination or association of persons, in

restraint of trade, will not be enforced when the enforcement would be in furtherance of the illegal purposes of the combination. *Brent v. Gay*, 149 Ky. 615, 149 S. W. 915, 41 L. R. A. (N. S.) 1034; *Artic Ice Co. v. Franklin Electric & Ice Co.*, 145 Ky. 32, 139 S. W. 1080; *Clemons v. Meadows*, 123 Ky. 179, 94 S. W. 13, 29 Ky. Law Rep. 619, 6 L. R. A. (N. S.) 847, 124 Am. St. Rep. 339; *Anderson v. Jett*, 89 Ky. 375, 12 S. W. 670, 11 Ky. Law Rep. 570, 6 L. R. A. 390; *Merchants' Ice & Cold Storage Co. v. Rohrman*, 138 Ky. 530, 128 S. W. 599, 30 L. R. A. (N. S.) 973, 137 Am. St. Rep. 390. It may also be conceded that at both common law and by statutes, when in order to recover in an action it is necessary to rely upon and prove the illegal contract to create a monopoly or combination in restraint of trade, no recovery can be had. *Continental Wall-Paper Co. v. Voight & Sons*, 148 Fed. 939, 78 C. C. A. 567, 19 L. R. A. (N. S.) 143; *Gray v. Oxnard Bros.*, 59 Hun. 387, 13 N. Y. Supp. 86; *American Handle Co. v. Standard Handle Co.* (Tenn. Ch. App.) 59 S. W. 709.

The contract between appellant and appellee was, however, not a contract for the creation of any monopoly or combination for the restraint of trade. It was made prior to the creation of the illegal combination complained of. It was such a contract as any two citizens might lawfully enter into, based upon a sufficient consideration, and could be enforced at the suit of either. The contract neither related to nor was in furtherance of the purposes of the illegal combination, nor did it grow out of the illegal agreement for the creation of the combination, nor did its enforcement rest upon any assertion of the alleged monopoly or combination. If appellant had been sued upon it, it would not have been necessary to either allege or prove the illegal contract of the combination in order to a recovery. It is not alleged that, when the appellant confessed the breach and settled the damages, appellee acted for the illegal combination, or that he had ever agreed with the combination to transfer the contract or its benefits to the combination, or that the combination on account of any contract or understanding with appellee had any interest in the contract between appellant and appellee. It is alleged that appellee made the settlement and took the money and note for himself, which precludes the idea that the combination had or received any interest in the contract. Hence it must be concluded that the contract between appellant and appellee was a matter entirely independent of and not connected with the contract by which the combination was created and operated. It is true that it is alleged that appellee intended, if the contract had been performed by appellant, to place the seed to be delivered into the control of the combination, or to use same in furtherance of its purposes. This allegation amounts to saying that the intention was never carried out.

[8-10] Surely, the mere intention of a party to a legal contract, formed after the making of the contract, not accompanied by any obligation to do so, to appropriate the property to be received under the contract, when it should be performed, to an illegal purpose, would not make invalid the contract when the intention was abandoned before the performance of the contract and never put into execution. It is true that it is alleged that appellant made the contract with appellee as a part of the scheme of the illegal combination and in furtherance of its purposes, but this averment can only relate to the facts which were alleged to have existed in the alternative statement that the illegal combination was formed after the making of the contract between appellant and appellee, as it could not relate to the statement wherein it was alleged that the contract was made before the combination was created. At common law, an illegal combination or trust is not prohibited from maintaining actions upon contracts which are collateral to and independent of the illegal contract by which the trust or monopoly was created and which are not in furtherance of the purposes of the combination. *Connolly v. Union Sewer Pipe Co.*, 184 U. S. 540, 22 Sup. Ct. 431, 46 L. Ed. 679; *National Distilling Co. v. Cream City Importing Co.*, 86 Wis. 352, 56 N. W. 864, 39 Am. St. Rep. 902; *Hadley-Dean Plate Glass Co. v. Highland Glass Co.*, 143 Fed. 242, 74 C. C. A. 462; *Wiley v. National Wall Paper Co.*, 70 Ill. App. 543; *Brent v. Gay*, supra. Hence a member of an illegal combination is not precluded from a right of recovery upon a contract which is independent of the contract by which the illegal combination is formed and is not in furtherance of its purposes.

As to what conclusion would be reached, if the alternative statement that the contract between appellant and appellee was entered into after the creation of the illegal combination, and in furtherance of the unlawful scheme of the combination, was the true fact, is not necessary to be decided, after the conclusion reached as to the right of the parties, if the other alternative statement of facts is the true one.

The judgments are therefore affirmed in each of the actions.

PHILLIPS, County Judge, v. BROACH,  
County School Superintendent.

(Court of Appeals of Kentucky. Dec. 2, 1919.)

OFFICERS  $\Leftarrow$  100(2)—REDUCTION OF COMPENSATION OF COUNTY SUPERINTENDENT DURING TERM.

Where, pursuant to Ky. St. § 4419, the fiscal court of a county ordered the salary of the

school superintendent for 1918 to 1921 to be 16 cents for each pupil child entitled to attend the common schools at such time, the school census report embracing all children between 6 and 20, but subsequently section 4364 was amended (Acts 1918, c. 138) to fix the ages of school children at 6 to 18, under Const. §§ 161, 235, the salary of the superintendent could not be so reduced, and he is entitled during his term to be paid at the rate of 16 cents per pupil between 6 and 20 years of age, the percentage of children between 18 and 20, in the absence of school census including them, to be ascertained theoretically in proportion to the latest preceding census.

Appeal from Circuit Court, Calloway County.

Petition for mandamus by Robert E. Broach, County School Superintendent, against Edward Phillips, County Judge. From an adverse judgment, the County Judge appeals. Judgment reversed, with directions to enter judgment for petitioner in conformity with the opinion.

E. P. Phillips and I. W. Keys, both of Murry, for appellant.

R. T. Wells, of Murry, for appellee.

CARROLL, C. J. At the November election, 1917, Robert E. Broach was elected county school superintendent of Calloway county for a term of four years, beginning on the first Monday in January, 1918. The fiscal court of Calloway county at its regular October term, 1917, entered an order fixing the salary or compensation of the school superintendent for the years 1918, 1919, 1920, and 1921, "at 16 cents on each pupil child entitled to attend the common schools of Calloway county as shown by census report of each year," the same to be payable out of the county levy of each year.

This order of the court, which was made previous to the election of Broach and fixed the compensation of the county school superintendent for the term of his office, was made under and pursuant to section 4419 of the Kentucky Statutes, providing in part that the county school superintendent—

"shall be allowed a salary annually by the fiscal court of his county based on the number of children reported in the census report of the district trustees of such county; which salary shall not be less than eight cents nor more than twenty cents for each pupil child thus reported."

At the time the salary of the school superintendent was fixed the school census report made each year embraced all children in the county between the ages of 6 and 20 years. Accordingly Broach, as school superintendent, would be entitled to 16 cents on each child between the ages of 6 and 20, as shown by the census report of Callo-

way county. In March, 1918 (Acts 1918, c. 138), the Legislature amended many sections of the then existing school law of the state, and among them section 4364 was so amended as to fix the ages of school children at from 6 to 18 years. The law was further so amended that the county superintendent, in place of being paid on a per capita basis, should receive a salary of not less than \$600 nor more than \$2,500 per annum.

It will thus be seen that as the salary or compensation of Broach was fixed on a per capita basis, as provided in the statute, at the time the order of the fiscal court was made, and the school age was from 6 to 20 years, the amendment to this statute, fixing the school age at from 6 to 18 years, reduced the number of children of school age in the county. In other words, a census report of the school children taken under the act of 1918 would omit all children between the ages of 18 and 20, thus, of course, reducing the number of children shown by the census report of former years by the number that were between the ages of 18 and 20.

This controversy between the school superintendent and the fiscal court comes up in this way: The school superintendent contends that his salary during his term of office for each year should be an amount equal to 16 cents for each child in the county between the ages of 6 and 20 years, while it is insisted by the fiscal court that for the years 1918, 1919, 1920, and 1921 his salary for each year should be equal to the amount of 16 cents on each child between the ages of 6 and 18 years, thus reducing for each of these years in quite a considerable sum the amount he would receive if he got 16 cents for each child between the ages of 6 and 20 years.

The lower court adjudged, in this suit for a mandamus against Phillips, county judge, asking that he be compelled to make an order in the county court, directing the county clerk to draw a warrant on the county treasurer to pay Broach his compensation based upon the census of pupils between the ages of 6 and 20 years, that he should make such order, and further adjudge that—

"in view of the fact that no census of the pupils 19 and 20 years of age was made for the year 1918, \* \* \* that in reaching the basis for determining the amount of plaintiff's compensation for the month of July, 1918, and for each succeeding month of 1918, the defendant will add to the number of pupils in the census as taken and certified for the year 1918 the number of pupils in the census for 1917, as certified by the state superintendent of public instruction, who were then 18 and 19 years of age, and for each of the succeeding years he will determine the amount of plaintiff's compensation in a similar manner, after considering the per cent. of increase or decrease as the case may be in the census taken hereafter over the census of former years, and base the in-

crease or decrease of pupils 19 and 20 years of age as the number of said pupils in the former years bears to the whole number of pupils in the census."

From the judgment the county judge prosecutes this appeal.

It is provided in part in section 161 of the Constitution that—

"The compensation of any city, county, town or municipal officer shall not be changed after his election or appointment, or during his term of office."

Under this section, as well as section 235 of the Constitution, which contains a similar provision, we have written in many cases that, when the salary of a public officer is fixed before his election or appointment, neither the Legislature nor any other authority has the power to change in any manner the compensation or salary so fixed by either reducing or increasing it. And it being admitted in this case that the change made by the Legislature in fixing the ages of children of school years did reduce the compensation of the county school superintendent, which had been fixed before his election, the only difficulty in the case arises out of the method of ascertaining how much his compensation will be reduced if the school years are fixed between 6 and 18.

This difficulty, as will be seen, grows out of the fact that no school census will be taken under the act of 1918 of children between the years of 18 and 20, and so there is no method provided in the law or furnished by this record by which the reduction in the compensation of the school superintendent can be determined. It will be observed that the lower court adopted a method by which the number of children between 18 and 20 in the county during the years 1918, 1919, 1920, and 1921 might be ascertained; but it is argued that the plan so laid down is difficult of execution and does not furnish an accurate method of computing the number of children between these ages.

In view of the fact that no school census will be made of children between the ages of 18 and 20, it is at once apparent that, unless a census should be taken, any plan adopted would be open to the objection that it would not accurately show the number of children between the ages of 18 and 20. But as there is no provision made for taking the census of the school children between 18 and 20, and this record does not furnish any suggestion as to how such a census could or should be taken, it becomes necessary to adopt the most practicable and workable scheme the conditions will permit. The plan adopted by the lower court, although substantially correct, is not, perhaps, as clear or as easy of execution as it might be, and so we have concluded to formulate the following:

The percentage that the children between the ages of 18 and 20 years, as shown by the census of 1917, bears to the whole number of children returned in that year, should first be ascertained, then, looking to the census of 1918, there should be applied to it the percentage of children between 18 and 20 as shown by the 1917 census, and the number of children found by this percentage, when applied to the returns of 1918, should be added to the number returned in the census of 1918. A similar method should be adopted for the years 1919, 1920, and 1921, for ascertaining the number of children in the county between the ages of 18 and 20.

Wherefore the judgment is reversed, with directions to enter a judgment in conformity with this opinion. The costs in this court will be divided between the parties.

### YONTS v. ADAMS.

(Court of Appeals of Kentucky. Dec. 2, 1919.)

DEEDS §114(1)—CONSTRUCTION OF DESCRIPTION; "INCLUDE SURVEY."

Deed with description running from beginning corner along fence to "top of ridge, thence a straight line to the back line of" designated survey, "thence with the meanders of lines and marked corners of said survey back to the beginning so as to include twenty acres, more or less, include survey," where beginning corner was within survey and not on any line thereof, held to convey only a 21-acre tract inclosed by leaving line of survey upon again reaching fence and proceeding along fence to beginning corner, and not to convey entire survey of 53 acres, notwithstanding words "include survey"; such words merely referring to portion of survey within boundary beginning and ending at designated beginning corner.

[Ed. Note.—For other definitions, see Words and Phrases, Including Survey.]

Appeal from Circuit Court, Letcher County.

Action between Joseph Yonts and S. E. Adams. From judgment rendered the former appeals. Affirmed.

Cleon K. Calvert, of Hyden, and David Hays, of Whitesburg, for appellant.

Edward C. O'Rear and J. C. Jones, both of Frankfort, and E. G. Fields, of Whitesburg, for appellee.

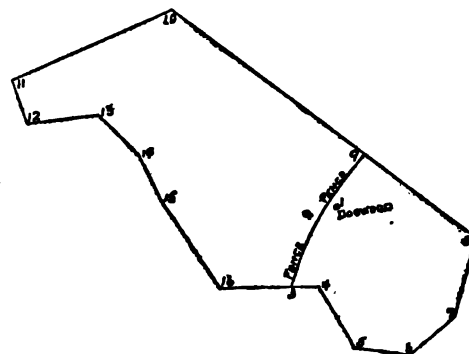
CLAY, C. This appeal involves the ownership of a small tract of land in Letcher county.

Appellant, Joseph Yonts, claims title under deed from E. T. Webb and wife dated March 24, 1910, while appellee, S. E. Adams, claims title under a subsequent deed from the same parties. That being true, the question of title depends on whether the land in contro-

versy was included in appellant's deed, which contains the following description of the land conveyed:

"Beginning on a dogwood near the fence and lane that was between Ned Webb and Joe Webb on the left-hand side of Bottom fork, going down, thence with what is now Ned Webb's fence to top of ridge, thence a straight line to the back line of a survey made in the name of E. T. Webb, thence with the meanders of lines and marked corners of said survey back to the beginning so as to include twenty acres, more or less, include survey."

The following map illustrates the issue:



It is conceded by the parties that the tract of land east of the line 3-9 passed by the deed, but insisted by appellant that not only that tract, but also the tract west of that line, which two tracts are covered by the survey of 1872, passed by the deed. It will be observed that the dogwood, which is the beginning corner of the tract conveyed to appellant, is not on any line of the survey of 1872. Therefore in case of either construction it is necessary to leave the lines of that survey in order to reach the point of beginning. Had the grantor intended to convey all the land embraced by the survey, the natural thing would have been to say so, or to follow the description contained in the survey, without other words of qualification. While it is true that the words, "include survey," are at the end of the description, these words must be interpreted in the light of the fact that the beginning corner was not on the survey, and of the further fact that the tract conveyed was to include only 20 acres more or less. It appears that there are 21 acres east of the line 3-9 and 32 acres west of that line. Should we adopt appellant's construction, he would take under the deed 53 acres, instead of about 20 acres as intended by the grantor. Furthermore, instead of returning to the beginning corner from the point 9 on the map along the fence which divides the two tracts, we would have to pass around the entire western part of the survey until we reached the point 3, and then return to the begin-

ning, thus retracing the first lines of the description and leaving the beginning point inside of the boundary, instead of making it the natural end of the boundary. In our opinion this construction cannot be sustained. The description does not require us to follow all the meanders of lines and marked corners of the survey back to the beginning, but to go with them "so as to include twenty acres more or less, include survey." Hence the more natural and reasonable construction is to leave the survey at the point 9 and return to the beginning corner along the natural division line, thus making the dogwood not only the beginning corner, but the last corner of the land surveyed. In this way we give full effect to the words, "so as to include twenty acres more or less," and construe the words, "include survey," not as embracing the entire survey, but that portion of the survey included within the boundary beginning and ending at the dogwood, and including 20 acres more or less. Since this is the construction adopted by the chancellor, it follows that the judgment below is correct.

Judgment affirmed.

#### CALDWELL v. E. F. SPEARS & SONS.

(Court of Appeals of Kentucky. Nov. 28, 1919.)

##### 1. SALES ⇨22(5)—TIME FOR ACCEPTANCE OF OFFER.

In an action for breach of a contract for sale of hemp, where both parties testified there was an offer of sale by defendant, but differed as to the time it was to remain open, held that communication of acceptance of offer on the following day was within a reasonable time.

##### 2. SALES ⇨22(5)—TIME FOR ACCEPTANCE OF GRATUITOUS OFFER.

A gratuitous offer to sell may be accepted within reasonable time before withdrawal.

##### 3. NEW TRIAL ⇨89 — TESTIMONY AT TRIAL CONSTITUTING SURPRISE.

In an action involving the question whether an offer to sell hemp was accepted while the offer was still open, where plaintiff had insisted that notice of acceptance given before midnight on day of offer was in time, it was to be anticipated that plaintiff would attempt to show that the offer continued longer than such day, where plaintiff's agent had so contended with defendant, so that defendant's surprise therein was not such as would be ground for a new trial under Civ. Code Prac. § 340, subsec. 3.

##### 4. NEW TRIAL ⇨97—SURPRISE; MOTION TO SET ASIDE SWEARING OF JURY AND FOR CONTINUANCE.

Defeated party cannot upon appeal avail himself of the objection that he was entitled to a new trial on ground of surprise, where he

did not ask for setting aside of swearing of jury and for continuance as soon as he became aware of it.

##### 5. NEW TRIAL ⇨143(4) — IMPEACHMENT OF VERDICT BY TESTIMONY OF JUROR.

A verdict may not be impeached on grounds for its rendition explained by a juror's testimony, except in criminal cases to establish the fact that the verdict was determined by lot, Cr. Code Prac. § 272, so that a verdict in a civil case cannot be set aside on testimony that the jurors misunderstood instructions.

Appeal from Circuit Court, Boyle County.

Suit by E. F. Spears & Sons against Jere Caldwell, Jr. Judgment for plaintiff, and defendant appeals. Affirmed.

John R. Allen, of Lexington, and Henry Jackson and Charles Fox, both of Danville, for appellant.

John W. Rawlings and George E. Stone, both of Danville, for appellee.

THOMAS, J. Alleging the violation of a contract which they claim was held by them for the purchase of the 1916 hemp crop of the defendant and appellant, the plaintiffs and appellees brought this suit to recover damages for such violation, and there was a judgment in their favor for the sum of \$1,907.88, to reverse which defendant prosecutes this appeal.

The contract declared on was an agreement between plaintiff and defendant by which the former was to purchase defendant's hemp at \$10 per hundred pounds. The damage claimed is the difference between the agreed purchase price and the value of the hemp at the time for delivery, which difference, \$4 per 100 pounds, calculated upon the basis of the amount of hemp, made up the sum returned by the jury in its verdict. Defendant made no denial of the amount of damages, if he is liable at all; his only defense being that he made no contract to sell plaintiffs his hemp.

The grounds urged for a reversal are: (1) That the court should have given to the jury, at defendant's instance, a peremptory instruction to return a verdict in his favor; (2) errors in the instructions given to the jury; and (3) that the court should have granted the motion for a new trial because of (a) surprise which ordinary prudence on the part of defendant could not have guarded against; and (b) a misinterpretation on the part of two of the jurors of the court's instructions, whereby they were led to subscribe to the verdict which they otherwise would not have done.

[1] Briefly considering these in the order named, it will be necessary in disposing of ground (1) to make a statement of some of the testimony given by the witnesses. The plaintiffs are dealers in hemp, and have their principal office at Paris, Ky. In 1916 they had

an agent in Boyle county, Mr. Richard Cobb, who was a farmer living about three miles from Danville. The defendant was also a farmer in that county, and on August 21st of that year, plaintiffs' agent met defendant at Danville. The two differ in their testimony as to the place of meeting, the time, and as to what occurred. Cobb, the agent, testified in substance that defendant offered to accept ten cents per pound for his hemp, and that he then replied, "Well, I want to see what I can do here with the farmers to-day in locating crops and so on; and I will let you know." He says this conversation occurred about 11 o'clock a. m., in front of Cecil's store; that some time in the afternoon he met defendant on the street, and the latter asked him, "Have you heard from your man yet?" To which the agent replied, "No; I wasn't going to call him until I went home; there is several fellows that is not in town that I expected to see, and I will call those as soon as I go home, and let you know."

Defendant's version of the transaction is that he met the agent, Cobb, at about noon, in a restaurant in Danville; that the latter asked him what he would take for his hemp, whereupon he replied, "Mr. Cobb, I will take 10 cents per pound for my hemp to-day." that he repeated that statement after he had finished his meal and was leaving the restaurant. He denies having any further conversation with the agent during the day about the matter. About 6 o'clock that afternoon Cobb from his residence telephoned the plaintiffs, informing them of defendant's offer, and it was immediately accepted. Cobb then attempted to reach the defendant over the telephone, by calling the residence on his farm, his father's residence, and different places in the city of Danville. About 9 o'clock p. m. he again called the residence of defendant's father (where defendant resided), but he was still absent, and word was left with his brother that plaintiffs accepted the proposition to purchase his hemp at \$10 per 100 pounds, the brother agreeing to deliver the message. Plaintiff did not return home until after his brother had retired, and he left his father's residence early next morning before his brother arose, so that the message was not delivered to him until noon, after his return from a business trip which he had made to an adjoining county. Upon being notified by his brother of plaintiffs' acceptance, the defendant repudiated it upon the ground that it was not made within the time limit of the offer, which he contended was to be for that day only, and that the day ended at sunset.

Instruction No. 1, given by the court, directed the jury to find for plaintiffs if they believed from the evidence that the offer of sale was not confined to the day upon which it was made, and instruction No. 2 directed them to find for defendant if they believed that the offer was limited to the day upon

which it was made. As we have seen, the jury returned a verdict for the plaintiffs, thereby finding that the offer was not limited as defendant insisted.

So the question is narrowed to this point, whether the offer as testified to by the agent Cobb, and which his principal afterward accepted, followed by the communication of acceptance the next day after the offer, constitutes a binding contract. It will be observed that the facts in the case do not present the question whether a bare proposal, unaccompanied by any previous negotiations or any facts or circumstances looking to a continuance of the offer, would constitute a contract if accepted by the offeree at any time in the future, since both parties testified that the offer was to remain open, but differ as to the length of time.

The law upon the subject of the creation of a contract by the making of an offer and its subsequent acceptance is well stated in 13 Corpus Juris, pp. 292, 297. With reference to the making of the offer the text, on page 293, says:

"An offer, if not under seal, may be revoked or withdrawn at any time before it is accepted, and the acceptance communicated when communication is necessary, for until then there is neither agreement nor consideration. Where an offer is accepted before it is revoked, the contract is as obligatory as if both promises were simultaneous. Here, as in other like cases, if both parties meet, one prepared to accept and the other to retract, whichever speaks first will have the law with him; and this question is one of fact to be decided by the jury."

Concerning the acceptance of the offer, on page 297 the text says:

"An offer comes to an end at the expiration of the time given for its acceptance, a limitation of time within which an offer is to run being equivalent to the withdrawal of the offer at the end of the time named. Where no time is fixed in the offer it expires at the end of a reasonable time. What is a reasonable time depends largely on the nature of the particular offer and the circumstances of the case."

The opinions of this court are in full accord with the above excerpts, as will be seen from the following cases: *Moxley's Adm'r's v. Moxley*, 2 Metc. 309; *Postal Telegraph-Cable Co. v. Louisville Cotton Seed Oil Co.*, 140 Ky. 506, 131 S. W. 277; *Shaw & Co. v. Ingram-Day Lumber Co.*, 152 Ky. 329, 153 S. W. 431, L. R. A. 1915D, 145; *Citizens' National Life Insurance Co. v. Murphy*, 154 Ky. 88, 156 S. W. 1069; *Portland Cement & Coal Co. v. Steckel*, 164 Ky. 420, 175 S. W. 663, and *Hutcheson v. Blakeman*, 3 Metc. 80. All of the writers upon the subject of contracts state the doctrine substantially as above.

Accepting this as the law upon the subject, and the finding of the jury as to the character of offer made by the defendant as



true, the only remaining question is whether the communication of the acceptance on the next day was within a reasonable time, under the circumstance of the case. That the answer should be in the affirmative we think there can be no doubt. Indeed it is not insisted that the next day was not a reasonable time within which to communicate the acceptance, and we conclude that the court properly instructed the jury as embodied in instruction No. 1, submitting plaintiffs' theory of the case, and that no error was committed by refusing to direct a verdict in favor of defendant.

[2] What we have said at least partially disposes of ground (2) urged for a reversal of the judgment. Under the contention therein made it is insisted by defendant's counsel that instruction No. 1 was erroneous, in that it did not require the jury to find that plaintiffs had accepted the offer, and that it ignored the right of defendant to withdraw the offer at any time before acceptance because there was no consideration for it. These criticisms would be well founded if there existed any facts for their support. The acceptance of the offer by plaintiffs, and its communication to defendant next day in the manner herein before stated, is not disputed, and the law is that a gratuitous offer may be accepted within a reasonable time before withdrawal. Hence there was no room, under the facts of the case, for the qualification and modification of the instruction, as counsel insist.

[3, 4] The basis for a reversal as contained in subdivision (a) of ground (3) is that defendant was surprised at the testimony of the agent Cobb to the effect that the offer was not limited to the day upon which it was made, and in his motion for a new trial he filed affidavits showing that he had received a letter from plaintiffs about a year before the trial, in which they insisted that if defendant's version of the offer was accepted as true, the day did not expire until midnight, and since the acceptance was delivered at defendant's home before that hour, it was within time, although not communicated to him. Accompanying that letter was one from plaintiffs' attorney at Paris, Ky., giving his construction of the law as to the meaning of the word "day." From these facts it is argued that defendant was led to believe that plaintiffs would not contend that the offer extended beyond the day in which it was made, and that he was surprised when the witness testified to the contrary. There are a number of reasons why the court properly disregarded this ground for a new trial, one of which is that this is not the character of surprise authorizing the granting of a new trial as contained in subsection 3 of section 340 of the Civil Code, since a litigant cannot be said to be surprised when his antagonist offers testimony to establish facts supporting

his contention in the case. The surprise contemplated by the Code is such as is not reasonably to be anticipated, or perhaps testimony contrary to a prior understanding between the parties, or something resulting from actual fraud or deception. A second reason is that if it be conceded that the alleged surprise was sufficient, and of the character to authorize the granting of a new trial, it would then have been the duty of the defendant, in order to get the benefit of it, to ask for the setting aside of the swearing of the jury and continuance of the case as soon as he was made aware of it. *Liverpool, London & Globe Insurance Co. v. Wright & Allen*, 158 Ky. 290, 164 S. W. 952; *Howard v. Strawbridge & Clothier*, 165 Ky. 88, 176 S. W. 977; *Shipp's Adm'r v. Suggett's Adm'r*, 9 B. Mon. 5, and *Ky. Distillers' Warehouse Co. v. Wells*, 149 Ky. 275, 148 S. W. 375. A third reason is that according to defendant's testimony he talked to the agent Cobb over the telephone on the morning of the next day after his brother notified him of the acceptance of the offer, and insisted that the acceptance came too late, which Cobb denied, claiming that it was made within the time limit of the offer. He therefore could not have been surprised at Cobb's testimony, which conformed to the contention made by him in that telephone conversation.

[5] In subdivision (b) of ground (3), plaintiff insists upon the right to a new trial because two of the jurors claim to have misunderstood the instructions of the court. In the first place there is absolutely no room for any misunderstanding of the instructions, since they are as plain and concise as it is possible for language to make them; but, independent of this, it is a well-established rule that a verdict may not be impeached, or grounds for its rendition explained, by the testimony of a juror, except in criminal cases a juror may be examined to establish the fact that the verdict was made by lot (*Criminal Code*, § 272); *Taylor v. Giger*, *Hardin*, 587; *Heath v. Conway*, 1 *Bibb*, 398; *Johnson v. Davenport*, 3 *J. J. Marshall*, 393; *Commonwealth v. Skeggs*, 3 *Bush*, 19. As said in the *Davenport Case*, which is quoted with approval in the *Skeggs Case*:

"The dangerous tendency of receiving testimony of the jurors for such a purpose is too obvious to require comment. It would open a door so wide, and present temptations so strong, for fraud, corruption, and perjury, as greatly to impair the value of, if not eventually to destroy, this inestimable form of trial by jury."

Upon the whole case we are convinced that none of the grounds relied on are sufficient to authorize a new trial, and the judgment is therefore affirmed.

## LEXINGTON &amp; E. RY. CO. v. ROBINSON.

(Court of Appeals of Kentucky. Nov. 21, 1919.)

1. CARRIERS  $\Leftrightarrow$ 320(24) — NEGLIGENCE JURY QUESTION IN ACTION FOR INJURIES.

In an action against a railroad for injuries to a girl passenger who got a hot cinder in her eye while passing through a tunnel, the issue of negligence *held* for the jury.

2. DAMAGES  $\Leftrightarrow$ 131(1) — EXCESSIVE VERDICT FOR INJURIES TO EYE FROM CINDEE.

In an action against a railroad for injuries to eye of a girl passenger from a cinder, an award to plaintiff of \$5,000 damages *held* grossly excessive, and given under the influence of passion or prejudice within Civ. Code Prac. § 340; it appearing reasonably certain that the injury was not permanent, but correctible in some degree at least through the use of glasses.

Appeal from Circuit Court, Breathitt County.

Action by Edna Robinson, by Ance Robinson, her next friend, against the Lexington & Eastern Railway Company. From judgment for plaintiff, defendant appeals. Reversed, with instructions to award defendant new trial.

O. H. Pollard, of Jackson, Samuel M. Wilson, of Lexington, and Benjamin D. Warfield, of Louisville, for appellant.

J. M. McDaniel, of Beattyville, Kelly Kash, of Irvine, and Hazelrigg & Hazelrigg and Hobson & Hobson, all of Frankfort, for appellee.

QUIN, J. Edna Robinson, 10 years of age, in company with a girl cousin 16 years old, became a passenger on a train\* of the appellant company at Jackson, Ky.; her destination being Haddix, some 8 or 10 miles distant. Edna's father accompanied them to the train. One of the front seats, in the ladies' coach having just been vacated, they were seated there; Edna being next to the window, which was open. Her companion's father (Edna's uncle) took a seat in the coach just opposite the girls, but later went into the smoking car. In passing through a tunnel on their way to Haddix, appellee claims that a hot cinder came through the window and struck her in the eye.

After their tickets had been collected and the conductor was on his second trip through the train, and before reaching the tunnel, the girls testify they, in a loud voice, requested the conductor to close the window. This request was made when he was some two or three seats from them. They say he turned, looked at them and towards the window, and continued collecting tickets. He did not lower the window, and the girls claim they were unable to do so. Appellee suffered greatly with her eye that night, and the suc-

ceeding day and night, and her pain was such that she returned to her home the second day and went with her father to see a physician, Dr. Hogg, who told them the eye was in such a condition he could do nothing for it, but recommended the application of some liniment. This gave some relief. Two or three days later, or about five days after the accident, appellee consulted Dr. Wilgus Back, and she says he removed a cinder from her eye. Though her eyes had been well and strong before the accident, she says she has been unable to read or to use her eyes since that day and was still suffering from them at the time of trial three years later.

There have been three trials of this case. A verdict of \$250 was set aside by consent; a second trial resulted in a hung jury; and in the third, the one from which the present appeal is prosecuted, appellee was awarded damages in the sum of \$5,000.

[1] The evidence in behalf of appellee is anything but satisfactory, yet sufficient to take the case to the jury. However, the verdict is not only against the weight of the evidence, but the amount awarded is so excessive that for both reasons a reversal must be ordered.

Appellee introduced in her behalf Dr. W. P. Hogg, who testified that he met appellee and her father on the street, or in his office, he did not recall which, as it had been some two or three years previous; he did not recall anything much about it; to the best of his knowledge the girl's eye was swollen; he was uncertain whether he prescribed any treatment.

In answer to a hypothetical question, he states that the condition of the eye might be permanent.

Dr. Wilgus Back, introduced by appellant, says that appellee did not consult him with reference to an injury to her eye; that she had a sty on her eye, and he operated on it, which gave her relief. He says he did not take a cinder out of her eye, and there was no evidence of a cinder having been in her eye; he never saw her again from that day until he met her at the government hospital, where she was being treated for some eye trouble. This was a year or two after her visit to him. He testified to the same effect on each of the previous trials. At the time of the last trial he was the regular surgeon for the appellant, but at the time he attended appellee he was not so employed by the company.

Dr. T. F. Wickliffe, also introduced by the appellant, is an eye, ear, nose, and throat specialist in charge of the government hospital at Jackson; says he first saw the appellee March 27, 1914, just after the hospital had been opened. She came to the hospital to have her eyes examined. He made a thorough examination of her eyes and found she had catarrhal conjunctivitis in both eyes.

This is an inflammation of the conjunctiva, the serous lining of the lids and covering of part of the eyeball. This was her only ailment. There was no evidence of any inflammation produced by a cinder. She made no reference to any cinder. That a cinder in the eye will produce a redness of the eyelid, or what is called "hyperæmia," which is a congestion of the blood vessels caused by an excessive amount of blood being brought to one spot. He testified that a slippery elm poultice, which appellee's aunt had made and applied to her eyes while at her home in Haddix, was not the proper remedy or treatment, as this would likely have caused more inflammation.

Appellee was called before the jury and an examination there made of her eyes by this witness, who states he could find no evidence of any injury to either eye due to a cinder. The condition he found was caused either by farsightedness or nearsightedness; he thought more probably it was the former. A cinder in one eye would not produce catarrhal conjunctivitis in both; that he had never seen any evidence of any injury to her eye by a cinder; that catarrhal conjunctivitis could be produced by a cinder remaining in the eye a long time, but the inflammation would be temporary if removed shortly. It will be recalled at this point that, according to appellee's testimony, Dr. Back removed the cinder within about five days after the accident.

Continuing his testimony, Dr. Wickliffe says if the eye had been damaged by a cinder there would be some evidence of the injury: that the optic nerve is so far back that it could not be injured by a cinder under any circumstances; and that appellee would only suffer pain from straining the eyes. There were no active ulcers on the girl's eye at the time of the examination, and even though a cinder had injured the eye months before, in the absence of such an ulcer, she would experience no pain from reading. He reiterates that in his judgment appellee is farsighted, and this, and not a cinder, is the cause of her trouble, and this condition can be corrected by glasses, though he did not give a prescription for glasses. He says her eyes were inflamed when he examined them on the first and second trials; they are still affected; she has catarrhal lids, and this condition could be produced by neglect. Catarrhal conjunctivitis acute is a mild form of a catarrhal inflammation of the conjunctiva, evidenced by a hyperæmia and mucoid discharge. This may be caused by any local irritant, such as dust, smoke, etc. With proper treatment the patient gets well in a few weeks. It will pass into a chronic form only through neglect, improper treatment, or the continued presence of the irritant.

In answer to a hypothetical question he makes this answer:

"Well, yes; you would say that is a permanent injury if that question is stated correctly and fairly."

But this answer is without any probative effect as this witness had testified after several examinations that the trouble with the appellee's eyes was due, in his opinion, to farsightedness, and he had found no evidence of any injury produced by a cinder. It was not necessary for him to assume a state of fact. The necessity for stating a case hypothetically arises where the witness has no personal knowledge of the facts.

[2] These three were the only physicians who testified, and one cannot read their evidence without the conviction that an award of \$5,000 is grossly excessive, and, to use the language of the Civil Code of Practice (section 340), it appears to have been given under the influence of passion or prejudice. According to the testimony, appellee's trouble can be arrested by the use of glasses, and, though the accident happened at least three years prior to the last trial it is nowhere in evidence that any effort or attempt has ever been made to supply this necessary, effective, and simple relief.

Appellee and her cousin testified, in rebuttal, that Edna did not consult Dr. Back for a sty; that it was a girl by the name of Etta Robinson that had the sty, and not appellee.

We would not be understood as minimizing in any way, the seriousness of an injury to the eye; but it seems reasonably certain the condition of appellee's eyes is not permanent, on the contrary is such as can be overcome or corrected in some degree at least through the use of glasses. It is probable the parties have confused the condition testified to by the physicians with what is known in ophthalmology as sympathetic ophthalmia, which is a serous or plastic inflammation of the uveal tract in one eye due to the effect of a similar inflammation in the other. It usually occurs from five to eight weeks after injury to the exciting eye. The uveal tract consists of the iris (muscle curtain forming the pupil), ciliary body (muscle of accommodation), and choroid (dark brown nutrient membrane in back part of the eye). Such inflammation is due to a perforation into the interior of the eye of traumatic or infective origin, and rarely, if ever, occurs without a perforating lesion, and usually terminates in blindness. But such symptoms or conditions were not disclosed by an examination of appellee's eyes according to the testimony. Besides, sympathetic ophthalmia seldom follows the removal of a substance, such as a cinder, and if there be any permanent effect it is not evidenced by inflammation but a scar on the cornea. If this scar is over the pupil, vision is interfered with; otherwise no subjective symptoms obtain.

Upon a return of this case, if appellee has

not been provided with suitable glasses we suggest that this be done; so that upon a retrial both the jury and the court will have the benefit of the result or effect obtained from their use. This test will tend largely to prevent injustice being done to either of the parties.

For the reasons herein stated, the judgment of the lower court is reversed, with instructions to award appellant a new trial.

### HORNSBY et al. v. HORNSBY et al.

(Court of Appeals of Kentucky. Nov. 25, 1919.)

#### 1. WILLS $\Leftrightarrow$ 617—LIFE ESTATES; SALE BY EXECUTORS CONSISTENT WITH DEVISE.

A clause in a will giving to testator's wife all household effects absolutely, and the "use and benefit of his property, both real estate and personal, during her life," followed by a clause directing division after her death, *held* consistent with a subsequent clause requesting executors not to file inventory but to qualify and sell the property and wind up the affairs as soon as in their judgment was expedient; and the widow was entitled to the use and income of the property itself for life, free from the executors' power to sell until after her death.

#### 2. LIFE ESTATES $\Leftrightarrow$ 21—PERSONAL PROPERTY; INCREASE IN VALUE BELONGS TO REMAINDERMEN.

Under a will giving testator's widow the "use and benefit" of his property during her life, the widow as life tenant is only entitled to income from cattle and not to the increase in value which is a part of the corpus of the estate of the remaindermen.

Appeal from Circuit Court, Shelby County.

Action by J. W. Hornsby and another, executors named in the will of J. W. Hornsby, deceased, against Jennie Calloway Hornsby and others, for a construction of the will. From a judgment construing the will, the executors appeal, and the named defendant files a cross-appeal. Affirmed in part upon the original appeal, and reversed in part upon the cross-appeal.

Willis, Todd & Bond, of Shelbyville, and W. P. Thorne, of Eminence, for appellants.

Thomas A. Barker, of Louisville, and Turner & Turner, of New Castle, for appellees.

**SAMPSON, J.** The executors named in the will of J. W. Hornsby instituted this action in the Shelby circuit court for a construction of the will. The testamentary paper in question reads as follows:

"I, Joseph W. Hornsby of Shelby county, Kentucky, being of sound mind and memory, realizing the uncertainty of human life, and the absolute certainty of death, and being desir-

ous of saying to whom and what way the property that it has pleased God to bless me with while living shall be disposed of after my death, do make and publish this paper as my last will and testament, hereby revoking all other wills heretofore made.

"First. It is my will that as soon after my death as may be found convenient by my executors, that all my just debts (if any) and my funeral expenses be paid.

"Second. I give and bequeath to my wife Jennie Calloway Hornsby all the personal and household effects of every kind and description in our home absolutely, and also the use and benefit of my property, both real estate and personal during her life.

"Third. Then I will the estate divided equally after the death of my wife Jennie Calloway Hornsby between my brother Thomas L. Hornsby, and my sister Cordelia Calloway wife of Samuel Calloway, deceased, and sister Cynthia Hudson, wife of W. L. Hudson.

"Fourth. The share set apart to my brother Thomas L. Hornsby shall go to him absolutely, but if he should die before I do, then his share shall go equally to his children, and if any of his children at that time be dead, leaving children then said children shall have that interest in said share to which their parent if living would have been entitled.

"Fifth. The share set apart to my sister Cordelia Calloway shall go to her absolutely, but if she should die before my estate is wound up, her share shall be divided equally between the following named children of hers, to wit: Joseph Calloway, Sam Calloway, Allen Calloway, Julia Bate, wife of Dr. B. A. Bate, Cordelia C. Walker, wife of J. W. Walker, and Lizzie Calloway.

"If at the time my estate is wound up, if any of the above named be dead leaving children, then said children, shall take that interest in said share to which their parents if living would have been entitled.

"If any of these children named shall be dead at that time leaving no children, then the interest in the share of the one so dying, shall go to the survivors of those named and their children.

"Sixth. It will be seen by the fifth clause of this will I have omitted one of my nephews, Irvine Calloway, that was not an oversight as he has gotten all of my estate that I want him to have.

"Seventh. The share of my estate set apart to my sister Cynthia Hudson shall be held in trust for the use and benefit of my sister and her husband, W. L. Hudson during her life, the income that is the net income to be paid to my sister annually or semi-annually as long as she lives. If she should die first leaving her husband, W. L. Hudson surviving, then one-half of my sister Cynthia Hudson's share shall still be held in trust, the net income of said one-half shall be paid to W. L. Hudson during his life, after the death of my sister and her husband, said share shall be equally divided between my brother Thomas L. Hornsby and sister Cordelia Calloway, and if any of them should be dead, then the interest of Thomas L. Hornsby is to his children and their children, and the interest of Cordelia Calloway is to go to her children that I have named in the fifth clause of this will, and their children.

"Eighth. I appoint my brother Thomas L.

Hornsby, and my brother-in-law, W. L. Hudson executors of this my will, and ask them not to file any inventory of my estate in the clerk's office, but qualify and make sale of my property and wind up the affairs as soon as in their judgment is expedient and profitable to all concerned.

"Ninth. Should either one of my executors named fail or refuse from any cause to qualify, the other shall act; if from any cause both should fail or refuse to qualify, then in that event the Shelby County Trust Company is requested to qualify.

"In testimony, whereof, I hereby set my hand and seal this the 23d day of September, 1915.

"Joseph W. Hornsby."

Hornsby died in 1918, leaving a widow, but no children. His estate was valued at something more than \$100,000, of which a farm of 304 acres constituted the major portion; the personal property amounting to somewhat more than \$30,000.

The only clauses of the will in question are the second and eighth. The executors contend that these two sections of the paper are antagonistic and cannot be harmonized, and under a rule of this court, where two provisions of a will are repugnant, one of them must be disregarded, the second or last clause must prevail; it being presumed that the last statement in the will was the final conclusion of the testator.

For the widow who is appellee, it is contended that the two clauses are not repugnant and may be harmonized and read together, and when so read truly and correctly express the will and wish of the testator. The trial court held that under the eighth clause of the will the executors have no power to sell any of the real estate or personalty until after the death of the widow, who is the life tenant, except for the purposes of paying debts and expenses, and that the widow as life tenant is entitled to the use and possession of the real estate as long as she lives, free from the control of the executors; she to pay all taxes, insurance, and expenses of repairs except the taxes which accrued previous to the death of the testator. And, further, the executors were adjudged the right to hold all the personal property outside of the household equipment, including the hay and corn which had been sold by the executors, except the life tenant was adjudged entitled to the use, benefit, and possession of the farming implements, machinery, and live stock outside of the stock cattle in which her husband owned only a one-half interest. But she was adjudged entitled to have absolutely the increase on the cattle, "that is, the difference between the value at the time of the death of the testator, and the amount for which they sold."

From this judgment the executors prosecuted an appeal and the widow a cross-appeal. From the second clause of the will it is obvious that the testator intended his wife, ap-

pellee, to have absolutely all of the household effects of every kind and description then in the home with the right to dispose of them as she saw fit, and further to have the use and benefit of all the balance of the property of the testator, both real and personal, so long as she lived; but she was granted no power of final disposition with respect to this last-named property.

[1] By the third clause of the will, the testator provides how his property should go after the death of his wife, which clearly indicates that the property was not to be divided until after the death of the widow, and as she is now living the devisees were not entitled to have a division. When we read the eighth clause, which says, "I appoint my brother Thomas L. Hornsby, and my brother-in-law W. L. Hudson executors of this my last will, and ask them not to file any inventory of my estate in the clerk's office but to qualify and make sale of my property and wind up the affairs as soon as in their judgment is expedient and profitable to all concerned," we are forced to the conclusion that the testator intended that the sale mentioned in winding up the affairs should not be made until after the death of the life-tenant, and giving this clause of the will this construction, which is but fair and reasonable, it harmonizes perfectly with the second clause to which we above referred; and, reading the two together, we find the testator's intention to be to give to his wife absolutely all the household effects of every kind and description then in the home and give her the use and benefit throughout her life of all the remainder of his property both real and personal, and at her death the corpus of the estate, outside of the household effects given to his wife absolutely with full power of disposition, was to go to his brother and two sisters in case they were then living, or, if not, then to certain of their children named in the will. The executors were then to take charge of the estate and wind up the affairs as soon as in their judgment was expedient and profitable to all concerned. Under this clause of the will, the executors were empowered to make an inventory of the property immediately after the decease of the testator, and to turn over the property to the life tenant, taking such measures as were reasonably necessary for the protection of the corpus thereof. The widow is entitled to the income for her support because this is clearly manifest from the last clause of the second paragraph, wherein it is stated that the wife shall have the use and benefit of all of my property both real and personal during her life. He does not say nor indicate that the property shall be sold and the money placed on interest or invested, and she maintained from such a fund, but she is to have the use and benefit of the property itself during her life. So construed,

there does not appear to be any repugnancy between the second and eighth clauses of the will, and the trial court properly construed the instrument to that extent.

[2] The judgment in so far as it gives to the widow absolutely "all the increase on the cattle, that is, the difference between the value at the time of the death of the testator and the amount for which sold," is erroneous for the reason that the widow as life tenant was not entitled to take the corpus of the estate but only the income therefrom. This rule is well stated in 17 R. C. L. 631, where it is said:

"Any increase in the value of the principal fund during the existence of the life estate is as a rule the property of the remainderman and not of the life tenant. Thus, an increase in the value of securities while in the hands of the life tenant belongs to the remainderman, as does also a profit made by the purchase and sale of securities, and the same is true of an increase in the value of real estate. \* \* \* It would seem, however, that where the increased value results not from earnings, but from increase in value of the corpus, it belongs to the remainderman." *Letcher's Trustee v. German Bank*, 134 Ky. 24, 119 S. W. 236, 20 Ann. Cas. 815; *Bains v. Globe Bank*, 136 Ky. 332, 124 S. W. 343, 136 Am. St. Rep. 263; *Cox v. Gaulbert's Trustee*, 148 Ky. 418, 147 S. W. 25; *Guthrie's Trustee v. Akers*, 157 Ky. 651, 163 S. W. 1117; *First National Bank v. Lee*, 66 S. W. 413, 23 Ky. Law Rep. 1897.

Applying this rule to the judgment entered in the lower court, giving absolutely to the widow increase in the price on the cattle that accrued after the death of her husband and before the cattle were sold, it is manifest that the chancellor erred to the prejudice of appellants, and to this extent the judgment is reversed, with instructions to enter a judgment giving to the life tenant only the income or return from the cattle or the sum realized from their sale but not any part of the corpus. In all other respects the judgment is affirmed.

Judgment affirmed in part upon the original appeal, and reversed in part upon the cross-appeal.

### PERKINS v. HARMON.

(Court of Appeals of Kentucky. Nov. 28, 1919.)

#### 1. EVIDENCE — 10(5) — JUDICIAL NOTICE.

It is a well-known fact that the course of a stream often changes.

#### 2. APPEAL AND ERROR — 1009(3) — REVIEW; EQUITABLE CASES.

Judgment of a chancellor should not be reversed, where the proof is contradictory, unless in the opinion of the appellate court the judgment is against the decided weight of the evi-

dence; the views of the chancellor being entitled to considerable weight.

Appeal from Circuit Court, Magoffin County.

Action by Daniel Harmon against Wib Perkins. Judgment for plaintiff, and defendant appeals. Affirmed.

J. W. Howard, of Salyersville, for appellant.

Calloway Howard, of Salyersville, and A. F. Byrd, of Lexington, for appellee.

QUIN, J. This is a dispute over the proper location of a boundary between farms belonging to the parties to this appeal. Appellee claims under a deed from Eli Fairchild and wife to Larkin Jackson, dated March 17, 1866, while the appellant claims under a deed of September 5, 1874, from Holloway Power and wife to George Perkins. The description of the land conveyed in the deed first above mentioned is as follows:

"Beginning at a stake at the forks of the branch just below said Jackson house; thence up said right-hand branch a small distance opposite a point just below a deer lick; thence up said point to the top of the forked ridge; thence up the forked ridge to opposite the mouth of the small branch running in on the north side of the creek; thence down the hill a straight line and crossing the creek to the mouth of the small branch at the upper end of said Jackson's field; thence up said branch with its meanders to the head of the same, to the top of the forked ridge; thence along the top of the said ridge to the top of the divide; thence running along with the top of the said dividing ridge around the head of the long rock house branch; thence down the ridge between said long rock house branch and the Burton fork to the head of the Lick branch; thence down the ridge between the said Lick branch and the long rock house branch to opposite the beginning; thence down the said point with the top of the same to the beginning."

This farm contains 150 acres. The Perkins farm contains 250 acres, more or less, and is thus described:

"Beginning at the upper end of Larkin Jackson farm; thence with said Jackson's line on the north side of the creek to the top of the ridge between the head of the right-hand fork of the State Road fork and Paint creek waters; thence up said ridge to Allen Bailey's line; thence with said Bailey's line on top of the ridge between the right-hand fork and Allen Bailey's creek to the line of Thomas J. Power; thence down a point to Larkin Jackson's line with said Jackson's line, to the beginning at the mouth of a branch."

In appellee's petition it is alleged that appellant was trespassing upon appellee's land and setting up an adverse and hostile claim thereto. He asked that he be adjudged

the owner of the land and his title to same quieted, and that appellant be enjoined and restrained from committing any further trespasses thereon. The lower court sustained appellee's contention, adjudging him the owner of the land in dispute, a tract of about 4 acres.

As will be seen, no bearings or distances are given in the two deeds, nor from a very crude drawing filed with the depositions is it possible to fix, with any degree of satisfaction, the true location of the line. It is conceded that the location of the boundary in dispute is a line common to both farms; the question being to properly locate this line. One cannot tell either the length of the lines or in what direction they run. The particular call is the one beginning at a point opposite the mouth of a small branch, thence down a hill a straight line, and crossing the creek to the mouth of the small branch at the upper end of the Jackson field. If possible to locate the mouth of this branch, it would not be an easy matter to tell in which direction the straight line should run, because the line could be straight and run from the mouth of the branch to any part of the top of the ridge. But there is a dispute as to the exact location of the mouth of the branch.

According to appellee, the mouth of the branch at the time of the execution of the Jackson deed was at a point somewhere between 30 and 50 feet east of its location at the present time. Due to a cloudburst or freshet, the channel of the branch was changed, and it does not empty into Mash fork at the same point as it did in 1866. It is also claimed that in the reconstruction of the county road at this place a considerable quantity of brush and logs were thrown in the bed of the creek, and this caused it to change its course.

Appellant introduced a number of witnesses who say there has been no change in the course of the branch, and that it now empties into the creek at the same place it always did. Numerically the witnesses are about equal. Most of them are old residents of Magoffin county, and who have known this ground for a period of from 25 to more than 50 years. One set of witnesses swear there has been a change in the course of the branch, while witnesses for the other side are just as positive there is no difference in it.

A surveyor appointed by the court on motion of appellee, with the consent of appellant, made his report and found that the line contended for by the appellee was correct. Appellee states that before he made his purchase he talked to appellant about the matter, and the latter pointed out to him the line of his farm, and this line is the one he

(appellee) claims is the proper one. There is further proof that the line found by the court to be the true one has been recognized by the parties for a number of years; but, on the other hand, there is as much proof that the line contended for by appellant has been so recognized.

[1] The testimony is in a hopeless state of conflict, it cannot be reconciled. Witnesses equally reputable do not agree. It is a well-known fact that the course of a stream often changes; this may result from various causes; some of these causes are given by the witnesses for appellee.

[2] The chancellor, upon final submission, found the line should run as claimed by appellee, and as found by the surveyor. The chancellor was doubtless familiar with the location of the property, perhaps was personally acquainted with the witnesses, and he was in a better position to fix the proper line than this court. The judgment of the lower court should not be reversed, where the proof is contradictory, unless in our opinion the judgment is against the decided weight of the evidence. There is a conflict in the evidence, the question as to the proper location of the boundary difficult of solution, and we have been furnished with no maps to aid or assist us. Other than asking us to accept as true the testimony of his witnesses, ignoring entirely the proof adduced by appellee, appellant has pointed out no reason for reversing the judgment below. He must do more than this.

The views of the chancellor are entitled to considerable weight, and, not having been shown sufficient, or any, ground to disturb his findings the judgment will be affirmed.

## EUREKA COAL & MINERAL CO. et al. v. JOHNSON.

(Court of Appeals of Kentucky. Dec. 2, 1919.)

### 1. TRESPASS $\S$ 20(3) — POSSESSION SUFFICIENT TO MAINTAIN ACTION.

Possession in plaintiff without title is sufficient to maintain an action in trespass against one who has no title.

### 2. TRESPASS $\S$ 20(4) — SUFFICIENCY OF POSSESSION OF UNINCLOSED LAND.

Actual possession of lands at the time of the trespass is necessary to enable a plaintiff without title to recover against a trespasser, and, where the land is not inclosed or embraced within a well-marked boundary, a mere claim of ownership under an oral agreement for purchase with an occasional cutting and removing of timber from parts of the land not occupied by the defendant is not sufficient.

Appeal from Circuit Court, Lee County.

Suit by Esther Johnson against the Eureka Coal & Mineral Company and others. Judg-

ment for plaintiff, and defendants appeal. Reversed and remanded for a new trial.

E. C. O'Rear and J. C. Jones, both of Frankfort, Sam Hurst and C. G. Gourley, both of Beattyville, and Worthington, Cochran & Browning, of Maysville, for appellants.

Blakey, Quin & Lewis, of Louisville, and J. M. McDaniel and T. B. Blakey, both of Beattyville, for appellee.

CLAY, C. Alleging that she was the owner and in possession of a certain described tract of land situated in Lee county, and that the defendants, Eureka Coal & Mineral Company, Southwestern Petroleum Company, and Ralph Hochstetter, had, at various times, wrongfully and forcibly and without the consent of plaintiff entered upon said land and committed numerous trespasses, plaintiff, Esther Johnson, brought this suit to recover damages in the sum of \$600 and for all proper relief. The defendants denied that plaintiff was, or had ever been, the owner, or in possession, of the tract of land described in the petition, or that they on the dates mentioned in the petition had wrongfully or forcibly or without the consent of plaintiff entered thereon and committed the various trespasses, and then pleaded that they were the owners of all the coal, gas, oil, and other minerals in the land in question, together with the usual privileges accompanying such ownership. The jury were instructed in substance that, if they believed from the evidence that the plaintiff was put in possession of the land in controversy by M. H. Courtney, then the burden was on the defendants to prove title superior to plaintiff, and that, if they believed from the evidence that the defendants had not shown title superior to that of plaintiff, then the law was for the plaintiff, and the jury should so find, etc. The jury returned the following verdict: "We, the jury, agree and find for the plaintiff the sum of two hundred (\$200.00) dollars." Thereupon, the court adjudged that plaintiff should recover the sum of \$200, with interest and costs, and further adjudged that plaintiff was the owner of the land in controversy. The defendants appeal.

For plaintiff, her husband, Samuel Johnson, testified as follows: He was his wife's agent in regard to the land in controversy. His wife was in possession of the land. His acts of possession were cutting logs and hauling them away, lumbering and cutting posts, and work such as that, all of which was done openly. The land adjoined the land where he and his wife lived, but there was a fence between the two tracts. Every year they cut timber off it and put it down where they lived. The land in controversy was not fenced or inclosed, nor had he and his wife cultivated any portion of it. The land was in the woods. They had no pos-

session of it except the making of logs and the cutting and making of board timber. M. H. Courtney put them in possession of it. He could not say that he cut and hauled logs from the acre and a half occupied by the defendants. Witness was recalled and produced a canceled check for \$10 executed by him to M. H. Courtney "for lands" and indorsed by M. H. Courtney and O. O. Courtney. He stated that the check was given as the first payment for the land in controversy. The next payment was to be made the following May, and Courtney was to send him the deed for examination. When Courtney was at the house the preceding fall, he had a list of the calls, told him where the land was, and showed him how it ran. Courtney then got the date of the check and said that he was going to send back the deed, but never sent it. Courtney first offered him the land for \$2.75 an acre and the timber for \$1.25 an acre, or \$4 straight for the land and timber, and he told Courtney that he would take it straight. The land which Courtney showed him "ran on top of the cliff, around to Spencer's line and with Spencer's line to another hill, and taking this boundary in and the cliffs. They was some places down behind the cliffs." Jim Stewart testified that he passed the land as much as twice a day, or at least nearly every day, and had seen Samuel Johnson cutting and hauling logs off of it. He had not seen Johnson doing any work on that part of the land used by the defendants. He did not know whether the land was fenced. Sim Spencer testified that he lived on Caves Fork. He was acquainted with the boundary of land in controversy, and knew Samuel Johnson and his wife. He bought some timber from Johnson that came off the land. He had helped Johnson haul the timber off. The land was not fenced. Charles McIntosh, plaintiff's son-in-law, testified that he had worked on the land claimed by plaintiff and was present at Johnson's house when the trade was made between Courtney and Samuel Johnson. He corroborates Samuel Johnson as to the terms of the trade, and says that after making the trade Courtney marked out the boundary. Nothing was said about excluding the minerals. When Johnson first went on the land, he commenced cutting timber about 500 yards from where defendants were drilling. Simon Groop and Anderson Johnson testified that Courtney told them that he had sold the land to Johnson's wife. Mitchell Johnson, a son of Samuel Johnson, testified that he had heard Courtney say to Johnson that he could have the land for \$2.75 an acre and the timber for \$1.25 an acre or the land and timber straight for \$4 an acre, and that Johnson said that he would take it all at \$4 straight. In showing the boundary, Courtney used the map. Pryse McIntosh testified that the land claimed by plaintiff was in-



closed by cliffs down to the Spencer fence line, but that Spencer's fence line and the cliffs did not make an inclosure.

[1] It is not insisted that plaintiff showed any kind of title to the land in controversy, but claimed that plaintiff was entitled to recover by reason of her possession. It may be conceded that it is the law in this and many other jurisdictions that possession in the plaintiff is sufficient to maintain an action of trespass against one who hath no title. *Wilson v. Bibb*, 1 Dana, 7, 25 Am. Dec. 118; *North v. Cates*, 2 Bibb, 591; *Crate v. Strong*, 69 S. W. 957, 24 Ky. Law Rep. 710.

[2] It therefore becomes necessary to determine whether plaintiff's proof of possession was sufficient. Though plaintiff's husband claims that his wife was in possession and that she was put in possession by Courtney, yet, when these statements are construed in the light of the facts constituting the possession, it is clear that all that Courtney did was to point out on the map the boundaries of the land in controversy and to sell it by oral agreement to plaintiff. At that time the land was not fenced, and, though it be true that there was a fence around a portion of it and a ridge on the other side, the fence and the ridge did not make an inclosure, nor did they embrace all the land, for a portion of it extended beyond the ridge. Furthermore, there was no well-marked boundary around the land. The land was not occupied or cultivated by plaintiff. All that she did on the land was occasionally to cut timber from different portions of it. It is well settled in this state that actual possession of land at the time of the trespass is necessary to enable a plaintiff without title to recover against a trespasser, and manifestly where the land is not inclosed or embraced within a well-marked boundary, mere claim of ownership with occasional cutting and removing of timber from parts of the land not occupied by the defendant is not sufficient. *Ohio & B. S. R. Co. v. Wooten*, 46 S. W. 681, 20 Ky. Law Rep. 383; *Shields v. Heard*, 53 S. W. 820, 21 Ky. Law Rep. 992. It follows that defendants' motion for a peremptory instruction should have been sustained.

Judgment reversed, and cause remanded for a new trial consistent with this opinion.

#### WATHEN v. WATHEN.

(Court of Appeals of Kentucky. Nov. 25, 1919.)

#### 1. APPEAL AND ERROR $\S$ 797(1)—DISMISSAL; NECESSITY OF CASE BEING DOCKETED.

Civ. Code Prac. § 741, providing that appellee may file an authenticated copy of the rec-

ord in the clerk's office of the Court of Appeals with the same effect as if filed by the appellant, does not authorize the appellee as a matter of right to demand a dismissal of the appeal on the ground that the Court of Appeals has no jurisdiction, or for any other reason, before the case has been regularly put upon the docket.

#### 2. APPEAL AND ERROR $\S$ 621(2), 797(1)—DISMISSAL; NECESSITY OF CAUSE BEING DOCKETED.

Civ. Code Prac. § 738, permitting one who has been granted an appeal by the lower court to file transcript in office of clerk of the Court of Appeals within 20 days before the first day of the second term of said court, does not deny to the appellant the right to file a transcript in the clerk's office at any time after the appeal has been granted him by the lower court, but if appellant does file his transcript before he is required to do so, such filing does not give the appellee the right immediately thereafter, or at any time until the case has been put on the docket, to have the appeal dismissed for want of jurisdiction, or any other cause.

#### 3. APPEAL AND ERROR $\S$ 797(3)—DISMISSAL; TIME.

Where appellant has been granted an appeal by the lower court, and he fails to file the transcript in the office of the clerk of the Court of Appeals within the time given by Civ. Code Prac. § 738, the appellee may, after such time, bring a copy of the judgment and supersedeas bond, if one has been executed, and, after filing same in the clerk's office, move the court to dismiss the appeal and discharge the supersedeas bond.

#### 4. APPEAL AND ERROR $\S$ 803—EFFECT OF DISMISSAL OF APPEAL.

Where appellee, after the appellant has failed to file the transcript within the time given by Civ. Code Prac. § 738, brings a copy of the judgment and has the court dismiss the appeal and discharge the supersedeas bond, if one was executed, the dismissal of the appeal does not prevent the appellant from bringing his case to the Court of Appeals by filing with the clerk the record as provided in section 734.

#### 5. APPEAL AND ERROR $\S$ 811—DOCKETING AND ADVANCING CAUSE; DISCRETION OF COURT.

Whether a case will be docketed, advanced, and submitted, or either advanced, docketed, or submitted, under Civ. Code Prac. § 753, subsec. 4, is entirely within the discretion of the Court of Appeals.

#### 6. APPEAL AND ERROR $\S$ 811—DOCKETING AND ADVANCING CAUSE; EFFECT.

Where an appeal is docketed, advanced, and submitted by the Court of Appeals under Civ. Code Prac. § 753, subsec. 4, the case then stands as any other case that has been submitted.

#### 7. APPEAL AND ERROR $\S$ 811—DOCKETING AND ADVANCING CAUSE; EMERGENCY.

The Court of Appeals will not docket, advance, and submit a case under Civ. Code Prac. § 753, subsec. 4, unless it appears that there is such an emergency as would authorize the case to be taken up out of the regular order.

**Appeal from Circuit Court, Marion County.**

Suit for divorce by Nellie Mansfield Wathen against John Baptist Wathen. From an order directing payment of a monthly allowance to the plaintiff during the pendency of the action, the defendant appeals. Motion to dismiss overruled.

S. T. Spalding, of Lebanon, W. C. McChord, of Springfield, and H. S. McElroy and S. A. Russell, both of Lebanon, for appellant.

Charles C. Boldrick, of Lebanon, and J. Verser Conner, of Louisville, for appellee.

CARROLL, C. J. In a suit for divorce and alimony brought by the appellee against the appellant in the Marion circuit court there was an order made and entered on October 10, 1919, directing the payment of a monthly allowance to the appellee during the pendency of the action. To this order the appellant excepted and prayed an appeal to this court, which was granted, and on October 20th the appellant executed a supersedeas bond.

The appellee, having obtained from the clerk of the Marion circuit court a true and complete copy of the record, filed it in the clerk's office of this court on November 7, 1919, and on the same day entered a motion in this court to dismiss the appeal of appellant upon the ground that the amount of alimony allowed appellee by the lower court was not sufficient to give this court jurisdiction of the appeal prosecuted from the order.

The appellant having filed his objection to the motion, the question is, Should the motion of the appellee to dismiss the appeal be overruled or sustained?

[1] It is provided in section 741 of the Code that—

"The appellee may file an authenticated copy of the record in the clerk's office of the Court of Appeals with the same effect as if filed by the appellant."

But this does not authorize the appellee to demand as a matter of right the dismissal of the appeal, upon the ground that this court had no jurisdiction of it, or for any other reason, before the case has been regularly put on the docket of this court.

[2] The appellant who is granted an appeal by the lower court must, under section 738 of the Code, "file the transcript in the office of the clerk of the Court of Appeals at least twenty days before the first day of the second term of said court next after the granting of the appeal, unless the court extend the time; as, for cause shown, the court may do." But this does not deny to the appellant the right to file his transcript in the clerk's office of this court at any time after the appeal has been granted him by the lower court. And if the appellant

should, within ten or any number of days after the appeal was granted, file the transcript in the office of the clerk of this court, that would not give the appellee the right immediately thereafter, or at any time until the case had been put on the docket, to have the appeal dismissed for want of jurisdiction or any other cause; and when the appellee brings the record up he occupies the same position as the appellant would if he had brought it up.

[3, 4] It is a further rule of practice that when the appellant has been granted an appeal by the lower court and he fails to file the transcript in the office of the clerk of this court within the time given by section 738, unless he has been given further time, the appellee may, after the time given to the appellant in section 738 to file the transcript has expired, bring here a copy of the judgment and supersedeas bond if one has been executed, and, after filing same in the clerk's office, move the court to dismiss the appeal and discharge the supersedeas bond if one was executed, and this will be done. The dismissal of the appeal under circumstances like these does not, however, prevent the appellant from bringing his case here on appeal by filing with the clerk of this court the record as provided in section 734 of the Code.

[5, 6] It is further provided in subsection 4 of section 753 of the Code that—

"In any case where the appeal is granted by the inferior court or where the appellee has been summoned, if the appeal is granted by the clerk of the Court of Appeals, the Court of Appeals may, at any time in its discretion, after the transcript is filed, on motion of either party upon reasonable notice to the adverse party, order the appeal docketed, advanced and set for hearing upon a day to be fixed by the court."

Under this section either party may, at any time after an appeal has been granted by the lower court or by the clerk of this court, file the transcript in the office of the clerk of this court, and move the court upon reasonable notice to the adverse party to docket, advance, and submit the case, entering at the same time his motion to dismiss, as well as any other motions he desires to make; but whether the case will be docketed, advanced, and submitted, or either advanced, docketed, or submitted, is entirely within the discretion of this court. If, however, the appeal is docketed, advanced, and submitted by this court, then the case stands as any other case that has been submitted.

[7] The appellee here did not proceed under this provision of the Code, but if he had done so we would not be disposed to docket, advance, and submit the case, because it does not appear that there is such an emergency as would authorize this case to be

taken up out of the regular order. This case will appear on the docket of the January term of this court, and when it is called on the docket the appellee may renew her motion to dismiss the appeal, and the motion will be promptly disposed of.

Other cases relating to the practice of docketing and advancing cases out of their order are *Stratton v. Meriwether*, 147 Ky. 577, 144 S. W. 1083; *Ingram v. Cincinnati Railroad Co.*, 127 Ky. 638, 105 S. W. 978, 32 Ky. Law Rep. 529; *L. & N. Railroad Co. v. Schmidt*, 104 Ky. 179, 46 S. W. 688, 20 Ky. Law Rep. 456. But it should be kept in mind that subsection 4 of section 753 now controls the practice in this respect, and that the docketing, advancement, and submission or either of cases, whether the motion is made by appellant or appellee, is entirely within the discretion of the court.

Wherefore the motion to dismiss the appeal is overruled.

#### TAYLOR et al. v. HURST et al.

(Court of Appeals of Kentucky. Nov. 28, 1919.)

#### 1. PARTIES $\S$ 6(1)—REAL PARTIES IN INTEREST TO SUE.

Where it appears that the plaintiffs are not the real parties in interest, a special demurrer or a motion to dismiss should be sustained, in view of Civ. Code Prac.  $\S$  18, 21.

#### 2. PARTIES $\S$ 6(2)—"REAL PARTY IN INTEREST."

The "real party in interest," within the meaning of Civ. Code Prac.  $\S$  18, 21, is the party who will be entitled to the benefits of the action on a successful termination thereof; one who is actually and substantially interested in the subject-matter, as distinguished from one who has only a nominal interest therein.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Real Party in Interest.]

#### 3. SPECIFIC PERFORMANCE $\S$ 106(1)—NECESSARY PARTIES; CONTRACT OF SALE OF LAND.

The assignee of a partial interest in a contract of sale of an interest in land is not a necessary party to a suit for specific performance by the vendee; but, where the vendee has assigned his entire interest, the assignee is a necessary party.

Appeal from Circuit Court, Bell County.

Action by C. Hurst, trustee, and others, against Lucy Taylor and others. Judgment for plaintiffs, and defendants appeal. Reversed.

Jas. M. Gilbert and C. I. Dawson, both of Pineville, and J. M. Robsion, of Barbourville, for appellants.

N. R. Patterson, of Pineville, and Colson & Hurst and John Fitzpatrick, all of Middleboro, for appellees.

QUIN, J. July 5, 1902, Harrison Taylor (now deceased) and his wife entered into a contract with appellee C. Hurst, as trustee, whereby the Taylors, in consideration of the sum of \$4 per acre, agreed to sell and convey to Hurst, trustee, the mineral rights in about 3,000 acres of land in Knox county. It is provided in said contract that:

"The party of the second part is to forfeit and lose all payments made on said land, and this obligation is to become null and void unless all of the purchase money is paid within six months from date hereof, and in case the second party fails to pay one-half the aforesaid purchase money within 60 days from date, then and in that event this obligation is to become null and void; otherwise, to remain in full force and effect."

December 20, 1902, in another paper signed by Harrison Taylor, it is recited that Hurst, trustee, had assigned his interest in said contract to J. J. Gibson, trustee, and that Gibson had paid the sum of \$390 on the purchase price. Gibson was to have the land surveyed, and the balance of the purchase price to be paid by May 1, 1903. This second paper was attached to the first one. On the margin of the original contract is this indorsement, signed by Gibson:

"Without recourse on me in any event, I hereby assign to C. Hurst and J. C. Slusher all right, title, and interest of mine in the within bond. November 10, 1906."

Both writings were recorded July 30, 1906. This suit was filed by appellees, seeking the specific performance of the foregoing instruments. From a judgment granting the relief prayed for, this appeal is prosecuted.

Many reasons are assigned for a reversal. We find one of them meritorious, viz. that appellees have not shown any right to maintain this suit. In the original title bond Hurst was trustee for himself, J. J. Gibson, and J. C. Slusher. In the extension, Gibson was trustee for C. Hurst, J. C. Slusher, Vincent Boreing, and D. B. Logan. Boreing, Gibson, and Logan disposed of their interests, but the exact dates of these transfers or assignments do not appear. Slusher transferred his interest to Robert Vanbever. He thinks this was after the present suit was filed. About the same time W. G. Colson purchased a one-half interest in the property, and Hurst disposed of his interest to Vanbever.

[1] The facts as to the status of the title to or the interest in this contract are gleaned from the depositions of appellees. They show rather conclusively they have no interest in this controversy, and either the special demurrer or the motion to dismiss, because plaintiffs (appellees) were not the real parties in interest, should have been sustained. Since we have reached the conclusion

that for this reason a reversal must be had, a few excerpts from the second deposition of appellee Hurst on this question might not be inappropriate. Referring to certain letters written to Gilbert Taylor, Hurst says:

"Yes, I told them all about it; J. C. Slusher, and Mr. Colson, and, I think, Mr. Vanbever. I sold my interest to Mr. Vanbever, and I was trying to get him and Mr. Colson to put up the money and settle this lawsuit as indicated in these letters there; but they did not do it, as I had sold out to Vanbever. \* \* \*

"Q. But you do remember, as you claim, of talking with Gilbert Taylor, and having an arrangement with him whereby he was to bid off the land of Emmett Taylor that was to be sold at the Knox circuit court? A. I didn't have any arrangement, but he told me he was going to bid it off, and Smiths had agreed with him they would sell the land when they got the title clear for so much, and I told him, if they would do that, I would try to get Mr. Colson and Vanbever to take it and settle the suit.

"Q. And I believe you say when all this was taking place you had no interest in this land at all? A. I had none in any way, except Vanbever owed me some money. I had transferred my interest to Vanbever; but all the money had not been paid.

"Q. Didn't you swear, in answer to Mr. Patterson's question, that at the time you had no interest in the land? A. Yes, sir; I had no interest, except in getting my money. I had sold out to Robert Vanbever. \* \* \*

"Q. Haven't you any idea when that transaction took place? A. Well, I don't know that I could state exactly; but I know that I sold out to Vanbever, because I was trying to work this deal to get Vanbever and Colson to take this matter over and make this deal with Gilbert Taylor, because I thought it would be better to settle the lawsuit than to go on with the suit. \* \* \*

"Q. How much did he pay them? A. I don't remember; I have not had a statement. He claimed to have paid some on that. I sold him some other land at that time, and I sold him my interest in the mineral right in this Taylor land, and he was to give me \$1,000 profit. I wish you would call Mr. Vanbever up, and have him come down here and bring that title bond. If he has the title bond, we can get it; if not, we can get it from the records.

"Q. I believe you say that the arrangements as you now remember between you and Mr. Vanbever were that, if you cleared this title and won the suit, he was to pay the \$1,000. A. Not if I cleared it; he was to clear it himself and pay the expenses. \* \* \*

"Q. Who is to pay the counsel fees and cost of this litigation under your contract and arrangement with Mr. Vanbever? A. I think Mr. Vanbever was to pay it, and Mr. Colson, together. In the first place, J. C. Slusher and I sold certain interest, and had a contract or title bond with W. G. Colson; afterward Mr. Slusher and I both sold out our interest that we retained under the Colson contract to Robert Vanbever, and I can't remember just all of the bond now. It has been some time, and have not read it for a long time. \* \* \*

"Q. Did you and Mr. Colson enter into this agreement with Mr. Vanbever? A. No, sir; just me and Mr. Slusher. Slusher and I sold our

interest to Vanbever. As I understand it, Mr. Colson owns one-half and Mr. Vanbever one-half interest in this lawsuit."

Civil Code, §§ 18, 21, provide as follows:

Section 18: "Every action must be prosecuted in the name of the real party in interest, except as is provided in section 21."

Section 21: "A personal representative, guardian, curator, committee of a person of unsound mind, trustee of an express trust, a person with whom or in whose name a contract is made for the benefit of another, a receiver appointed by a court, the assignee of a bankrupt, or a person expressly authorized by statute to do so, may bring an action without joining with him the person for whose benefit it is prosecuted."

It is not claimed the contract sued on was made, or that appellees are suing, for the use or benefit of Colson or Vanbever. They are not shown to have had any interest in the contract at the time of its execution. It was some years later, probably between 1908 and 1912, that they purchased the interests of Slusher and Hurst. Unfortunately the agreements between these parties are not in the record, and it is impossible to tell just when these transactions occurred.

[2] The real party in interest, within the meaning of the Code provision, is the party who will be entitled to the benefits of the action upon a successful termination thereof; one who is actually and substantially interested in the subject-matter, as distinguished from one who has only a nominal interest therein. 15 Ency. Pl. & Pr. 710; 33 Cyc. 1558. As said in *Gross v. Heckert*, 120 Wis. 314, 97 N. W. 952:

"The test of whether one is the real party in interest, within the meaning of the statute, is: Does he satisfy the call for the person who has the right to control and receive the fruits of the litigation?"

[3] The assignee of a partial interest in the contract is not a necessary party to a suit for specific performance by the vendee, but where the vendee has assigned his entire interest the assignee is a necessary party. 36 Cyc. 760; *Craver v. Spencer*, 40 Fla. 135, 23 South. 880; *Brewer v. Dodge*, 28 Mich. 359. In the latter case the court says:

"It appears from complainant's own showing that in June, 1870, he conveyed the premises in dispute to one Charles E. Ritson. Ritson never made himself a party to the suit. By that conveyance complainant ceased to have any further interest in the controversy. If any one was injuriously affected by any subsequent proceedings, it was Ritson, and not complainant. It was no concern of his, after he has sold out all his interest. A court of equity must have the real parties before it, and will not permit a party who has voluntarily divested himself of any claim on his own behalf to continue litigating. As soon as a complainant assigns his rights, the suit as to him ceases, and becomes as defective for want of a complainant as if it

had abated by his death. It can only be restored to activity by bringing the rights of the assignee before the court."

And as said further in 30 Cyc. 47:

"As a rule, whenever the assignment of a chose in action vests the assignee with the ownership of the claim, the action is to be brought in the name of the assignee, as the real party in interest, and this whether the title of the assignee be regarded as legal or equitable. The question does not relate either to the formal sufficiency of the assignment or to the existence of equitable grounds."

And on page 48 of the same volume:

"The rule of the Codes noticed above is not merely content with the beneficial ownership of the chose; but, unlike the statutory rule now or formerly found in several states, it demands the beneficial ownership. The effect of the assignment being to divest the assignor of his ownership, an action on the chose can no longer be brought in his name, either alone or for the use of the assignee. Nor is the rule affected by the fact that the assignor, in making the assignment, has expressly authorized an action in his name upon the assigned chose in action, or has expressly stipulated that if an action is necessary he will bring it in his own name and turn over all the proceeds to the assignee. Nor will the fact that the consideration for the assignment of the chose has failed permit an action in the name of the assignor, unless he has recovered the title."

In *Bassett v. Inman*, 7 Colo. 270, 3 Pac. 383, the assignee of a note and account was held to be the real party in interest, though the consideration of the assignment may have been a payment to the assignor after recovery in the suit by the assignee. See, also, *Hutchings v. Weems*, 85 Mo. 285; *Pomeroy's Eq. Juris.* (4th Ed.) § 1274. In *Craver v. Spencer*, supra, the court says:

"The contract, of which specific performance was sought in this case, having been absolutely and irrevocably assigned to Cox, he was an indispensable party complainant, and without him or his proper representatives before the court, no final decree could properly be rendered."

*Lampkin v. M. & O. R. Co.*, 146 Ky. 514, 142 S. W. 1037, was a suit to recover damages for injuries to a shipment of hogs, and from a verdict for defendant Lampkin appealed. After quoting sections 18 and 21 of the Civil Code, the court says:

"Lampkin is not the real party in interest; for the amended petition shows that he sold the hogs to Holt, and that any judgment that is recovered is to be for the benefit of Holt. Sec-

tion 21 has no application. Lampkin is not the trustee of an express trust, or a person with whom or in whose name a contract is made for the benefit of another. \* \* \* Under this section [Civil Code, § 19] it was proper that Lampkin should be a party as plaintiff or defendant; but Holt is a necessary party plaintiff, as he is the real party in interest. The meaning of section 19, when read with section 18, is that the action must be brought in the name of the assignee the real party in interest; but if the assignment is not authorized by statute the assignor must be a party as plaintiff or defendant. The Code of Practice governs all civil cases. By section 1, civil cases are actions or special proceedings. An appeal to this court is regulated by the provisions of the Code of Practice, and must be prosecuted by the real party in interest. So far as we can know, Holt, the real party in interest, may not desire this appeal prosecuted. Lampkin has no interest in the action, except to recover a judgment for Holt, and as Holt is not appealing from the judgment refusing him any relief, the appeal must be dismissed."

And, so in an abstract opinion in *Garrigus v. Blakey*, 7 Ky. Law Rep. 677, we find:

"In this action by G., 'for the use and benefit' of W., the plaintiff, G., states that he 'brings this suit for the use and benefit of W.,' and after setting out his alleged cause of action says 'that for a valuable consideration he transferred the same to his coplaintiff, who now owns it,' but not designating W. as the person meant by coplaintiff. The prayer is 'that he and his coplaintiff be substituted' to certain rights under a mortgage, 'and they pray judgment,' etc. The names of G. and W. are signed to the petition 'by' an attorney."

And it was held that, it appearing on the face of the petition G. had—

"no interest in the matter, and W. is not a plaintiff, the court properly dismissed the petition. But even if W. be considered a party to the petition, G., having no interest, cannot prosecute an appeal alone."

We do not deem further citation or comment necessary. Whether Hurst and Slusher had such an interest in the contract sued on as made them proper parties, it is certain that Colson and Vanbever were the persons actually and substantially interested in the subject-matter of the controversy, the ones to be benefited by the judgment; hence were necessary parties, and the court erred in failing and refusing to require them to be made parties.

Wherefore the judgment is reversed, for further proceedings consistent with this opinion.

## NOEL v. JONES et al.

(Court of Appeals of Kentucky. Nov. 25, 1919.)

1. WILLS  $\S$ 490—PRESUMPTION THAT TESTATOR KNEW QUANTITY OF LAND DEVISED.

Where a testator resided upon a farm for more than 20 years previous to executing his will, and had purchased it separately from his other lands, it must be assumed he knew that it contained only 400 acres, instead of "about 425 acres."

2. WILLS  $\S$ 490—EVIDENCE TO IDENTIFY LAND DEFECTIVELY DESCRIBED.

In identifying real property defectively described in a will, evidence as to the character, condition, use, and designation of all of testator's lands may be considered in ascertaining his intentions when using the descriptive terms, but not to create a devise or contradict the will.

3. WILLS  $\S$ 441—INTENTION SHOWN BY SURROUNDING CIRCUMSTANCES.

The testator's intention which must govern the construction of his will is the intention he had when and while making his will, to ascertain which the will must be construed in the light of the existing surrounding circumstances at such time.

4. WILLS  $\S$ 561(2)—DESCRIPTION OF LAND AS HOME PLACE.

A devise of "the home place, known as the Proctor farm, containing about 425 acres," construed as devising the "Proctor farm," containing 400 acres, together with his other adjacent lands used in connection therewith to make up such amount, and excepting a certain tract of 113 acres which for two or more years prior to making the will testator had listed for taxation as a separate tract from the home place, and which other terms of the will showed was not intended to be included in this devise, but to pass as remainder.

5. WILLS  $\S$ 578(3)—CONSTRUCTION; REMAINDER OF "LANDS" AS EMBRACING AFTER-ACQUIRED CITY HOUSES AND LOTS.

Ky. St.  $\S$  4839, providing that "a will shall be construed with reference to real and personal estate \* \* \* to speak and take effect, as if \* \* \* executed immediately before testator's death, unless a contrary intention shall appear," does not have the effect of passing after-acquired city houses and lots, which are lands under the designation "remainder of my lands," in a devise where testator designates as "lands" farm property only, and specifically described his houses and lots devised, thus indicating a contrary intention, notwithstanding a residuary clause should be construed liberally to prevent intestacy.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Land.]

Appeal from Circuit Court, Franklin County.

Action between Silas M. Noel and Maggie Jones and others involving construction of a will. From a judgment designating what

property passed to each devisee, and declaring testator died intestate as to certain after-acquired city property, Silas M. Noel appeals. Affirmed.

Leslie W. Morris and Hazelrigg & Hazelrigg, all of Frankfort, for appellant.

B. G. Williams, of Frankfort, for appellees.

HURT, J. The grandfather of appellant, Silas M. Noel, who bore the same name, died, in the year 1895. Previous to his death, on the 8th day of January, 1894, he executed his last will and testament, which was duly probated after his death. At the date of the execution of his will he was the owner of a farm, which consisted of about 401 acres, and which he had acquired title to from one Proctor, and upon which he resided. Adjoining this tract of land, and between it and the Leestown turnpike, there were four small tracts of land, of which he was the owner. One of these small tracts contained about 12 acres, and the other three contained less than 1 acre each. These tracts were situated on the western side of the Proctor tract. He was, at that time, also the owner of three tracts of land, which together contained 113 acres, and which were situated upon the north side of the Proctor tract, and adjoined each other; but only one of these tracts adjoined the Proctor tract, for a distance of about 30 feet, and was separated from it by a fence. He also owned two houses and lots upon Anne street, in Frankfort, Ky., one upon Wilkinson street, and another upon Clinton street, in the same city, and a vacant lot in Thorn Hill, near by. His wife was then living, and also two daughters, who were married, and whose names were Maggie Jones and Clara Noel, respectively.

By the first, second, third, fourth, and fifth clauses of his will he disposed of his entire personal estate. The sixth clause of his will, the construction of which is in controversy here, is as follows:

"Sixth. I give and bequeath to my wife and Maggie Jones, my daughter, the home place, known as the Proctor farm, containing about 425 acres and the remainder of the land and the house and lot on Wilkinson street, in Frankfort, Ky., and the house and lot on Clinton street, in Frankfort, Ky., and the lot at what is known as Thorn Hill, near Frankfort, Ky., to be held and used by them jointly until the death of my wife; and at the death of my wife, Maggie Jones is to have the home place, containing about 425 acres, during her life, and at her death said place is to be divided as follows: One-half of said farm to her oldest child, Silas Noel Jones, and the remainder to be divided equally amongst all her children, including said Silas Noel Jones, and in the case of the death of any of her children during infancy, the others are to inherit his or her portion, and at the death of my wife, I give and bequeath the remainder of my land, outside of the home

farm, and the two houses and lots and the lot above mentioned, to my daughter, Clara Noel, during her life, and at her death to go to her son, Silas M. Noel. I also give and bequeath to my daughter, Clara Noel, wife of John C. Noel, my two houses and lots on Anne street, between Main and Market streets, in Frankfort, Ky., during her life, and at her death to go to her son, Silas M. Noel."

After the execution of the will, the testator became the owner of a house upon Washington street, in Frankfort, and another lot in Thorn Hill. This action was instituted, among other things, for a construction of the will, and thereby to have it determined as to what property passed to each of the devisees under the will, as well as the rights of the devisees therein, respectively. The widow of the testator having died, the trial court adjudged that the will devised to Maggie Jones the Proctor farm, or "home place," consisting of the original Proctor farm and the small tracts of land owned by testator, which adjoin it on the west side, and bind upon the Leestown turnpike road, during her natural life, with remainder to her children. These small tracts contain 12.984 acres, .508 of an acre, .095 of an acre, and about one-half of an acre, respectively. It was also decided that the will devised to Clara Noel, with remainder to her son, Silas M. Noel, the appellant, the house and lot on Wilkinson street, in Frankfort, the house and lot on Clinton street, and the lot in Thorn Hill, which testator owned at the time of the execution of the will, but that the house and lot on Washington street, and the lot in Thorn Hill, which were acquired by testator after the making of his will, did not pass to any of the devisees under the will, but that testator died intestate as to those pieces of property, and they passed to his heirs, in accordance with the laws of descent and distribution, and from this judgment the appeal herein was taken.

As to the two houses and lots upon Anne street, in Frankfort, it is conceded that these were devised by the will to Clara Noel for life, with remainder to her son, the appellant, and were not in controversy in this action. It is contended by appellant that the court erred in adjudging:

(1) That the four small tracts of land, adjoining the original Proctor farm upon the west, and abutting upon the Leestown turnpike road, were a part of the Proctor farm, or "home place," of the testator, and were a part of the devise to Maggie Jones for life, with remainder to her children, upon the death of her mother, the testator's widow.

(2) That the house upon Washington street and the lot in Thorn Hill, acquired by testator after the execution of the will, were undevised, and did not pass to Clara Noel for life, with remainder to appellant, under the will.

These contentions will be considered in their order.

[1] (a) The soundness or unsoundness of the first contention, because of which a reversal is sought, turns upon a determination of what the testator meant and intended when he said in the will that "Maggie Jones is to have the home place, containing about 425 acres," or rather what he intended that the "home place, containing about 425 acres," should include. It is not overlooked that in the second line of the sixth clause, when making the joint devise to Maggie Jones and his wife, the testator described the "home place" as being "known as the Proctor farm," and, if there was nothing further to shed light upon the testator's meaning, it would seem that he used the term "home place" as meaning the Proctor tract proper; but it will be observed that he describes the joint devise to his wife and Maggie Jones as the "home place," known as the Proctor farm, containing about 425 acres, and when he came to devise the same property to Maggie Jones, to take effect in possession after the death of his wife, he described it as the "home place, containing about 425 acres." The Proctor farm, proper, contained only a fraction of an acre in excess of 400 acres, and since the testator owned and resided upon it for 20 or 25 years previous to the execution of his will, and made the purchase of it separately from his other lands, it must be assumed that he was acquainted with the fact that it only contained 400 acres, instead of about 425 acres.

[2-4] For the purpose of identifying real property which is defectively described in a will, evidence may be considered as to the lands owned by the testator, the character of the lands, and their condition, and how he used and designated them, and for the purpose of ascertaining the intentions of the testator, when he made use of the terms of description, although such evidence cannot be invoked for the purpose of creating a devise which the will does not make, nor to contradict the will. *P'Simer v. Steele*, 106 S. W. 851, 32 Ky. Law Rep. 647. The devise of a "home place," or "home farm," is equivalent to the term, the land or farm upon which "I now live," or "now occupied by me," and the latter terms will carry all the lands actually used by and in the possession of the testator, at that place where he lives or occupies, and may include several parcels, not immediately adjacent, if they were all used together and constituted one tract, and a general word covering a piece of real estate will include all lands used with it. *Gentry v. Gentry*, 77 S. W. 1115, 25 Ky. Law Rep. 1433; *Kelsey v. Long*, 7 Ky. Law Rep. 823; 40 Cyc. 1532. The intention of the testator, which in all cases must govern the construction of his will, is the intention he had at the time and while making his will. *Maupin v. Goodloe*, 6

T. B. Mon. 399; *Reuling v. Reuling*, 137 Ky. 640, 128 S. W. 151. To ascertain the testator's intention at that time, the language of the will must be construed in the light of the circumstances existing and surrounding him when he executed the will. *McClelland's Ex'r v. McClelland*, 132 Ky. 284, 116 S. W. 730; *Reuling v. Reuling*, supra. As heretofore stated, the evidence shows that, at the time of the execution of the will, the testator owned the Proctor farm, proper, the four small tracts adjoining it upon the west, and bordering on the Leestown pike, and containing, together, 13 or 14 acres, 113 acres of land to the north of the Proctor farm, and the lots in Frankfort and Thorn Hill, which were specifically mentioned. All the farm lands owned by him were comprised by the Proctor farm and the tracts adjacent to it, and all of which he appeared to use as his "home place," although, when referring specifically to one of the adjacent tracts, he designated it by the name of the person from whom he acquired it, or some name descriptive of its use or condition. Hence the devise of the "home place" would seem to carry with it all the lands he owned at that place, including the Proctor farm and the adjacent lands used with it as one tract, if the other terms of the will did not disclose clearly a contrary intention.

When he devised the "home place, containing about 425 acres," it is clear that he intended to include more land in it than the Proctor farm, proper, which had only 400 acres; and it is equally clear that he did not intend to include all of his lands adjacent to the Proctor farm for, if he had, he knew that he was devising to her about 527 acres, instead of 425 acres, and in the joint devise to his wife and Maggie Jones, after mentioning the "home place, known as the Proctor farm, containing about 425 acres," he specifically devises to them, for the life of his wife, "the remainder of the lands," and after the death of his wife he devises to Maggie Jones and her children the "home place," and to Clara Noel and her son "the remainder of the land, outside of the home farm." The small tracts of land on the west side of the Proctor farm, proper, and bordering on the Leestown pike, and all of which, except one, containing only .095 of an acre, lie directly between the pike and the Proctor farm, and fill the intervening space, and had been used by the testator as a part of his home place for a number of years before the making of the will. The fencing, which had formerly separated them from the Proctor farm, had been removed by the testator, many years before, when he incorporated them into the farm upon which he resided, and in the lists made by him of his property for taxation they and the Proctor farm were listed and treated by the testator as being one tract of land. The Proctor farm contained nearly 40 times as

much land as all the four small tracts on the western side of it together, and it is not strange that, when the testator incorporated them into it, he should designate the entire boundary as the "Proctor farm," although it should not be overlooked that, in the devise to Maggie Jones and her children, the property devised is described as the "home place," and not as the Proctor farm. In making the lists of his property for taxation, for two or more years previous to the execution of the will, the testator listed the 113 acres, which lie to the northward of the Proctor farm, as a separate tract from the lands embraced in the "home place," and these lands adjoin the Proctor farm for the space of only about 30 feet. He evidently treated them as a separate tract of land from his home place. Hence we conclude that the testator intended that the "home place, containing about 425 acres," which he devised to Maggie Jones and her children, should consist of the Proctor farm and the four small tracts of land on its western margin, and that the 113 acres, to the northward of the Proctor farm, should pass under the designation of "remainder of my lands" to Clara Noel and her son.

[5] (b) The disposition of the house and lot upon Washington street and the lot in Thorn Hill, both of which were acquired by the testator after the execution of the will, depends upon the determination as to the soundness of the second of appellant's contentions. It is contended that the words, "and at the death of my wife, I give and bequeath the remainder of my land, outside of the home farm, \* \* \* to my daughter, Clara Noel," etc., in the concluding portion of the sixth clause, devised to her for life, with remainder to her son, the lots which testator acquired after the execution of the will. This contention could have no support, except upon the theory that, under the rule prescribed by section 4839, Ky. Stats., it does not appear from the will that the testator did not intend that all real property, which he might acquire and own at his death, other than the "home farm," should pass under the devise of "the remainder of my land, outside of the home farm," to Clara Noel and her son. It will be remembered that, under the rule of the common law, a will spoke and had effect, as to real property comprised in it, as of the date of its execution, and that such property acquired by the testator after the execution of his will did not pass under it. This rule was changed by the statute, which is now section 4839, Ky. Stats. which provides that—

"A will shall be construed, with reference to the real and personal estate comprised in it, to speak and take effect as if it had been executed immediately before the death of the testator, unless a contrary intention shall appear by the will."

Giving to this statute all the effect which it was intended to have, it is clear that it



does not affect any real estate, except such as is comprised in the will, and after-acquired real estate does not pass under it, unless there is some clause in it broad enough to comprise or embrace the after-acquired property, and when read in connection with the other parts of the will, and in the light of the circumstances surrounding the testator, it does not appear from the will that the testator's intention was that the after-acquired property should not pass under it. It cannot be disputed that general words in a will, descriptive of property, and where the will purports to pass all real property of a testator, or all such property not specifically excepted, will operate to pass real property subsequently acquired, unless it shall appear from the will that the testator had a contrary intention. *Pepper v. Pepper*, 115 Ky. 520, 74 S. W. 253. But, if there is no clause in the will which is general and broad enough to have comprised the after-acquired real property, if the testator had owned it at the date of the execution of the will, it could not be said that at the date of his death, or just preceding it, the testator intended that it should be embraced by and pass under the will, but a contrary intention would appear from the will.

In the instant case the testator in his will does not make any reference to after-acquired property, nor is there any general term made use of, descriptive of the property, which the will purports to affect, when read in the light of the context, which is general and broad enough to include the lots acquired after the will was made, nor to have embraced them, if the testator had owned them, at the date of his will. True, houses and lots in cities and towns are lands, and the will devised to Clara Noel, for life, with remainder to her son, "the remainder of my lands, outside of the home farm"; but the testator, throughout his will, makes a clear distinction between lands for agricultural purposes, and lands which consist of houses and lots in cities and towns. Each of the houses and lots treated of in his will he specifically mentions by its location, and disposes of it specifically, under the designation of a house and lot, or lot on a certain street, or in a certain place, and the term "lands" he applies to the lands suitable for, or used for, purposes of farming—such lands as of which the "home farm" consisted. Hence, when the term "remainder of my lands, outside of the home farm," as used, the testator was evidently referring to the 113 acres of farming lands which he then owned "outside of the home farm," and which were situated to the northward of the home farm, although, under the rules above stated, if, after the execution of the will, the testator had acquired lands of the same class as the 113 acres, they would have passed un-

der the will, as the term "remainder of my lands, outside of the home farm," would have been general enough to have embraced them. As a residuary clause the language, "remainder of my lands, outside of the home farm," would have the effect to pass all property of a similar kind; but its operation would be confined to that description of property of which the residue consisted, which was lands suitable for, or used for, farming purposes. Hence it appears from the will that the testator did not intend to include houses and lots in towns in the residue of his "lands, outside of the home farm," nor any real property, except of a character similar to the "home farm," or farming lands. This conclusion is reached without overlooking the rule that a residuary clause should be construed liberally, so as to prevent any intestacy, if possible, without doing violence to the testator's intention, nor the presumption, in aid of such construction, to the effect that a testator always intends to dispose of all of his property by his will; but it appears from the will that the testator had no intention that the house and lot on Washington street and the lot in Thorn Hill, acquired after the will was made, should pass under it, and as a result he died intestate as to them.

The judgment is therefore affirmed.

#### CLIFT et al. v. RICE.

(Court of Appeals of Kentucky. Nov. 25, 1919.)

##### 1. INSPECTION/ §4—OIL INSPECTORS; FILLING UNEXPIRED TERM ON VACANCY.

In view of Ky. St. § 2204, the term of oil inspector is four years, and when a vacancy occurs in such office it may be filled by the county judge for the remainder of the term, even though the term of office of the county judge expires thereafter during the term of the office of inspector, but such appointment can only be for the unexpired part of the term, and not for the full four years.

##### 2. INSPECTION §4—OIL INSPECTORS; TERM OF OFFICE.

In determining when the term of an oil inspector, appointed under Ky. St. § 2204, will expire, the date of the appointment of the first inspector in the county under such act (passed in 1886 [Laws 1885-86, c. 1150]) must be ascertained, and four-year periods be counted from that time.

##### 3. INSPECTION §4—OIL INSPECTORS; ENTRY OF ORDER OF APPOINTMENT NUNC PRO TUNC.

Where one appointed oil inspector under Ky. St. § 2204, filed his bond with the clerk of the county court, but no order was made by the county court appointing him or accepting his bond, the court thereafter could enter, nunc pro tunc, an order appointing him and accepting his bond as of the date he was originally appointed; bond rendering it unnecessary for

the court to depend upon memory or recollection of any person.

#### Appeal from Circuit Court, Mason County.

Suit by T. J. Rice against Stanton O. Clift and another. There was a judgment in favor of plaintiff, and defendants appeal, and plaintiff files a cross-appeal. Affirmed.

J. M. Collins and Worthington, Cochran & Browning, all of Maysville, for appellants. Stanley Reed, of Maysville, for appellee.

CARROLL, C. J. In December, 1917, W. H. Rice, county judge of Mason county, whose term expired in January, 1918, appointed T. J. Rice inspector of oils under the provisions of section 2204 of the Kentucky Statutes to fill out the term of the former inspector, which it is alleged would have expired in June, 1921.

At the November election, 1917, H. P. Purnell was elected county judge to succeed Rice, and in August, 1918, he appointed Stanton O. Clift oil inspector in place of Rice.

Following this appointment Rice brought suit against Clift and Judge Purnell to enjoin Clift from qualifying or exercising any of the powers or duties of inspector, and to enjoin Purnell, as judge, from appointing any other person in place of Clift until the end of the term for which Rice had been appointed.

On hearing the case the lower court adjudged that the term of T. J. Rice would not expire until November 14, 1919, and enjoined Clift from exercising or attempting to exercise any of the powers of inspector until that time. He also enjoined Purnell as judge from making any further appointment to the office of inspector during the term of Rice.

From this judgment Clift and Purnell prosecute an appeal contending that the term of T. J. Rice expired with the term of the appointing judge, and therefore the term of Rice ended in January, 1918, when Purnell took the office of Judge, and that Clift, his appointee, was entitled to the office until the end of the four-year term of Purnell in January, 1922. T. J. Rice prosecutes a cross-appeal, insisting that his term of office will not expire until July 18, 1921, in place of November 14, 1919, as held by the lower court.

[1] Previous to 1886 the statute providing for the appointment of oil inspectors did not fix their term of office, but in May, 1886, the Legislature passed an act (Acts 1885-86, c. 1150) providing in part that—

"The inspector shall remain in office for four years unless removed by the court for misconduct, negligence or incompetency."

This act may be found in chapter 71 of the Kentucky Statutes and the provision quoted from the act of 1886 in section 2204 of the Statutes.

In *Hoke v. Richie*, 100 Ky. 66, 37 S. W. 266, 38 S. W. 132, 18 Ky. Law Rep. 546, the court held that the term of office of the oil inspector under the statute was four years, and that when a vacancy occurred in the office it could be filled only until the end of the four-year term during which the vacancy occurred, or in other words, that an appointment to fill a vacancy arising from any cause was only for the unexpired part of the four-year term in which the vacancy occurred, and not for a full term of four years.

The conclusion reached by the court in that case is criticized, but we are not disposed to depart from it, although it may in some cases permit a retiring county judge to make an appointment that will extend into and during a large part of the term of his successor in office. But aside from this objection, which rests on personal or political grounds rather than on merit or the good of the service, the construction given the statute in the *Hoke* Case makes it easy to determine when the term of an incumbent will expire.

[2] Following the rule laid down in the *Hoke* Case, which was approved in *Tansey v. Stringer*, 76 S. W. 537, 25 Ky. Law Rep. 916, it is only necessary, in determining when the term of an oil inspector will expire, whether he was appointed to fill a vacancy in the office, or appointed when a term of four years had ended, to ascertain the date of the appointment of the first inspector under the act of 1886, now section 2204 of the Kentucky Statutes, and count four-year periods from that time.

Looking now to the record, we find that the first appointment of an oil inspector for Mason county under the act of 1886, now section 2204 of the Kentucky Statutes, was made, or attempted to be made, on November 15, 1887. This information we get from the following order of the Mason county court, entered on the order book of the court in July, 1889:

"Whereas Conrad M. Phister, on the 15th day of November, 1887, was appointed coal oil inspector for four years under the law passed May 15, 1886, by Wm. P. Coons, judge of the Mason county court, and at which time his bond was signed by him with N. Cooper as surety and left in county clerk's office, but there was no order made by the county court so appointing him said coal oil inspector on file and excepting his bond as such. Therefore this order is now made for them, and said Conrad M. Phister is appointed coal oil inspector for four years from November 15, 1887, and he, being in court, took the oath, and together with N. Cooper, his surety, acknowledged the bond executed by them on said November 15, 1887, which is approved and now ordered filed, and this order is to have the same force and effect as if made on said November 15, 1887."

It will be seen from this *nunc pro tunc* order of the county court that the court found that Phister was appointed for a term of four

years on November 15, 1887; and that, although he executed the required bond, the court failed to enter on its records an order appointing him, and therefore, on July 18, 1889, it entered the above nunc pro tunc order, setting forth that his appointment for a term of four years began on November 15, 1887.

If Phister's appointment dates from November 15, 1887, and we should count four-year periods from that date, the term of Rice, under his appointment made in December, 1917, would expire, as held by the lower court, on November 15, 1919. But if the appointment of Phister was not made until July 18, 1889, the date of the nunc pro tunc order, and four-year periods should be counted from that time, the term of Rice would not expire until July 18, 1921. It therefore appears that whether the term of Rice expires in November, 1919, or in July, 1921, terms, or whether the appointment and term of Phister commenced on November 15, 1887, or July 18, 1889, the solution of this question depends on the effect of the nunc pro tunc order made on July 18, 1889.

On behalf of Rice it is contended that the county court had no power by the order made on July 18, 1889, to postdate the appointment of Phister to November 15, 1887, or, in other words, that the order made in July, 1889, was not a valid nunc pro tunc order, and, this being so, the first order appointing Phister was the order of July, 1889.

This argument is rested on the ground that a nunc pro tunc order can only be made on the strength of a record showing the existence of a previous order that by mistake or inadvertence has been omitted from the record; and it is said that when the county court in July, 1889, made and entered this nunc pro tunc order there was no record evidence showing that Phister had been in fact appointed oil inspector on November 15, 1887, but that his appointment as of that date was by mistake or inadvertence omitted from the record, and, this being so, the court was without authority by the order made in July, 1889, to postdate the time of his appointment to November 15, 1887.

In support of this our attention is called to the cases of *Raymond v. Smith*, 1 Metc. 65, 71 Am. Dec. 458; *Kendrick v. Williams*, 157 Ky. 767, 164 S. W. 72; *Ralls v. Sharp's Adm'r*, 140 Ky. 744, 131 S. W. 993; *Montgomery v. Viers*, 130 Ky. 604, 114 S. W. 251;

*Boyd County v. Ross*, 95 Ky. 167, 25 S. W. 8, 15 Ky. Law Rep. 520, 44 Am. St. Rep. 210.

In *Morgan's Adm'r v. L. & N. R. Co.*, 181 Ky. 76, 203 S. W. 1065, the question was whether the county court had power to make a nunc pro tunc order, showing the previous appointment of Hobbs as administrator of Morgan. The facts were these:

The administrators' bond book in the clerk's office in which the appointment was made showed that on February 13, 1915, Hobbs had executed bond as administrator of Morgan, and that his bond had been approved, but there was no order made on the records of the county court showing the appointment of Hobbs as administrator. On September 15, 1916, the county court of Lee county entered a nunc pro tunc order, reciting that Hobbs had been appointed administrator of February 13, 1915, but that by oversight or inadvertence the order appointing him and accepting his bond had not been entered on the order book of the court, and it was therefore recited in the nunc pro tunc order that his appointment as administrator should take effect from February 13, 1915. On these facts, after reviewing the cases, it was held that the nunc pro tunc order was a valid order.

[3] We think there is no substantial difference between the facts of that case and the facts of the one we have. In this case it appears that on November 15, 1887, Phister with surety executed his bond as oil inspector, although there was no order made by the county court appointing him or accepting his bond. The statute, however, did not then or now require that the bond should be recorded, but only that it be filed with the clerk of the county court; and this bond we must assume showed on its face that Phister had been appointed oil inspector. So that in entering this nunc pro tunc order the court was not depending on memory or the recollection of any other person, but was acting upon a record in the proper office, showing that Phister, on November 15, 1887, had executed the bond required by the statute as oil inspector; and with this record before him the judge was not in error in finding that Phister had been appointed oil inspector on November 15, 1887, and that the judge by oversight or neglect had failed to enter on his order book an order showing his appointment.

We think the judgment should be affirmed; and it is so ordered.

## DAVIS v. ABELL.

(Court of Appeals of Kentucky. Nov. 25, 1919.)

**1. PARTNERSHIP §77—LIABILITY OF PARTNER FOR PROCEEDS OF SALE OF PARTNERSHIP PROPERTY.**

Partner, who sold a portion of the partnership assets, is chargeable with proceeds of sale upon action for settlement of partnership affairs.

**2. FRAUDS, STATUTE OF §17—PROMISE TO ANSWER FOR DEBT OF ANOTHER.**

Ordinarily, under statute of frauds, one is not bound for the debt or default of another, unless his undertaking is in writing and signed by the person to be charged.

**3. FRAUDS, STATUTE OF §16—PARTNER'S PROMISE TO PAY OTHER PARTNER'S SHARE OF DEBTS.**

Partner's promise to pay other partner's share, as well as his own, of partnership debts, being a promise to pay debts for which he himself was personally liable, was not within statute of frauds, relating to promises to pay debt or default of another, and was enforceable though not in writing.

**4. SUBROGATION §3(3)—PAYMENT OF PARTNER'S SHARE OF DEBTS BY OTHER PARTNER.**

In action for settlement of partnership affairs, where property of one of the partners was attached for the satisfaction of his part of the firm's obligations, a partner who pays, attached partner's share of the partnership debts, under agreement to so do, is entitled to be subrogated to third partner's rights under the attachment lien.

Appeal from Circuit Court, Livingston County.

Action by C. B. Davis against J. L. Abell, in which J. L. Abell made his answer a cross-petition against T. M. Davis and wife and a counterclaim against plaintiff. From the judgment rendered, plaintiff appeals, and defendant J. L. Abell cross-appeals. Affirmed in part on the original appeal, and reversed in part on cross-appeal.

C. H. Wilson, of Smithland, for appellant. Charles Ferguson and John M. Montgomery, both of Smithland, for appellee.

**SAMPSON, J.** In 1911 four men, B. C. Davis, J. L. Abell, W. I. Clark, and T. M. Davis, organized a partnership under the firm style of Smithland Tile Company for the purpose of engaging in the business of manufacturing and selling brick and tile in the town of Smithland. They were equal in the business. C. B. Davis and Abell were solvent while T. M. Davis and Clark had little or no property. T. M. Davis was the son of C. B. Davis, and it appears from the evidence that the son was taken into the partnership at the instance and request of

the father, and upon the assurance of the father that the son's obligation incurred by reason of the partnership, and on its account would be assumed and paid by the father.

[1] The business was started on borrowed capital, and its indebtedness increased until, at the time it ceased to operate, some three years after it began business, it owed about \$7,500. The business had been a failure. It owned a small piece of land in Smithland and some brick and tile machinery, appraised at a little more than \$1,000. This property was sold under a judgment of the court for \$1,205. It had no other assets, except an engine, which C. B. Davis sold for \$100, and with which sum he is and should be charged.

After the business closed down T. M. Davis became a nonresident of the state, though he left some real property in or near Smithland. A part of this, a house and lot, was conveyed by him to his wife, and this conveyance is attacked by Abell as a fraudulent conveyance. Clark was in declining health and wholly unable to pay any part of the partnership debts. Thereupon Clark, on the request of one or both of said persons, conveyed by deed his one-fourth interest in the real and personal property of the firm to C. B. Davis and J. L. Abell, two-thirds to Davis and one-third to Abell. Clark died shortly thereafter. The indebtedness of the firm, which was for borrowed money, was renewed and carried along for some months. Creditors began to insist upon payment, and Abell and C. B. Davis approached a Smithland bank with a request for a loan of \$4,500. This was granted by loaning Davis \$3,000 and Abell \$1,500 on the representation of the two men that the whole sum was to be applied upon the outstanding obligations of the partnership, and that Davis was assuming and paying both his share and that of his son. Davis applied only \$2,694.83 of the \$3,000 which he obtained to the extinguishment of the firm's indebtedness, while Abell applied the whole \$1,500 obtained by him to that purpose. This left the firm owing several hundred dollars, which was also represented by notes given by the firm and signed by each of the partners. Finally Abell and C. B. Davis disagreed about the proportion of the firm's indebtedness which each should bear; it being contended by Abell that Davis should carry two-thirds of it and Abell one-third.

When this dispute arose, C. B. Davis immediately instituted this action for a settlement of the partnership affairs, and to recover of Abell \$861.50, which he alleged he had paid on the partnership debts in excess of the amount paid by Abell, and, as incident to said action, sued out a general order of attachment against the property of Abell. Abell made his answer a cross-petition against T. M. Davis and wife and a counter-

claim against C. B. Davis for \$319.25, averring that he had paid this amount more on the indebtedness of the firm than had C. B. Davis. T. M. Davis surrendered his property, which was attached, for the satisfaction of his part of the firm's obligation. After proof was heard, the chancellor adjudged the partnership should be closed and its affairs wound up; dismissed C. B. Davis' claim of \$861.50 against Abell, and discharged the attachment; adjudged Abell entitled to recover \$319.25 of C. B. Davis, but this part of the judgment was later modified by a supplemental judgment, requiring Davis to pay the \$319.25 on the indebtedness of the partnership, instead of paying it to Abell. The attachment of Abell against the property of T. M. Davis was sustained, and C. B. Davis was subrogated to the rights of Abell under this judgment lien. The entire property of the partnership was adjudged sold, and the proceeds applied to the payment of the firm's debts, and an execution was awarded in favor of the creditors of the firm against all of the partners. The judgment also recited that C. B. Davis declined to prosecute his lien under the attachment against the property of his son, and thereupon the cross-petition of Abell against T. M. Davis was dismissed. C. B. Davis now contends that this was without his knowledge or authority, and insists that the judgment in this respect, as in many other respects, is erroneous. He prosecutes this appeal.

[2-4] Appellant's chief contention is that C. B. Davis is not liable for that part of the partnership obligation which was primarily due from his son T. M. Davis, in the absence of a writing to that effect, and he seeks to avoid responsibility for this one-fourth of the debts on the ground that one is not bound for the debt or default of another, unless his undertaking be in writing and signed by the person to be charged, and he cites the statute of frauds. While this is ordinarily the rule, and the statute of frauds is applied in such case, it has no application here, because the indebtedness is that of the firm of which C. B. Davis was a member and as such liable for the entire indebtedness. In other words, the obligations of the firm were the obligations of C. B. Davis, and his promise to pay the debt of the firm was the promise to pay his own debt, and, this being true, it takes the case out of the statute of frauds. The promise of Davis made to the bank and other creditors, appears to be reasonably well established by the evidence and is binding, and it may be enforced, though not in writing and signed by the party to be charged. This simplifies the whole matter very much and renders C. B. Davis liable for two-thirds and Abell liable for one-third of the firm's obligations, and they should be required to pay in this ratio, but Davis should

be subrogated to the rights of Abell under the attachment lien on the T. M. Davis property, and allowed to recoup his outlay made for T. M. Davis by appropriating the funds derived from the sale of T. M. Davis' property.

C. B. Davis paid \$2,604.83 of the indebtedness of the firm, which payment was for himself and son, there was only \$1,347.41 paid on C. B. Davis account. From this sum must be subtracted the amount which C. B. Davis received from Clark, being \$333.34, which leaves only \$1,014.08 paid by C. B. Davis upon the firm's indebtedness although T. M. Davis has paid \$1,347.41 and Abell \$1,500, less \$166.66, which he received from Clark's interest, leaving \$1,333.34. C. B. Davis should first be required to pay on the partnership debts \$319.25, so as to make his payment equal to that of his son's. Abell should be charged with the difference between \$1,347.41 and \$1,333.34, the sum he paid; then C. B. Davis is liable for and should pay two-thirds of the remainder of the indebtedness of the firm and Abell one-third, after the assets are exhausted.

On motion of C. B. Davis the judgment should be corrected, in so far as it dismissed the answer and cross-petition of Abell and discharged the attachment against the property of T. M. Davis, and C. B. Davis should be subrogated to the rights of Abell under said attachment lien. To this extent the judgment is reversed, but affirmed in all other respects. Each party will pay half the costs in this court.

Judgment affirmed in part on the original appeal, and reversed in part on the cross-appeal.

GILBERT, Superintendent, v. GREENE, Auditor.

(Court of Appeals of Kentucky. Nov. 21, 1919.)

1. STATUTES  $\S$ 190—CONSTRUCTION; UNAMBIGUOUS LANGUAGE.

When the intention of Legislature is so apparent from the face of a statute that there can be no question as to its meaning, there is no room for construction.

2. STATUTES  $\S$ 188—CONSTRUCTION.

When language is clear and unambiguous, it will be held to mean what it plainly expresses.

3. STATUTES  $\S$ 192—CONSTRUCTION; TECHNICAL TERMS.

Words and phrases are used in their technical meaning if they have acquired one, and in their popular meaning if they have not.

4. STATUTES  $\S$ 189 — CONSTRUCTION; RULES OF GRAMMAR.

Phrases and sentences are to be construed according to the rules of grammar, unless there

are adequate grounds for departure therefrom, either in the context or in the consequences which would result from a literal interpretation.

**5. STATUTES §191—CONSTRUCTION; WORDS IN ORDINARY USE.**

Words of common use are to be understood in their natural, plain, ordinary, and genuine signification as applied to the subject-matter of the enactment.

**6. TAXATION §913½, New, vol. 7A Key-No. Series — INHERITANCE TAX; SCHOOL FUND; "GENERAL USE OF THE COMMONWEALTH."**

In view of Const. §§ 171, 183, 184, Ky. St. § 459, and the history of revenue legislation, the common school fund is entitled to share in the income from inheritance taxes collected for the "general use of the commonwealth," under Acts 1906, c. 22, art. 19, § 1, and to receive the same apportionment of the whole as it receives of the ad valorem tax under Ky. St. Supp. 1918, § 4019, designating certain portions of the tax collected for "ordinary expenses of the government" for "support of common schools" and other specified purposes, notwithstanding Ky. St. § 4370, since funds for "general use of the commonwealth" are for the support of the whole government and contradistinguished from the funds for "ordinary expenses of the government," distinguished from common school fund by Ky. St. Supp. 1918, § 4019, are not to be restricted to the common, usual or ordinary expenses necessary to carry into effect ordinary powers of the commonwealth.

**7. CONSTITUTIONAL LAW §48—PRESUMPTION OF VALIDITY OF STATUTE.**

The lawmaking power of the state is entitled to at least as strong a presumption in favor of the validity of its acts as a criminal on trial in favor of his innocence.

**8. STATUTES §218—CONTEMPORANEOUS CONSTRUCTION.**

The rule that resort will be had to contemporaneous construction in construing a statute is not applicable unless the statute is ambiguous and uncertain in its terms, and it is really difficult to ascertain its true meaning, and an erroneous interpretation by administrative officials for a term of years will not be adopted where its meaning is plain and easily understood.

Appeal from Circuit Court, Franklin County.

Action between V. O. Gilbert, Superintendent, and Robert L. Greene, Auditor, etc. Judgment for latter, and former appeals. Reversed, with instructions.

M. M. Logan, Arthur M. Rutledge, and Alex P. Humphrey, all of Louisville, for appellant.

Jay W. Harlan, of Danville, and Chas. H. Morris, Atty. Gen., for appellee.

QUIN, J. Section 1, art. 19, c. 22, of the Acts of 1906 (Ky. Stats. of 1915, § 4281a),

relating to inheritance taxes, provides that all property which shall pass by will or by the intestate laws of this state shall be subject to a tax of \$5 on every \$100 of the fair cash value of such property, to be paid to the sheriff or collector of the proper county for the general use of the commonwealth.

From the passage of this act, to June 20, 1918, the auditors of public accounts distributed the amount received as inheritance taxes in the same manner as taxes and income derived from other sources. During this period there was set aside to the common school fund the same proportion of moneys collected by way of inheritance taxes as was set apart to the common school fund out of other taxes and income.

Taking the position that the common school fund was not legally entitled to any part of the inheritance taxes collected since March 25, 1918, appellee, the present auditor, declined to set apart to this fund the inheritance taxes so received after said date. To settle the question, this agreed case was filed, and, from a judgment sustaining the contention of the auditor, the present appeal has been prosecuted. It is stated in the briefs that the sum due the schools from collections up to that time amounted to \$417,928.50.

To the better understanding of the points involved, we will refer briefly to certain provisions of our Constitution and statutes applicable here.

The Constitution provides:

"Sec. 171. The General Assembly shall provide by law an annual tax, which, with other resources, shall be sufficient to defray the estimated expenses of the commonwealth for each fiscal year. Taxes shall be levied and collected for public purposes only. \* \* \*"

Section 183 requires the General Assembly to provide for an efficient system of schools throughout the state.

Section 184 sets apart for common schools certain enumerated sources of revenue, and provides further:

"The interest and dividends of said fund, together with any sum which may be produced by taxation or otherwise for purposes of common school education, shall be appropriated to the common schools, and to no other purpose."

Thus we have ample constitutional authority and direction to provide funds sufficient for the estimated expenses of the state and the maintenance of the common schools.

During the extended legislative session following the adoption of the present Constitution, two acts were passed which bear upon the question under investigation.

By an act of November 11, 1892 (Ky. Stats. 1894, § 4019), it is provided:

"An annual tax rate of forty-two and one-half cents upon each one hundred dollars of value of all property directed to be assessed

for taxation, as hereinafter provided, shall be paid by the owner, person or corporation assessed. The aggregate amount of tax realized by all assessments shall be for the following purposes:

"Fifteen (15) cents for the ordinary expenses of the government; five (5) cents for the use of the sinking fund; twenty-two (22) cents for the support of common schools, and one-half of one cent for the agricultural and mechanical college. \* \* \*"

By an amendatory act of May 8, 1897, the rate was fixed at 52½ cents upon each \$100 of value for three years, and 47½ cents thereafter; the schools to receive 22 cents as in the original act (Ky. Stats. 1899, § 4019).

By an act of July 6, 1893 (Ky. Stats. 1894, § 4370), there is dedicated to the school fund certain interest, dividends, taxes, and other income, including an annual tax of 22 cents on each \$100 of value of all real and personal estate and corporate franchises.

In 1906 (March 15th) there was a revision of the revenue laws of the state. This act provided for the levying of an ad valorem tax, license taxes, and an inheritance tax. This was the first inheritance tax law in our state. The first section of the act (Ky. Stats. § 4019) provides that—

"An annual tax of 50 cents upon each one hundred dollars of value of all property directed to be assessed for taxation, as hereinafter provided shall be paid by the owner, person or corporation assessed. The aggregate amount of tax realized by all assessments shall be for the following purposes: 21½ cents for the ordinary expenses of the government, 26 cents for the support of the common schools, 2 cents for the use of the sinking fund, ½ of one cent for the agricultural and mechanical college [now University of Kentucky]. \* \* \*

Said act imposes an annual tax at the same rate which may be fixed by law on other personalty for state purposes upon each \$100 of value of shares of banks and trust companies. Ky. Stats. § 4092. It also provides that the same rate of taxation for state purposes which is or may be in any year levied on other real estate shall be levied upon the value of railroad bridges, rolling stock, etc. Ky. Stats. § 4102.

In 1917, at a special session of the Legislature, many revenue acts were passed, and some of these have a very important bearing on this case. For the sake of brevity we will merely refer to them, giving the source of income and the application or distribution thereof, the first number indicating the chapter of the original act, the other the section of Carroll's Statutes, vol. 3 (1918):

License tax on corporations to be credited to the sinking fund. 7 (4189a).

Tax on distilled spirits, distributed to the state road fund 20 per cent., to the school fund 30 per cent., and 50 per cent. to the general expenditure fund of the state. 5 (4214a1 and 4214a2).

Excise tax on fermented liquor, to be credited to the general expenditure fund. 6 (4214b1).

Race track license. 8 (4223b1, 4223b2, 4223b3 and 4223b4). And tax on bank deposits. 4 (4019a1). No mention is made in either of these acts as to the application of the income provided.

Tax on oil production, for state purposes. 9 (4223c1), as amended by an act of March 29, 1918. A similar application is made of a tax on building and loan associations. 14 (4019a6).

Mortgage recording tax, credited to the sinking fund. 11 (4019a9).

Chapter 11 (Laws Sp. Sess. 1917) fixes the levy at 40 cents upon each \$100 of value of all property subject to taxation divisible as follows:

"21½ fifty-fifths shall be for the ordinary expenses of the government, 26 fifty-fifths for the support of common schools, 2 fifty-fifths for the use of the sinking fund, ½ of one fifty-fifth for the University of Kentucky, and 5 fifty-fifths for the state road fund."

This section was amended by an act of March 5, 1918, chapter 4, p. 11 (Ky. Stats. 1918, § 4019), the distribution changed as follows:

"An annual tax of forty (40) cents upon each one hundred dollars (\$100) of value of all property directed to be assessed for taxation, as herein provided, shall be paid by the owner, person or corporation assessed. Of the aggregate amount of tax realized by all assessments under this forty (40) cent rate, fifteen cents shall be for the use of the ordinary expenses of the government, eighteen cents for the support of the common schools, one cent for use of the sinking fund, one and three-quarter cents for the support and erection of buildings for the University of Kentucky at Lexington, five-eighths of one cent for the support and erection of buildings for the Eastern State Normal School located at Richmond, five-eighths of one cent for the support and erection of buildings for the Western State Normal School located at Bowling Green, and three cents for the state road fund, and the auditor of public accounts will make distribution of said tax in accordance with the said apportionment at the end of each month."

As may be easily discerned from a reading of the foregoing, the important question for decision, simply stated, is: Does the expression "for the general use of the commonwealth," in the inheritance tax law (Ky. Stats. § 4281a), mean the same thing as "for the use of the ordinary expenses of the government," found in Ky. Stats. § 4019, supra?

It would seem that an answer to the proposition is found in the very statement thereof. That they mean two different things appears plain when we study the two laws, a brief history of which we have endeavored to give.

[1-3] When the intention of the lawmaking body is so apparent from the face of a stat-

ute that there can be no question as to its meaning, there is no room for construction. It is not allowable to interpret that which needs no interpretation. When language is clear and unambiguous, it will be held to mean what it plainly expresses. It is an elementary rule of construction that words and phrases are used in their technical meaning if they have acquired one, and in their popular meaning if they have not.

[4] Phrases and sentences are to be construed according to the rules of grammar, and from this presumption it is not permissible to depart, unless adequate grounds are found either in the context or in the consequences which would result from a literal interpretation.

[5] Words of common use are to be understood in their natural, plain, ordinary, and genuine signification as applied to the subject-matter of the enactment.

[6] Thus interpreted, we have no hesitancy in saying that the expression "general use of the commonwealth" means a use not limited or restricted to a precise import or application. It pertains to and affects the entire body politic; it is universal within the limits of the reference; i. e., it applies to all, and not merely to some specific or particular part of the whole.

In Webster's Intl. Dict., "general expense" as applied to a railroad is defined as "a charge incurred for the benefit of the road as a whole, and not for any special department."

This definition has a special relevancy as applied to the various statutes relating to the levy and distribution of taxes and other sources of income in this state. The expression "ordinary expenses of the government" has always had a specific and distinct meaning, and one firmly fixed and recognized by the Legislature. It clearly pertains to those common, usual, or ordinary expenses of the state, not otherwise specified. It represents one of the subdivisions into which the general funds are apportioned.

Ordinary expenses are the expenditures which are necessary to carry into effect the ordinary powers of the commonwealth. This term is used in contradistinction to express, or extraordinary, powers or expenses. Take for example the 1918 act, the taxes realized from the 40-cent assessment are classified and credited to (1) common schools, (2) sinking fund, (3) University of Kentucky, (4) Eastern and Western Normal Schools, (5) state road fund, and (6) the ordinary expenses of the government. The latter necessarily includes those items of expenditure not otherwise specifically enumerated. And so through all the statutory changes the common schools and the ordinary expenses have been recognized and designated as two of the chief items into which the general funds have been distributed.

There are a number of objects and purposes for which the state needs funds and ob-

tains them, either from its revenues, income, or taxation.

In speaking of the state's revenues in its entirety, we refer to the funds as having been collected for state purposes, or for the general use of the commonwealth; that is, for all purposes. This "general use" or "state purpose" is the collective designation of the assets of the state which furnish the means for the support of the whole government.

There are certain great heads or subdivisions of public expenditures to which this income is credited or appropriated as provided by statute, and all receipts must be so prorated, unless, in the statute pertaining to any given source of revenue, it is expressly provided that it shall be used or credited to certain specific or designated purposes.

The expense fund is sometimes referred to as the "General Expenditure Fund"; in other words, a fund for general expenses, i. e., expenses not provided for from other revenue; both have the same meaning. This is made plain in the 1917 act, chapter 5, relating to the license on distilled spirits which is apportioned to the state road fund, the school fund, and general expenditure fund.

Thus the statutes themselves furnish the best means of their own exposition, and, since the sense in which language was intended to be used can be clearly ascertained from their parts and provisions, the intention thus indicated will prevail, and it will not be necessary to resort to other means of aiding the construction.

Appellee confounds the general fund, i. e., the income for state purposes, with one of the charges upon it, and treats the fund and the charges as convertible terms, whereas the general expenditure fund or the fund for the ordinary expenses of the government is but one of the subdivisions of the whole.

In *United States v. Goldenberg*, 168 U. S. 95, 18 Sup. Ct. 3, 42 L. Ed. 394, it is said:

"The primary and general rule of statutory construction is that the intent of the lawmaker is to be found in the language that he has used. He is presumed to know the meaning of words and the rules of grammar. The courts have no function of legislation, and simply seek to ascertain the will of the legislator. It is true there are cases in which the letter of the statute is not deemed controlling, but the cases are few and exceptional, and only arise when there are cogent reasons for believing that the letter does not fully and accurately disclose the intent."

See, also, *Lewis' Sutherland*, Stat. Const. §§ 366 and 367; *Endlich on Interpretation of Stats.* §§ 1, 2, and 3.

*City of Louisville v. Button*, 118 Ky. 732, 82 S. W. 293, 26 Ky. Law Rep. 606, furnishes a good illustration of the rule. The charter of cities of the first class provides (Ky. Stats. § 2981):

"In the ordinance fixing for any year the tax rate the general council shall subdivide its



levy as follows: A levy for schools, \* \* \* a levy for sprinkling streets, \* \* \* and a levy for general purposes. \* \* \*

The levy ordinance for 1904 passed by the general council of the city of Louisville made no provision for street sprinkling, and it was sought to appropriate \$15,000 of the general purpose fund for street sprinkling. In sustaining the lower court, which denied the right to so appropriate this money, we said:

"The question then narrows itself down in this case to the one whether 'street sprinkling' is embraced in the term 'general purposes.' Without undertaking to define here what may be included in the latter term, we are clear that its being enumerated with some dozen other divisions, each of which is required to be provided for expressly, if at all, negatives the proposition that one embraces the other. For, if that were true, it would be within the power of the council to levy the whole tax under the head of 'general purposes,' defeating entirely the motive of the legislation requiring a particularization of subjects for which taxes are to be levied. The attempted deflection of the 'general purpose' fund complained of was illegal, and was therefore properly enjoined."

General purpose fund of cities of the first class bears the same relation to the city's budget or general fund as the general expenditure fund of the state bears to money collected for state purposes.

City of Louisville v. Louisville School Board, 119 Ky. 574, 84 S. W. 729, 27 Ky. Law Rep. 209, involved the construction of Ky. Stats. § 3004, which says:

"\* \* \* The penalty provided for herein [meaning the penalty on unpaid tax bills, Ky. Stats. § 2998] shall go to the tax receiver for the benefit of the city."

While admitting there was some force in the school board's contention in that case that it was entitled to its proportion of this penalty, the court points out that in the original tax law of the city of 1884, which was substantially the same as the one then in force (1905), that which was called a penalty was then called a commission, and went to the tax receiver for his own benefit, and in the new law "commission" is substituted for penalty, and, since the tax receiver's office had been put on a salary basis, the city instead of the officer should receive the money.

Another ground for reversal in the above case was the construction of the statute by the city officials.

A similar conclusion was reached in Fuqua, Supt. v. Hager, Auditor, 119 Ky. 407, 84 S. W. 325, 27 Ky. Law Rep. 46, regarding the schools' proportion of the tax on premiums received from foreign insurance companies.

Practically the identical question raised by this appeal was decided in Auditor v. Trustees Frankfort Common Schools, 81 Ky. 680, in which it was sought by mandamus to compel the auditor to transfer, from the account

of revenue for the ordinary expenses of the government to the common school fund, certain sums collected from the railroads from 1879 to 1883. Section 10 of article 12, c. 92, title "Revenue and Taxation," of the General Statutes 1883, reads:

"All money paid into the treasury under this article shall be for the ordinary expenses of the government."

While the court in the opinion confuses the expression "ordinary expenses" and "general purposes," in referring to section 10, supra, it pointedly states:

"But for this express appropriation of the tax thus raised to a designated purpose [ordinary expenses], it would be applied as other taxes levied upon property in general."

Here we have a positive declaration of this court upon the precise question now before us, and we adhere to the conclusions therein reached.

It is argued that, even though the school fund was entitled to its proportion of the inheritance taxes prior to 1918, the act of that year limited the schools to such tax only as was realized by the assessment of the property mentioned under the 40-cent rate.

This alleged change in the statute is found in the words italicized:

"Of the aggregate amount of tax realized by all assessments *under this forty (40) cent rate*, fifteen cents shall be *for the use of* the ordinary expenses of the government, 18 cents for the support of the common schools," etc.

We fail to comprehend the force of this argument, because, if the schools be limited to such taxes only as may be realized under this 40-cent rate, why not place a like limit upon the other enumerated objects and purposes of the state's disbursements; such, for instance, as the ordinary expenses of the government? Just how or why the stricture should be applied to the schools, we cannot see. Is it not a matter of the "pound of flesh" after all, and could a separation of the items be decreed without involving the very fund it is sought to enrich?

It is also contended that Ky. Stats. § 4370, provides exactly what shall constitute the common school fund, and the income of this fund is limited as therein provided. We do not so understand the statute, nor has the Legislature so interpreted it, because in subsequent acts, notably in 1917, it has expressly supplemented the school fund from other sources. The Constitution does not so limit it. Section 184 provides that the schools shall be entitled to the items therein specified, together with such other sums as may be produced by taxation or otherwise. And this is in keeping with section 171 of the Constitution, providing for the levy of an annual tax which, with other resources, shall be sufficient to defray the estimated expenses of the commonwealth for each fiscal year.

Counsel asks how the inheritance taxes are to be apportioned if the schools are entitled to participate. The answer, beset with no difficulties, is—exactly as the ad valorem taxes are divided.

The ratio should be the same as provided by section 4019, Ky. Stats., viz., 18 cents out of each 40 cents collected, the other funds enumerated in the statute to receive their proper share.

[7] The lawmaking power of the state is entitled to at least as strong a presumption in favor of the validity of its acts as a criminal on trial in favor of his innocence.

We must give some meaning to the various statute passed at the special session of 1917, wherein certain licenses were appropriated to certain specific purposes. In these, as well as in the general revenue act of 1906 and other statutes, the Legislature recognizes the distinction between a fund for the general use of the commonwealth and one for its ordinary expenses, and, when it intended a certain income to go to a specific fund or funds, it so declares, and in the absence of such a designation, or where it is set apart for state purposes, or the general use of the commonwealth, it will be treated as a general fund for the benefit of all and not for just one of the subheads. All statutes shall be construed with a view to carry out the intention of the Legislature. Ky. Stats. § 459.

"Where a statute that has been construed by the courts has been re-enacted in the same, or substantially the same, terms, the Legislature is presumed to have been familiar with its construction, and to have adopted it as a part of the law, unless it expressly provides for a different construction. So where words or phrases employed in a new statute have been construed by the courts to have been used in a particular sense in a previous statute on the same subject, or one analogous to it, they are presumed in the absence of a clearly expressed intent to the contrary, to be used in the same sense in the new statute as the previous statute. These rules are also extended to statutes, and parts of statutes that have been re-enacted after having received a practical construction by the legislative or executive departments of the government." 36 Cyc. 1153.

[8] The conclusion herein reached renders unnecessary a discussion of the question of contemporaneous construction, besides, as said in *Bosworth v. Marshall*, 165 Ky. 32, 176 S. W. 348:

"This rule is not resorted to by the courts unless the statute is ambiguous or uncertain in its terms and it is really difficult to ascertain its true meaning; and where, even though it has been given one interpretation by the administrative officials for a term of years, its meaning is plain and easily understood, the courts will not adopt the erroneous interpretation put upon it by the administrative officials."

We find no ambiguity in the statute; but, did we so find, the construction given the

statute by the Legislature and state officials from 1906 to 1918 would tend strongly to support the position and contention of appellant.

We are enjoined by the Constitution to hold the school fund inviolate. How jealously the courts have guarded this fund can be seen from the cases in which it was sought to appropriate a part thereof. The Legislature has likewise shown an ardent and active interest in the schools of the state and evinced in many ways its desire to protect and extend the wholesome influence of those institutions, commonly referred to as the bulwarks of our civilization. Kentucky's future depends largely upon the intelligence and education of its children, and, where the Legislature has so plainly and appropriately indicated its purpose to further the cause of education in this commonwealth, it is our agreeable duty to carry into effect that intention, and, so construing the statute we conclude that the income from inheritance taxes shall be apportioned to the common school fund and the other objects and purposes referred to in section 4019, Ky. Statutes, and in the ratio therein provided.

For the reasons given, the judgment of the lower court will be reversed, with instructions to enter judgment in accordance with the prayer of the petition, directing the auditor of public accounts to place to the credit of the school fund its due proportion of the funds received from inheritance taxes.

#### BAXTER REALTY CO. v. MARTIN.

(Court of Appeals of Kentucky. Oct. 24, 1919.  
Rehearing Denied Nov. 28, 1919.)

1. GUARDIAN AND WARD §107 — SALE OF MINOR'S LAND UNDER ERRONEOUS JUDGMENT NOT SUBJECT TO COLLATERAL ATTACK BY INFANT ON MAJORITY.

A judgment for sale of indivisible property of an estate in remainder for payment of lien notes and distribution of proceeds, if not void, but merely erroneous, cannot be attacked in a collateral proceeding against the purchaser at such sale or his vendee by a minor distributee, who was represented by guardian in such suit for distribution, and has since become of age.

2. GUARDIAN AND WARD §87 — SALE OF PROPERTY FOR PAYMENT OF DEBTS AND DISTRIBUTION.

In a suit brought under Civ. Code Prac. § 490, subsec. 2, bringing all necessary parties before the court, the fact that no summons was issued upon the pleading of the holder of a mortgage lien constituted no objection to the proceedings or judgment, where the original petition set out the amount of such debt as just and subsisting, and while the case should have been submitted on the whole pleadings, error in submitting it upon the lien claimant's plea was not prejudicial to the interest of an infant distributee.

**3. PROCESS — SET-OFF IN SUIT FOR SALE OF INDIVISIBLE PROPERTY.**

A statutory guardian's suit to sell indivisible property jointly owned to pay lien debts, and divide the proceeds between the owners, falls under Civ. Code Prac. § 490, subsec. 2, and a lien creditor's debt may be set up therein and paid from the proceeds of sale before distribution, and the infant plaintiff under 14 years of age need not be made a defendant as to lien creditor's claim, particularly since the claim, although designated as "counterclaim, set-off and cross-petition," was not a cross-petition, under section 96, but a set-off under section 97, requiring no summons, whether plaintiff be an infant or an adult.

**4. INFANTS — SALE OF INFANT'S REAL ESTATE; STATUTORY REQUIREMENTS.**

The power of equity courts to sell infant's real estate is purely statutory, and all substantial provisions of the Code relating thereto must be strictly complied with, or otherwise they will not be divested of title, but an infant may bring such a suit as plaintiff, through a statutory guardian, in which case Civ. Code Prac. § 86, subsec. 3, providing against rendering judgments against infants summoned, before the regular guardian or committee shall have made a defense, etc., is without application to a set-off by a lien claimant.

**5. GUARDIAN AND WARD — JUDGMENT FOR SALE OF INDIVISIBLE PROPERTY NOT SUBJECT TO VACATION FOR ERRORS IN ALLOWING PAYMENT OF CLAIMS.**

The error of the court in allowing to be paid out of the proceeds of sale, in a suit brought by a statutory guardian for sale of indivisible property, payment of debts, and distribution of the estate, certain claims that should not have been paid, did not in any manner affect the validity of the judgment ordering the sale, or authorize its vacation; such errors being available only on appeal.

**6. GUARDIAN AND WARD — FILING BY STATUTORY GUARDIAN OF PLEA FOR MORTGAGE HOLDER IN PROCEEDING FOR DISTRIBUTION.**

That the statutory guardian of an infant filed a pleading for the mortgage holder in a proceeding for sale of indivisible land for payment of the mortgage and distribution, where the infant was a distributee, does not render the judgment therein void as to such infant.

**7. GUARDIAN AND WARD — SALE OF ESTATE AND DISTRIBUTION—RIGHT OF INFANT DISTRIBUTEE TO LIEN ON LAND SOLD AND FOR MONEY SQUANDERED BY GUARDIAN.**

Where a judgment directing sale of indivisible land of an estate in possession for payment of a lien and distribution was neither void nor erroneous, an infant distributee, whose share was unlawfully permitted to be withdrawn by her guardian, who squandered it, has a remedy under Civ. Code Prac. § 497, providing, in such a proceeding under section 490, subsec. 2, the infant's share shall not be paid by the purchaser, but shall remain a lien on the land, bearing interest until she comes of age, and her claim may be enforced against the land, where the guardian has not executed the bond required by section 498.

**8. GUARDIAN AND WARD — WITHDRAWAL OF WARD'S SHARE ON SALE FOR DISTRIBUTION.**

Where an order in a proceeding for sale and distribution of an estate recites that G., as guardian "ad litem," was permitted to withdraw the proceeds, *held*, that it must be presumed that the words "ad litem" were added by mistake or inadvertence, and that he withdrew the fund as statutory guardian, which he was, where he was not guardian ad litem.

**9. GUARDIAN AND WARD — PURCHASER AT SALE FOR DISTRIBUTION MUST SEE WARD'S INTEREST PROTECTED.**

A purchaser of land in which an infant has an interest must look to the record in which the land is sold, and carefully see that every substantial provision of the Code intended for the infant's protection has been observed, and, failing to do so, no orders or judgments of the court will save the purchaser at the suit of the infant to recover the estate.

Appeal from Circuit Court, Jefferson County, Chancery Branch, Second Division.

Suit by Nellie E. Martin against the Baxter Realty Company. Judgment for plaintiff, and defendant appeals. Reversed, with directions.

Pope Nicholas and Oscar Bader, both of Louisville, for appellant.

Bingham, Sloss, Tabb & Mann, of Louisville, for appellee.

CARROLL, C. J. In 1903 Grinstead conveyed to Ada B. Martin, wife of W. D. Martin, as trustee, a tract of land in Jefferson county; the deed providing that Ada Martin should hold the estate for her use and benefit during life, with remainder to W. C. Martin and Nellie E. Martin, her children. It was also provided that if W. D. Martin, the husband of Ada B. Martin, should survive her, the children should furnish him with a home and maintenance during life, and further that, if Nellie E. Martin should die without issue before reaching the age of 21 years, then her interest in the land should pass to her brother, W. C. Martin.

In October, 1905, a petition in equity was filed in the Jefferson circuit court, in which W. C. Martin, who was over 21, Nellie E. Martin, then an infant under 14 years, by her statutory guardian, B. F. Gardner, W. D. Martin, and B. F. Gardner, administrator of A. B. Martin, deceased, were plaintiffs, against Laura B. Fox and Joseph Dodge as defendants. In this petition it was averred that Ada B. Martin had died intestate, leaving surviving her as her only heirs at law her husband, W. D. Martin, and her two children, W. C. and Nellie E. Martin, the latter being an infant under 14 years of age; that B. F. Gardner had been appointed and qualified as administrator of Ada B. Martin and as statutory guardian of Nellie

E. Martin. It was further averred that Ada B. Martin left no personal estate, or any estate, except the small tract of land conveyed to her by Grinstead; that in the deed conveying to her this land a lien note for \$1,600 unpaid purchase money was executed to Grinstead and assigned by him to Laura B. Fox; that Ada B. Martin was also indebted to Dodge, an unsecured creditor, in the sum of \$700; that the land could not be divided without materially impairing its value, and a sale of the property would be of benefit to the parties, including the infant, Nellie E. Martin; that W. D. Martin and W. O. Martin consented to a sale of the property. It was further prayed that the estate of Mrs. Ada Martin be settled, that the debt of Mrs. Fox be paid out of the proceeds, and that the interest of Nellie E. Martin in the proceeds be reinvested for her benefit, and the remainder of the proceeds distributed between the parties entitled thereto.

In answer to this petition Dodge set up his claim against Ada Martin. A Mrs. Webber also came into the suit, and asserted a claim against the estate of Ada Martin, and Laura B. Fox, the holder by assignment of the \$1,600 lien note executed to Grinstead as part of the purchase price of the land, set up her lien in a pleading styled "Answer, Counterclaim and Cross-Petition." But it was only made a cross-petition against Mrs. Webber, the creditor who had, come into the case.

On the answer, counterclaim, and cross-petition of Mrs. Fox the case was submitted, and it was adjudged that Mrs. Fox had a superior lien on the land. The judgment further recited that—

"It appearing from the petition that a sale of the land is sought by the plaintiff, and all parties having agreed to such a sale, and it further appearing from the pleadings and proof that said land cannot be divided without materially impairing its value, or the value of the interest of the owners thereof, it is accordingly adjudged that the same be sold."

Out of the proceeds it was directed that the debt of Mrs. Fox be paid, and further provided that the case should be retained on the docket for the disposition of other questions.

After this the land, having been appraised at \$4,250, was sold for \$3,820. Soon afterwards the sale was confirmed, and the purchaser by agreement of parties paid into court the purchase money, and the land was conveyed to him free of all liens. At the time the purchase money was paid an order was entered rejecting the claims of Dodge and Webber, and an order of distribution was made, directing the payment of the lien debt of Mrs. Fox, the amount due W. D. and W. O. Martin, as well as other costs and fees. It was further ordered that the amount due Nellie E. Martin—

"shall be withheld by the court and reinvested or loaned upon the recommendation of her guardian and subject to the approval of the court until the said Nellie shall become 21 years of age, unless otherwise ordered."

It further appears that a few months after this, and on October 10, 1906, by an order of court, "B. F. Gardner, guardian ad litem for Nellie Martin, is granted immediate leave to withdraw from the fund in court the sum of \$458.92," which was the amount coming to Nellie E. Martin out of the proceeds of the sale as shown by the order of distribution.

In 1916 Nellie E. Martin, the appellee, who had just reached her majority, brought this suit against the appellant, Baxter Realty Company, that had by conveyances come into possession of the land, setting up that the judgment ordering the sale of her interest was void, and she still remained the owner of an undivided one-half of the land. Alleging that the land was indivisible she prayed that it be sold and for a division of the proceeds between herself and the Baxter Realty Company. The Baxter Realty Company put in issue all the material averments of the pleading affecting its interest, and asked, if it should be adjudged that the order directing a sale of Nellie E. Martin's interest was void, that it have a lien on her interest for certain improvements it had made and necessary expenses it had incurred in paying taxes and in other ways. After the pleadings had been made up the court adjudged the judgment attacked void on the ground that Nellie E. Martin was not before the court when it was rendered, and the proceeding in which her land was ordered to be sold was not authorized by any provision of the Code or Statutes; that Nellie E. Martin was the owner in fee simple of an undivided one-half interest in the land and the Baxter Realty Company the owner of the other one-half interest; that the property could not be divided without impairing its value, and a sale was ordered and distribution of the proceeds in accordance with the judgment; the case being retained on the docket to adjust the rights of the parties with reference to costs, compensation for rents, improvements, taxes, and other matters in dispute. From this judgment the Baxter Realty Company prosecuted the appeal now before us.

[1] The first question to be determined is: Was the judgment attacked, in so far as it directed a sale of the interest of Nellie E. Martin, void, or merely erroneous, or either? If it was void, neither the judgment nor the proceedings had thereunder divested her of title, and the judgment now appealed from was correct; but, if this judgment complained of was merely erroneous, it could not be vacated in this collateral proceeding, nor could the purchaser at the judicial sale, who was a stranger to the suit in which the land was sold, nor his vendee, the Baxter Realty Company, be divested of the title of Nellie

E. Martin which they acquired by virtue of the judgment and sale thereunder.

The petition filed in October, 1905, and heretofore referred to, asking a sale of the land and division of the proceeds after the payment of debts is so inartistically drawn that it is difficult to determine under what section of the Civil Code of Practice it was brought; but we think it must have been intended to bring it under section 490 and subsection 2 thereof, providing that—

"A vested estate in real property jointly owned by two or more persons may be sold by order of a court of equity, in an action brought by either of them, though the plaintiff or defendant be of unsound mind or an infant. \* \* \* 2. If the estate be in possession and the property cannot be divided without materially impairing its value, or the value of the plaintiff's interest therein."

We think it fair to assume that it was brought under this section because the estate sought to be sold was a vested estate in possession owned by W. C. and Nellie E. Martin subject to the maintenance of W. D. Martin, their father, and it could not be divided without materially impairing its value.

We are further of the opinion that in a suit under this section of the Code the estate may be settled when all necessary parties are properly before the court, and of course a lien creditor, such as Mrs. Fox was, may be made a party, and the lien debt ordered to be paid out of the proceeds of sale. There seems to us no good reason why this should not be done, in order that a sale of the property may be had and provision made for the payment of lien and other debts in one suit in place of bringing two suits for that purpose, although in this case there was no estate to settle, as Mrs. Martin left no interest in the land. It was, however, necessary to sell the land to pay the lien debt of Mrs. Fox.

In a suit under section 428 to settle the estate of a decedent, it has been held that it was not improper to join the cause of action provided for in subsection 2 of section 490 when the land sought to be sold was indivisible. *Elliott v. Fowler*, 112 Ky. 376, 65 S. W. 849, 23 Ky. Law Rep. 1676; *Catlin v. United States Fidelity & Guaranty Co.*, 137 Ky. 208, 125 S. W. 297. And if a suit to settle the estate can be joined with a suit under section 490 when the facts authorize it, it would reasonably appear that in a suit under section 490 the estate may be settled, provided always that the Code provisions in regard to the sale of infants' lands are complied with.

Looking at the case as if it had been brought under section 490, subsection 2, it was written in *Ellis v. Smith*, 147 Ky. 99, 143 S. W. 776, that such a suit may be brought by the statutory guardian of the owners of the indivisible land without making any party defendant. In that case the

statutory guardian of Kelly and John Smith, who were infants and the owners of an indivisible tract of land, brought suit for its sale under section 490, subsection 2, of the Civil Code of Practice. The court ordered a sale of the land, and the case was brought here on exceptions filed by the purchaser. The question in the case was whether the land of infants could be sold under section 490, subsection 2, upon petition by their guardian, without naming either of them as a party plaintiff or defendant, and the court held that he might do so. To the same effect is *Scott v. Graves*, 153 Ky. 221, 154 S. W. 1084.

[2] Holding that this suit was brought under subsection 2 of section 490, and that under this section, upon proper allegations and when all necessary parties are before the court, indivisible real estate may be sold and lien debts thereon satisfied out of the proceeds, we find no objection to the proceedings or the judgment in the fact that no summons was issued on the pleading of Mrs. Fox. The petition set out the amount of her debt, and showed that it was a just and subsisting debt, as well as a lien on the land, and in her pleading she merely set forth what was admitted in the petition, not asking any relief against the infant that the petition did not show her entitled to. Nor do we find any material error in the fact that the case seems to have been submitted for judgment on her pleading. It should, of course, have been submitted on the whole case; but the error in this respect was unsubstantial and in no wise prejudicial to the interest of the infant.

In *Whalen v. Hopper's Guardian*, 152 Ky. 727, 154 S. W. 40, we had before us a case presenting facts very similar to the facts appearing in this record. In that case a suit was brought by the statutory guardian of three infant children, each of whom, as the record shows, was over 14 years of age, and there was also joined as plaintiff their father, Arthur E. Hopper. The defendants were a building association and Hutchison. The suit was brought to have a sale of some real estate owned by the mother of the children and distribution of the proceeds after paying lien debts. In the petition it was set up that the building association had a mortgage lien on the property; that Hopper, the father, also had a lien arising out of the fact that he had paid certain sums to the building association in partial discharge of its lien debt and to the extent of this he asked in the petition to be subrogated to the rights of the building association. The building association and Hutchison, who also had a lien on the property, filed answers, counterclaims, and cross-petitions setting up their liens; but no summons on these pleadings was executed on the infant plaintiffs, who, as we have said, were over 14 years of age. The case having been submitted, there was a judgment in favor of the building association for its lien debt and cost, a like judgment in favor of

Hopper for the amount which he had paid on the lien debt after his wife's death, and also a judgment in favor of Hutchison for his lien debt. The property was ordered sold to pay the debts, the remainder of the proceeds to be divided between the parties in proportion to their interests. Exceptions were filed by the purchaser at the decretal sale upon the ground that the infants should have been made parties defendant, and defense made for them as to the claims of the building association, Hopper, and Hutchison. On the facts shown in the record this court held in the opinion that the suit was brought under section 489 of the Civil Code of Practice to sell the land of the infants to pay the debt of their ancestor, and not for a division of the proceeds among the owners under subsection 2 of section 490, and accordingly it was said that the suit should have been brought against the infants, and, after service of process, defense have been made for them by their statutory guardian.

It is not important to inquire into the reasons that influenced the court in the Whalen Case to hold that the purpose of the suit was to sell the land to pay the debts of the ancestor under section 489, and not to distribute the proceeds among the owners under section 490. But there can be no doubt about the correctness of the conclusion reached by the court in that case after it had determined that the suit was brought under section 489 of the Civil Code of Practice. Because it has been held in *Hartman v. Fast*, 145 Ky. 402, 140 S. W. 549, *Shelby v. Harrison, Jr.*, 84 Ky. 144, and many other cases, that when the suit is brought under section 489 to sell the estate of infants to pay the debts of their ancestor they must be made defendants to the action, and when over 14 years of age served with process. It has also been held in the cases of *Shelby v. Harrison*, supra, *Ellis v. Smith*, supra, and *Scott v. Graves*, 153 Ky. 221, 154 S. W. 1084, that when the suit is under section 490, subsection 2, it may be brought by the infants through their statutory guardian as plaintiffs, and it is not necessary that they should be made defendants or served with process.

[3] In the case we have, taking into consideration the purpose of the suit, which was to sell indivisible property jointly owned for the purpose of paying lien debts and dividing the proceeds between the owners, we are well satisfied that the suit properly falls under subsection 2 of section 490 of the Civil Code of Practice. We are also satisfied that in such a suit the debt of the lien creditor may be set up and paid out of the proceeds of sale before distribution between the parties entitled thereto. Therefore it is not necessary that the infant who was under 14 years of age should have been made a defendant, as she had the right to bring the suit through her statutory guardian as plaintiff. Nor was

it necessary for a summons to issue on the pleading of Mrs. Fox against the infant plaintiff, as the claim and right of the lien creditor were fully described in the petition. But, aside from this, the pleading of Mrs. Fox, although designated as a "counterclaim, set-off, and cross-petition," was not made a cross-petition against the plaintiff, nor could it have been under section 96 of the Civil Code of Practice. It could only have been made a set-off against the infant and other plaintiffs, and under section 97 of the Civil Code of Practice no summons is required on a set-off or counterclaim against a plaintiff. And this is so, whether the plaintiff be an infant or an adult.

[4] So that, when the infant is properly a plaintiff, as in this case, subsection 3 of section 36 of the Civil Code of Practice providing that "no judgment shall be rendered against an infant" who is summoned in this state, until the regular guardian, or committee, of such infant shall have made defense or filed a reply stating that, after a careful examination of the case, he is unable to make defense, has no application. This provision is only applicable when the infant is made a defendant and is summoned in this state. We have consistently held that the power of courts of equity to sell the real estate of infants is purely statutory, and that all the substantial provisions of the Code relating to the sale of infants' real estate must be strictly complied with, or otherwise they will not be divested of title. But when the suit may be brought by an infant as plaintiff, through his statutory guardian, it would manifestly be a foolish as well as useless thing to require the statutory guardian who brought the suit to also file an answer in the suit reiterating in substance the facts averred in his petition.

In other words, when a suit may be and is brought by a statutory guardian for his infant ward, who is joined as plaintiff, the ward is as certainly before the court and his interest is as certainly protected as if he had been made a defendant and the statutory guardian had filed an answer for them, because in either event the infant is represented by his statutory guardian. Nor can we think of any reason why, in a suit brought to sell indivisible property under subsection 2 of section 490 of the Civil Code of Practice, a lien creditor, whose debt is set out in the petition and admitted to be correct, should not be allowed to set up by answer and set-off his lien, in order that his debt may be paid out of the proceeds. It is clear that this practice is not forbidden by the Code when the suit is brought by the statutory guardian under subsection 2 of section 490 of the Civil Code of Practice, and equally clear that it is not prejudicial to the interest of the infant. On the contrary, there is accomplished in one suit exactly the same end for which two suits would be required, with a duplication of

costs, if the lien creditor was obliged to file an independent suit.

[5] It is true that in the case before us the court allowed to be paid out of the proceeds of sale claims that should not have been paid, but the error of the court in this respect did not in any manner affect the validity of the judgment ordering a sale of the property. Nor is there any authority that would authorize the vacation of a judgment for error in the distribution of proceeds or the improper allowance of claims. Errors like these are only available on appeal.

[6] It is further urged that the judgment was void because the statutory guardian of the infant, Nellie E. Martin, was the attorney who filed the pleading for Mrs. Fox, a creditor, and in support of this position the case of Ball v. Poor, 81 Ky. 26, is relied on. In that case the facts were these: Suits were brought by creditors of Mrs. Ball to subject her land to various liens, and, being a nonresident, she was brought before the court by constructive process as to one, but as to the other creditor she was not before the court by process of any kind. It appears, however, that personal judgment went against Mrs. Ball as to both the creditors on the authority of a power of attorney in which she authorized her appearance to be entered in the actions. This power of attorney was given by Mrs. Ball to the attorney for the creditors in whose favor personal judgment was entered on the strength of it. The court held the personal judgment to be void, upon the ground that it was within the prohibition of section 416 of the Kentucky Statutes, providing that—

"Powers of attorney to confess judgment, or to suffer judgment to pass by default, or otherwise, and every release of errors given before an action is instituted, are declared void."

We do not, however, think this case should be treated as controlling authority, sufficient to hold the judgment ordering a sale of the infant's land in the case we have void merely because her statutory guardian was the attorney for the lien creditor, because there is no pretense whatever that the debt asserted by the lien creditor was not a just and subsisting debt, or that the creditor did not have a lien on the land in which the infant had an interest for the amount of it.

The attorney did not enter the appearance of the infant in the suit of Mrs. Fox, nor did he confess judgment for the infant. The suit brought by the infant and the other joint owners, in which the answer of Mrs. Fox was filed, stated, as we have seen, that in the deed of Grinstead conveying the land to Ada Martin a lien was retained on the land to secure Grinstead in the payment of the unpaid purchase price represented by a note for \$1,600, and that the defendant Laura B. Fox was the holder of the note by assignment from Grinstead; that Laura B. Fox

was willing to accept the principal of the debt and accrued interest at the time of payment in satisfaction of the obligation; and it was therefore prayed that when the land should be sold the lien debt of Mrs. Fox be paid out of the proceeds of the sale.

[7, 8] The judgment directing a sale of the land was neither void nor erroneous, but the infant, Nellie E. Martin, is not without remedy in this case for the wrong that was done her in failing to secure to her the \$458 to which she was entitled as her share of the proceeds of the land. It is provided in section 497 of the Civil Code of Practice that—

"In the action mentioned in subsection 2 of section 490, the share of an infant, or of a person of unsound mind, shall not be paid by the purchaser, but shall remain a lien on the land bearing interest until the infant become of age, or the person of unsound mind become of sound mind, or until the guardian of the infant, or the committee of the person of unsound mind, execute bond as required by section 493."

And when this money due the infant was paid into court, which it appears from the record was done, the court had no jurisdiction or power to authorize or permit the money to be withdrawn from the court until the guardian of Nellie E. Martin executed the bond required by section 493 of the Civil Code of Practice. It appears, however, from the record, as we have seen, that on October 10, 1906, B. F. Gardner, guardian ad litem, was permitted by an order of court to withdraw this sum, which we may take it for granted he did, although the record does not so show. It will be observed that the order recited that B. F. Gardner as "guardian ad litem" was permitted to withdraw the funds; but we presume that the words "ad litem" were added by mistake or inadvertence, and that he withdrew it as statutory guardian, as he was statutory guardian, and not guardian ad litem. Assuming that he withdrew the funds as statutory guardian, the record does not show that he executed the bond required by section 493 of the Civil Code of Practice, and on the record we must presume he did not. As this order of the court, as it appears from the record, was a void order, whether Gardner withdrew the money as guardian ad litem or as statutory guardian, the sum due Nellie E. Martin remained under the express provision of the Code a lien on the land, bearing interest until she became of age.

We had a case very similar to this in *Com. v. Catlin*, 129 Ky. 493, 112 S. W. 665. In that case suit was brought to sell the indivisible land of W. D. Catlin for distribution of the proceeds among his children. The purchaser paid into court the purchase money including the shares of two infants. The shares so paid into court were loaned out at interest by order of court, but afterwards the order lending it out was set aside and the money collected by the commissioner,

who squandered it. Thereafter the guardian appointed for the children brought suit against the purchaser of the land at the judicial sale, asserting a lien on the land for the amount due his wards. The court, in considering the case, after referring to section 497 of the Civil Code of Practice and the necessity for the execution of the bond as required by section 493, said:

"The infants having no guardian to whom their respective shares of the purchase money could be paid, by the express terms of the Code these remained a lien upon the land, bearing interest, and the purchaser was prohibited from paying the money over to any one prior to the time they became of age, except to their statutory guardian after the execution of the bond required by section 493. The court would have had no authority to direct payment, and the payment by the purchaser on his own motion was unauthorized and void, so far as the interests of the infants are concerned. The rights of the infants are fixed and secured by the provisions of the Code cited, and the lien on the land could not be lifted or discharged, except in the manner pointed out by the letter of the law. No order of the court made concerning the money wrongfully paid to the commissioner by the purchaser could affect the rights of the infants; and when the appellant qualified as their guardian, and executed the proper bond in accordance with the provisions of the Code, supra, he had a right to demand and receive the purchase money belonging to them, and to enforce the statutory lien which secured it."

The case was here again in 119 S. W. 769, on the appeal of the purchaser from a judgment giving the infants a lien on the land, and the court said it was claimed in his behalf:

"That as the judge of the circuit court failed to incorporate in the order of sale that the infants' shares should remain a lien on the land until the infants arrived at age, or the guardian of the infants executed bond as required by section 493 of the Civil Code of Practice, and that as the commissioner violated the Code in drafting the bonds and in receiving the purchase price, the guardian of the children ought to be estopped from interfering with the innocent purchasers of the land. We know of no rule of equitable estoppel that will apply to infants in a case like this. It is true it was an unfortunate mistake of the court and commissioner; but, as stated in the former opinion, it cannot be permitted to result to the detriment of the children, who were unable to protect their own interests."

The case was here again in *Catlin v. United States Fidelity & Guaranty Co.*, 137 Ky. 208, 125 S. W. 297, on another question not here pertinent.

It seems a hard case that the vendee of the purchaser at the judicial sale should be required to refund to Nellie E. Martin the amount of her interest in the land, when the sum due her has been paid into court by the purchaser at the judicial sale and paid

out by an order of the court to a person not authorized to receive it; but the provision of the Code is peremptory. It was intended to protect the interests of infants, and a court has no jurisdiction or power to overlook or ignore these provisions intended for the security of infants who are unable to protect themselves.

[9] A purchaser of land in which an infant has an interest must look to the record in which the land is sold and carefully see to it that every substantial provision of the Code intended for the protection of the infant has been observed. If they have not, no orders or judgments of the court will save them in the suit of the infant to recover her estate. It follows, from what we have said, that the judgment was not void, although the case was very badly prepared and practiced from the beginning to the end; but Nellie E. Martin, under the facts appearing in this record, has a lien on the land to secure her in the payment of \$458, with interest from October 10, 1906, until paid. If, however, there are reasons not appearing in this record why she is not entitled to the amount specified, they may be set up in a supplemental pleading, and after the issues, if any, are joined on this pleading, and evidence, if any, taken, the court will determine the matter according to the rights of the case.

Wherefore the judgment is reversed, with directions to proceed in conformity with this opinion.

#### MUSIC v. COMMONWEALTH.

(Court of Appeals of Kentucky. Nov. 14, 1919. Rehearing Denied Dec. 19, 1919.)

#### 1. CRIMINAL LAW §665(1) — SEPARATION OF WITNESSES IN DISCRETION OF COURT.

Civ. Code Prac. § 601, authorizing the court to exclude witnesses for adverse party not under examination if either party "requires" it, is not mandatory, and merely gives the party the right to ask for the separation, and the court the power to grant it subject to the exercise of his sound discretion.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Require.]

#### 2. CRIMINAL LAW §1168(2) — REFUSAL TO SEPARATE WITNESSES HARMLESS.

The court's refusal to separate witnesses upon defendant's request therefor, under Civ. Code Prac. § 601, where nearly all of the witnesses testified to different facts and there could be no occasion for collusion or conspiracy to verify each other or give false testimony, if error, was harmless.

#### 3. CRIMINAL LAW §369(2,15), 370, 371(1, 12)—EVIDENCE OF OTHER CRIMES ADMISSIBLE.

Evidence of other crimes is competent to show identity, guilty knowledge, intent, or mo-



tive, and may be admitted where the offense charged is so interwoven with other offenses that they cannot be separated.

4. CRIMINAL LAW §369(3), 371(12) — EVIDENCE OF OTHER CRIMES SHOWING MOTIVE.

In prosecution for murder of policeman attempting to arrest defendant following a robbery, evidence relating to the robbery was properly admitted for purpose of showing that defendant had committed recent felonies which would authorize policeman to arrest him, and for purpose of showing that defendant's motive in killing the policeman was to avoid arrest for such felonies, where court admonished jury as to purpose for which such testimony might be used.

5. CRIMINAL LAW §1036(1)—EXCLUSION OF EVIDENCE NOT REVIEWABLE WHERE NOT SET FORTH.

Refusal to admit testimony will not be considered on appeal, where there was no avowal as to what the witness would have testified to had he been permitted to answer question.

6. CRIMINAL LAW §1170(1)—EXCLUSION OF EVIDENCE HARMLESS ERROR.

In murder prosecution, refusal to permit defendant to state where he was reared, and as to whether his parents were living or dead, was not prejudicial.

7. HOMICIDE §300(12) — INSTRUCTIONS AS TO SELF-DEFENSE.

In a prosecution for murder of policeman while attempting to arrest defendant, instructions held not to deprive defendant of the right to the exercise of self-defense if he had not known deceased was an officer and was attempting to arrest him.

8. HOMICIDE §244(1) — SUFFICIENCY OF EVIDENCE OF MURDER OF POLICEMAN.

In prosecution for murder of policeman, where defendant claimed self-defense, evidence held to show that defendant killed policeman to prevent arrest, knowing at the time of the killing that deceased was a policeman and intending to arrest him.

9. CRIMINAL LAW §507(1) — WHAT CONSTITUTES ACCOMPLICE.

That fact that a witness was jointly indicted with defendant does not make him an accomplice if the testimony shows that he was not one.

10. CRIMINAL LAW §1173(2) — FAILURE TO INSTRUCT AS TO TESTIMONY OF ACCOMPLICE HARMLESS ERROR.

Where accused testifies to substantially the same facts as his alleged accomplice, he is not prejudiced if the court fail to give instruction concerning testimony of accomplices.

11. CRIMINAL LAW §719(1)—ARGUMENT OF COUNSEL NOT REVERSIBLE ERROR.

Inappropriate remarks of counsel during the argument to the jury will not justify reversal, unless altogether unfounded from any fact or circumstance appearing in the case, and manifest such a wide departure from legitimate deductions as to be at once poisonous and prejudicial; but, where remarks are foreign to any-

thing appearing in the case, and made for purpose of taking an undue advantage, and such was the probable effect, it is the court's duty to reverse the judgment.

12. CRIMINAL LAW §780(8)—ARGUMENT OF COUNSEL HARMLESS ERROR.

Counsel's argument to jury, which assumed facts to which there was no express testimony, but which were fairly deducible from the circumstances, held not ground for reversal, where jury was directed by the court to try case on the law and the evidence alone.

Appeal from Circuit Court, Boyd County.

Charles Music was convicted of murder, and he appeals. Affirmed.

W. D. O'Neal, of Louisa, for appellant.

Chas. H. Morris, Atty. Gen., and Beverly M. Vincent, Asst. Atty. Gen., for the Commonwealth.

THOMAS, J. From a judgment of the Boyd circuit court convicting him of the crime of murder, and fixing his punishment at death, the appellant, Charles Music, prosecutes this appeal. Defendant's victim was Charles W. Hatfield, and the killing occurred about 12:30 on the night of March 30, 1919. The deceased was a policeman of the city of Ashland, and met his death under the following circumstances, which are established by the undisputed testimony found in the record:

Some time near 12 o'clock on the night in question, the appellant and his codefendant in the indictment, Edward Bradley, forcibly robbed Charles Hill, the owner and proprietor of the Bragg Hotel, located in Ashland. The robbery was accomplished by the two defendants in the indictment suddenly appearing in the office of the hotel, in which the manager was the only person at that hour, and, putting him in fear with drawn revolvers, they took his watch and some money from his person, some money from the cash drawer behind the desk, and they then tore down the telephone, and backed out of the office with revolvers drawn on the manager. They then disappeared up the street. The victim of the robbery immediately notified the police department, and they at once instituted a search for the robbers. The deceased, Hatfield, about 30 minutes thereafter discovered them near the corner of Fifteenth street and Greenup avenue, and while he was trying to arrest them the defendant and appellant shot him with a 45 automatic Colt's pistol, from which shooting he died soon thereafter. His death was not instantaneous, however, for after being shot he fired at the defendant (or both of them) some five or six times, his pistol being one of much smaller caliber than that used by the defendant. All of the witnesses, without contradiction, testified that the first shot was much louder than those following it, and that

there was a slight intermission of perhaps a second or so between the first one and those fired by the policeman. Immediately after the shooting, which attracted the attention of the other searching policemen, the defendants in the indictment were pursued through alleys and streets of the city, in which pursuit the defendant Bradley was captured, but the appellant succeeded in making his escape, and was captured two days thereafter in Lawrence county. After shooting Hatfield, and while fleeing from the officers, the defendant threw away his pistol and his overcoat, both of which were afterward found and identified as being his property, or at any rate as being the overcoat and pistol which he had in his possession on the afternoon preceding the killing, when a number of witnesses saw him in different parts of the city wearing the overcoat, and to some of them he exhibited and tried to sell the pistol. He had a German pistol at that time, which he also tried to sell. To one witness he tried to pawn both pistols for \$7.50, but requested a loan of another one which was in working order, until the two pawned by him could be redeemed. The overcoat was further identified by several witnesses who saw defendant wearing it on the fatal night, both before and after the killing. The deceased at the time he was killed was wearing his uniform, and, according to the preponderance of the testimony, he was also wearing a light overcoat, on the outside of which was his policeman's badge. All the witnesses testified that he also wore his policeman's cap.

It was proven by the commonwealth that the two pistols in the possession of the defendant on the afternoon preceding the killing were stolen from the window of a store in Huntington, W. Va., on the night of March 29th. The witness so testifying not only identified the pistols by their appearance, but he had them on exhibition in the store window, and had taken their numbers. It was also proven by the commonwealth that the offense of robbing a storehouse is a felony under the laws of the state of West Virginia.

Robert Dawson, introduced by the commonwealth, was yard conductor of the Chesapeake & Ohio Railway Company, and had charge of a switch train which was doing some switching on the night of the tragedy. The witness was standing on Front street, about 290 feet from the scene of the killing, and saw what occurred. He testified that he saw two men somewhat in the shadow of a telegraph pole, one of whom had on an overcoat; that the latter ran toward the middle of the street, and fired the fatal shot at Hatfield, who immediately started to fall; that as he fell he drew his pistol and commenced firing; that Bradley, who was not wearing an overcoat, did not appear to have anything to do with the shooting, but got

behind a box by the side of a telephone pole just after defendant fired the fatal shot, and about the time Hatfield commenced shooting; that immediately after defendant fired the shot, he ran, as did also Bradley about the time Hatfield ceased shooting. The engineer of the switching train corroborated the conductor in some particulars.

Appellant's codefendant, Bradley, was introduced by the commonwealth, and in stating what occurred at the time of the killing, he said:

"Well, me and this man, Music, we was coming out of the alley turning into Fifteenth street, and within a couple of, from the corner of Fifteenth and Greenup this policeman came along. He said, 'Stop there a minute,' and Music says, 'Stop hell,' and turned around and fired this shot. I seen the officer in back of us, and then the officer commenced shooting, and I got behind a post until he shot out, and that is all I know about it."

He further testified that he had nothing to do with the killing, and did not know that appellant was going to shoot, nor had there been any agreement or conspiracy between him and appellant to kill deceased, or any one else; nor had there been an agreement to resist arrest. He said he did not see the policeman until after the defendant had fired at him, when witness turned and saw deceased and recognized him as a policeman, or supposed him to be a policeman from his cap. He corroborates the conductor and engineer as to his hiding behind the box and running away about the time the shooting ceased.

The defendant introduced no witness but himself. He acknowledged having the pistols at all the times testified to by the commonwealth's witnesses, that he and Bradley had committed the robbery at the hotel, and that he shot the deceased. In relating what transpired at the time, he said:

"Well, sir, me and Bradley was coming up this street, and there was some one came right out behind us, out of the alley, and says, 'Wait there,' and I looked around and seen him just start up with a gun, and I pulled my gun and shot. I done it to save my life."

He said that he did not know that the deceased was a policeman, but he did not deny seeing his uniform, badge, or cap. Other minor facts and circumstances appear in the record, bearing more or less upon the guilt of the accused, but the above constitutes substantially the testimony in the case.

It is urged for a reversal that the court erred: (1) In refusing to separate the witnesses, upon motion of the defendant; (2) in permitting the introduction of incompetent testimony by the commonwealth; (3) in refusing to admit testimony offered by defendant; (4) in instructing the jury; (5) in failing to instruct the jury concerning the evidence of Bradley, who, it is claimed, was

an accomplice, as required by section 241 of the Criminal Code of Practice; and (6) prejudicial argument made by attorney for the commonwealth in addressing the jury.

[1] Briefly considering these in the order named: (1) Section 601 of the Civil Code of Practice, which applies in the trial of criminal causes, provides that the presiding judge may exclude from the courtroom witnesses of the adverse party not under examination, if either party requires it, and it is insisted that it was prejudicial error for the court to overrule the motion made by defendant for that purpose. The application of the section has often been before this court, and it has uniformly been held that its only purpose was to vest a discretionary power in the trial court to exclude and separate the witnesses, but it has never been held that the failure to do so was prejudicial error authorizing a reversal of the judgment, unless the particular facts and circumstances of the case made it so. The section has never been construed as mandatory or as imposing an imperative rule. It simply gives the party the right to ask for the separation, and the authority in the court to grant it, subject always, however, to the exercise of a sound discretion.

In the case of *Johnson v. Clem*, 82 Ky. 84, the court, in considering the section of the Code, supra, recognized the necessity of construing it in a way most conducive to a just and proper practice by leaving the question to be determined by the presiding judge in the exercise of a sound discretion; the court then said:

"This, it seems to us, is the meaning of the provision of the Code on this subject, and when it provides that, when either party requires it, the judge may exclude from the court room any witness, it is a matter addressed to his discretion.

"The word 'require' means simply the right of the party to make the motion, to ask for the exclusion of the witness, and is not a demand that the court is compelled to comply with."

The case of *Salisbury v. Commonwealth*, 79 Ky. 425, relied on by defendant, does not announce a different rule. It does not appear that the judgment was reversed for the alleged error of failing to separate the witnesses, but whether so or not it was held that the witness sought to be excluded was the prosecutor of the defendant, as well as a witness, and because he was a prosecutor the rule should especially apply to him.

[2] But the rule as announced in that case has long since been departed from, and it is now held that the prosecuting witness may remain in the court room if it is necessary for the proper conduct of the trial, even though a motion may have been made for the exclusion of all the witnesses. There is nothing in this case to show that defendant's rights were prejudiced in the least because the

witnesses were allowed to remain in the court room. Nearly all of them testified to different facts and circumstances looking to the guilt of the defendant, and there was not and could not be any occasion for any collusion or conspiracy among them to fortify each other or to give false testimony; and, even if the matter complained of should be regarded as a technical error we would not be authorized to reverse the judgment therefor, unless it was prejudicial to the substantial rights of the defendant. For other cases dealing with this question see *Druin v. Commonwealth*, 124 S. W. 856, *Greer v. Commonwealth*, 85 S. W. 166, 27 Ky. Law Rep. 333, and *Baker v. Commonwealth*, 106 Ky. 212, 50 S. W. 54, 20 Ky. Law Rep. 1778.

[3] The incompetent testimony alleged in appellant's (2) contention consists mainly in that relating to the robbery at the hotel and of the store in Huntington, W. Va. This testimony no doubt was admitted chiefly for the purpose of showing that defendant, not only had committed recent felonies which would authorize the policeman to arrest him, but it also tended to show the motive of defendant in taking the life of deceased, which was to avoid arrest for those felonies. The general rule existing without exception in criminal practice, is that evidence of other crimes is competent to show identity, guilty knowledge, intent, or motive, and the evidence may also be admitted where the offense charged is so interwoven with other offenses that they cannot be separated. The more recent cases from this court so holding are *Clary v. Commonwealth*, 163 Ky. 48, 178 S. W. 171, *Romes v. Commonwealth*, 164 Ky. 334, 175 S. W. 669, *Richardson v. Commonwealth*, 166 Ky. 570, 179 S. W. 458, *Commonwealth v. McGarvey*, 158 Ky. 570, 165 S. W. 978, *Thomas v. Commonwealth*, 185 Ky. 226, 214 S. W. 929, and *Hickey v. Commonwealth*, 215 S. W. 431. A substantial statement of the rule is thus made in the *Clary Case* referred to:

"When one is being tried for a crime, the relevancy of the proof of other crimes of which he has been guilty is only in case where a crime has been proven and the proof of some other crime is necessary to identify the accused as the person who committed the crime proven, as above stated; or, where it is necessary to show guilty knowledge in the accused, it is relevant to prove that at another time and place, not too remote, the accused committed, or attempted to commit, a similar crime to the one of which he is accused; or, where it is necessary to show a particular criminal intent in the person on trial, or to show malice in him, or the motive for the commission of the crime, or to show that the crime of which he is being tried is a part of a plan or system of criminal actions, it is relevant to prove against the accused, under proper instructions of the court to the jury, other crimes of which the accused has been guilty."

[4] The court in the instant case admonished the jury as to the purpose for which

it might consider this complained of testimony and we are confident that it was not error to admit it when accompanied with the admonition.

[5, 6] The (3) error complained of is so wholly immaterial as to scarcely require our consideration. The defendant's attorney asked him while on the stand where he was reared, and whether his parents were living or dead. For some reason the commonwealth objected to this testimony, which objection was sustained. There was no avowal as to what the witness would say had he been permitted to answer the questions, and for this reason alone the error, if material, could not be considered by us. Under no aspect of the case could it be said that the refusal of the court to allow the questions to be answered was prejudicial to defendant's rights. For aught that appears it may have been prejudicial to permit answers to be made.

[7, 8] The (4) ground, complaining of the instructions given to the jury, is based upon the contention that they deprive the defendant of the right of the exercise of self-defense, whether he knew the deceased was an officer and attempting to arrest him or not, but we do not so construe the instructions. Those which it is claimed contain the vice complained of are numbers 2 and 5. They are too long to insert in this opinion. Suffice it to say that under instruction No. 2 the jury were not authorized to convict the defendant unless they found from the evidence that "at the time of such shooting he knew or had notice that said Charles W. Hatfield was a police officer," and No. 5 did not deprive defendant of his ordinary right of self-defense unless he "had notice that said Hatfield was a police officer." The court did not submit in any of the instructions the duty of Hatfield to inform the defendant of the fact that he was about to be arrested, or the nature of the offense with which he was charged, for the two manifest reasons: (a) That according to all the testimony the policeman did not have time nor opportunity to so inform the defendant (*Hickey v. Commonwealth*, supra, and cases therein referred to); and (b) that defendant knew that he had just committed a felony and was at that time fleeing from apprehension. Besides, the testimony of Bradley, who is the only witness who told what the deceased and the defendant said at the time, contains facts which are not denied, and which show that defendant knew the purpose which the officer had in view when he said, "Stop there a minute," after which defendant said, "Stop, hell," and immediately fired. No reasonable person can read this record without being convinced beyond doubt that the policeman was killed to prevent the arrest, and at a time when defendant knew that he was a policeman and intended to arrest him. While the instructions are not connectedly drawn, we think

they submit in substantial form the law governing the right of the defendant under the facts and circumstances of the case.

[9] In considering the (5) error relied on, it may be briefly disposed of upon the ground that the witness Bradley is not shown by the testimony of any one to be an accomplice in the crime for which the defendant was tried. The fact that he was indicted jointly with the defendant does not make him an accomplice if the testimony in the case shows that he was not one. Thus in *Gregory's Kentucky Criminal Law*, p. 824, it is said:

"The mere fact that one person is indicted for, or charged with, a crime in connection with another does not make him an accomplice, and whether or not he is an accomplice is a fact to be determined, like any other fact, from the evidence."

The text is supported by the cases from this court of *Sizemore v. Commonwealth*, 6 S. W. 123, 10 Ky. Law Rep. 1, *Smith v. Commonwealth*, 148 Ky. 69, 146 S. W. 4, *Deaton v. Commonwealth*, 157 Ky. 325, 163 S. W. 204, and *Nicoll v. Commonwealth*, 169 Ky. 491, 184 S. W. 386.

In the *Deaton Case*, upon this point, it is said:

"It is erroneously assumed by appellants that they [commonwealth's witnesses] were accomplices. The fact that they were so indicted does not make them so. *Ochsner v. Commonwealth*, 128 Ky. 761 [109 S. W. 326, 33 Ky. Law Rep. 119]; *Sizemore v. Commonwealth*, 6 S. W. 123, 10 Ky. Law Rep. 123; *Nelms v. Commonwealth*, 82 S. W. 260 [26 Ky. Law Rep. 604]. That fact, like any other fact, is to be ascertained from the evidence."

[10] Furthermore, the rule is that, where the accused testifies to substantially the same facts as does the alleged accomplice, he is not prejudiced if the court failed to give the instruction concerning the testimony of an accomplice. *Finch v. Commonwealth*, 92 S. W. 940, 29 Ky. Law Rep. 187. It is therefore apparent that this ground of complaint is without merit.

The alleged misconduct of the attorney making the closing argument to the jury, of which complaint is made in ground (6) consists in these remarks:

"They (the defendants) knew they were going to be arrested. Policeman Hatfield said: 'Hold on there, boys. The Bragg hotel has been robbed; you fill the bill. Wait until I investigate.' \* \* \* We do not ask him if he stole those pistols in Huntington; we knew he did it. \* \* \* He pleaded not guilty, and compelled us to prove his guilt, and after we had proven he fired the shot that killed Charles Hatfield, his attorney took him into the room there (pointing to the jury room), and told him that it would not do for him to contradict all those witnesses, and that he had better admit the shooting, and

say he did it in self-defense, and did not know Hatfield was a policeman."

[11] The last remark complained of was withdrawn by the attorney when the objection to it was made. The defendant's attorney at once denied the fact contained in the statement, all of which occurred in the presence of the jury, and the court said, "The jury will try the case on the law and the evidence alone." The proper latitude to be allowed an attorney in his argument to the jury has frequently been before this court, and in each case it has been held that reasonable inferences to be drawn from the facts and circumstances might be made and commented upon, and that to do so was not prejudicial error. The law in such cases recognizes the frailty of human nature, and that in the heat of argument inappropriate remarks are liable to be made; but unless they are altogether unfounded from any fact or circumstance appearing in the case, and manifest such a wide departure from legitimate deductions as to be at once poisonous and prejudicial, a reversal will not be ordered for that reason alone. But if the complained of remarks are entirely foreign to anything appearing in the case, and if they were made for the purpose of taking an undue advantage, and such was their probable effect, it is the duty of the court to reverse the judgment rendered upon a verdict so obtained.

[12] We do not find the remarks complained of in this case to belong to the latter class. While the attorney for commonwealth in some of them assumed facts for which there was no express testimony, yet they were fairly deducible from the circumstances, and besides, the court directed the jury in substance not to be influenced by them, but to "try the case on the law and the evidence alone."

It might be safely said that no trial is faultlessly conducted, and if the proceedings of the courts in conducting tedious and expensive trials could be set aside for every technical error, however nonprejudicial, there would be no end to litigation, and the commonwealth would be bankrupted in an effort to apprehend and convict offenders.

Our conclusion is that the judgment should not be reversed for the alleged error now under consideration. The penalty in this case being the severest known to the law, we have given thorough consideration to each of the grounds urged for a reversal of the judgment, and are unable to say that any of them furnish just cause for setting it aside. The Legislature in fixing the penalty of death as punishment for murder realized that there are occasions where the magnitude of the crime authorized its infliction. It is not for us to comment on the wisdom or lack of wisdom of this law, but to administer it when

and where the facts and circumstances demand it.

Finding no error authorizing a reversal of the judgment, it is affirmed.

### KINSER v. KINSER.

(Court of Appeals of Kentucky. Dec. 5, 1919.)

#### 1. DIVORCE $\S$ 108—DENIAL OF JURISDICTIONAL FACTS.

In husband's divorce suit, denial in wife's answer of the jurisdictional facts with reference to the county of the residence of the parties, under Ky. St.  $\S$  2120, was in effect a plea to the jurisdiction, and required proof of such facts under Civ. Code Prac.  $\S$  422, though wife did not in terms object to court's jurisdiction.

#### 2. DIVORCE $\S$ 124—INSUFFICIENCY OF EVIDENCE TO PROVE ALLEGED RESIDENCE OF PLAINTIFF.

In husband's divorce suit against nonresident wife, evidence held insufficient to prove husband's residence in county in which action was brought, required by Ky. St.  $\S$  2120, and Civ. Code Prac.  $\S$  422.

Appeal from Circuit Court, Campbell County.

Action by L. L. Kinser against L. L. H. Kinser. Judgment of dismissal, and plaintiff appeals. Affirmed.

Howard M. Benton, of Newport, and O. F. See, Jr., of Louisa, for appellant.

Fred M. Vinson, of Ashland, for appellee.

CLAY, C. Plaintiff, L. L. Kinser, appeals from a judgment of the Campbell circuit court dismissing his petition for an absolute divorce. The petition was filed on May 14, 1918, and is as follows:

"The plaintiff, L. L. Kinser, says that he resides in Campbell county, in the state of Kentucky, and has resided in Kentucky for the past five years. The plaintiff says that on the 3d day of March, 1898, in the county of Monroe and the state of Tennessee, he and the defendant, L. L. H. Kinser, were united in matrimony, in due accordance with the laws of the state of Tennessee were made man and wife; that he lived with the defendant as his wife until on or about the 10th day of May, 1913, at which time they separated. Plaintiff further says that they have lived separate and apart without any cohabitation during the last five years past, he having had an actual residence in the state of Kentucky during all that time. The plaintiff further says that the defendant is a nonresident of this state, and, as the plaintiff believes, is now absent from this state, and that she resides in the state of Tennessee, and her post office is Knoxville, Tenn.

"Wherefore the plaintiff prays for a judgment for divorce from the defendant, L. L. H. Kinser, and for all proper relief both general and special, and will ever pray."

A corresponding attorney was appointed to warn defendant of the pendency of the action. On July 15, 1918, defendant filed a verified answer in two paragraphs. In the first paragraph she denied that plaintiff resided in Campbell county, Ky., or that he had resided in Kentucky for the past five years, or that he had an actual residence in the state of Kentucky during the last five years. She further denied that either her residence or post office address was Knoxville, Tenn. In the second paragraph she pleaded the residence of plaintiff at the time of the filing of the suit was in Lawrence county, Ky.; that he was under indictment in that county for the crime of bigamy, committed by his marrying Ida Smith in that county on July 5, 1913, when at the time he was married to defendant; that his effort to secure the divorce was and is merely to show, or attempt to show, to a jury that he is now divorced, in the hope that the verdict of the jury will be tempered with sympathy and the term of years therein imposed be lessened; that by virtue of such being the state of the case, a court of equity should not interpose in his behalf.

On November 8, 1918, plaintiff filed in open court an amended petition, stating defendant's full given name, and alleging that defendant was then a nonresident of Kentucky and absent therefrom, and that her attorney of record, F. M. Vinson, was in United States military service, and absent from the state, and that if defendant had engaged another lawyer to represent her in the action, neither plaintiff nor his counsel was aware of it. At the same time, plaintiff's motion for the court to appoint some person on whom to serve notice for taking depositions was sustained, and Hubbard Schwartz was appointed for that purpose. Pursuant to notice served on Hubbard Schwartz, plaintiff took the depositions of several witnesses in Louisa, Ky., on November 14, 1918. One of the witnesses, T. J. Branham, testified that he knew plaintiff, and that plaintiff had lived in Kentucky for five years next before the 10th day of May, 1918; that during that time plaintiff had not lived or cohabited with the defendant to the knowledge of witness; that since he had known plaintiff, plaintiff claimed Lawrence county, Ky., as his home, and had always voted there, and that defendant had stated to witness that she lived at Knoxville, Tenn. Mrs. Linda Branham testified that she had known plaintiff more than five years; that during all that time he claimed his residence in Lawrence county, and had never lived with or cohabited with the defendant. She further stated that plaintiff had told her that he was always going to make Kentucky his home. Ethel Stuff testified that she had known plaintiff since April 13, 1913; that she first got acquainted with him at Louisa; that during all that time he claimed his residence in Law-

rence county, and she had never known of his living with the defendant. W. J. Roberts, the circuit court clerk of Lawrence county, testified that in a suit filed in that court by defendant against plaintiff there was a written contract signed by plaintiff and defendant dated May 10, 1913, reciting that the parties were separated, and that the husband was by the agreement making provision for the separate maintenance and support of his wife and their children. Witness further testified that plaintiff had been tried and convicted of bigamy, but that the judgment had been reversed by the Court of Appeals in an opinion rendered October 25, 1918, and reported in *Kinser v. Commonwealth*, 181 Ky. 727, 205 S. W. 951.

On November 16, 1918, plaintiff took the deposition of Mrs. Rose Lepper pursuant to written notice served on Hubbard Schwartz, and also on the county attorney. Mrs. Lepper testified that she lived in Newport, Ky.; that she had been acquainted with plaintiff since August, 1917, when he rented an apartment from her at 617 Washington avenue, Newport, that since that time he had lived continuously in Newport. On cross-examination by Mr. Schwartz she stated that plaintiff was connected with the American Tobacco Company; that his business required him to be away from home a portion of the time, and that he visited different places in Kentucky; that during all that time he had kept his apartment on Washington avenue, and that she knew nothing about defendant's whereabouts. On cross-examination by Mr. McLaughlin she testified that defendant had never been at her home during the time that plaintiff lived there, and that she had never seen the defendant. On redirect examination she stated that plaintiff had lived separate and apart from his wife without cohabitation during the period that she had known him.

[1] Plaintiff insists that it was not necessary for him to prove that he resided in Campbell county when the suit was brought, because the defendant waived the jurisdiction of the Campbell circuit court by her failure to demur or to answer to the jurisdiction. Under our statute an action for divorce must be brought in the county where the wife usually resides, if she has an actual residence in the state; if not, then in the county of the husband's residence. Section 2120, Kentucky Statutes. And notwithstanding the fact that the Code provides that the residence of the parties must be proved by one or more credible witnesses (Civ. Code Prac. § 422), we have nevertheless held that where the defendant in a divorce suit is actually summoned or appears and fails to plead or object to the jurisdiction of the court on account of the suit's not being in the county of her residence, she waives the jurisdiction, and the court will have complete jurisdiction to hear and de-

termine the case upon its merits. *Johnson v. Johnson*, 12 Bush, 485; *Tudor v. Tudor*, 101 Ky. 530, 41 S. W. 768, 19 Ky. Law Rep. 747. But in view of the Code provision we are not inclined to extend the doctrine of waiver any further. Though it be true that the defendant did not in terms object to the jurisdiction of the court, the first paragraph of her answer contained a denial of the jurisdictional facts with reference to the residence of the parties. That being true, it was in effect a plea to the jurisdiction, and was therefore sufficient to challenge the right of the court to proceed unless the plaintiff proved the jurisdictional facts.

[2] The depositions were all taken by plaintiff. Mrs. Lepper's testimony is to the effect that plaintiff rented an apartment from her in August, 1917, and had occupied the apartment from that time on when not out on the road for the American Tobacco Company. On the other hand, two or three of the witnesses stated that plaintiff had always lived in Lawrence county, and had claimed that county as his home, and one of them stated that he had voted there. No one testified that plaintiff went to Newport to make his home there, or that he ever claimed that his home was there. In view of the positive evidence of his own witnesses that he always claimed Lawrence county as his home, we are clearly of the opinion that the mere fact that he rented an apartment in Newport and occupied it when not out on the road was not sufficient to establish his residence in Campbell county. That being true, he was not entitled to bring his suit there, and the court did not err in dismissing the petition.

Judgment affirmed.

## LAY v. COMMONWEALTH.

(Court of Appeals of Kentucky. Dec. 5, 1919.)

### 1. CRIMINAL LAW §600(2)—AFFIDAVIT AS TO TESTIMONY OF ABSENT WITNESS ON APPLICATION FOR CONTINUANCE.

Ordinarily it would not be reversible error for court to compel defendant to go to trial in the absence of a witness who did not appear in answer to a summons, or who absented himself after trial had commenced, if an affidavit of what he would testify to if present was permitted to be read as his deposition.

### 2. CRIMINAL LAW §596(2), 867—REFUSAL TO DISCHARGE JURY OR POSTPONE TRIAL UPON DISAPPEARANCE OF WITNESS.

In murder prosecution, where there were three eyewitnesses for state in support of theory that defendant was aggressor, and where only testimony, other than by affidavit, in support of defendant's theory that deceased was

aggressor was that of defendant himself, court's refusal, upon disappearance of witness who would have corroborated defendant's testimony, and who had been sworn and placed under the rule as a witness for defendant, to discharge jury or postpone trial until it could be ascertained that witness could not be produced and then to discharge jury was prejudicial error.

### 3. HOMICIDE §189—EVIDENCE OF BAD FEELING BETWEEN DEFENDANT AND DECEASED.

In murder prosecution, where evidence for the commonwealth tended to show defendant was the aggressor, while evidence for defendant showed deceased brought on the difficulty by his acts and declarations, the state of feeling existing between defendant and deceased, as evidenced by their declarations and conduct previous to killing, was admissible for purpose of showing who commenced the difficulty.

### 4. CRIMINAL LAW §673(3)—ADMONITION AS TO PURPOSE OF IMPEACHING EVIDENCE.

If evidence is introduced impeaching the credibility or the moral character of any witness, the court may, on his own motion, and should, if so requested, give the usual admonition of the purpose for which such impeaching or attacking evidence is allowed.

Appeal from Circuit Court, Whitley County.

J. S. Lay was convicted of manslaughter, and he appeals. Reversed, with directions.

Henry O. Gillis and Stephens & Steely, all of Williamsburg, for appellant.

Charles H. Norris, Atty. Gen., and Beverly M. Vincent, Asst. Atty. Gen., for the Commonwealth.

CARROLL, J. The appellant, Lay, under an indictment charging him with the murder of A. D. Ausbrook, was found guilty of manslaughter, and his punishment fixed at confinement in the state penitentiary for six years. From the judgment on the verdict he prosecutes this appeal, complaining that many errors prejudicial to his substantial rights were committed by the trial court.

A brief statement of the facts showing the relations between Lay and Ausbrook, as well as the circumstances immediately surrounding the homicide, will be helpful to an understanding of the disposition that should be made of this chief assignment of error.

A bitter enmity had existed between Lay and Ausbrook for some months before Ausbrook was killed, and threats of violence were made by one against the other; although it should be said that the record shows that the threats of Ausbrook were many times more numerous than those of Lay. At any rate they were enemies, and apparently each was anticipating that he might be at any time attacked by the other. The causes that produced the bad feeling be-

tween these men it is hardly necessary to relate.

Ausbrook was shot and killed by Lay about midnight in a soft drink establishment conducted by Pete Chappis, a Greek, in the town of Jellico. Russell Allen, Cal Bennett, and Pete Chappis, aside from Ausbrook, were the only persons in the place of Chappis when Lay came to the door for the purpose of going in. These three eyewitnesses to the tragedy each testified, in substance, that Ausbrook was several feet from the door when Lay opened the door, and immediately began shooting at Ausbrook, who was unarmed. There is no dispute about the fact that Lay fired four shots; the first one did not strike Ausbrook, as he knocked the pistol of Lay up with his hand or arm, but the other three entered his body, and a moment after the last shot was fired he fell on his back to the floor, dying in about ten minutes.

These witnesses, as well as Everett Barnhill, who was out on the street, but came to the door and looked in about the time the last shot was fired, say that after Ausbrook fell to the floor Lay struck him a number of times in the face with his pistol. In short, the evidence of these witnesses made out a clear case of murder against Lay.

Lay, in his own behalf, said that he did not know Ausbrook was in Chappis' place at the time he went there on his way home for the purpose of getting a soft drink; and in relating what occurred when he was in the act of going in the place he said:

"Well, as I turned the corner going in the New York restaurant A. D. Ausbrook was in my face before I saw him, and threw his hand on my right shoulder and ran his hand in his pocket and I jerked my gun like that (indicating), and cocked it as I brought it out, and he caught to my left shoulder, and my gun fired like that (indicating). He knocked the pistol off, and it fired into the glass door, and I grabbed him, and he jerked me on the inside of the building trying—I was trying to get his hand out of his pocket, and I jerked it back against my breast that way (indicating), and he grabbed at it with his left hand, and I think it went through his hand and into his breast, and I fired it again, and he kept jerking me further inside the house, and I jabbed him in the face with it, and it fired and he fell backward."

He further testified that when he started in the door Ausbrook, who was in the room near or at the door, put his hand on his shoulder, and said, "God damn you; don't you run over me;" that at the time he drew his pistol Ausbrook had his left hand on his (Lay's) shoulder and his right hand on or in his pocket, and that, thinking he was going to get his pistol and kill him, he drew his pistol and fired.

It further appears that when the case was called for trial on the seventh day of the term Jim Moses, a witness who had been summoned for both the commonwealth and Lay was present, answered to his name, and

was called as a witness for the defendant and put under rule with the other witnesses for the defendant to be ready when he was called. It also appears that the commonwealth did not offer Moses as a witness, and that when the defendant, Lay, begun the introduction of evidence in his behalf Moses was present, waiting to be called as a witness in his behalf. The introduction of evidence was not concluded on the day when the first witnesses for the defendant were examined, and on the following day, which was the ninth day of the term, the attorneys for Lay shortly before they desired to introduce Moses as a witness discovered for the first time that on the morning of that day he had left the courthouse and city of Williamsburg in which the trial was in progress. Upon making this discovery they immediately filed the following affidavit of Lay:

"The affiant, J. S. Lay, says that he is the defendant in the above-styled case. He says that he cannot safely go to trial and have the trial in this case concluded at this time, because of the absence of Jim Moses, a material witness for the defendant; that defendant has used due diligence to procure and secure the attendance of said witness, and to that end before the case was set for trial had a subpoena issued by the clerk of this court for said witness and same was duly executed upon said Jim Moses by the sheriff or one of his deputies before the day fixed for the trial; that the commonwealth also had said witness summoned on behalf of the commonwealth; and that when this case was called for trial on July 21, 1919, said witness, Jim Moses, was present in open court, and answered to the call of his name as a witness for the commonwealth, and was duly sworn as a witness for the commonwealth; and that defendant then had said witness called on his own behalf, and he was then sworn as a witness for defendant in this case, and was placed under the rule and properly admonished by the court.

"Defendant says that, had said Jim Moses not been present on the calling of this case for trial, defendant would not have been ready for trial, and would not have announced ready, but, said witness being present, the defendant did announce ready for trial at that time. Defendant says that on the night of July 21, 1919, he and some of his attorneys talked fully with said Jim Moses about what he knew of the facts involved in this case, and what he would testify regarding same, and that said witness was then admonished to be sure and be present when he was called as such witness, and he promised to do so, and he was informed that his evidence would be very material on behalf of defendant.

"Defendant says that on July 22d, some time after court convened in the morning, and before noon, he saw said Jim Moses in conversation with R. L. Pope, one of the attorneys assisting in the prosecution of this case, and saw said Pope making gestures with his hands as if very earnestly talking to said witness, and that defendant has not seen said Jim Moses since said time. He says said witness has completely disappeared, and has absented himself



from this court, and was not present when called as a witness for defendant, and has not since been present. He says that he first learned that said witness had absented himself about 1 o'clock p. m. on yesterday, July 22d, just before court convened for the afternoon, and that he, through his attorneys, immediately communicated this information, and all the information he had regarding the absence of said witness, to the court, and informed the court of the importance of said witness in behalf of the defendant, and announced in open court that he could not afford to have this trial concluded without the presence of said Jim Moses and his testimony in his behalf; that he then requested the issuance of warrants of arrest for said witness, and two such warrants were ordered by the court and issued by the clerk and placed in the hands of the sheriff, or a deputy sheriff, for execution; that the court said to proceed with the trial, and the presence of said witness would be procured if it were possible before the trial was concluded. Pursuant thereto defendant proceeded with the production and introduction of such evidence as he had available, and that he has now introduced all such evidence except the evidence of said Jim Moses, and possible rebuttal evidence. Defendant says that said Jim Moses is not yet present in court, or in town so far as defendant is informed, and that he has no information as to his whereabouts, and defendant has exercised the greatest diligence and used every means known to him and within his power to ascertain the whereabouts of said witness and secure his attendance as a witness, and has been unable to do so. Defendant says that said Jim Moses is and has been absent without the procurement or consent of this defendant or any of his attorneys, and against his will, and by reason of conditions over which defendant had no control, and defendant does not know why said witness disappeared or is not here. He says that his motion is not made for delay, but because of the materiality of the testimony of said witness to affiant's defense herein, and that justice may be done him on his trial in this case. Affiant says that the residence of said witness is in Whitley county, Ky., and he believes his attendance can be procured at the present term of this court, or at the next term thereof, but he does not know the present whereabouts of said witness.

"Defendant says that if said witness were present, he could testify, and same would be true, as follows: That on the night A. D. Ausbrook was killed he had been at his brother's near Jellico, and came into Jellico to take the midnight train towards Corbin, and while waiting for the train said Moses went into the New York restaurant where Ausbrook was killed, and a short time before the killing, and ordered some eggs, and had procured same and was eating same at the time of the killing. That about five minutes after said Moses entered said restaurant, A. D. Ausbrook came in there. Said Moses was sitting at the counter near the front end of the restaurant, and on the right-hand side of the door as you go in, and Ausbrook came up to the counter on the right of said Moses, and asked the Greek, Pete Chappis, to loan him his pistol, and said Greek said he had no pistol. Then said Ausbrook walked

around to the other side of said Moses, and again asked said Greek for his pistol, and received a similar reply. That said Greek and said Ausbrook then walked back into kitchen of said restaurant out of sight of said Moses. That after a while the Greek came out behind the counter, and Ausbrook came out in front of the counter and walked to the door and opened the screen door, and he heard said Ausbrook then say, 'God damn you; don't run over me,' and he saw this defendant at the door as if he were coming in, and saw said Ausbrook grab said Lay by the shoulder with his left hand and put his right hand in his front pants pocket, and make a motion as if to draw something out of his pocket, and he then saw Lay raise his pistol, and Ausbrook knocked it to one side and fired, and the bullet went through the glass door, which was standing open. He then saw said Ausbrook with his right hand in his pocket, apparently trying to draw something out, and Lay holding his hand, and they were scuffling, and Lay fired three more shots rapidly, just about as fast as they could be fired, and at the last shot Ausbrook fell near witness, and Lay immediately walked out of the restaurant. That Lay did not walk around or to the body of said Ausbrook or strike him at all after he fell. That Ausbrook did not say a word after he said, 'God damn you; don't run over me;' and that Lay never said a word at any time. He says that there was no one in said restaurant closer to the said Ausbrook and Lay than he was at the time of said shooting, and as soon as the shooting commenced the Greek ran back into the kitchen, and a man who was at the telephone also ran into the kitchen. He says that said Lay did not at any time come back into the restaurant after the shooting, and said Moses soon went out of the front door, got his train, and left Jellico. He says he watched and saw everything that occurred between said Ausbrook and Lay."

And also the following affidavit of his attorneys, Gillis, Steeley, Snyder, and Bird:

"The affiants state that they are attorneys for the defendant, J. S. Lay, and that the witness Jim Moses is absent without their procurement or consent and against their will, and that he did not inform any of them that he was going to leave, and that they do not know where he is or why he left, and that they have read or heard read the affidavit of J. S. Lay as to what said Moses would testify if present, and that they believe same is true from the statements made by said Moses to them. They say that the defendant cannot afford to have this trial concluded without the presence of said Moses, and that the proper force and effect of his evidence cannot be had by reading same from said, or any, affidavit, but that his personal presence and testimony in the presence of the jury is material to and important for said defendant."

With the filing of these affidavits counsel for Lay moved the court to discharge the jury, which motion the court overruled, but permitted the affidavit made by Lay as to what the evidence of Moses would be if present to be read to the jury as his deposition.

It further appears that during the day the court issued a rule against Moses returnable to the first day of the next term, to show cause why he should not be punished for contempt in absenting himself from the court "after he had been sworn and placed under the rule as a witness for the defendant." It might here also be said that Moses was not apprehended, nor did he appear during the trial of the case, which was not concluded until the eleventh day of the term, or during that term of court; nor does the record show his whereabouts. Nor is there any fact or circumstance in the record tending in any manner to show that Lay or his counsel, or any person acting for either, had any part whatever in bringing about the disappearance of Moses. The causes that influenced him to leave under the circumstances stated are not disclosed by the record.

[1, 2] The trial of this case was not had at the indictment term, and under ordinary circumstances it would not be reversible error for the court to compel the defendant to go to trial in the absence of a witness who did not appear in answer to a summons, or who absented himself after the trial had commenced, if an affidavit of what he would testify to if present was permitted to be read as his deposition; but, under all the facts and circumstances appearing in this record, we are of the opinion that it was prejudicial error not to discharge the jury when the motion for that purpose, supported by the affidavits, was made, or to have postponed the trial until it could be certainly ascertained that Moses could not be produced, and when this appeared to discharge the jury.

It will be at once seen that the evidence of Moses was extremely important and material to Lay, as it supported in every substantial particular his version of the circumstances attending the homicide.

The absence of Moses, who, we must presume, would have given the testimony set forth in the affidavit of Lay, left the evidence of Lay as to what happened at the time of the killing entirely unsupported except by the affidavit, and in one particular by a witness named Douglas, who was out in the street. Douglas, however, was absent in the army, and for this reason, being unable to be present, his deposition was taken by Lay and read on the trial.

The evidence of the three eyewitnesses to the killing who testified for the common-

wealth was, as we have said, extremely damaging to Lay, and if Lay had been supported by the evidence of Moses given in person to the jury it is at least possible that a different verdict would have been returned.

It is true the affidavit of Lay was read as the evidence of Moses, but every lawyer at all familiar with jury practice knows that the evidence of a witness given to the jury in the form of an affidavit made by the defendant is not nearly so effective as the testimony of the witness in person would be. If, however, the personal attendance of Moses cannot be had on another trial and his deposition cannot be secured, as it may be, the defendant must go to trial on an affidavit as to what he would state if present, but he will at least not be taken by surprise on account of the absence of Moses, as he and his counsel must have been on the last trial.

It is also urged as error that the trial judge refused to permit a number of witnesses to testify concerning threats alleged to have been made by Ausbrook against Lay. On another trial the court should permit all material evidence offered, tending to establish threats either in the form of declarations or acts or conduct made by Ausbrook about or against Lay to go to the jury, and also all the material declarations, acts, and conduct of Lay tending to show threats made by him against Ausbrook, or his state of feeling and mind toward Ausbrook, for the purpose of illustrating in so far as it would do so who commenced the difficulty that ended in the death of Ausbrook.

[3] The evidence for the commonwealth tended to show that Lay was the aggressor, while the evidence for Lay tended to show that Ausbrook brought on the difficulty by his acts and declarations, and therefore the state of feeling existing between these two men as evidenced by their declarations and conduct previous to the fatal meeting was admissible for the purpose of showing who commenced the difficulty.

[4] If evidence is introduced impeaching the credibility or the moral character of any witness the court may on his own motion, and should if so requested, give the usual admonition of the purpose for which such impeaching or attacking evidence is allowed.

Wherefore the judgment is reversed, with directions for a new trial not inconsistent with this opinion.

## CREECH et al. v. CREECH et al.

(Court of Appeals of Kentucky. Dec. 5, 1919.)

## 1. ADVERSE POSSESSION §47—INTERRUPTION OF CONTINUITY OF POSSESSION BY EVICTION BY OWNER.

The continuity of possession of land by owner's grandchildren, claiming under an alleged contract between their father and owner, was broken by the eviction, by owner, of the grandchild in possession, where it was from one to three years before one of the grandchildren again located on the land.

## 2. ADVERSE POSSESSION §63(7)—VENDEE'S POSSESSION UNDER EXECUTORY CONTRACT.

Vendee's possession under an executory contract of sale is not adverse to that of his vendor until he has performed the conditions thereof or repudiated the latter's title, whether contract is in writing or in parol.

## 3. VENDOR AND PURCHASER §44—EVIDENCE OF SALE OF LAND BY FATHER TO SON.

Evidence that son's widow and children made no attempt to assert title upon father's eviction of their representative from certain land, and did not sue father, notwithstanding his acts of ownership over land, and that father continued to pay taxes, and permitted children other than such son to build houses thereon, held to support view that father had not sold land to son.

Appeal from Circuit Court, Harlan County.

Suit by W. M. Creech and others against Ballard Creech and others. Judgment for defendants, and plaintiffs appeal. Reversed and remanded.

G. A. Eversole, of Harlan, for appellants.  
H. M. Brock and J. F. Bowling, both of Harlan, for appellees.

CLAY, C. W. M. Creech and others, children of Isaiah Creech, deceased, brought this suit against Ballard Creech and others, children of Gilbert Creech, a deceased son of Isaiah Creech, for the partition of a small tract of land in Harlan county, which, it is claimed, was owned by Isaiah Creech and descended to plaintiffs and defendants upon his death. The defendants denied the title of plaintiffs, and pleaded exclusive title thereto by adverse possession. On final hearing the defendants were adjudged to be the owners of the land, and plaintiffs appeal.

The land in controversy consists of two small tracts, known as the "Jim Garden" and the "Jack Field." Gilbert Creech, the father of defendants, built a house on the "Jim Garden," and remained there until his death which occurred in 1896. After that his widow and children continued to occupy the home until the year 1906 when they moved to Virginia. S. B. Day and his wife, a daughter of Gilbert Creech, remained in possession of the home. On December 20, 1906, Isaiah

Creech brought a suit of forcible entry in a justice's court and evicted Day. Thereupon Isaiah Creech rented the house and lot to Dr. Wright, who remained there about a year. After that time Ballard Creech, who had been married, returned to the house. In the years 1910 and 1911 Isaiah Creech sold to W. M. Creech and Polly Ison a part of the "Jim Garden," and they each built a house thereon within a short distance of the house occupied by Ballard Creech. The tract in question was a part of the home farm of Isaiah Creech, and he paid taxes thereon up until his death, which occurred in the year 1912.

For defendants, Ballard Creech testified that the defendants had lived on the land for 25 years and have always claimed it. They put out an orchard, built a barn, cultivated a portion of the land, and cleared a little of it, and occupied and controlled it in every respect. During all that time his grandfather had never demanded any rent. The land was cleared and improved. When he returned to the place, Dr. Wright was in the house; but he stayed there only a short time. He believed that was in 1910. He never entered any objection to the erection of the houses by Polly Ison and W. M. Creech. On redirect examination he stated that, when Bill Creech started to buy, he told him that they claimed that that was their possession. Bill said: "You have got no possession. That was tried in High Lewis' court." He further stated that the "Jim Garden" and "Jack Field" were in separate inclosures. He only remembered of their cultivating two corn crops in the "Jack Field." This took place in the years 1902, 1903, or 1904. Since that time the "Jack Field" had not been used for anything except for pasture. W. W. Cornett testified that it had been 20, probably 22 or 23, years since Gilbert Creech moved on the land and built his house. At that time Gilbert Creech claimed the land. Lewis Creech testified that it had been 25 or 30 years since Gilbert Creech built the house and moved on the land, and that Gilbert claimed the land. The "Jack Field" was separated from the "Jim Garden" by the Still House branch and a lane. Alex Creech, a son of Isaiah Creech, testified that Gilbert Creech built the house on the land about 27 years ago, and from that time on he commenced to claim the land. Gilbert got the land from his father, Isaiah. His father had told Gilbert that, if he would help him pay the debt he owed, "he aimed to let him have the land." He saw Gilbert pay his father \$200 on the land at one time and \$50 at another. Gilbert Creech and his widow lived on the land about 17 years before she moved to Virginia. The tract of land in controversy was the only land that Isaiah Creech had not disposed of by deed. At the time Gilbert Creech was buried, his father said that he

was sorry he had not made a deed to Gilbert. On cross-examination he stated that Gilbert and his children had never cultivated the "Jack Field." All the time Gilbert Creech was looking to his father for a deed. E. Z. Vanover testified that Gilbert Creech bought the land from his father. The old man said he had sold it to him. He told the old man of hearing Gilbert say that his father would make him a deed, and the old man said he was ready and willing to make it at any time. In his opinion it had been 27 or 28 years since Gilbert Creech moved on the land. He had never heard any trade made between Isalah Creech and Gilbert Creech, H. B. Davis testified that Gilbert Creech had moved on the land 26 or 27 years ago. When he moved on the land, Gilbert Creech claimed it. Isalah Creech told Gilbert about owing Judge Hall a note, and said, if he would pay the note off, he would deed him the land. Gilbert said he would do that. He did not know whether he had ever done it or not.

J. K. Creech, one of plaintiffs, testified that both Gilbert Creech and his father told him that the father had not sold Gilbert the land. His father so swore on the trial of the forcible entry case. The money that Gilbert paid over to his father was money owed his father on the sale of timber. Gilbert Creech never claimed the land. After Steve Day was put out, Dr. Wright occupied the house; then Ballard Creech moved in. He got Elisha Creech to go to his father and ask him to let Ballard occupy the house. Ballard said he would give up possession at any time. It was 6 or 7 years from the time Gilbert Creech moved on the land until his death. After Gilbert moved in, his father cultivated the "Jack Field" two or three times in corn, and pastured it whenever he desired. There was an apple orchard on the "Jim Garden" tract, from which his father gathered fruit whenever he desired. W. M. Creech testified that he was with his father, Isalah Creech, and Gilbert Creech, every few days, and never heard of any trade by which his father sold the land to Gilbert. He had heard Gilbert say that he knew that his father never aimed him any land there. He and his father and Gilbert hauled the timber to make Gilbert's house. His father arranged for the timber from which the lumber was sawed. Gilbert Creech occupied the house from 6 to 8 years before his death. When Ballard returned from Virginia, he told his grandfather that he would pay him as much rent as anybody. He also said that he would fence the land, and his grandfather helped to fence it. The reason that Gilbert Creech moved on the land was that he had had trouble with his mother-in-law, who wanted to get him waylaid and killed, and his father wanted him on the home place, thinking it was safer there. Gilbert never paid his father anything for the farm. The money he

gave his father was proceeds of a debt for lumber which he had collected. His father did owe W. F. Hall a note, but he borrowed the money from R. N. Cornett and paid the note off. H. C. Lewis testified that he was a justice of the peace in 1906, and that he rendered a judgment evicting Stephen Day from the land in the suit of forcible entry brought by Isalah Creech. For a while he was deputy sheriff, and Gilbert Creech never paid any taxes on the land. They were paid by Isalah Creech. Elisha Creech testified that, when Ballard Creech returned, he stated to his grandfather that he would pay him as much rent as anybody. Isalah Creech did not want him to have the land, but witness asked him to let Ballard come back to the place. Then Isalah Creech let Ballard move in. Isalah Creech never charged Ballard any rent. E. C. Davis testified that he had been engaged in the logging business and that Gilbert Creech was his first partner. Gilbert Creech lived on Pounding Mill branch for a part of the year 1892. In the spring of 1892 he moved to the "Jim Garden." In the year 1894 he, Gilbert, Sam Estepp, and Alex Creech bought timber of William Ison, and he procured the consent of Isalah Creech to haul through the "Jack Field." The \$250 which Gilbert Creech paid to his father was money due his father for timber sold. The reason Gilbert Creech moved to the "Jim Garden," he said, was that his father was afraid that he would be killed. After Gilbert moved on the place, Isalah Creech "tended" the "Jack Field" in the year 1894. In 1900 Isalah Creech put a fence around the "Jack Field." Isalah Creech, Jr., testified that Gilbert Creech built a house and moved on the land about 27 or 28 years ago. At that time Gilbert Creech claimed the land. At the time Gilbert Creech died, Isalah Creech said that he was glad that he had not made Gilbert a deed, because if he had the widow would have shared, but now he could just make a deed to Gilbert's heirs, and then they would get it. Isalah Creech often pointed out "Jim Garden" and "Jack Field" as the boundary of land which he intended for Gilbert. Annie Creech testified that Gilbert Creech was living on the land when she was married, and that occurred 27 or 28 years ago. H. C. Lewis testified that he remembered Gilbert's living on the land as far back as 1891.

[1, 2] The continuity of the defendants' possession was broken by the eviction of Day and wife on December 20, 1906. It was a year, and probably three years, from that time before Ballard Creech again located on the land. Under these circumstances, his possession cannot be added to the possession prior to December 20, 1906, to make up the statutory period. This is conceded by appellees, but the contention is made that the evidence was sufficient to show title by ad-

verse possession prior to December 20, 1906. The evidence as to the precise time when Gilbert Creech, the father of defendants, entered upon the land, leaves the question in doubt; but, if it be conceded that he entered more than 15 years prior to the eviction of his son-in-law, that fact is by no means conclusive that his and his children's holding was adverse under the facts of this case. The possession of the vendee under an executory contract of sale is not adverse to that of his vendor until he has performed the conditions thereof or repudiated the latter's title; and this is true, whether the contract be in writing or in parol. 2 O. J. p. 153, § 270; 1 R. C. L. § 73, p. 750; Padgett v. Decker, 145 Ky. 227, 140 S. W. 152; Gosson v. Donaldson, 18 B. Mon. 230, 68 Am. Dec. 723. Hence, if any portion of the purchase money remains unpaid, the holding of the vendee is not adverse, unless he repudiated his vendor's title. 1 R. C. L. § 74, p. 751; Gamble v. Hamilton, 31 Fla. 401, 12 South. 229.

It is the contention of appellees that their father bought the land under a parol contract. One of the witnesses testified that Isaiah Creech told Gilbert Creech that, if he would help him pay off the debt he owed, he aimed to let him have the land, and that he saw Gilbert pay his father \$200 at one time and \$50 at another. Another witness testified that Isaiah Creech told Gilbert about owing Judge Hall a note, and said that, if he would pay the note off, he would deed him the land, but whether this had ever been done he did not know. Even if it be conceded that this evidence was sufficiently satisfactory to show a contract of purchase, in view of the evidence to the contrary, yet neither witness testified when the conversation took place, nor did the one who saw Gilbert pay his father \$200 at one time and \$50 at another say when either payment was made. Manifestly Gilbert's holding was not adverse until he complied with the contract and made such payments on the Hall debt as he agreed to make. For aught that appears in the record, these payments, if made at all on the land in question, may have been made after the year 1892. If so, Gilbert Creech's holding did not become adverse until that time, there being no evidence to the effect that prior to that time, he actually repudiated his father's title. That being true, there was no adverse holding for 15 years as required by the statute.

[3] Aside from these considerations, it seems to us that the acts of the parties support the view that there was never any sale of the land in controversy to Gilbert Creech. When the widow and heirs left the property in 1906, and their representative, Stephen Day, was evicted by Isaiah Creech, there was no attempt then to assert any title to the property. During all the time that it was

claimed that Gilbert Creech and his children owned the property, Isaiah Creech paid the taxes thereon. The weight of the evidence is to the effect that, when Ballard Creech returned, he did so with the understanding that he was to assist his grandfather in fixing the fencing. Not only so, but Ballard Creech and the other defendants knew that their grandfather was selling off portions of the land in controversy, and saw the vendees build houses adjoining that occupied by Ballard Creech. Notwithstanding these well-known acts of ownership on the part of their grandfather, they did not sue their grandfather, but waited until after his death before bringing an action for that purpose. Looking at the case from every angle, we are constrained to the opinion that the defendants failed to show title by adverse possession, and that the court erred in adjudging that they were the sole owners of the land.

Judgment reversed, and cause remanded for proceedings consistent with this opinion.

### WILSON v. SMOOT et al.

(Court of Appeals of Kentucky. Dec. 5, 1919.)

#### 1. REFERENCE $\S$ 100(7)—WAIVER BY FAILURE TO EXCEPT TO REPORT OF MASTER COMMISSIONER.

By failing to except to items of debit or credit contained in a report of the master commissioner, plaintiff waived all errors, if any, in allowing them.

#### 2. APPEAL AND ERROR $\S$ 1022(1)—REVIEW OF CONFIRMATION OF MASTER COMMISSIONER'S REPORT ON ACCOUNTING.

In the absence of some basis on which the Court of Appeals can accurately determine the state of defendant trustee's account as contained in a report of the master commissioner, the court is not inclined to disturb the judgment of the trial court confirming the account.

#### 3. TRUSTS $\S$ 179—MEASURE OF DUTY OF ACTIVE TRUSTEE.

Under a will creating an active trust in the trustee without joint beneficial interest in the trust property, he is accountable only for the management of the property in the mode pointed out by the settlor in the trust instrument, as an ordinarily prudent business man would be required to do under like circumstances.

#### 4. TRUSTS $\S$ 182—MANAGEMENT OF PROPERTY BY TRUSTEE FOR CHILDREN.

A trustee under his wife's will "for the benefit of the children" performs his duty by preserving, improving, and keeping the property in a way that will be beneficial to the children when they shall come into possession of it on his death, when the trust expires.

**5. COSTS  $\Leftrightarrow$ 32(3)—PARTIAL SUCCESS IN SUIT FOR ACCOUNTING.**

In a daughter's suit to compel her father, trustee under her mother's will for the benefit of children, to account, the trial court did not abuse its discretion in requiring the daughter to pay her part of the costs, though she succeeded in the suit to the extent of requiring her father to make an accounting, where she failed to obtain any other relief.

**6. TRUSTS  $\Leftrightarrow$ 166(2)—REMOVAL OF HUSBAND AS TRUSTEE FOR CHILDREN.**

Where a wife, who died in 1912, by will appointed her husband, with whom she had lived since 1871, as trustee for their children, before the court will remove him as trustee at the suit of a daughter something more must appear than failure to make reports and settlements as required by law, and more than a mere neglect to realize all that possibly could be realized from the trust property.

**7. TRUSTS  $\Leftrightarrow$ 308—PENALTY FOR FAILURE OF TRUSTEE INTELLIGIBLY TO ACCOUNT.**

When a trustee fails to keep his accounts in an intelligent manner, the penalty is to charge him with the value of the use of the trust property for the purpose to which it is devoted, and to credit the sum with legitimate expenses and reasonable compensation.

Appeal from Circuit Court, Fleming County.

Suit by Amanda S. Wilson against John J. Smoot, trustee, and others. From an adverse judgment, plaintiff appeals. Judgment affirmed.

F. H. McCartney and O. R. Bright, both of Flemingsburg, for appellant.

B. S. Grannis and Jno. P. McCartney, both of Flemingsburg, for appellees.

**THOMAS, J.** In December, 1912, Elvira Smoot, who was the wife of the appellee and defendant below, John J. Smoot, and the mother of the appellant and plaintiff below, Amanda S. Wilson, departed this life domiciled in Fleming county, leaving a last will and testament. She was the owner of a small farm in Fleming county bordering on the Licking river and containing about 75 acres, a small lot upon which was located a residence in the town of Sherburne, and personal property appraised at \$600, together with some household and kitchen furniture. She also owned a one-half undivided interest in a vacant lot in the town of South Sherburne, it being located just across the Licking river in Bath county. In her will she provided for the payment of her debts and funeral expenses, and devised to her husband, the defendant John J. Smoot, her household and kitchen furniture; to her daughter Amanda S. Wilson (the plaintiff below), her one-half interest in the vacant lot in South Sherburne; and in a residuary clause she devised the remainder of her property to her hus-

band in trust for the use and benefit of her three children, Anna Smoot, Amanda S. Wilson, and Henry L. Smoot, providing that the property should remain in trust during the life of her husband, and that at his death it should be equally divided among the three children, or the issue of those who might be dead at that time, but, if no surviving issue, then the property to go to the survivor or survivors. The clause of the will appointing the husband trustee says:

"I appoint my husband, John J. Smoot, as trustee in trust for said children of the property so devised them herein and empower him to control, use and manage same for their benefit according to his judgment, and it is my will that the said John J. Smoot be not required to execute any bond as trustee aforesaid, having full confidence in his judgment and discretion in managing said property for the benefit of my said children."

The plaintiff, Mrs. Wilson, was a widow at the time of her mother's death and lived on a 160-acre farm adjoining the one owned by the testatrix. She had one child about 13 years of age for whom she was appointed guardian, and her occupancy, management, and control of the lands of her deceased husband was by virtue of her dower interest therein and of the remaining portion through her guardianship of her son.

Upon the death of testatrix, and after her will was probated, there seems to have been at least a tacit understanding among all of the interested parties that the defendant as trustee under the will of his deceased wife with his daughter Anna Smoot, who was then about 35 years of age and unmarried, and who had always lived with her parents, should continue to occupy the 75 acres under the management and control of the trustee for their use and benefit, as well as for the benefit of the other two children. Matters continued to move along as they had done before the death of the mother, with all members of the family working harmoniously together for their mutual comfort. As a part of this understanding, the maiden sister was to receive, as compensation for her labors as cook and housekeeper for her father, \$50 per year over and above her maintenance, and by common consent the son, Jeff Smoot, cultivated a portion of the farm as a tenant upon the usual and customary terms that prevailed in that vicinity. During all this time Mrs. Wilson enjoyed the privilege of the family household to an unlimited extent, and as freely as she had done during the lifetime of her mother. She and her father embarked on some small business ventures in the way of grazing cattle for the market, and the trust farm was free and open to her for pasturing, feeding, and other care of her stock, all of which privileges she, without objection from any source, frequent-

ly availed herself. She admits in her deposition that she was at her father's house almost daily, and that more frequently than otherwise she would take her noonday meal with her father and her sister. Things continued after this fashion until about the middle of April, 1915, when Anna Smoot accused plaintiff's son of taking from the former \$3, which seems to have been admitted as true by plaintiff, since she returned the amount to her sister. However, this incident estranged the sisters, and plaintiff soon thereafter became uncompromisingly angry with her father and brother also, neither of whom, according to this record has ever given her the slightest pretext for her conduct. She followed this up by applying to the county court for a rule requiring her father as trustee under her mother's will to make settlement of his accounts as such trustee, and later emphasized that determination by filing this suit asking for such accounting and charging that her father was incapable and incompetent to serve as trustee, and asked that he be removed and another appointed in his place.

All the relief that plaintiff sought by her petition was resisted, not only by the answer of the trustee, but also by the answers of her brother and sister whom she also made defendants in her suit. The court, under an agreed order dated June 9, 1917, referred the cause to the master commissioner to take proof and report the condition of the accounts of the trustee. In the discharge of that duty the commissioner took the depositions of plaintiff, her father, and her brother. The depositions covered the transactions of the trustee as well as the condition of his account up to August 1st of that year. The report of the commissioner was filed January 21, 1918, and it was ordered to and did lay over for exceptions until May 21st thereafter, when, no exceptions having been filed, it was confirmed. On the day of confirmation the court ordered the commissioner to make settlement with the trustee for matters occurring in the discharge of his trust after August 1, 1917, to the date of confirmation. That settlement was made and a report by the commissioner was filed, to which the plaintiff filed exceptions to certain items of credit taken by the trustee, which items were pointed out in the exceptions, and the court upon submission overruled the exceptions and confirmed the report. He declined to remove the trustee, or to give plaintiff judgment for any sum, since she had received benefits almost equal to the balance found to be due her after deducting her costs which were adjudged against her. To reverse these rulings of the court, plaintiff prosecutes this appeal.

[1, 2] It is at once apparent that we are without authority to review any of the items allowed, either of debit or credit, contained in the first report of the master commissioner, since there were no exceptions to any

of them, and plaintiff thereby waived all errors, if any, in allowing them. It is likewise doubtful if we have authority to reverse any of the items in the second report, since the record is silent as to what evidence, if any, was heard either by the commissioner before making it, or by the court upon the trial of plaintiff's exceptions thereto. Under such circumstances, we might well presume that, unless the record affirmatively shows that no evidence was heard, the court did hear evidence and found it sufficient to sustain his judgment. Whether this be the correct practice or not, we are quite convinced of our inability to determine from the exceptions alone for what purpose the items excepted to were expended, since there is nothing contained in either the report of the commissioner or the exceptions to show what that purpose was, and we do not feel that it is incumbent upon us to presume that they were not made in furtherance of the general purposes of the trust. There are items in the first report of a similar nature to those excepted to in the second report, and the evidence heard by the commissioner before filing his first report shows the purpose of such expenditure. But we do not conceive it to be our duty to presume that similar items in the second report were incurred in like manner, and, in the absence of some basis upon which we could accurately determine the state of defendant's account as contained in the commissioner's second report, we are not inclined to disturb the judgment of the trial court in confirming it. *Graves' Committee v. Lyons*, 103 Ky. 446, 179 S. W. 413.

[3] It is insisted by the attorney for the trustee that the will of testatrix conferred upon him a joint beneficial interest in the trust property with his children, and in substantiation of this we are referred to the case of *Feagan v. Metcalfe*, 150 Ky. 745, 150 S. W. 988. In that case it was inferentially held that the husband as trustee under his wife's will for the latter's children took a joint beneficial interest with the children in the trust property which was inseparable from their interest. But in that case the clause of the will creating the interest of the trustee provided that—

He "shall take, hold and enjoy all the real and personal estate of the decedent whatsoever that such decedent may be possessed of at the time of the death of such decedent in trust for the use and benefit of our children and heirs at law then living."

While the similar clause of the will now under consideration does not expressly provide for any enjoyment of the trust property by the trustee, but only that he shall "control, use and manage same" for their (children's) benefit according to his judgment. The word "enjoyment" contained in the will involved in the *Feagan Case* is absent from the will involved in the case before us. If we treat the present will as one creating an active trust

in the trustee, without joint beneficial interest in the trust property, he would then be held to account only for the management of the property in the mode pointed out by the settlor in the instrument creating the trust, as an ordinarily prudent business man would be required to do under the same or similar circumstances.

[4] It will be observed that the will of the testatrix does not require her husband and appointed trustee to so manage and control the property as to realize the greatest financial profit therefrom, but only that it shall be done by him "for the benefit of the children." This may be accomplished by managing the property in a good, husbandlike manner, so as to increase its productiveness, and so as to preserve, improve, and keep it in a way that will be beneficial to the cestui que trust when they shall come into possession of it at the death of their father. There is nothing in the testimony found in the record to show that he is not managing the estate in this manner. On the contrary, it rather shows that he is managing it so as to attain that result.

[5] Very decided objection is made to that part of the judgment requiring the plaintiff to pay her part of the cost, amounting to \$53.25, since it is claimed that she succeeded at least to the extent of requiring her father to make an accounting; but an accounting is only for the purpose of ultimate relief of obtaining a judgment, and, if the accounting does not result in a judgment in plaintiff's favor for some amount, we fail to see where in plaintiff's personal gratification obtained by her would be sufficient to carry the cost in her favor. The matter of cost in an equity case is largely in the discretion of the court, and in view of the fact that defendant had failed to make any report, and that plaintiff failed, by the suit, to obtain any other relief than the report, we think the court did not abuse his discretion in the adjustment he made of the payment of cost.

It is insisted that the evidence contains enough to show the incompetence of the trustee, and that the court erred in declining to remove him. The general rule containing the grounds upon which courts of equity may remove trustee is thus stated in 39 Cyc. 261, 262:

"What constitutes a sufficient reason for removing a trustee is a matter peculiarly within

the discretion of the court, which should be guided by considerations of the welfare of the beneficiaries and of the trust estate. But the power of removal, especially of trustees appointed by will, ought to be exercised sparingly. There must be a clear necessity for interference to save trust property. It is not every mistake or neglect of duty which will induce a court to remove a trustee. There must be such gross negligence or misconduct as to evidence a want either of capacity or fidelity, putting the trust in jeopardy. Mere failure in the discharge of duties on account of mistake or misunderstanding is not ground for removal, unless such failure shows a want of the proper capacity to execute the duties. Still less will the court interfere because of an injudicious exercise of discretion, or refusal to exercise a discretionary power for the advantage of the estate. And even acts of imprudence or neglect are usually treated as reasons for making the trustee give recompense for the wrong or error rather than as ground for superseding him in his office."

[6, 7] In the instant case the trustee was appointed by the will of his deceased wife. She had been living with him since 1871, and must be presumed to have been thoroughly familiar with his ability to manage such property, as well as familiar with his methods of doing so. With this knowledge she appointed him trustee for her children during his life, saying that she had "full confidence in his judgment and discretion in managing said property for the benefit of my said children." Under these circumstances, and in the light of the text above quoted, before the court would remove the defendant as trustee under the will of his wife something more should appear than a failure to make reports and settlements as required by law, and more than a mere neglect to realize all that possibly could be realized from the trust property. When a trustee fails to keep his accounts in an intelligent manner, the penalty is to charge him with the value of the use of the trust property for the purpose to which it is devoted, and to credit that sum with legitimate expenses and a reasonable compensation for the trustee; but there is no testimony in the case to show the result of such a method of settlement were we to find the trustee derelict in his duties so as to require the application of that rule.

We therefore conclude that under the condition of the record there is no alternative left to us but to affirm the judgment, which is accordingly done.



## FLUMMER'S ADM'R v. TRI-STATE TELEPHONE CO. et al.

(Court of Appeals of Kentucky. Nov. 28, 1919.)

## 1. MASTER AND SERVANT ¶201(2)—NEGLIGENCE OF FELLOW SERVANTS ACTING UNDER FOREMAN'S SUPERVISION.

The negligent act of a fellow servant becomes the negligence of the master, where the servant is doing an act with the knowledge of the master's foreman and practically under his supervision.

## 2. MASTER AND SERVANT ¶286(40)—NEGLIGENCE IN FAILURE TO WARN QUESTION FOR JURY.

In action for death of a servant caused by the cutting of a tree, which fell upon telephone wires, causing a telephone pole to fall upon the deceased, whether defendant was negligent in allowing the tree to be cut without warning held for the jury.

## 3. MASTER AND SERVANT ¶285(12) —PROXIMATE CAUSE OF INJURY QUESTION FOR JURY.

Whether negligence in cutting trees, which fell on telephone wires and caused a rotten telephone pole to fall on and kill a workman not warned of the danger was the proximate cause of death, and the result one which should have been foreseen, held for the jury.

## 4. TELEGRAPHS AND TELEPHONES ¶15(2,4) —DUTY OF TELEPHONE COMPANY TO MAINTAIN WIRES AND POLES.

The duty of a telephone company requires it only to maintain its wires and poles in a reasonably safe condition for travel upon the highway along which the line runs, and such a company is not liable for death of one killed by reason of the negligent cutting of a tree, which fell upon the wires and caused a pole to fall upon the deceased, even though the telephone company negligently allowed the pole to become decayed around the bottom.

Appeal from Circuit Court, Harlan County.

Action by Hobart Flummer's administrator against the Tri-State Telephone Company and others. Judgment for defendants, and plaintiff appeals. Affirmed in part, and reversed in part.

Rose & Huff, of Harlan, for appellant.

H. C. Clay, of London, and Wm. Baxter Lee, of Knoxville, Tenn., for appellees.

THOMAS, J. S. J. Condon & Co. (hereinafter referred to as the Construction Company) is a corporation engaged in construction work. It had the contract for the reconstruction of a public highway in Harlan county. Along the highway to be improved the Tri-State Telephone Company (hereinafter referred to as the Telephone Company) maintained a telephone line which was used in the transmission of telephone messages, and over which wires the Western Union Telegraph Company (hereinafter referred to

as the Telegraph Company), by some traffic arrangement with the Telephone Company, transmitted its messages between Pineville, Ky., and Harlan, Ky. On July 27, 1916, the foreman of the Construction Company, Leander Creech, with a crew of about eight hands, was engaged in clearing off the right of way for the proposed improved road, parts of which ran over the old roadbed, and other parts to the side and off of it, and while so engaged one of the hands chopped down a tree, which was about 12 or 15 inches in diameter, and it fell upon the telephone wire near by, causing one of the telephone posts to break off at the ground and fall. In doing so it struck Hobart Flummer (another member of the crew) on the back of the head and instantly killed him.

Appellant, as administrator of the deceased, brought this suit against the Construction Company, the Telephone Company, the Telegraph Company, and the foreman, Creech, seeking to recover damages for the alleged negligent killing of plaintiff's decedent, in the sum of \$20,000. The negligence alleged against the Construction Company was that it, through its agents and servants, negligently caused the tree to be cut and fall upon the wire, which was the direct and proximate cause of the falling of the telephone post, resulting in the decedent's death, and the same negligence was charged against the foreman, Creech. It was alleged against the Telegraph and Telephone Companies that they had negligently maintained their posts and line, and suffered the posts to become rotten, but for which the post would not have broken or fallen upon the deceased.

The Telegraph Company did not answer, since it was determined by the court that service upon it was not properly had, and the return of the sheriff on the summons against it was quashed. The other defendants answered, denying the allegations of the petition, and pleading assumed risk and contributory negligence. Appropriate pleadings denying these pleas made the issues. During the progress of the trial the plaintiff dismissed the suit as to the foreman, and the court at the close of the testimony sustained the motion for a peremptory instruction as to the Construction Company and the Telephone Company, which motion was followed by a verdict in their favor, upon which judgment was pronounced dismissing the petition, and complaining of it the plaintiff prosecutes this appeal.

The undisputed facts found in the record are that the deceased was 17 years old, and met his death within a short while after beginning work on the second day of his employment. At the time he and a collaborer were engaged in rolling a log off of the contemplated right of way, which was about

108 feet from where the tree was being felled. As we gather from the proof, the deceased was down on the ground, with his chest against the log. A servant of the Construction Company by the name of Ben Noe, who was 20 years of age, chopped down the tree, and between the place where he was at work and where the decedent was rolling the log were obstructions in the way of undergrowth, and there was also a large rock, which served to prevent the deceased, in his position, from seeing Noe. About 14 feet from the deceased was the fatal telephone pole, which was the one nearest him from where the tree fell on the wire. The tree was located on the side of a steep hill, and in falling down the hill it struck a dogwood bush and was thrown against the wire, causing the post near the deceased to break and fall, resulting in his death. Noe had been at work for about an hour only. He testified that he did not know the location or situation of the deceased, nor did he have any knowledge of the condition of the telephone post, and in telling how he came to cut the tree said:

"I asked him [Creech] must I go and cut that tree, and he said if I thought I could throw it off the wire to do so, and I told him I didn't know whether I could or not; I would try; and he said, 'All right.'"

After that, and before the accident, the foreman directed the deceased to roll away the log, and when the tree was about to fall the foreman was within 53 feet of it, being between the deceased and the tree, and saw Noe and other servants pulling a grapevine to keep the tree from falling against the wire. According to his testimony, he saw this one or two minutes before the tree fell; but he neither went to assist in preventing the tree from falling across the wire, nor did he warn the deceased, so that he might guard against possible accident.

There is slight conflict between the testimony of the servant Noe and the foreman as to what occurred with reference to cutting of the tree. The foreman does not deny in terms the testimony of Noe upon this subject, nor does he deny that he directed Noe and those working with him to cut the particular tree in question, but says that he told them to "cut the small saplings and brush, but these larger things up here, don't cut anything that will fall on the wire." However, he admits that he afterward saw that Noe and his companions were chopping down the tree.

It is insisted by the Construction Company that Noe and the deceased were fellow servants, and that the master is not liable to the deceased for the negligence of a fellow servant. This insistence is resisted by the plaintiff, who contends that under the doctrine known as the "association theory," as

set forth and upheld in the cases of *L. & N. R. R. Co. v. Brown*, 127 Ky. 732, 106 S. W. 795, 32 Ky. Law Rep. 552, 13 L. B. A. (N. S.) 1135; *Louisville Railway Co. v. Hibbitt*, 139 Ky. 43, 129 S. W. 319, 139 Am. St. Rep. 464; *Harris v. Rex Coal Co.*, 177 Ky. 630, 197 S. W. 1075, and cases referred to therein, Noe and the deceased were not fellow servants, so as to relieve the master of liability for the negligence of the former, and that the court erred in applying the fellow servant doctrine to the facts of this case.

In the *Brown Case* the injured servant was head brakeman on a freight train of the master, the Louisville & Nashville Railroad Company, and was injured through a head-on collision between his train and a work train of the railroad company, which collision, it was alleged, was brought about through the negligence of a flagman on the work train failing to flag the freight train upon which the plaintiff was working, and it was held that the flagman of the work train was not a fellow servant of the brakeman on the freight train. In the *Hibbitt Case* the injured servant was a motorman on a street car operated by the Louisville Railway Company, and he was injured in a collision with another car operated by a different crew, and it was held that the servants operating the latter car were not fellow servants with plaintiff. In the *Harris Case* the deceased was engaged in uncoupling coal cars and shoving them to the place where they were dumped, all of which work was performed at the bottom of a 600-foot incline. Another servant of the company was engaged in coupling cars at the head of the incline, preparatory to being sent down, and receiving other cars coming up the incline. Through his negligence some loaded cars were permitted to run down the incline and killed the deceased, and it was held that the relation of fellow servant did not apply as between the deceased and the servant at the top of the incline, whose negligence caused the accident.

The reason underlying the association theory is well stated in the *Brown Case* in this language:

"When the servant is injured by employees of the same master, who are not directly associated with him, and with whom he is not immediately employed, and whose qualifications for the place they occupy he has no means of knowing, and in whose selection he has no voice, and over whose conduct and actions he has no control, and against whose negligence and carelessness he cannot protect himself, he may recover damages from the master for injuries received through their negligence, whether it be ordinary or gross, and without any reference to the position or place the servant causing the injury holds."

[1] It is argued in the instant case that the testimony shows that the deceased was

so situated with reference to the servant, Noe, that he could not see what the latter was doing, nor pay any attention as to how he was performing his work, so as to protect himself against Noe's negligence, if any, and that under the association theory the latter was not his fellow servant. But whether that doctrine shall be carried to the extent contended for we do not deem it necessary to decide under the facts of this case, for we are convinced that Noe's action and conduct in cutting down the tree was with the consent and knowledge, if not direction, of the foreman, Creech, and practically under his supervision. In such cases the negligent act of the servant producing the injury becomes the negligence of the master, notwithstanding the negligent servant may be a fellow servant of the one injured. *Burton Construction Co. v. Metcalfe*, 162 Ky. 366, 172 S. W. 698; *C. N. O. & T. P. Ry. Co. v. Gardner*, 165 Ky. 48, 176 S. W. 351.

In the *Metcalfe* Case the crew was employed by the *Burton Construction Company* in knapping rock. The plaintiff and others were at the foot of the hill engaged in that work, while others were up the side of the hill, breaking large rock into smaller pieces, which were afterward still further reduced by plaintiff and his associates at the foot of the hill. The servants on the side of the hill negligently permitted a large rock to roll down the hill, striking plaintiff, resulting in his injury, and it was held that, although the negligent servant might be regarded as the fellow servant of plaintiff, since the former was working under the immediate direction and in the presence of the foreman, the negligence was that of the master. Quoting from the case of *L. & N. R. R. Co. v. Crady*, 73 S. W. 1126, 24 Ky. Law Rep. 2339, the court said:

"For appellant it is claimed that Thomas, being in the same line of employment as appellee, was his fellow servant, and that the negligence resulting in the accident, if any one was negligent besides appellee, was that of Thomas, and that therefore there can be no recovery. There was proof to support the claim of appellee that Thomas acted under the direct command of his superior, and therefore that his act was the same as if the superior in person had done the thing. In other words, the act was not the result of Thomas' judgment or lack of judgment, or his care or lack of care. The controlling mind in the transaction was that of the foreman."

[2] The opinion in the *Gardner* Case follows the same rule, and we are clearly of the opinion that the court erred in failing to submit to the jury the issue as to the negligence of the foreman in consenting or directing the tree to be cut in the manner it was, and in not warning the deceased that the tree was about to fall in such manner as to strike the wire, since, according to his own testimony, he had ample time in which to do so, after the discovery that the tree was about to fall.

[3] Still another question is presented, which is, conceding that the felling of the tree in the manner it was done was negligence, and that the master is liable therefor, because it was done at the direction of and with the consent of the foreman, was the death of the deceased the proximate result of that negligence? This question is not argued by counsel for either side, but since it is presented, and is an element affecting the rights of the parties, we conclude that it is our duty to briefly notice it.

In the very recent case of *Nunan v. Bennett*, 184 Ky. 591, 212 S. W. 570, we had occasion to consider this question at some length, and we arrived at the conclusion that, where the consequences flowing from the alleged negligent act were such that an ordinarily prudent person under all the circumstances might have reasonably foreseen or anticipated, the one perpetrating the act, or who is responsible therefor, would be liable for such consequences. It was therein said:

"The rule is well settled that, to fix liability upon a person for remote negligence, the injury complained of must be one that under all the circumstances might have been reasonably foreseen or anticipated by a person of ordinary prudence to flow from or be the natural and probable consequence of the first negligent or wrongful act."

Under the facts of this case there were a number of workmen in the vicinity where the tree was being felled, and it is in proof that the foreman knew that the telephone posts were very much decayed, that slight force would cause them to fall, and we think it was a question for the jury to determine whether he should have anticipated and foreseen the probable consequences of injury to some member of the crew if one should fall. The court should have submitted to the jury whether the felling of the tree under the circumstances was negligence, and whether it was done under the direction and with the knowledge and consent of the foreman, and whether he, in the exercise of a reasonable prudence, should have foreseen or anticipated that one of the posts would fall as a result of the tree striking the wire and injure one of the servants employed on the job. It results, therefore, that the court erred in sustaining the motion for a peremptory instruction in favor of the *Construction Company*.

[4] In regard to the peremptory instruction in favor of the *Telephone Company* but little need be said. Its duty to strangers required it only to maintain its wires and posts in a reasonably safe condition for those using the highway along which the line ran. This necessarily means the use of the highway by the traveling public. No law, so far as our research goes, requires such a company to maintain its wires and poles so as to successfully resist the cutting down of a

tree upon them, and the fact that the poles may have, through the negligence of the company, become decayed around the bottom, so as to render them weak, will not alter the company's responsibility under facts like these in the case before us, since it is not pretended by any one that the pole would have fallen, but for the falling of the tree on the wire, for which the Telephone Company is in no wise responsible.

Wherefore the judgment is affirmed as to the Telephone Company, but it is reversed as to the Construction Company, with directions to grant a new trial as to it, and for proceedings against it in conformity with this opinion.

### STUART v. CLEMENTS.

(Court of Appeals of Kentucky. Oct. 17, 1919.  
Rehearing Denied Dec. 19, 1919.)

#### 1. LANDLORD AND TENANT §138—RIGHT TO MANURE PRODUCED ON PREMISES SUBJECT TO CUSTOM.

As between landlord and tenant, manure produced upon the premises is the property of the landlord, in which the tenant has no interest, and for removal or sale of which, without the lessor's consent, the tenant is liable, unless custom or usage of the neighborhood, known to the parties previous to the agreement, renders the contract otherwise.

#### 2. CUSTOMS AND USAGES §13—AGREEMENT AS AFFECTED BY CUSTOM BECOMING A PART THEREOF.

A lawful custom, which is permitted to enter into contracts made with reference to it, becomes a part of the contract, the same as if incorporated therein, so that the rights of the parties to the contract are governed by the provisions of such custom or usage.

#### 3. PLEADING §218(4)—DISMISSAL ON OVERRULING DEMURRER TO ANSWER AND PLAINTIFF'S FAILURE TO PLEAD OVER.

Where the court was in error in overruling a demurrer to the second paragraph of the answer, but not as to the third paragraph, which contained a complete defense, and plaintiff declined to plead further, there was no alternative, except to dismiss the petition.

#### 4. APPEAL AND ERROR §1040(14)—HARMLESS ERROR IN OVERRULING DEMURRER TO ANSWER.

Where plaintiff, demurring to the three paragraphs of the answer, elects to stand on decision overruling the demurrer, the judgment will be affirmed, though one paragraph is bad; the other paragraphs being good.

#### 5. PLEADING §214(1)—FACTS ADMITTED BY DEMURRER.

A paragraph of an answer, stating facts constituting a defense to which plaintiff has declined to plead, is as effectually admitted by a demurrer as if evidence had been introduced to establish it, or there had been an agreed statement of facts showing its truth.

Appeal from Circuit Court, Daviess County.

Action by Mrs. C. G. C. Stuart against Mrs. Charles Clements. Judgment dismissing the petition, and plaintiff filed a transcript, accompanied by a motion for an appeal. Motion for appeal sustained, appeal granted, and judgment affirmed.

R. M. Stuart, of Owensboro, for appellant.  
Clements & Clements, of Owensboro, for appellee.

THOMAS, J. The appellee and defendant below, Mrs. Charles Clements, was a tenant for the years 1915, 1916, and 1917 of the appellant and plaintiff below, Mrs. C. G. C. Stuart, who owned the leased farm, which is situated in Daviess county, Ky. After the expiration of the tenancy, plaintiff filed this suit against defendant, seeking to recover of the latter the sum of \$216, alleged to be the value of 36 loads of manure, 12 of which the defendant had sold from the leased premises, and 24 of which she had removed from the premises just before the expiration of the lease.

The first paragraph of the answer denied some legal conclusions alleged in the petition, as well as some facts not going to the merits of the case, and the second paragraph in substance stated that the manure was made by cattle exclusively owned by defendant, which had been fed with produce also owned by her, and it was therein insisted that these facts gave the defendant the right to dispose of the manure; but it was nowhere denied but that the produce fed to the cattle was grown upon the leased premises, although it was the property of the tenant, being his portion of the crop, supplemented by a small portion purchased from the landlord, which was also grown upon the premises.

The third paragraph relied upon a usage and custom prevailing in the neighborhood for many years, to the effect, as stated, "that, where the tenant furnished his own feedstuffs for live stock, the manure produced by such live stock so fed with feed belonging to the tenant became his personal property, with the right of removal or sale by such tenant." It was then alleged that the custom so relied upon "was well known to both plaintiff and defendant at the time the contract for the rental of said farm was made and executed, and it was made in view of said custom."

A demurrer was filed to each of paragraphs 2 and 3, which the court overruled, and, the plaintiff declining to plead further, her petition was dismissed, and complaining of that judgment she has filed the transcript in this court, accompanied by a motion for an appeal.

[1] The action of the court in overruling the demurrer to the second paragraph of the

answer presents a question which, so far as we have been able to ascertain, has not heretofore been before this court; but it has quite frequently been before the highest courts in other states and countries, and has received consideration by able text-writers upon the subject, and with but a single exception it has been held that, under the facts presented by the paragraph of the answer under consideration, as between landlord and tenant, manure produced upon the leased premises is the property of the landlord, in which the tenant has no interest, and for which he is liable if he removes or sells it without the consent of the lessor. 24 Cyc. 1067; *Laswell v. Reed*, 6 Me. (Greenl.) 222; *Perry v. Carr*, 44 N. H. 118; *Daniels v. Pond*, 21 Pick. (Mass.) 367, 32 Am. Dec. 269; *Lewis v. Lyman*, 22 Pick. (Mass.) 437; *Conner v. Coffin*, 22 N. H. 541; *Plumer v. Plumer*, 30 N. H. 558; *Elting v. Palen*, 60 Hun, 306, 14 N. Y. Supp. 607; *Middlebrook v. Corwin*, 15 Wend. (N. Y.) 169; *Enoch Wetherbee v. Adolphus Ellison*, 19 Vt. 379; *Brigham v. Overstreet*, 128 Ga. 447, 57 S. E. 487, 10 L. R. A. (N. S.) 452, 11 Ann. Cas. 75; *Bonnell v. Allen*, 53 Ind. 130; *Gallagher et al. v. Shipley*, 24 Md. 418, 87 Am. Dec. 611; 19 Amer. & Eng. Ency. 927; *Taylor's Landlord and Tenant*, §§ 541 and 693; *Pickering v. Moore*, 87 N. H. 533, 32 Atl. 828, 31 L. R. A. 698, and annotations, 68 Am. St. Rep. 695; *Brigham v. Overstreet*, 128 Ga. 447, 57 S. E. 487, 10 L. R. A. (N. S.) 452, 11 Ann. Cas. 75; *Munier v. Zachary*, 138 Iowa, 219, 114 N. W. 525, 18 L. R. A. (N. S.) 572, and annotations, 16 Ann. Cas. 526; *Washburn on Real Property*, vol. 1, top page 609, and 16 R. C. L. pp. 754 and 755.

The general doctrine as announced by the above authorities is very succinctly stated in the volume of Cyc. referred to, thus:

"The general rule is that manure made by a tenant upon leased farm lands in the ordinary course of husbandry is, in the absence of special agreement to the contrary, the property of the lessor, and belongs to the farm as an incident necessary for its improvement and cultivation, and the tenant has no right to remove it from the premises or apply it to any other use. However, manure made in livery stables, or in buildings unconnected with agricultural property, belongs to the tenant, unless there be a contract to the contrary; and it has been held that a tenant is entitled to manure made from fodder grown elsewhere and bought by him."

The reason underlying this principle of law which led the courts to its adoption, is thus stated in the case of *Lassell v. Reed*, supra:

"It is our duty to regard and protect the interests of agriculture as well as trade. It is obviously true, as a general observation, that manure is essential on a farm, and that such manure is the product of the stock kept on such farm, and relied upon as annually to be appropriated to enrich the farm and render it productive. If, at the end of the year, or of the term,

where the lease is for more than a year, the tenant may lawfully remove the manure which has been accumulated, the consequence will be the impoverishment of the farm for the ensuing year, or such a consequence must be prevented at an unexpected expense, occasioned by the conduct of the lessee, or else the farm, destitute of manure, must necessarily be leased at a reduced rent or unprofitably occupied by the owner."

Some of the cases hold to the rule as above stated absolutely, without regard to the fact of the feed consumed by the stock which produced manure having been grown on premises other than the one leased, while other cases held that, when the manure is produced from feed grown on other premises, it becomes the property of the tenant. However, we are not called upon to discuss this distinction, since in the instant case the feed, as we have seen, grew upon the leased premises from which the tenant claimed the right to remove it. In such case there has been but one dissent, so far as we have been able to discover, from the general rule; that being the case of *Smithwick v. Ellison*, 24 N. C. 326, 38 Am. Dec. 697. The cases, while announcing the rule as stated, confine its application to manure produced upon agricultural lands in the usual and ordinary course of husbandry. It has no application to accumulations of manure in livery stables and places other than agricultural premises. The reasoning of the courts, as well as text-writers, in applying the doctrine to agricultural leases, commends itself as being sound, and we unhesitatingly adopt it as being the correct rule governing the rights of landlord and tenant in the character of leases referred to. The rule, however, is deducible from the mere fact of the relationship of landlord and tenant, and "in the absence of covenant or custom to the contrary." 16 R. C. L., supra.

In *Taylor's Landlord and Tenant*, § 542, speaking of the effect of a custom or usage of a neighborhood upon the general rule, it is said:

"There may be mutual privileges founded on the common usage of a neighborhood, to which outgoing and incoming tenants are entitled."

And all of the authorities are of one accord that it is competent for the parties to agree between themselves as to who shall have the right to the manure produced.

[2] The third paragraph of the answer, relying upon a usage and custom of the neighborhood, brings the case within the exception to the general rule above, and the court was clearly right in overruling the demurrer to it. But counsel for plaintiff in their brief insist upon the well-established rules governing the admission of a custom or usage as forming a part of the terms of a contract, requiring that the usage or custom relied on must, unless actually known,

be general in the locality, and of such duration as to raise the presumption that the parties contracted with reference to it, and that no custom or usage will be upheld, if it is against public policy. These limitations on the admission of a custom or usage as entering into the terms of contracts are well settled, and are of universal application; but the first one is eliminated in this case by the very terms of the third paragraph of the answer, which expressly states that the pleaded custom was well known by both plaintiff and defendant, and that the lease contract was made and executed in view of it. We know of no public policy that would be invaded by upholding the custom, for the general rule above announced was adopted, not so much in furtherance of a public policy, but because it was thought by the courts to best subserve the industry of agriculture. Besides, the same authorities, *supra*, announcing the general rule, also say that it may be modified by a prevailing usage or custom. It is well established that a custom which is lawful, and which is permitted to enter into contracts made with reference to it, becomes a part of the contract, the same as if the custom were incorporated therein, and the rights of the parties to the contract are to be governed by the provisions of the custom or usage. This doctrine of the law is so axiomatic that we deem it unnecessary to refer to authorities in substantiation of it.

[3] It results, therefore, that the court was in error in overruling the demurrer to the second paragraph of the answer, but the order overruling it to the third paragraph of that pleading was proper. Since, however, the third paragraph contained a complete defense, and plaintiff declined to plead further, there was no alternative except to dismiss the petition.

[4] At this point a somewhat troublesome question of practice is presented, which is whether, in view of the state of the record and our rulings thereon, the judgment should be affirmed or reversed. It is insisted in the petition for a rehearing filed by appellant that we should order a reversal of the judgment, with directions to sustain the demurrer to the second paragraph of the answer, with leave for plaintiff to reply to the third paragraph, if she so desires; this upon the ground that under the ruling of the trial court upon the demurrer to the answer, in which it erroneously held the second paragraph thereof sufficient, it would have been a vain and useless thing for plaintiff to reply to the third paragraph, denying the custom therein alleged. Opposing this, it may be urged that this court is one of review only, exercising appellate jurisdiction exclusively, and must determine causes from the exact conditions as shown by the record to exist at the time the judgment appealed from was rendered, although we might find that the

court may have committed an intervening error against appellant, which error could not and did not influence the final judgment, as it was the only one the court could have rendered in any event.

It must be admitted that on the surface the contention of appellant has at least a measure of plausibility; but an analysis of the situation will, we think, demonstrate its weakness. This court, not being one of original jurisdiction in cases like this, must determine causes brought before it by appeal from the transcript only, which is but a photograph, so to speak, of what occurred in the court below. Pleadings cannot be filed here, and we cannot presume that any of the parties to the appeal desire to or will file additional pleadings upon a return of the case, or make issues which they declined to do when they elected to risk their cause upon the state of the pleadings at the time the judgment was rendered.

It is true that in 6 Ency. of Pleading & Practice, 367, it is said that:

"The overruling of a demurrer to a bad answer, or a bad paragraph of an answer, is generally such an error as will require a reversal of the judgment thereon. This is the case, even though there be other good answers or paragraphs, under which evidence of the matter alleged in the one improperly overruled is admissible."

In support of the statement in the text are a number of cases from the Indiana Supreme Court, and an examination of them reveals the fact that the bad paragraph of the pleading demurred to, as well as the good ones therein, were pleaded to, and a trial was had upon evidence introduced; but the record in the case did not disclose whether the judgment was rendered because of the issue presented by the bad paragraph, or those presented by the good paragraphs, for which fact alone the judgments were reversed.

But, in the case of *Hill v. Pollard*, 132 Ind. 588, 32 N. E. 564, the same court held that, if the record disclosed that the judgment was rested entirely upon the facts alleged in the good paragraphs, the error in overruling the demurrer to the bad one would be harmless. In that case the answer contained two paragraphs, to each of which a demurrer was filed by the plaintiff and overruled. Issue was joined, and the court found the facts alleged in the second paragraph to be true. Upon appeal it was held that there was error in overruling the demurrer to the first paragraph of the answer, but held that it was properly overruled as to the second paragraph. Commenting upon the effect to be given that error upon appeal, the court, affirming the judgment in favor of defendant, said:

"From this finding [that the facts in the second paragraph were true], it is clearly apparent that the appellants were not harmed by the ruling on the demurrer in overruling of the demurrer to the first paragraph, and that the

finding and judgment rest on the second paragraph."

Almost the precise question now under consideration was before the Appellate Court of Indiana in the case of *Morrison v. Kendall*, 6 Ind. App. 212, 33 N. E. 370. That was a suit upon a note, to which the defendant answered in three paragraphs. The first one pleaded a novation, the second relied upon the statute of limitations in Indiana, and the third relied upon the same statute of Michigan, to which state the defendant had removed between the time of the execution of the note and the filing of the suit. A demurrer was filed to each paragraph, and overruled. Plaintiff elected to stand upon the demurrer, and judgment went against him. Upon appeal it was held that the court should have sustained the demurrer to the first paragraph of the answer, but that it was properly overruled as to the second and third paragraphs. In affirming the judgment the court said:

"We have here two other paragraphs of answer to which demurrers were overruled. The plaintiff refused to plead over, but elected to abide the ruling of the court. The demurrers to these paragraphs admitted the truth of all the facts that were well pleaded, for the purposes of the demurrers only; but the plaintiff has gone one step beyond. He refused to plead further, and prayed the judgment of the law on the facts contained in these answers. His position is the same as if he should say, 'I confess the facts for all purposes in the case, but deny the law.' If the law be against him, his right to recover is forever gone. He has confessed a fact which must ultimately destroy his right to a recovery. If this court should reverse the case, with instructions to the trial court to sustain the demurrer to the first paragraph of answer, as soon as that should be done the defendant might then move for judgment in his favor as upon a default."

The learned author of *Elliott on Appellate Practice*, who was a member of the Supreme Court of the state of Indiana during the time

the opinions referred to were rendered, in section 637 of that work, says:

"Where the record shows that the judgment rests entirely on good paragraphs of a complaint, an error in overruling a demurrer to a bad paragraph will be regarded as harmless. So, where the record affirmatively shows that no harm resulted from overruling a demurrer to one of several paragraphs of an answer, the error will be deemed not prejudicial. \* \* \* Where facts are admitted in an agreed statement, an error in overruling a demurrer to a bad paragraph of answer is, as it has been held, rendered harmless."

Again, in section 666, it is said:

"Where a demurrer is overruled to a bad paragraph of a complaint consisting of several paragraphs, there is prejudicial error, unless the record affirmatively shows that the judgment rests on a good paragraph or paragraphs. If the record proper clearly shows that the judgment rests on the good paragraph or paragraphs, there is no available error, since the court can see from an inspection of the record that no harm was done the complaining party."

[5] In the instant case there is no agreed statement of facts, nor is there any evidence from which this court, by an inspection of the record, can determine that the judgment appealed from was rested on any particular paragraph of the answer; but paragraph 3, which we hold sufficient to constitute a defense, is as effectually admitted by the demurrer, and to which the plaintiff declined to plead, as if evidence had been introduced to establish it, or there had been an agreed statement of facts showing its truth. We therefore conclude that the authorities, *supra*, as well as the rules governing appellate practice, require us, under the condition of this record, to affirm the judgment, since we must dispose of the cause from the record before us, and not from one which plaintiff might make, if given a second opportunity.

Wherefore the motion for an appeal is sustained, the appeal granted, and the judgment is affirmed.

**CATOR v. COMMONWEALTH BONDING & CASUALTY INS. CO. (No. 80-2865.)**

(Commission of Appeals of Texas, Section A. Nov. 12, 1919.)

**1. CORPORATIONS ⇐80(10) — WAIVER OF RIGHT TO CANCEL SUBSCRIPTION CONTRACT BY TRANSFER OF STOCK.**

Though the organization of a corporation under the laws of Arizona, instead of under the laws of Texas, as provided in a stockholder's contract, was a departure from the terms of the contract sufficient to warrant its cancellation at the suit of the stockholder, the transfer of his stock after he had acquired knowledge of such departure was a waiver by him of his right of cancellation on such ground.

**2. CORPORATIONS ⇐80(2) — CHARGEABLE WITH FRAUD OF AGENTS IN PROCURING SUBSCRIPTIONS.**

A corporation is chargeable with the fraudulent representations of its agents made for the purpose of procuring subscriptions, the rule applying to subscription contracts entered into between the subscriber and promoter prior to incorporation, when such contracts have been adopted by the corporation.

**3. CORPORATIONS ⇐79—NO ENFORCEMENT OF PROMOTER'S CONTRACT PRIOR TO ADOPTION.**

A contract by a promoter in which he attempts to bind the future corporation, without a present existence, and to create a liability against it, cannot be enforced against the corporation unless and until adopted by it.

**4. CORPORATIONS ⇐30(1)—FIDUCIARY RELATION BETWEEN PROMOTER, COMPANY, AND STOCKHOLDERS.**

The promoter of a corporation to be formed stands in a fiduciary relation toward it, and to the subscribers to its stock.

**5. CORPORATIONS ⇐80(2) — LIABILITY FOR FRAUD OF PROMOTING COMPANY.**

Where one company acted as promoter of another, and procured by misrepresentations a subscription to the latter's stock, as between the promoting company and the subscriber the fraud of the company was ground for rescission, and the organized company for whose benefit the subscription contract to its stock was made through its acceptance or adoption acquired no higher right than that of the promoting company.

**6. CORPORATIONS ⇐80(2) — RESPONSIBILITY FOR FRAUDULENT REPRESENTATIONS INDUCING STOCK SUBSCRIPTION.**

A company accepting a subscription to its capital stock, procured by one technically not its agent through fraudulent misrepresentations made without its authority, not only adopts the act of such a one in receiving the subscription, but also impliedly adopts and becomes responsible for any fraudulent representations made to induce the subscription, whether or not it is without knowledge or notice of the fraud, and cannot defend the stockholder's suit for rescission.

**7. CORPORATIONS ⇐80(10)—NO WAIVER OF RIGHT TO RESCIND SUBSCRIPTION IN ABSENCE OF KNOWLEDGE OF FRAUD.**

Where a stockholder, induced to subscribe by fraudulent misrepresentations of the promoter, had no knowledge of the fraud when he transferred his stock; he did not thereby waive his right to rescind his subscription.

**8. CONTRACTS ⇐265—PLACING OTHER PARTY IN STATU QUO ON RESCISSION.**

The rule that one who seeks rescission of a contract for fraud must be able to place the other party in statu quo only requires that the other shall be placed in substantially his original situation, and that the rescinding party shall derive no unconscionable advantage from his conduct.

**9. CORPORATIONS ⇐83—CANCELLATION OF SUBSCRIPTION; JUDGMENT PROTECTING COMPANY IN SUIT TO CANCEL STOCK SUBSCRIPTION.**

In suit to rescind a stock subscription, where the company to which plaintiff had assigned his certificate was made a party defendant, judgment ordering surrender of the certificate for cancellation *held* effectually to protect the main defendant, the company whose stock was sought to be canceled, being tantamount to a tender and return by plaintiff of the certificate.

**10. CORPORATIONS ⇐80(12)—NO RECOVERY FROM COMPANY OF AMOUNT PAID PROMOTER ON RESCISSION OF SUBSCRIPTION.**

Where a contract to subscribe to corporate stock stipulated that an amount was paid the promoters in consideration of their agreement to organize and incorporate the company free from expense to stockholders, and none of the amount was paid or received by the company, on rescinding his subscription for misrepresentations a stockholder was not entitled to recover the amount from the organized company.

Error to Court of Civil Appeals of Seventh Supreme Judicial District.

Suit by L. S. Cator against the Commonwealth Bonding & Casualty Insurance Company. From judgment for plaintiff, defendant appealed to the Court of Civil Appeals, which reversed and remanded (175 S. W. 1074), and plaintiff brings error. Judgment of the Court of Civil Appeals reversed, and judgment of the trial court reformed, and as reformed affirmed on recommendation of the Commission of Appeals.

J. A. Stephens, of Benjamin, H. E. Hoover, of Canadian, and Chas. L. Black, of Austin, for plaintiff in error.

F. H. Haddix, of Los Angeles, Cal., and Lumpkin & Harrington, of Amarillo, for defendant in error.

SONFIELD, P. J. Suit by plaintiff in error to cancel a subscription to the capital stock of the Commonwealth Bonding & Casualty Insurance Company, to recover \$625, the amount of cash paid on such subscription, and the cancellation of a note in the sum of



\$4,375, and a deed in trust on certain lands in Hansford county, executed under the terms of the subscription contract. Trial to the court resulted in a judgment in favor of plaintiff in error, canceling the subscription contract, the note and deed in trust, and decreasing the recovery of the \$625. The Court of Civil Appeals reversed the judgment of the district court, and remanded the cause. 175 S. W. 1074.

Plaintiff in error entered into a written contract of subscription to the capital stock of the Commonwealth Bonding & Casualty Insurance Company, a corporation in process of organization. The contract was entered into with the Commonwealth Organization Company, promoters of the proposed corporation. For convenience, the corporation will be referred to as "Commonwealth Company" and the promoting company as "Organization Company." The contract of subscription provided that the corporation should be organized under the laws of Texas, with an authorized capital stock of \$300,000, and a paid-up capital of at least \$200,000, free from organization expenses. The subscription was for 125 shares of the par value of \$10 each, plaintiff in error agreeing to pay therefor the sum of \$5,000, \$4,375 to be paid in money or securities, at any time after June 1, 1911, upon receipt of notice that a certain amount of capital stock had been subscribed in good faith; the sum of \$625, to be paid concurrently with the execution of the contract, to the Organization Company in consideration of the agreement to organize a corporation, and in lieu of any further or other contribution to the expense of organizing and incorporating the company. The contract was dated the 12th day of December, 1910. Upon its execution plaintiff in error executed and delivered to C. S. McDonald, who represented the Organization Company, his note in the sum of \$625, payable to the order of McDonald, which note plaintiff in error alleged was afterwards delivered to the Organization Company, and has been fully paid by him. Thereafter plaintiff in error executed to the Commonwealth Company his note in the sum of \$4,375 and a deed in trust to certain lands in Hansford county to secure same. The corporation was, in fact, organized under the laws of Arizona.

It was alleged, and the evidence established, that McDonald represented, among other things, that at the time of the execution of the contract \$200,000 of the stock of the proposed corporation had been fully paid in cash free of all expenses; that the representation was fraudulently made, was material, and was relied upon by plaintiff in error; that the cash or paid-up capital did not at any time exceed the sum of \$16,000. It was further alleged and established that the stock was worthless, and had not then and had never had a market value.

The Commonwealth Company answered that plaintiff in error had participated, by proxy, in a meeting of the stockholders, in which it was determined that incorporation should be under the laws of Arizona; that after plaintiff in error had knowledge that the corporation had been so organized he transferred his certificates of stock to the Bankers' Guaranty Company, and thereby plaintiff in error was estopped to seek cancellation on the ground of breach of contract in this particular; and that by reason of the transfer of his stock he was in no position to return the same and restore the parties to their original status; and for this reason he should be denied cancellation on any ground alleged.

The Bankers' Guaranty Company, herein after referred to as the "Bankers' Company," was a party defendant to the suit, and filed its answer, admitting that plaintiff in error had transferred to it his certificate of stock; that it was then, and had been at all times, ready to surrender the stock and disclaimed any interest therein; that the transfer of the stock by plaintiff in error was for the sole purpose of enabling the Bankers' Company to carry out the purposes for which the Commonwealth Company had been incorporated. The judgment of the district court recites that the certificate of stock is in possession of the Bankers' Company, and orders the Bankers' Company to deliver it up for cancellation.

[1] We concur in the holding of the Court of Civil Appeals that, while the organization of the corporation under the laws of Arizona, instead of under the laws of the state of Texas, as provided in the contract, was, under the evidence, a departure from the terms of the contract, sufficient to warrant cancellation, the transfer of his stock by plaintiff in error, after he had acquired knowledge of such departure, was a waiver of the right of cancellation on this ground.

The Court of Civil Appeals held the representation that \$200,000 of the capital stock of the proposed corporation had been paid in cash prior to the execution of the subscription contract, both fraudulent and material. The undisputed evidence establishes that the representation was relied upon by plaintiff in error, who was thereby induced to enter upon the contract. Relief was denied him because the evidence did not disclose notice to the corporation of the fraudulent representation at the time of its adoption of the contract; and on the further ground that he, having transferred his stock to the Bankers' Company, was in no position to restore the status quo.

[2] The authorities agree that a corporation is chargeable with the fraudulent representations of its agents made for the purpose of procuring subscriptions. "The well-established rule now is that a corporation

cannot claim or retain the benefit of a subscription which has been obtained through the fraud of its agents. The misrepresentations are not regarded as having actually been made by the corporation, but the corporation, is not allowed to retain the benefit of the contract growing out of them, being liable to the extent that it has profited by such misrepresentations. The question of the authority of the agent taking the subscription is immaterial herein. It matters not whether he had any authority, or exceeded his authority, or concealed its limitations. The corporation cannot claim the benefits of his fraud without assuming also the representations which procured those benefits." 1 Cook, Corp. (7th Ed.) § 140.

We are of opinion that the same rule should apply to subscription contracts entered into between the subscriber and promoter prior to incorporation when such subscription contracts have been adopted by the corporation.

It has been held broadly that fraudulent representations made by a promoter prior to the organization of the corporation, in order to induce subscriptions, do not give ground for rescission. This holding is based upon the proposition that a promoter is not the agent of the corporation.

A promoter's relation to the future corporation is unique. There are not wanting authorities declaring him an agent of the proposed corporation. Thus in *Dickerman v. Northern Trust Co.*, 176 U. S. 181, 20 Sup. Ct. 311, 44 L. Ed. 423, it is said:

"The promoter is the agent of the corporation and subject to the disabilities of an ordinary agent."

This language is quoted with approval in *Fred Macey Co. v. Macey*, 143 Mich. 138, 106 N. W. 722, 5 L. R. A. (N. S.) 1036.

[3] This is hardly an accurate statement. An agency implies the existence of a principal, and a delegation of authority from the principal to the agent. A nonexistent corporation can have no agent. *Railway Co. v. Granger*, 86 Tex. 350, 24 S. W. 795, 40 Am. St. Rep. 837. It follows, therefore, that a contract by a promoter in which he undertakes to bind the future corporation and create a liability against it cannot be enforced against the corporation unless and until adopted by it. *Railway v. Granger*, supra; *Weathersby v. Lumber Co.*, 107 Tex. 474, 180 S. W. 735.

[4] Though the promoter cannot, strictly speaking, be regarded as an agent, his relation to the future corporation and to the subscribers is of a fiduciary character. He is an intermediary between the corporation and the subscribers, future members, who in the aggregate will form the corporation. His relation to the corporation is analogous to that of an agent to his principal, and the

rules governing the relation of principal and agent have been extended to apply to that of the promoter to the corporation. Under all the authorities, he is held accountable to the corporation in like manner as though the relation of principal and agent, in fact, existed.

Contracts of subscription, prior to incorporation, differ in some respects from ordinary contracts, and are not governed entirely by the general principles of the law of contracts. They also have elements differentiating them from other contracts of promoters. Strictly speaking, there can be no subscription to the capital stock of a corporation prior to incorporation, because, until organized, there is no capital stock. Technically and without reference to statutory provisions, they are contracts to subscribe rather than contracts of subscription. Various theories of liability under, and enforcement of, such subscription contracts have been advanced by the courts, a statement or discussion of which is not deemed necessary.

We are impressed with the correctness of the statement in 1 Machen, Corp. § 257, as follows:

"Upon whatever theory subscriptions to the capital of a projected company are to be enforced—whether because of adoption or acceptance by the company after its incorporation, or because they are deemed binding in the first instance—they are, nevertheless, subject to rescission for fraud or misrepresentation of the promoters to the same extent as if the company had been already incorporated."

If the subscription be regarded as a continuing offer binding only upon its acceptance by the corporation, the offer being induced through fraudulent representations, such acceptance or adoption, there being no other or new consideration, does not relieve it from the taint of fraud and make it invulnerable to attack on that ground. It stands on a parity with any other contract having its inception in fraud, and in the absence of intervening rights is voidable at the instance of the party thus induced to make the offer.

[5] If the subscription be regarded as a present, binding contract, made for the benefit of the future corporation and enforceable by it upon organization, the rule that the rights of the person for whose benefit a contract is made are subject to the equities growing out of the contract between the original parties applies. 13 C. J. p. 610. As between the Organization Company and plaintiff in error, parties to the contract, there can be no question that the fraudulent representations by the agent of the Organization Company inducing the contract would be available as a ground for rescission. The corporation for whose benefit the contract was made, through its acceptance or adop-

tion, acquired no higher or better right than the Organization Company.

[6] The corporation accepting a subscription to its capital stock procured by one technically not its agent, through fraudulent misrepresentations made without its authority, not only adopts the act of such a one in receiving the subscription, but also impliedly adopts and becomes responsible for any false and fraudulent representations which may have been made to induce the subscription. 2 Clark & Marshall Private Corporations, 1463. That the corporation was without knowledge or notice of the fraud is immaterial. No liability is sought to be imposed upon the corporation. Plaintiff in error seeks only to be relieved from liability under a contract having its inception in fraud. He seeks to prevent the corporation from deriving any benefit under such contract. Relief is granted, not because of the culpability of the corporation, nor because it was guilty of any wrong in the premises, but only on the ground that it can derive no benefit or profit from the contract thus procured.

The corporation in adopting the contract takes it subject to all defenses and any right of rescission which might exist in favor of plaintiff in error as against the Organization Company, with whom the contract was made. It cannot claim the benefits of the promoter's fraud in procuring the subscription, without assuming also the representations through which the benefits were procured.

[7] The remaining question is: Did plaintiff in error waive his right of rescission on this ground through the transfer of his stock to the Bankers' Company?

In order to a waiver of the right of rescission, there must be knowledge of the fraud. The undisputed evidence establishes that at the time of the transfer of his certificate of stock by plaintiff in error he had no knowledge of the falsity of the representation.

The evidence establishes that the stock was worthless, and has not, and never had, a market value. There are authorities to the effect that this obviates the necessity of the return, or offer to return, of the stock certificate." 1 Thompson, Corporations (2d Ed.) § 742; 2 Fletcher, Corporations, § 631. In the view we take of this question, it is not necessary to determine this proposition.

[8] The rule that one who seeks rescission must be able to place the party in statu quo only requires that the party shall be placed in substantially his original situation, and that the other shall derive no unconscionable advantage from his conduct. *Basye v. Paola Refining Co.*, 79 Kan. 755, 101 Pac. 658, 25 L. R. A. (N. S.) 1302, 131 Am. St. Rep. 346.

[9] The Bankers' Company was a party defendant to the suit. In its answer it disclaimed any interest in the stock, and offered to surrender the certificate. The uncontroverted evidence is, and the judgment so states, that the stock certificate was in possession of the Bankers' Company, and the judgment ordered its surrender for cancellation. There was no appeal from the judgment by the Bankers' Company, nor did defendant in error complain of the court's judgment in this particular. There is nothing in the record to indicate that the Bankers' Company has not complied with the terms of the judgment rendered against it, from which it has not appealed. The judgment, in our opinion, effectually protects the Commonwealth Company, and is tantamount to a tender and return by plaintiff in error of the stock certificate.

[10] Under the judgment of the district court, plaintiff in error was decreed a recovery of the sum of \$625, the amount paid by him at the date of the execution of the contract, together with interest.

As stated by the Court of Civil Appeals, the subscription contract expressly stipulates that the \$625 is paid to the promoters in consideration of their agreement to organize and incorporate the company free of expense to the stockholders; and the testimony shows that none of this amount was ever paid to or received by the Commonwealth Company. Plaintiff in error was therefore not entitled to a recovery of this sum from the Commonwealth Company.

We are of opinion that the judgment of the Court of Civil Appeals should be reversed, and the judgment of the district court reformed so as to exclude a recovery of the sum of \$625, with interest, and, as so reformed, affirmed.

PHILLIPS, C. J. The judgment recommended by The Commission of Appeals is adopted and will be entered as the judgment of the Supreme Court.

**TEXAS FIDELITY & BONDING CO. v.  
GENERAL BONDING & CASUALTY  
INS. CO. (No. 105-2944.)**

(Commission of Appeals of Texas, Section B.  
Nov. 19, 1919.)

**1. CORPORATIONS ⇨374—ULTRA VIRES ACTS;  
INCIDENTAL OR CONSEQUENTIAL POWERS NOT  
EXPRESSLY PROHIBITED.**

The doctrine of ultra vires ought to be reasonably understood and applied, and whatever may fairly be regarded as incidental to, or consequential upon, those things which a corporation has been authorized to do ought not, unless expressly prohibited, be held by judicial construction to be ultra vires.

**2. CORPORATIONS ⇨484(2) — ULTRA VIRES  
ACTS; POWER TO INDEMNIFY SURETY UPON  
BAIL BOND.**

A corporation, having the power in its charter to act as surety on any bond required in the course of any judicial proceeding may enter into an indemnity agreement to indemnify a surety on a bail bond, the character of the instrument by which the corporation binds itself being immaterial, where it in fact furnished security on the bond.

**Error to Court of Civil Appeals of Fifth  
Supreme Judicial District.**

Suit by the Texas Fidelity & Bonding Company against the General Bonding & Casualty Insurance Company. A judgment for defendant was affirmed by the Court of Civil Appeals (184 S. W. 238), and plaintiff brings error. Reversed, and rendered in favor of plaintiff, as recommended by the Commission of Appeals.

Etheridge, McCormick & Bromberg, of Dallas, for plaintiff in error.

W. J. J. Smith, of Dallas, and W. D. Cardwell, of Wichita Falls, for defendant in error.

**MONTGOMERY, P. J.** One A. C. Karslake was by three several informations charged with felonies alleged to have been committed in the state of Louisiana. He was arrested and imprisoned. Acting by his attorney he applied to the plaintiff in error, Texas Fidelity & Bonding Company, to become his surety on three bail bonds required under the laws of Louisiana in order to obtain his liberty pending a trial of the causes. The plaintiff in error agreed to sign said bonds as surety upon being indemnified for so doing by the attorneys for Karslake and by the defendant in error, the General Bonding & Casualty Insurance Company, and the payment of a premium of \$100.

The General Bonding & Casualty Insurance Company, in consideration of \$100 to it paid by Karslake, executed and delivered to the Texas Fidelity & Bonding Company a

written agreement by which it agreed to indemnify the fidelity company against all liability as surety on the three bonds. A copy of one of these agreements appears in the opinion of the Court of Civil Appeals. 184 S. W. 238.

The bail bonds were executed by Karslake as principal, and the Texas Fidelity & Bonding Company as surety, and were approved by the proper authority, and Karslake was liberated.

Karslake failed to appear at the time stipulated in the bonds, and thereupon they were forfeited and judgment rendered against the Texas Fidelity & Bonding Company as surety. That company paid the judgments and instituted this suit to recover from the General Bonding & Casualty Insurance Company the amount so paid, with interest and attorney's fees. The defendant in its answer alleged that it was incorporated under the laws of Texas for the purpose of doing a surety, casualty, and liability insurance business, and none other; that it was not authorized and empowered to do business in the state of Louisiana, and that the contract was void for want of authority and corporate power on its part to make it. Both parties to this controversy were incorporated under title 71, chapter 13, R. S. 1911, article 4928 et seq.

The Texas Fidelity & Bonding Company had at the time of the execution of the bonds obtained a permit to do business in Louisiana, but the General Bonding & Casualty Insurance Company had not obtained authority to transact business in that state. The Texas Fidelity & Bonding Company in its petition alleged that Karslake, who was not made a party, was a fugitive from justice, insolvent, and a nonresident of the state. The contract sued on was executed and delivered in this state and all negotiations with reference thereto occurred in this state.

The trial court held that the contract sued on was ultra vires, and rendered judgment that plaintiff take nothing as against the General Bonding & Casualty Insurance Company. This judgment was by the Court of Civil Appeals affirmed. 184 S. W. 238.

**Opinion.**

In view of the conclusion we have reached upon the principal question, that is the power of the corporation to make the contract, made the basis of the suit, it will not be necessary to consider any other question.

The statute under which the Texas Fidelity & Bonding Company and the General Bonding & Casualty Insurance Company were incorporated, among other things, authorized such corporations to "act as surety and guarantor of the fidelity of employes, trustees, executors, administrators, guard-

ians, or others appointed to, or assuming the performance of, any trust, public or private, under appointment by any court or tribunal, or under contract between private individuals or corporations; also on any bond or bonds that may be required to be filled in any judicial proceeding; also to guarantee any contract or undertaking between individuals, or between private corporations, or between individuals or private corporations and the state and municipal corporations or counties, or between private corporations and individuals." Article 4928, R. S. 1911.

Under this statute the General Bonding Company was authorized to act as surety on any bond required in the course of any judicial proceeding, and was also authorized to guarantee any contract or undertaking between individuals and corporations.

The plaintiff in error argues that the transaction here involved was within the power of defendant in error under both the clause granting power to act as surety and that authorizing the guaranty of contracts and undertakings between corporations and individuals.

Under the clause authorizing the corporation to act as surety it is urged that the effect of the transaction was, so far as the corporation and the rights of its stockholders are concerned identical with the effect which would have resulted from the execution of the bail bonds by the corporation as surety; that as the corporation had the power to pledge its credit for the appearance of the accused, Karslake, to answer the criminal charges, it could do so either directly by signing the bonds, or indirectly by securing another to do so and agreeing to indemnify the actual signer against loss. Under the provision authorizing the guaranty of contracts and undertakings of others the contention is that when the Texas Fidelity & Bonding Company signed the bail bonds as surety at the request of Karslake there arose by implication of law an implied contract or undertaking on the part of Karslake to appear in accordance with the condition of the bonds, or, failing in that, to pay the penalties named in the bonds, and that the defendant in error in legal effect guaranteed that Karslake would comply with his contract or undertaking.

[1] In examining these propositions, we will refer briefly to some of the rules which have been applied in determining whether contracts of corporations are ultra vires. In *Attorney General v. Great Eastern Ry. Co.*, 5 App. Cases, 473, Lord Chancellor Selborne, referring to the doctrine of ultra vires, said:

"This doctrine ought to be reasonably and not unreasonably understood and applied, and that whatever may fairly be regarded as incidental to or consequential upon those things which the Legislature has authorized, ought not, unless expressly prohibited, to be held by

judicial construction to be ultra vires. In the application of the doctrine the court may be influenced somewhat by the special circumstances of the case."

The foregoing was quoted with approval by the Supreme Court of the United States in *Jacksonville Ry. Co. v. Hooper*, 180 U. S. 514, 16 Sup. Ct. 379, 40 L. Ed. 515. In this last case, which involved a contract made by a railroad company by which it procured a lease and undertook to maintain a summer hotel, and to keep the property insured for the benefit of the lessor, it is said:

"Although the contract power of railroad companies is to be deemed restricted to the general purposes for which they are designed, yet there are many transactions which are incidental or auxiliary to its main business, or which may become useful in the care and management of the property which it is authorized to hold, and in the safety and comfort of the passengers whom it is its duty to transport. Courts may be permitted, where there is no legislative prohibition shown, to put a favorable construction upon such exercise of power by a railroad company as is suitable to promote the success of the company, within its chartered powers, and to contribute to the comfort of those who travel thereon."

In *Brown v. Winnissimmet Co.*, 11 Allen (Mass.) 326, Chief Justice Bigelow of the Supreme Court of Massachusetts said:

"We know of no rule or principle by which an act creating a corporation for certain specific objects, or to carry on a particular trade or business, is to be strictly construed, as prohibitory of all other dealings or transactions, not coming within the exact scope of those designated. Undoubtedly the main business of a corporation is to be confined to that class of operations which properly appertain to the general purposes for which its charter was granted. But it may also enter into contracts and engage in transactions which are incidental or auxiliary to its main business, or which may become necessary, expedient, or profitable in the care and management of the property which it is authorized to hold under the act by which it was created."

In *Northside Railway Co. v. Worthington*, 88 Tex. 562, 30 S. W. 1055, 53 Am. St. Rep. 778, there is a valuable discussion of this question by Chief Justice Gaines, in which he distinguishes between that class of contracts which are within the power of the corporation to make, as incidental to its authorized business, and those contracts which though beneficial are entirely outside the scope of the authorized business of the corporation.

As showing the extent to which the authorities have gone in upholding contracts not strictly within the charter powers of a corporation, but which were made in furtherance of its business, we refer to *Munoz v. Brassel* (Civ. App.) 108 S. W. 417, in which it was held that a corporation authorized to engage in the wholesale liquor business had

authority in furtherance of its principal business to sign as surety the statutory bond required of a retail liquor dealer. In this case writ of error was denied by the Supreme Court. The principle upon which this case is founded has been approved in many cases in other jurisdictions. See *Timm v. Grand Rapids Brewing Co.*, 180 Mich. 371, 125 N. W. 357, 27 L. R. A. (N. S.) 186, and note.

A corporation is usually granted its powers in general terms, and the means by which the powers granted are to be exercised are left to the discretion of its managing officers. "If the means employed are reasonably adapted to the ends for which the corporation is created they come within its implied or incidental powers, although they may not be specifically designated by the act of incorporation. The meaning is that, except where expressly restricted by charter or statute, corporations take by implication the right to use all reasonable modes of executing their express powers which a natural person might adopt in the exercise of similar powers. They must have a choice of means adapted to ends, and are not to be confined to any one mode of operation. 10 Cyc. 1097.

[2] The corporation in this case had the power to act as surety on bail bonds. The essence of this power is the right to pledge its assets to secure the personal presence of one charged with crime to answer the charge. So far as the rights of the stockholder and the public are concerned, it can make no difference whether its credit is pledged directly by the execution of the bond as surety or by procuring another to act as surety and agreeing to indemnify such person. In either case the corporation furnishes the security. The practical effect is the same whether the corporation acted as surety on the bond of Karslake, and thus undertook to have him present to answer the charges, or agreed to indemnify another as surety if he failed to so appear. The character of instrument which it employed to bind itself is immaterial. If the corporation agreed to, and did, furnish security on the bond by procuring another corporation or individual to execute the bond, it agreeing to indemnify against loss, it was but the method adopted by it of exercising the power which it had to act as surety.

We also think that under its power to guarantee contracts or undertakings entered into by others the contract was within the charter powers of the corporation. The real transaction was: Karslake was confined in prison and desired bail. He applied to the Texas Fidelity & Bonding Company to furnish security. It agreed to furnish the security if protected by the obligation of the defendant in error to indemnify it against loss. Karslake applied to defendant in error to in-

demnify plaintiff in error against loss, and paid defendant in error for furnishing such indemnity.

The effect of the contract of indemnity was to guarantee that Karslake would comply with the conditions of the bonds, or, if in default, pay the penalties named in the bonds. The real thing done by defendant in error was to guarantee the Texas Fidelity & Bonding Company that Karslake would perform his agreement. So construed, the corporation had express power to enter into the agreement. While there is some technical difference between an agreement to indemnify and a guaranty, yet where the purpose to be accomplished and the liability assumed is practically the same under either form of contract, we do not think a corporation should be permitted to escape liability upon a contract fairly entered into because it adopted the one form of contract rather than the other to accomplish the same result.

We recommend that the judgment of the trial court and the Court of Civil Appeals be reversed, and that judgment be here rendered in favor of the plaintiff in error for the sum of \$6,024.90, with interest thereon from the 24th day of October, 1914, at 6 per cent.

PHILLIPS, C. J. The judgment recommended by the Commission of Appeals is adopted and will be entered as the judgment of the Supreme Court.

PARK v. RICH et al. (No. 86/2888.)

(Commission of Appeals of Texas, Section B. Nov. 5, 1919.)

APPEAL AND ERROR §843(2)—MATTERS NOT NECESSARY TO DECISION ON REVIEW.

Question as to effect of Const. art. 12, § 6, on liability of a stock subscriber not being involved in the case under consideration, or necessary to its decision, motion to express an opinion on the question will be overruled.

On motion for rehearing. Denied.

For former opinion, see 212 S. W. 947.

SADLER, J. The motion for rehearing, with its very extensive accompanying argument, presented by the defendants in error, is nothing more than a repetition of the original contentions made in this cause. Every subject presented by the motion was carefully considered, and we recommend that the motion be overruled.

The plaintiff in error has presented a motion in which we are requested to express an opinion on the question as to the effect of the

Constitution, § 6, art. 12, touching the liability of a stock subscriber, who does not pay his subscription, but causes the corporation to issue to him shares of stock which on their face show to be fully paid and nonassessable, and which stock has been transferred by the original subscriber to an innocent purchaser for value. We do not think the question involved in the case under consideration, or necessary to its decision. An opinion on the proposition called for by the plaintiff in error, in our view of the record presented in this case, would be purely academic. Our holding in the original opinion is based upon the contractual liability of the original stock subscriber.

We recommend that this motion be refused.

**THORNTON et ux. v. GOODMAN.**  
(No. 111-2961.)

(Commission of Appeals of Texas, Section A.  
Nov. 26, 1919.)

**1. MORTGAGES ⇨369(3)—FORECLOSURE SALE NOT INVALID FOR INADEQUACY OF PRICE.**

A sale under a trust deed cannot be avoided merely because of inadequacy of price and an offer on the part of the grantors in the trust deed to pay the debt and expenses incident to the sale, even though the beneficiary under the trust deed was the purchaser and has not disposed of the property.

**2. MORTGAGES ⇨209—ATTORNEY OF BENEFICIARY MAKING FORECLOSURE SALE AS TRUSTEE.**

The effort of a trustee in a trust deed, as attorney of beneficiary, to collect the note secured thereby was not incompatible with his duty as trustee to make a sale in the event of its nonpayment.

**3. MORTGAGES ⇨8—DEED IN TRUST A MERE MORTGAGE WITH POWER OF SALE.**

A deed in trust to secure a debt is in legal effect a mere mortgage with power of sale.

**4. MORTGAGES ⇨24—INTEREST IN DEBT DOES NOT DISQUALIFY TRUSTEE.**

Interest in the debt secured does not disqualify one from acting as trustee in a trust deed.

**5. MORTGAGES ⇨24, 362—MORTGAGEE MAY ACT AS TRUSTEE.**

A mortgagee may himself act as trustee in a trust deed, and become the purchaser at a sale of the property.

**6. MORTGAGES ⇨209—TRUSTEE ACTING AS ATTORNEY FOR BENEFICIARY CREATES NO PRESUMPTION OF FRAUD.**

The fact that a trustee under a trust deed executed to secure a debt acts as attorney for the beneficiary in attempting to collect the debt makes it the duty of the court to scrutinize very closely every act of the trustee in the execution of the trust, but no presumption of fraud can arise from the mere relation.

**Error to Court of Civil Appeals of Eighth Supreme Judicial District.**

Action by Lewis Goodman against A. L. Thornton and wife, a judgment for plaintiff was affirmed in the Court of Civil Appeals, (185 S. W. 926), and the defendants bring error. Reversed and rendered.

G. L. & Atlas Jones, of San Antonio, for plaintiffs in error.

Lea, McGrady & Thomason, of El Paso, for defendant in error.

SONFIELD, P. J. Lewis Goodman, joined by his wife, conveyed in trust to Atlas Jones certain premises in the city of El Paso, to secure the payment of a note in the sum of \$2,500, due one year after date, payable to the order of A. M. Thornton. The note contained a provision for attorney's fees. The deed in trust vested in the trustee the power of sale, in the event of default. The note not being paid at maturity, the trustee, after due notice and advertisement, sold the premises on the first Tuesday in November, 1914, to A. M. Thornton for the sum of \$1,000, and executed a deed conveying the property to her. On November 11, 1914, Lewis Goodman, plaintiff, brought this action against A. L. Thornton and his wife, A. M. Thornton, defendants, seeking to cancel the trustee's deed and to recover title and possession of the premises, together with their rental value. In his petition, plaintiff offered to pay the principal and interest of the note, the expenses incident to the sale, together with attorney's fees, and prayed the court to find the amount he should, in equity, be required to pay defendants.

The case was tried to a jury, and submitted upon special issues. The trial court filed additional findings. Judgment was entered on the verdict in favor of plaintiff, canceling the trustee's deed and awarding him title and possession of the premises and the sum of \$885.50 for rents. The judgment further established the debt of plaintiff to defendant A. M. Thornton, and this amount, less the sum of \$885.50, was awarded defendant A. M. Thornton, with foreclosure of her lien upon the premises. On appeal, the judgment of the district court was affirmed. 185 S. W. 926.

The findings of the jury and additional findings by the trial court, together with a full statement of the facts, are contained in the opinion of the Court of Civil Appeals; but for the purpose of determining the questions presented, the following statement will suffice:

Atlas Jones, the trustee, was a member of the law firm of G. L. & Atlas Jones. In making the loan, the trustee acted as attorney for A. M. Thornton, examining the title to the land and preparing the note and deed in trust, which fact was known to plaintiff.

When the note matured, it was sent to the bank for collection, and was thereafter placed in the hands of G. L. & Atlas Jones for this purpose. The attorneys notified plaintiff of this fact, and advised that, if the note was not paid by a given date, the property would be sold under the deed in trust, but, if paid without further trouble, a reduction in the attorney's fees would be made. Receiving no answer to this communication, the trustee proceeded to post the notices of sale and to advertise the same, in full compliance with the law, and, in addition, mailed plaintiff a copy of the notice, and thereafter made the sale. The jury found the market value of the premises to be \$5,800 at the date of sale.

The trial court and Court of Civil Appeals found there was no actual fraud on the part of the trustee, and no irregularity of any kind in the sale, which was made fairly and in good faith. The Court of Civil Appeals held, however, that the action of the trustee in accepting employment as attorney for the beneficiary, to collect the note, without the knowledge and consent of plaintiff, constituted a constructive fraud upon him; that this, coupled with the inadequacy of price, was sufficient to warrant the setting aside of the sale, especially in view of the fact that the beneficiary was the purchaser, the premises were still in her hands, and plaintiff had promptly sought to set aside the sale, offering to do complete equity.

[1] Unless the trustee was disqualified to act, the sale was valid, without taint of fraud, unfairness, or slightest irregularity, or any circumstances tending to prevent the property from bringing approximately its reasonable value. This being true, the sale cannot be avoided merely because of inadequacy of price. *Pearson v. Flanagan*, 52 Tex. 266; *Klein v. Glass*, 53 Tex. 37; *Irvin v. Ferguson*, 83 Tex. 491, 18 S. W. 820; *House v. Robertson*, 89 Tex. 681, 36 S. W. 251. Nor will the sale be set aside on the offer of plaintiff to pay the debt and expenses incident to the sale, even though the beneficiary under the trust deed was the purchaser, and has not disposed of the property. In the absence of fraud, unfairness, or irregularity, the offer presents no ground for such relief.

This leaves for determination the one question: Was Jones, through his employment as attorney for the beneficiary under the trust deed, disqualified from acting as trustee?

[2] We can perceive no good reason for holding that a disqualification exists. Default having been made in the payment of the note, a sale was authorized. There was no controversy as to the existence of the debt, or its amount. It was at least as much to the interest of the debtor as to the beneficiary that the note be paid without the exercise of the power of sale. No active duty was imposed upon the trustee until directed to make the sale. The payment of the note would have terminated the trusteeship. The effort of Jones, as attorney for the beneficiary, to collect the note was not incompatible with his duty as trustee to make the sale, in the event of its nonpayment. The duties of the trustee were specifically set out in the instrument, and any departure therefrom would be easy of detection.

We think the view that no disqualification exists logically results from the previous decisions of the Supreme Court.

[3-6] A deed in trust to secure a debt is in legal effect a mere mortgage with power of sale. *McLane v. Paschal*, 47 Tex. 365. Interest in the debt secured does not disqualify one from acting as trustee. The mortgagee may himself act as trustee, and become the purchaser under such sale. *Howard v. Davis*, 6 Tex. 174; *Scott v. Mann*, 33 Tex. 726; *Goodgame v. Rushing*, 35 Tex. 722; *Bohn Bros. v. Davis*, 75 Tex. 24, 12 S. W. 837. In view of this holding by our Supreme Court, the Circuit Court of Appeals of the Fifth Circuit, in *Randolph v. Allen*, 73 Fed. 37, 19 C. C. A. 367, held a sale by a trustee, an employé of the beneficiary, and at his direction, valid. If the mortgagee himself and his employé are qualified to so act, by what process of reasoning can it be held that an attorney of the beneficiary is, through the relation, disqualified? The relation of the parties would make it the duty of the court to scrutinize very closely every act of the trustee in the execution of the trust; but no presumption of fraud can arise from the mere relation. *Clark v. Eaton*, 100 U. S. 149, 25 L. Ed. 573.

We are of opinion that the judgment of the Court of Civil Appeals should be reversed, and judgment here rendered for defendants.

PHILLIPS, C. J. The judgment recommended by the Commission of Appeals is adopted, and will be entered as the judgment of the Supreme Court.



## TUCKER et al. v. ANGELINA COUNTY LUMBER CO. (No. 108-2942.)

(Commission of Appeals of Texas, Section A. Nov. 26, 1919.)

1. BOUNDARIES  $\S$ 32—SUFFICIENCY OF DESCRIPTION IN PLEADING.

In trespass to try title to land in Lacey league, defendants, claiming part of the land through adverse possession, did not limit their claim to the Moses Hill survey by generally describing the land as being in the latter survey in their pleadings, where they also described the land by metes and bounds.

2. ADVERSE POSSESSION  $\S$ 86(2)—MISTAKE AS TO BOUNDARY.

Where one claims only to the true boundary, wherever situate, his possession beyond such line through mistake is not adverse; but one claiming ownership of all the land within his marked boundaries, which are embraced in the description in a deed under which he claims, is claiming adversely, although he erroneously believes the marked boundary to be the true boundary.

3. DEEDS  $\S$ 111—PARTICULAR DESCRIPTION PREVAILS OVER GENERAL.

There being a repugnance between the general and particular descriptions in a deed, the latter will prevail.

4. ADVERSE POSSESSION  $\S$ 80(3)—REPUGNANT DESCRIPTIONS IN DEED AS NOTICE OF ADVERSE CLAIM.

Description by metes and bounds in deed, together with actual possession, was notice to true owner of adverse claim, although deed erroneously referred generally to the land as being in a different survey.

Error to Court of Civil Appeals of Ninth Supreme Judicial District.

Trespass to try title by the Angelina County Lumber Company against L. R. Hines, A. J. Tucker, and others. There was a judgment in favor of some of the defendants which was reversed in the Court of Civil Appeals (184 S. W. 596), and defendants Tucker and others bring error. Judgment of Court of Civil Appeals reversed, and judgment of trial court affirmed.

Minor & Minor, of Beaumont, and W. F. Goodrich, of Hemphill, for plaintiffs in error.

Mantooth & Collins, of Lufkin, and W. D. Gordon, of Beaumont, for defendant in error.

SONFIELD, P. J. Action in trespass to try title by Angelina County Lumber Company, plaintiff, against L. R. Hines, George Honeycutt and wife, G. E. Pratt, A. M. Jones, George Tucker, Andrew J. Tucker and wife, and W. F. Goodrich, defendants, to recover 1,243½ acres of the J. S. Lacey league in Sabine county. By supplemental petition, Elizabeth A. Perry and W. D. Gordan were

vouched in as warrantors. Defendants Hines, and Honeycutt and wife, were disposed of by agreed judgments, and are not before this court. Trial was to the court, and judgment rendered in favor of plaintiff for all the land sued for, except a tract of 31 acres awarded to defendants Andrew J. Tucker and wife, and a tract of about 35½ acres awarded to defendants A. M. Jones, G. E. Pratt, and W. F. Goodrich, and awarding plaintiff a recovery against W. D. Gordan on his warranty. On appeal, the Court of Civil Appeals reversed the judgment of the district court, and rendered judgment vesting title to all the lands sued for in plaintiff. 184 S. W. 596.

On the trial the following agreement was entered into between the parties:

"It is agreed between the counsel for all parties that the plaintiff has title from the sovereignty of the soil to the John S. Lacey survey described in plaintiff's petition, unless it is affected by, and divested through, defendant's plea of the statutes of limitation under the three, five, and ten years statutes."

It appears that in January, 1880, James A. Allen conveyed to George W. Tucker 317 acres of land, described generally as a part of the Moses Hill survey, and particularly by metes and bounds, which deed was duly recorded in the same year. The defendants herein claim under George W. Tucker, who, on the 22d day of September 1909, conveyed 158½ acres to defendants Jones and Pratt, and on the 10th day of September, 1909, conveyed 158½ acres to defendant Andrew J. Tucker. In each conveyance the land is described as a part of the Moses Hill survey, and further by metes and bounds.

The Tucker 317-acre tract, except 66½ acres, is a part of the Moses Hill survey. To the extent of 66½ acres, it conflicts with the Lacey league. Of this 66½ acres, 35½ acres form a part of the 158½ acres conveyed by Tucker to defendants Jones and Pratt, and now claimed by these defendants and defendant Goodrich; and the balance of 31 acres forms a part of the 158½-acre tract conveyed by George W. Tucker to defendant Andrew J. Tucker.

The whole controversy is with reference to the 66½ acres so included in the George Tucker 317-acre tract, and a part of the Lacey league.

[1] The lands claimed by defendants were described in their pleas, as in the deeds under which they claimed, as a part of the Moses Hill survey. Whether any part of the land so claimed by them was a part of the Lacey league was a controverted issue. Defendants disputed the location of the boundary line contended for by plaintiff. Believing the Tucker tract in its entirety a part of the Moses Hill, they described their

lands, being the Tucker tract, as a part of that survey. This did not, as held by the Court of Civil Appeals, have the effect of limiting their claim to that part of the Tucker tract within the boundaries of the Moses Hill survey. Their pleas, after the general description, contained a particular description by metes and bounds, and that part of the land in controversy claimed by each was, as stated in the judgment, included in their respective descriptions. The particular description was not vitiated or destroyed by the general description, and defendants were not precluded from establishing title by limitation to any part of the land embraced in their description by metes and bounds, even though such land was not in fact a part of the Moses Hill survey.

[2] Had Tucker claimed only to the true boundary line between the Hill survey and the Lacey league, wherever situate, the holding of the Court of Civil Appeals, that his possession beyond the true boundary line was an encroachment upon the Lacey through mistake and therefore not adverse in its character, would have been correct. Such is not the case made by the record or the legal effect of the evidence adduced.

The trial court found, and there is evidence to sustain the findings, that the 317 acres conveyed by King to George W. Tucker embraced the 66½ acres in controversy; that the boundaries of the tract, as described in the deed, were clearly marked on the ground for more than 40 years before the institution of the suit; that, for more than 10 years prior to the filing of the suit, Tucker held actual, continuous, and adverse possession of the 317-acre tract, including the 66½ acres in controversy, claiming all the land as his own, cultivating, using, and enjoying same as his home, with an inclosure of about 8 acres of the 66½ acres, and with 5 or 6 of the 66½ acres cleared and cultivated.

Tucker claiming ownership of all the land within his marked boundaries and embraced in the description in the deed under which he claimed, the fact that he erroneously believed the marked southern boundary of his tract the true boundary between the Hill and the Lacey surveys, and, so believing, asserted title to and claimed the land, as a part of the Hill, did not prevent his possession, taken and continued for the statutory period, from ripening into title by limitation. *Bruce v. Washington*, 80 Tex. 368, 15 S. W. 1104; *Daughtrey v. N. Y. & T. Land Co.* (Civ. App.) 61 S. W. 947; *Hand v. Swann*, 1 Tex. Civ. App. 241, 21 S. W. 282.

It is urged that the encroachment of a

few acres, of the character shown by defendants, coupled with the fact that the claim, use, and occupation were under a deed, limiting the assertion of title to the Hill survey, was insufficient to apprise the true owner of the Lacey league of an adverse appropriation of any of the land beyond the actual inclosure.

[3, 4] The deed under which Tucker claimed cannot be construed as limiting his claim to land within the Hill survey. Though describing the land as a part of that survey, it also described it by metes and bounds and included therein the land in controversy. There being a repugnance between the general and particular descriptions, the latter will prevail. Tucker's deed, fixing the southern boundary line of his tract so as to embrace the part of the Lacey in controversy, and his actual possession, cultivation, use, and enjoyment of a part of the Lacey so embraced in his deed, were sufficient to apprise the true owner of the Lacey that a claim of right was being asserted to a part thereof and that the claim extended to the marked southern line of the 317-acre tract as described in Tucker's duly recorded deed.

In the Court of Civil Appeals, plaintiff assigned error to the rendition of judgment in favor of defendants Pratt, Jones, and Goodrich, on the ground that there was no evidence of adverse possession for the requisite time of the tract awarded them. It is asserted that Tucker's conveyance to Pratt and Jones, which segregated the tract conveyed from the balance of the land, was of date prior to Tucker's acquisition of title by limitation and there has been no possession since the conveyance. We cannot so hold. The trial court made no finding of the exact date of the commencement of Tucker's actual possession of a part of the land in controversy, but did find such possession for "ten years or more" before the institution of the suit. There was evidence that such possession was taken and continued for a period of "sixteen or eighteen years" before the trial in 1915. There is evidence therefore to sustain the court's conclusion that these defendants established title by limitation to the tract awarded them.

We are of opinion that the judgment of the Court of Civil Appeals should be reversed, and that of the district court in all things affirmed.

PHILLIPS, C. J. The judgment recommended by the Commission of Appeals is adopted and will be entered as the judgment of the Supreme Court.

WELLINGTON RAILROAD COMMITTEE  
et al. v. CRAWFORD et al. (No. 76-2842.)(Commission of Appeals of Texas, Section B.  
Nov. 5, 1919.)1. **BILLS AND NOTES** ¶164—**RAILROAD BONUS  
NOTE NONNEGOTIABLE.**

Notes given as part payment of bonus to railroad and made conditional upon completion of certain grade before certain time were non-negotiable, and contractors to whom railroad had transferred notes had no greater rights against makers than railroad itself would have enjoyed.

2. **SUBSCRIPTIONS** ¶15(1)—**CONTRACT RE-  
QUIRING ENTIRE PERFORMANCE OF CONDI-  
TIONS BY RAILROAD.**

A contract, whereby a railroad company agreed to construct and operate a railroad to a town, in consideration of which citizens agreed to do certain things and pay a certain bonus to the company held to be an entire contract, so that complete performance by the company was necessary to the acquisition by it of any rights, though certain things were to be done and certain payments made before completion of road, since apportionment of benefits to subscribers on partial performance was impossible, and their payments were mere advancements which could be recovered back on failure to perform.

3. **SUBSCRIPTIONS** ¶12—**JOINT OR SEVERAL  
LIABILITY OF SUBSCRIBERS TO RAILROAD  
BONUS.**

Where citizens of town agreed to contribute toward construction of railroad to the town under a contract entered into with railroad by a committee of the citizens, and individually executed notes payable to railroad upon completion of road within certain time, the liability of a citizen so subscribing was severable and not joint, extended only to amount subscribed, and was not affected by any agreement of the committee not authorized by the contract.

4. **SUBSCRIPTIONS** ¶21(4)—**PLEADING SUB-  
SCRIBERS' BREACH OF CONTRACT NECESSARY.**

In an action on notes given by subscribers to a bonus to a railroad and made conditional upon completion of road by certain date, railroad contractor to whom notes had been transferred suing on notes notwithstanding failure to complete road within required time could not avoid such condition upon ground of breach of contract by the citizens making such completion impossible without pleading such breach.

5. **SUBSCRIPTIONS** ¶21(4)—**PLEADING PER-  
FORMANCE OF CONTRACT BY RAILROAD.**

A contract, whereby citizens of a town agreed to make certain payments to and do certain things for railroad upon completion and operation of railroad, being an entire contract, a railroad contractor suing on the citizens' notes could not recover without alleging performance of the contract.

6. **SUBSCRIPTIONS** ¶21(1)—**RIGHT OF CON-  
TRACTOR TO SUE ON SUBSCRIPTION CONTRACT.**

Where citizens of a town agreed to make certain payments and do certain things in con-

sideration of construction and operation of a railroad, and executed notes to railroad conditioned upon completion of track within certain time, railroad contractors to whom notes had been transferred could not, upon failure to complete road within required time, recover on notes, notwithstanding citizens' breach of contract making performance within required time impossible, where contractor, despite breach, treated contract as in force, since contractors, upon breach, had right either to ignore breach and claim rights under contract, or treat contract as at an end and sue for breach.

7. **VENUE** ¶21—**PRIVILEGE OF PENDENTE LITE  
PURCHASERS.**

Parties who acquired notes after action to recover possession thereof had been brought, having acquired their rights pendente lite, were in no position to assert a right to be sued in the counties of their respective residences.

Error to Court of Civil Appeals of Seventh Supreme Judicial District.

Action by Wellington Railroad Committee and others against C. W. Crawford and others. Judgment for plaintiffs reversed by Court of Civil Appeals (174 S. W. 1004), and plaintiffs bring error. Judgment of Court of Civil Appeals reversed, and judgment of trial court affirmed.

G. A. Brown, of Oklahoma City, Okl., R. H. Cocke, Jr., and R. H. Templeton, both of Wellington, and Charles L. Black, of Austin, for plaintiffs in error.

W. W. Wilkinson, of Ft. Worth, J. L. Lackey, of Burkburnett, M. Reynolds, of Wellington, H. B. Hill, of Shamrock, L. D. Miller, of Wheeler, and R. E. Taylor, of Henrietta, for defendants in error.

**MONTGOMERY, P. J.** The record in this case is very voluminous. The transcript contains more than 300 pages, and the statement of facts about 250 pages. We will not undertake to set out the pleadings of the various parties, but will, as briefly as possible, give a history of the transactions out of which this litigation arose, and the facts, so far as necessary, to a proper understanding of the conclusions reached by us.

This litigation arose out of a contract made by numerous citizens of Wellington, Tex., and the Altus, Lubbock, Roswell & El Paso Railroad Company, by which the citizens, acting largely by and through a committee selected by them, agreed to pay certain sums under certain conditions, in order to secure the construction and operation of a railroad to Wellington. For convenience, the Altus, Lubbock, Roswell & El Paso Railroad Company will be called the "railway company," and the committee above referred to will be designated as the "committee." We think it necessary to set out the contract which is the basis of this suit. Said contract was as follows:

"This contract and agreement made and entered into this the 15th day of April, A. D. 1909, by and between the Altus, Lubbock, Roswell & El Paso Railroad Company, a corporation duly chartered and incorporated under and by virtue of the laws of the state of Oklahoma, whose capacity to sue and be sued is hereby admitted by and through Edward Kennedy, president and duly authorized agent of the said Altus, Lubbock, Roswell & El Paso Railroad Company, party of the first part, and the Wellington Railroad Committee of Wellington, Texas, composed of C. B. Boverie, chairman, Vernon Glenn, secretary, A. V. Cocke, treasurer, T. M. Stansell, J. S. Campbell, C. W. Roberts, P. W. Myers, S. Y. Pritchard, John Aaron and R. H. Templeton, and all others who contributed and subscribed to the railroad bonus hereinafter mentioned, parties of the second part, witnesseth:

"(1) That the said parties in consideration of the covenants and agreements hereinafter mentioned, hereby mutually covenant and agree, each with the other, as follows: That said party of the first part, or their assigns, doth hereby agree and obligate itself to construct, equip and complete for operation, and operate same, a railroad of standard gauge from the town of Wellington, Collingsworth county, Texas, to the town of Hollis, in the county of Greer, in the state of Oklahoma, where passenger and freight facilities shall be maintained, said road to be a continuation of the trunk line of the Altus, Lubbock, Roswell & El Paso Railroad; to erect and equip at Wellington, Texas, depot, yard switches, etc., commensurate with all reasonable needs and demands of passenger and freight traffic at said town of Wellington, Texas.

"(2) That in consideration of the advantages, benefits and conveniences to accrue from the construction and operation of said line of railroad from Wellington, Texas, to Hollis, Oklahoma, said parties of the second part hereby agree to pay to the party of the first part the sum of forty thousand dollars, on the terms, conditions and stipulations hereinafter provided, and furthermore, to furnish free of cost to party of the first part grounds for depot, station, switch yards in or near the town of Wellington, Texas, or where said second party may locate said grounds for depot, station and switch yards, said depot grounds to be in the amount of forty acres, same being suitable for said depot grounds, switch yard, and right of way across Collingsworth county, Texas, via Wellington, Texas, according to the survey to be made by virtue of this contract, said right of way to be 100 feet in width.

"(3) That said party of the second part shall deposit in the banks of Wellington, Texas, the sum of four thousand dollars in cash, subject to the checks of Edward Kennedy, president of the said first party railroad company, for engineering and promoting said line of proposed road from Wellington, Texas, through said Collingsworth county, Texas; also said second party shall deposit in the said banks of Wellington, Texas, good notes for the sum of thirty-six thousand dollars, \$16,000 of which shall become due and payable when said first party completes said grade of said proposed railroad between the towns of Wellington, Texas, and Hollis, Oklahoma, according to this contract; the remaining \$20,000 of which shall become

due and payable to the first party upon the completion of said railroad between the said towns of Wellington, Texas, and Hollis, Oklahoma, according to the terms of this contract.

"(4) The said party of the first part shall make a preliminary survey of the said road between the towns of Wellington, Texas, and Hollis, Oklahoma, within sixty days, and shall make a complete and permanent survey within sixty days from the making and signing of this contract.

"(5) That the said parties of the second part shall begin securing deeds of right of way within ten days from the time of notice that survey locating said right of way has been completed, and continue same with due diligence until deeds to the entire right of way have been secured. Said deeds of right of way are to be delivered to party of the first part upon its obtaining a charter from the state of Texas, to build and maintain over permanent survey; in case condemnation proceedings are necessary to secure any part of said right of way, said party of the first part shall institute proper proceedings to secure same upon notice by party of the second part that such condemnation proceedings are necessary, and said second party shall pay all cost, expense of court and damage that may be awarded by such proceedings; said second parties are to secure legal services for the institution and prosecution of such condemnation proceedings.

"(6) It is agreed by and between both of the parties hereto that the grading of said railroad shall begin at Wellington, Texas, within sixty days from the date of this contract, and pushed to completion as rapidly as possible, and be completed not later than March 1st, 1910, after date hereof, and failure to complete said grade on or before said date forfeit all rights, interests and privileges under and by virtue of this contract.

"(7) That party of the first part agrees that the steel rails used in the construction of said road shall not be lighter than sixty pounds rails, and that the material used on the construction of said road shall in all things be first class material.

"(8) That party of the first part shall execute deed to said forty acres of land as soon as same has been located and secured, and said deed shall be delivered in escrow in the First National Bank of Wellington, Texas, to be delivered to party of the first part upon the completion of said road to Wellington, Texas, according to the terms of this contract.

"(9) In consideration of the parties of the first part furnishing right of way from Wellington, Texas, west through Collingsworth county, Texas, party of the first part agrees not to demand an additional bonus from that herein recited for the extension of said road over said survey to be hereafter made, but nothing herein shall be construed to prevent party of the first part from receiving any bonus to locate any town on said survey.

"(10) It is further understood and agreed by and between the parties hereto that in consideration of the advancement of the four thousand dollars in cash to the first party by the said second party for the engineering and promoting said road, the said party of the first part agrees to deposit in the First National Bank of Wellington, Texas, upon the signing of this contract

four thousand dollars in preferred stock in the said Altus, Lubbock, Roswell & El Paso Railroad Company of the line between Altus, Oklahoma, and Hollis, Oklahoma, which is now under construction, said stock to be unincumbered for security in favor of the said second party that said first party will complete said preliminary survey and complete said permanent survey as provided for in this contract, and in case grade is not completed as provided and in the time specified, then, and in that event, the said four thousand dollars in stock of said railroad shall become the property of and payable to the second party.

"(11) The party of the first part obligates itself to construct, equip and complete said line of railroad from Hollis, Oklahoma, to Wellington, Texas, on or before January 1st, 1911, and failure by party of the first part to complete said road according to the terms of this contract and in the time herein specified thereby forfeits all rights, interest and claims upon the said second party by virtue of this contract. It is hereby agreed that time is made an essential of this contract, and is a part of this consideration passing from the said second party.

"(12) The said railroad shall be deemed constructed, equipped and completed by party of the first part in making a trip over said line of road with a train equipment consisting of one engine and ten freight cars, and another equipment consisting of one engine and combination baggage and mail coach and three passenger coaches on or before said January 1st, 1911.

"(13) It is agreed and understood that should the party of the first part fail to begin actual work on said grade within the time specified in the contract, or fail to complete the grade within the said time herein specified and stipulated for the completion of same, said first party thereby forfeits any and all rights, interests and claims by virtue of this contract upon said second party. It is further agreed and stipulated that if the said party of the first part, or its assigns, fail to construct, equip and complete and operate said line of road from the said town of Hollis, Oklahoma, to Wellington, Texas, within the time herein specified for the completion of the same, and in the manner herein specified, said first party shall thereby forfeit any and all further claims to interest by virtue of this contract.

"(14) This contract is made in duplicate and signed by all parties hereto in duplicate, and each is a copy of the other, and each an original."

The contract was signed by the railway company and by the committee named therein, and by a large number of other persons who executed some of the notes referred to in the contract. There were, however, a large number of persons who executed notes who did not sign the contract.

After the execution of the contract, a form of note was agreed on by the railway company and the committee, the form being as follows:

"\$— No.—

"Wellington, Tex., April 15, 1909.

"On demand, six months after date, without grace, for value received, I, we, or either of

us, promise to pay to the order of Edward Kennedy in Wellington, Texas, at First National Bank, ——— dollars, with interest after maturity at the rate of 10 per cent. per annum until paid, and if not paid at maturity, and collected by an attorney, or by legal proceedings, an additional sum of ten per cent. on the amount of this note as attorney's fees.

"This note is given as part payment of bonus as per contract between the Wellington Railroad Committee and the Altus, Lubbock, Roswell & El Paso Railroad Company, of even date with this note, and it is to become due and payable upon completion of the grade for said railroad between Wellington, Texas, and Hollis, Oklahoma, according to said contract, and in case the grade is not completed on or before March 1st, 1910, this note is to become null and void on that date."

The committee secured the notes to be executed by divers persons in the aggregate sum of \$16,000. These notes, for convenience, will be called "grade notes"; and, under an agreement of the parties, these notes were delivered to C. J. Glenn, cashier of the First National Bank of Wellington, to be held by him until the railway company should have completed the grade in accordance with the contract; at which time he was to deliver the notes to the railway company. The notes for \$20,000, called for in the contract, were also executed by various parties, but, under an agreement between the committee and the president of the railway company, were held by A. V. Cocke, one of the committee. The notes, as executed, were approved by the railway company.

After the above transaction, the railway company caused a survey to be made, and made a contract with J. E. Hines and A. C. Crawford, by which Hines and Crawford were to do the necessary grading for the railway company, at a stipulated price, and were to receive in part payment therefor the \$16,000 of "grade notes" when the grade was completed; and the balance was to be paid in cash by the railway company. Before the work was done, Hines quit the partnership, and was succeeded by F. T. Collingsworth. Crawford and Collingsworth graded a large part of the roadbed, and under their testimony had almost completed the work when, on February 7, 1910, they were, at the suit of one J. C. Stansell, enjoined from entering on a section of the land, across which the survey ran, for the purpose of constructing said grade.

As to this section of land, the committee had secured a deed for the right of way, but the description of the land was so defective as to pass no title. This defect, however, was overlooked by the committee, and not known to it until the injunction was issued. The deed which was secured had been delivered to the railway company and accepted by it, and it had failed to call the attention of the committee to the defect.

On February 12, 1910, five days after the

issuance of the injunction, a condemnation proceeding was instituted by the railway company to condemn the right of way across the Stansell land; and the right of way was duly condemned, and the proper judgment was entered on March 4, 1910. The injunction suit was dismissed in May, 1910, and Crawford and Collingsworth again began work and finished the grade some time thereafter, and in May, 1910, got their final estimate from the engineer of the railway company. There was, however, an issue of fact in this case as to whether the grade was ever completed in the manner provided for in the contract between the railway company and the committee.

On March 24, 1910, Crawford and Collingsworth filed a suit, No. 181, in the district court of Collingsworth county, against the railway company and Kennedy, its president, and most of the committee and several other persons who signed the contract, and alleged the execution of the contract between the committee and the railway company, and that they, under the contract with the railway company, had completed the grade, and that the \$18,000 of "grade notes" had been assigned to them, and prayed for judgment against the defendants for said notes or their value.

On April 4, 1910, the railway company and Kennedy filed an answer and cross-complaint in said suit against the committee and others, alleging a breach of the contract by the committee, and asking judgment for the "grade notes."

On May 17, 1910, the committee, joined by numerous other persons who executed the contract with the railway company, filed their answer and also a plea in reconvention, in which they allege: The execution of the contract above referred to, and that the railway company had failed to construct the railroad provided for in said contract, and that the consideration for all of the notes had failed, including both the \$16,000 "grade notes" and the \$20,000 in notes payable upon the completion of the railroad; and further alleging that the "grade notes" were in the possession of the First National Bank of Wellington and C. J. Glenn, who held the same in escrow; and praying that said bank and said Glenn be made parties to the suit, for judgment against all the parties declaring said construction contract and all of said bonus notes canceled, and for the possession of said "grade notes."

On December 18, 1910, Crawford and Collingsworth, the railway company, and Kennedy dismissed their several suits and cross-actions, and thus left the case pending only upon the reconvention of the committee.

In April, 1912, the above suit being still pending, C. J. Glenn, the custodian of the "grade notes," delivered all of them, except about \$1,000, to Crawford and Collingsworth.

These "grade notes" were by Crawford and

Collingsworth assigned and delivered to divers persons.

On June 27, 1912, the Wellington Railroad Committee and others, who were defendants in the original suit, amended their pleadings and filed what is styled "plaintiff's first amended original petition," and thereafter they are designated as plaintiffs. The parties designated as defendants are C. W. Crawford, F. T. Collingsworth, Edward Kennedy, the railroad company, and several other persons to whom it is alleged that the "grade notes" had been delivered by Crawford and Collingsworth.

The plaintiffs' petition covers 48 pages of the transcript, and it is possible only to set out in a general way the allegations thereof. The making of the contract hereinbefore set out is alleged and a breach thereof on the part of the railway company and Crawford and Collingsworth by failure to complete the railway grade within the time provided for in the contract, and it is further alleged that the railroad company and Crawford and Collingsworth had breached the entire contract by total failure to complete and operate the railroad. The facts with reference to the execution and delivery of the "grade notes" to the First National Bank of Wellington and Glenn, its cashier, in escrow, are alleged, as hereinbefore set out, and the further fact that notwithstanding the pendency of the suit the bank and Glenn had delivered said notes to Crawford and Collingsworth and that they had been by Crawford and Collingsworth delivered to the other persons named as defendants, which persons it is alleged lived in Tarrant and Gray counties. It is further alleged that the parties having possession of the notes were threatening to bring separate suits on each of said notes in counties other than Collingsworth county and to join in said suits Crawford and Collingsworth as indorsers, in order to give the court jurisdiction.

There was a prayer for an injunction enjoining the defendants and each of them from transferring, selling, or otherwise disposing of any of said notes or from bringing any suit thereon pending the trial of the case, and a further prayer that on the trial plaintiffs have judgment for possession of said notes and for the cancellation thereof and for recovery against the railroad company for the moneys furnished to pay for the right of way and depot grounds, etc.

The writ of injunction was granted as prayed for, and duly issued. Harry Weis and all the other parties defendant to whom the notes had been transferred by Crawford and Collingsworth filed pleas of privilege claiming the right to be sued in the counties of their respective residences. These pleas of privilege were overruled.

Crawford and Collingsworth answered by alleging that the grade to the railroad company had been completed and that failure to

complete it within the time named in the contract was due to the failure on the part of plaintiffs to secure the right of way and to the issuance of the injunction in the suit brought by Stansell, and that said injunction suit was brought with the connivance and consent of the plaintiffs in order to prevent a completion of the grade within the time named in the contract. They admitted having received the "grade notes" except for about \$1,000 from the bank and Glenn, and that they had assigned and sold certain of said notes to the other defendants. They further alleged that, before entering into the contract to construct the grade for the railroad company, they were informed by the officers of the railroad committee that if the grade was properly completed the "grade notes" would be delivered and paid whether the railroad was ever completed or not. They alleged that they owned certain of the "grade notes" executed by plaintiffs and prayed for judgment thereon and for damages, etc.

Weis and the other defendants holding the notes by transfer from Crawford and Collingsworth, in addition to their pleas of privilege, adopted the answers of Crawford and Collingsworth and also pleaded in reconvention for a judgment on the notes held by them, and in the alternative for judgment against Crawford and Collingsworth for the sums paid to them for said notes.

The railroad company and Kennedy disclaimed any interest in the "grade notes" and pleaded other matters not necessary to be set out.

The defendants made application for change of venue, which was overruled.

The case was tried by jury upon special issues, and on the verdict judgment was rendered for the plaintiffs, the railway committee and others. Upon appeal the judgment was reversed and the cause remanded for a new trial. 174 S. W. 1004.

#### Opinion.

The record in this case is so voluminous, and so many questions are raised, that we will not attempt to treat the several assignments separately, but will determine only those matters which we think are of controlling importance.

[1] We have set out the contract in full and shown the character of the notes executed. The notes are nonnegotiable, and the rights of the parties holding and suing on them in this case are no better than the rights of the railway company would have been if the notes had never been transferred by it.

The notes executed by the several subscribers to the fund to be given as a donation to the railway company refer to the contract, and the rights and liabilities of the subscribers depend in a large measure upon the proper interpretation of the contract as evidenced by the written agreement and the notes.

[2] As we construe the contract, it is in its nature entire. The railway company, before it was entitled to any benefit under the contract, was required to complete and operate the railroad to the town of Wellington. Its agreement was to build, equip, and operate the railroad, and as an inducement to do so the railway committee acting for the citizens of Wellington agreed to do certain things and make certain payments. The nature of the contract, the advantages to be derived by the citizens of Wellington from its performance, as well as the language of the contract itself, clearly indicate that the complete performance by the railroad company was necessary to the acquisition by it of any right under the contract. A partial performance by the railroad company would not have conferred upon the subscribers any of the incidental advantages which constituted the sole consideration for the execution by them of the contract.

The contract makes full performance by the railway company of the entire contract a condition precedent to the right of the railway company to receive and retain any benefits under it. The first, second, eleventh, and thirteenth paragraphs of this contract clearly indicate that it was the intention of both parties that the contract should be entire. The fact that there was an agreement to furnish certain sums of money and secure right of way and depot grounds and deliver the grade notes before the completion of the railroad does not in our opinion make the contract a severable one.

"A contract is entire when by its terms, nature, and purpose it contemplates and intends that each and all of its parts and the consideration shall be common to each other and interdependent. On the other hand, it is the general rule that a severable contract is one which in its nature and purpose is susceptible of division and apportionment." 13 C. J. 561.

"The fact that a contract provides for payment from time to time as the work progresses under the contract does not itself render the contract severable unless the provision amounts to an apportionment of the consideration to the separate portions of the work, and this is true generally of installment payments under a contract." 13 C. J. 564.

There could be no possible apportionment of benefits under the contract in this case. Its partial performance could be of no possible advantage to the subscribers. The payments to be made before completion of the road were mere advancements, and, being such, if the railway company failed to perform the entire contract the amount so paid could be recovered back.

[3] We also think that, in so far as the liability of the makers of the notes is concerned, their liability was several, and not joint. The committee was the limited agent of the subscribers and had no authority as such except as expressed in the contract. Each sub-

scriber was bound only for the amount of the notes executed by him or contributions promised by him, and was not bound by any agreement made by any member of the committee not authorized by the contract.

If, as claimed by Crawford and others, some of the subscribers by causing an injunction suit to be brought prevented the completion of the grade, the liability, if any, for such acts, was that of those causing the suit to be brought, and not of those innocent of any wrong.

With these preliminary conclusions announced, the main question in this case is: What are the rights of the parties under the facts shown? For our present purpose we concede, as claimed by Crawford and others, that the grade was completed, and that under the contract the completion of the grade entitled them to the possession of the grade notes. We further concede that they were entitled to collect the grade notes, and, if payment was refused, could at any time before the time for the completion of the railroad have maintained a suit for their collection. The evidence in this case, however, shows that long before the trial of this case, and in fact before the filing of a cross-action by Crawford and others to recover on the notes, the time for the completion of the railroad had expired, and it had not been completed, and the enterprise had been abandoned. Under these circumstances, could the court properly render judgment on the notes? We have already stated that the contract was entire, and that the railroad and those claiming under it were entitled to nothing under the contract unless the road was completed. If the notes had been paid and afterwards the building of the railroad abandoned, each subscriber would have been entitled to recover the amount paid by him from the railway company. If we are correct in the foregoing conclusion, then it is evident that the notes at the time of the trial were not valid obligations, and the subscribers were entitled to their cancellation unless the right of the subscribers was affected by the alleged breach of the contract relied upon by Crawford and Collingsworth and the other holders of the notes.

[4] As to this matter, which seems to be the ground upon which the Court of Civil Appeals acted, we think that the alleged breach and repudiation of the contract was not available as a defense by Crawford and others, for two reasons: First, because the alleged breach was not plead by Crawford and others. The Court of Civil Appeals as to this point based its decision on the allegations of an abandoned pleading of the committee. This pleading had been superseded by amendment and was no longer a part of the pleadings in the case, and if, as claimed, it amounted to a renunciation of the contract, that fact should have been pleaded by Crawford and others if they desired to avail themselves of such renunciation. Second, because even if

the committee had renounced the contract, yet the evidence shows that Crawford and others did not accept the renunciation and elect to treat the contract as at an end, but, on the contrary, after the alleged breach continued, as they had a right to do, to treat the contract as in full force and continued to work upon the grade of the railroad. Crawford and others evidenced their election not to abandon the contract, not only by continuing to perform, but in this case as tried, insisted by their pleading that they were entitled to recover on the contract itself. They nowhere alleged the breach of the contract as an excuse for failure to fully perform, and nowhere alleged that they were damaged by the breach. In fact, they stand upon the contract, and, treating it as divisible, seek to recover the amount of the grade notes without showing either a performance of the entire contract or any sufficient reason why it was not performed.

[5] The contract being entire, Crawford and others could not recover on the contract without alleging performance. If, as claimed, the committee had breached the contract and they accepted the same as terminating the contract and relieving them from their obligation to perform, their cause of action should have been based, not on the contract itself, but for damages by reason of its breach.

[6] Our view of the situation is that the contract being entire, if breached by the subscribers, the railway company and others claiming the notes had the right either to ignore the breach and continue to perform and claim their rights under the contract, or to treat the contract as at an end and sue for damages for its breach.

The principles applicable to breaches of contract by announcing that it will not be performed are clearly shown in *Greenwall Theatrical Co. v. Markowitz*, 97 Tex. 485, 79 S. W. 1071, 65 L. R. A. 302, where it is said:

"The law with reference to a contract to be performed at a future time, where the party bound to performance announces prior to the time his intention not to perform it, as established by the cases of *Hochster v. De la Tour* and the *Danube and Black Sea Company v. Xenos*, on the one hand, and *Avery v. Bowden*, *Reid v. Hoskins*, and *Barwick v. Buda*, on the other, may be thus stated. The promisee, if he pleases, may treat the notice of intention as inoperative, and await the time when the contract is to be executed, and then hold the other party responsible for all the consequences of nonperformance; but in that case he keeps the contract alive for the benefit of the other party as well as his own; he remains subject to all his own obligations and liabilities under it, and enables the other party not only to complete the contract, if so advised, notwithstanding his previous repudiation of it, but also to take advantage of any supervening circumstances which would justify him in declining to complete it.



"On the other hand, the promisee may, if he thinks proper, treat the repudiation of the other party as a wrongful putting an end to the contract, and may at once bring an action as on a breach of it; and in such action he will be entitled to such damages as would have arisen from the nonperformance of the contract at the appointed time, subject, however, to abatement in respect of any circumstances which may have afforded him the means of mitigating his loss."

"When the promisee adopts the latter course, treating the contract as broken and himself as discharged from his obligations under it, he resolves his right into a mere cause of action for damages. He is no longer concerned with the disposition which the promisor may make of the subject matter of the contract. *Kadish v. Young*, 108 Ill. 170 [43 Am. Rep. 548]; *Johnstone v. Milling*, 16 Q. B. Div. 467; *Roper v. Johnson*, L. R. 8 C. P. 167; *Roehen v. Horst*, 178 U. S. 1 [20 Sup. Ct. 780, 44 L. Ed. 953]; *Anson on Con. 368 et seq.*, and authorities cited; *Cyclopedia Law and Procedure*, 635-637, and authorities cited."

It is true that the railway company and its assigns were, when the grade was completed, entitled to the possession of the grade notes and to maintain suits thereon against the several makers. If, however, as in this case, no suit was brought, or if brought and not tried until the time for the completion of the railroad had expired, the several makers of the notes had a right to defeat a recovery by pleading and proving an abandonment of the undertaking by the railway company.

If, as we have attempted to show, the notes had been paid, the failure to complete the railroad would authorize the recovery of the money so paid, then it is evident that the court in this case should not, after the happening of the event preventing recovery, render judgment on the notes.

In *LaFayette County Monument Corp. v. Magoon*, 73 Wis. 627, 42 N. W. 17, 8 L. R. A. 761, it appears that Magoon had given a check to the monument corporation in payment of a subscription to aid in the construction of a monument. There was an agreement that the donation was made on the condition that by a certain named date \$6,000 should be raised for the monument fund. Before the time expired within which the \$6,000 should have been raised, suit was brought on the check and judgment rendered for the association. Magoon appealed. Subsequent to the appeal the time within which the \$6,000 was to have been raised expired, and Magoon attempted to have the judgment reversed on account of the failure to raise the sum of \$6,000. This relief was denied, but the court said:

"The failure to raise \$6,000 for the monument fund by March 1, 1898 (if such failure has occurred) is not a defense to this action, al-

though, had the action been pending after that date, such failure might, perhaps, have been interposed, by leave of court, as a counterclaim, arising puls darrien continuance, provided the stipulation between the parties in that behalf is valid and binding upon the plaintiff—a proposition not here determined."

The court in the opinion further said:

"It has already been suggested that if the condition contained in the contract between the parties of April 6, 1887, is valid, and if there has been a breach thereof, the defendant can recover of the plaintiff, in any proper action or proceeding, the amount paid upon his subscription. In such case, the judgment herein not having been paid, it would be against equity and good conscience to require the defendant to pay it. Under the old practice he could probably be relieved of the judgment by a suit in equity to restrain its collection. But, if entitled to relief, the present practice gives him a simpler and more summary remedy; that is by a motion to the circuit court, upon a proper showing, to discharge the judgment. If such a motion be made after the cause shall have been remitted to that court, and that defendant can satisfy the court that such condition is a valid and binding one upon the plaintiff, and that it has been broken, and the defendant shall pay the costs of this action, we think the motion should be granted."

In our opinion the principle announced above is sound. Under the undisputed facts *Crawford and Collingsworth* and those claiming under them were not entitled at the time of the trial to any recovery on the notes.

If we are correct in this conclusion, then it necessarily follows that the judgment rendered by the trial court was the only possible judgment in this case.

[7] We think the court properly overruled the pleas of privilege of all of the defendants who asserted a right to be sued in the counties of their several residences. Long before these notes were transferred to such defendants, the committee had brought suit for the possession of the notes, and the custodian of the notes was a party to the suit. The parties who acquired the notes thereafter were properly made parties to this suit, and, having acquired whatever rights they had pendente lite, were in no position to assert a right to be sued in the counties of their respective residences. As what we have said disposes of the whole case, we do not think it necessary to consider other errors assigned.

We recommend that the judgment of the Court of Civil Appeals be reversed, and that the judgment of the trial court be affirmed.

PHILLIPS, C. J. The judgment recommended by the Commission of Appeals is adopted and will be entered as the judgment of the Supreme Court.

**SOUTHERN GAS & GASOLINE ENGINE  
CO. et al. v. RICHOLSON et al.**  
(No. 96-2921.)

(Commission of Appeals of Texas, Section B.  
Nov. 19, 1919.)

**1. CONTRACTS ⇨169—CONSTRUCTION IN  
LIGHT OF CIRCUMSTANCES.**

The rule that the contract must be read in the light of surrounding circumstances in arriving at a just interpretation of the terms does not admit of a violation of the express language which the parties have employed in defining their obligations, nor the reading into the contract of terms which its express provisions exclude.

**2. SALES ⇨90—MERGER OF NEGOTIATIONS IN  
WRITTEN CONTRACT.**

Seller, having agreed by writing to furnish certain specified machinery and do certain specified things with reference to the installation of the irrigation machinery sold, was not bound beyond the obligations specifically imposed, since all negotiations relating to installation of the machinery were merged in the written contract.

**3. SALES ⇨85(1)—OBLIGATION OF SELLER OF  
IRRIGATING MACHINERY TO INSTALL IT.**

Seller of irrigating machinery, having agreed by written contract that the writing was the complete agreement to ship machinery within certain time, to furnish blueprints for the foundations, and to provide an engineer to supervise the installation, and instruct buyer's operators, was not required to install the machinery, being bound to do only those things specified in the contract.

**4. SALES ⇨179(3)—ACCEPTANCE AS WAIVER  
OF DELAYED DELIVERY.**

Under irrigating machinery sales contract, providing that "receipt of material constitutes a waiver of any claim for damages on account of delay," buyer could not recover damages resulting from delayed installation of the machinery due to delay in delivery thereof; the claim for such damages having been waived by acceptance of machinery upon delayed delivery.

**5. TRIAL ⇨343—CONSTRUCTION OF VERDICT  
IN LIGHT OF TESTIMONY.**

Verdict, in being construed, should be viewed in the light of the testimony.

**6. SALES ⇨422—CONSTRUCTION OF VERDICT.**

Verdict for buyer of irrigating machines for damages to rice crop resulting from seller's breach of contract held, in view of the findings, to embrace damages for delayed installation of machinery, which damages buyer, by acceptance of the machinery upon delayed delivery, had waived under stipulation of the contract.

Error to Court of Civil Appeals of Eighth Supreme Judicial District.

Action by the Southern Gas & Gasoline Engine Company against J. J. Richolson and another, in which the named defendant cross-complained and the Foos Gas Engine Compa-

ny intervened. Judgment for named defendant on his cross-complaint, affirmed by Court of Civil Appeals (181 S. W. 529), and plaintiff and intervenor bring error. Judgments of district court and Court of Civil Appeals reversed, and cause remanded.

Bryan & Bryan and Andrews, Streetman, Burns & Logue, all of Houston, for plaintiffs in error.

Lane, Walters & Storey and B. F. Louis, all of Houston, Townsend, Quinn & Townsend, of Columbus, and Paul Kayser, of Houston, for defendants in error.

**McCLENDON, J.** The controversy in this case arose out of an alleged breach of contract of sale of certain machinery for the irrigation of a rice farm. For convenience, the parties will be designated as in the trial court: Southern Gas & Gasoline Engine Company, plaintiff; Foos Gas Engine Company, intervenor; J. J. Richolson and L. P. Bunge, defendants. Intervenor was a foreign corporation, engaged in the manufacture of machinery. Plaintiff was a Texas corporation, engaged in the sale of machinery, and acted as agent for intervenor in Texas. The usual course of business between the two corporations was for plaintiff to purchase the machinery from intervenor and make sales direct to purchasers in its own name. The contract in question was made between intervenor and defendant Richolson, the owner of the farm, because Richolson wanted the responsibility of intervenor behind the contract. The machinery was paid for partly in cash upon its delivery; the balance in two notes of \$3,500 each, payable to the order of intervenor, secured by chattel mortgage on the machinery. One of these notes was transferred to plaintiff as its share in the transaction.

Plaintiff brought this suit against Richolson upon its note and for foreclosure. Intervenor sued upon its note, and joined in the prayer for foreclosure. By way of cross-action, defendant Richolson sought damages for an alleged breach of the contract of sale, claiming failure on intervenor's part to install the machinery in time to irrigate the 1910 crop and failure of the plant to supply the amount of water guaranteed in the contract. Defendant Bunge was interested with Richolson in cultivating part of the land. Upon a verdict upon special issues, the trial court rendered judgment in favor of the defendant Richolson for \$16,193.05, which sum was arrived at by calculation from the facts found in the verdict after deducting the amount of the two notes sued upon and an agreed credit. This judgment was affirmed by the court of Civil Appeals, Eighth District. 181 S. W. 529.

The question of leading importance is

whether the judgment embraces items of damage for which defendant was not bound under the contract. This question embraces two elements: First, whether under the contract the intervener was obligated to install the machinery; and, if not, second, whether the verdict includes damages for failure to install in time to water the crop.

Defendant's cross-action was grounded in breach of contract alone; the contention being, among others, that intervener was obligated to install the machinery. This contention is rested on two propositions: First, that the contract expressly, or by necessary implication, imposed this obligation; and, second, that the contract, when read in the light of surrounding circumstances, must be so construed. The contract, which was in the form of a proposal, and was accepted by intervener on January 3, 1910, contains the following provisions:

"We propose to furnish you:

"One Foom vertical two-cylinder engine, which shall develop 125 brake horse power, when using the following fuel: Producer gas made from commercial lignite such as Hoyt, Calvert, or Rockdale coal. To be shipped about 90 days from approval of order."

"Erecting.—We are to furnish an engineer to supervise the installation of the machinery furnished hereunder and instruct your operators. You are to build necessary foundations to our blueprints, place the machinery thereon, furnish all help and facilities required. You are to promptly remove all obstacles to the complete performance of our contract, or compensate for any loss or delay resulting therefrom. [Interlined:] 30 days; also superintend foundation."

"Guarantee.—This plant is guaranteed to deliver 125 brake H. P. 24 hours on 8,744 lbs. of commercial lignite coal, such as Hoyt, Rockdale, etc., and to pump 800 gallons of water per min. when operating on a 40-foot lift. The engine will not use more than  $\frac{1}{1000}$  gallons of lubricating oil per H. P. hour.

"We reserve the right to alter the above equipment to best suit the fuel used and operating conditions."

"It is understood that this contract covers the complete agreement that no agent has any authority to obligate us by any terms not herein expressed, and no modification shall be binding, unless in writing, and approved by our home office at Springfield, Ohio.

"This agreement is subject to delays caused by fires, strikes, accidents, or other causes beyond our control; no liability is assumed therefore; receipt of material constitutes a waiver of any claim for damages on account of delay."

In the specifications attached to the contract it is provided:

"The plant is to be complete, less foundations, hauling, common labor, buildings, and flumes."

[1, 2] The evidence conclusively shows that both parties to the contract had in contemplation that the plant was to be used for supplying water to irrigate a rice crop to be planted upon defendants' farm in 1910. That the contract must be read in the light of the

surrounding circumstances, in arriving at a just interpretation of its terms, may be conceded; but this rule does not admit of a violation of the express language which the parties have employed in defining their obligations, nor the reading into the contract of terms which its express provisions exclude. In interpreting the several obligations of the parties, we may measure the reciprocal duties imposed by reference to the main object of accomplishment. The parties have, however, specifically provided what each was to do under the contract. Intervener's obligations may be summarized: To furnish certain specified machinery, which, when installed, was guaranteed to produce certain specified results under given conditions; to ship the machinery within about 90 days of acceptance of the proposal; to furnish blueprints for the foundations; to provide an engineer to supervise the installation and instruct defendant's operators. Defendant was to build the foundations according to the blueprints furnished, place the machinery thereon, furnish all help and facilities required, and promptly remove all obstacles to complete performance of the contract. Clearly a failure on the part of intervener to perform any part of what it therein bound itself to do would create a corresponding right in defendant to exact compensatory damages for such failure, measured by the effect of that failure upon the main object in contemplation of the parties. Beyond the obligations thus specifically imposed, in so far as erecting the plant is concerned, intervener cannot be held bound. This would be necessarily true, whether or not the contract had provided in specific terms that it embraced the entire agreement of the parties, under the familiar rule that, where a contract is reduced to writing, it will be held to merge all negotiations of the parties upon the subject dealt with. In this contract, however, the parties have specifically stipulated that the writing covers the complete agreement, and no agent has authority to obligate intervener by any terms not therein expressed.

[3, 4] It seems to us plain that the contract did not bind intervener generally to install the machinery or plant, but only bound it in this respect to do the specific things therein provided as above stated. Some of these specific obligations no doubt necessarily constituted portions of the sum total of what might be construed to embrace the installation of the plant, and all of them had a bearing upon the installation, or at least upon the time of installation. The furnishing of the machinery and its shipment to destination were essential requisites to installation, as the latter could not be begun until the machinery arrived. The same is true with reference to the time of providing the blueprints for the construction of the foundations. This element of delay in installation, however, is

eliminated as a recoverable item of damage, in that, as appears to be conceded by defendant, the acceptance of the machinery upon arrival constituted a waiver of any claim for damages on account of delay theretofore existing, under express stipulation of the contract. The only other obligation in the contract on the part of intervenor, affecting the question of installation, was to furnish an engineer. It is not claimed that this was not done, or that the engineer was incompetent or derelict in his duties. The evidence would warrant a finding, however, that some of the items furnished by intervenor were not adequate, or were defective, and that delay in final installation was caused by supplying these deficiencies. The failure of intervenor to perform any of these obligations provided for in the contract would necessarily impose upon it the obligation to respond in damages; but we are unable to deduce from the entire contract that there was any general obligation on the part of the intervenor to install the machinery; and to measure intervenor's obligation by the damages resulting to the crop from a failure to have water supplied in time, unless such failure was the result of a breach of the specified obligations of intervenor imposed by the contract, would be to read into the contract an obligation which its terms do not impose, and which by implication they necessarily exclude. We conclude that the contract does not bind intervenor generally to install the machinery.

[5] The next question is whether the judgment embraces elements of damage for which intervenor was not obligated under the contract. This question calls for a construction of the verdict, to arrive at which fairly it should be viewed in the light of the testimony. The verdict is set out in full in the opinion of the Court of Civil Appeals. In so far as pertinent to the instant inquiry, it embraces the following findings:

That there was unreasonable delay on the part of intervenor "in installing the machinery" (No. 2); that "such unusual delay occasioned damage \* \* \* to the rice crop of defendant" (No. 3); that the plant would not pump the guaranteed amount of water (No. 4); that the guaranteed capacity of the plant would have been sufficient with the rainfall to properly irrigate the land (No. 14); that it was not of capacity to deliver said amount (No. 15); that it did not furnish sufficient water to irrigate the land if properly cared for and distributed without being wasted (No. 16); that the cause of damage to defendant's rice crop was "the plant not being able to pump sufficient water" (No. 19); and "by the machinery being defective, or its failure to pump the required number of gallons of water" (No. 22); that the damage to the crop was not caused by defendant's failure to prepare necessary canals and laterals, or by any neglect or inexperience of defendant, his agents, or employés (Nos. 20 and 21).

The amount of recovery is arrived at by taking the answers of the jury to the special

issues, in which they estimate the amount of rice actually raised on the land (No. 7); the average yield per acre "if sufficient water had been furnished by the plant, together with the rainfall, to raise such crop" (No. 8); the reduction in grade of the crop actually raised under what it would have been, "had sufficient water been furnished by said plant (No. 9); the market value of the rice actually raised (No. 10); the market value of the rice that would have been raised, "had sufficient water been furnished by the plant, and at the proper time" (No. 11); the additional cost of production of the additional crop which would have been raised, had the guaranteed amount of water been produced by the plant, "and if such water had been provided without delay in the installation of said plant" (No. 13).

The evidence is quite voluminous, and in many respects sharply conflicting. It shows that the proposal was accepted January 3d, that the machinery was not shipped until the latter part of April, and not received at destination until May 14th or 15th. The evidence was conflicting as to the time installation was completed; but, whatever date we take, as shown by the evidence, there was testimony strongly pointing to the conclusion that the crop was needing water for some time before the installation was consummated.

[6] We think, under a fair construction of the above jury findings, the amount of recovery awarded necessarily includes an indeterminate amount of damage to defendant's rice crop, occasioned by not having the plant installed as early as water was needed. It is true that, in answer to special issues 19 and 22, the jury find that the damage to the crop was occasioned by insufficiency in capacity of the plant. If the answers to these special issues be construed as a finding that the entire damage previously estimated was referable to this incapacity alone, then the answers to said special issues are directly in conflict with the answers to special issues 2 and 8, in the latter of which the jury find that the unreasonable or unusual delay of intervenor in installing the machinery occasioned damage to the crop. In special issue No. 11 the gross value of the crop that would have been raised, "had sufficient water been furnished by the plant and at the proper time," is estimated, and in No. 13 the additional cost of raising such additional crop as would have been raised "if such water had been provided without delay in the installation of said plant." The figures given in these estimates form two of the essential bases of the judgment, and it is quite clear that the net amount of defendant's recovery necessarily embraces damage occasioned by a failure to have sufficient water in time for the requirements of the crop. What this

amount is the verdict furnishes no basis for estimation.

As above shown, one of the necessary elements in having the water at any given time was the delivery of the machinery, which was delayed beyond the contract period. The delay thus occasioned has, as above shown, been eliminated as a recoverable item of damage. We think it clear from the verdict that it embraces all damages occasioned to defendant's crop by a failure to have water in sufficient quantities at the time required by the crop, the effect of which was to impose upon the intervener a guaranty that the plant would be installed in time to supply such water; a burden not imposed by the contract, except in so far as its failure to perform specific obligations undertaken by it may have contributed to such failure.

Nor can it be said that the answers of the jury to the twentieth and twenty-first special issues confine the damages found to the failure to perform the obligations imposed by the contract upon intervener. Those issues relate solely to acts of defendant regarding the construction of canals and laterals, and to neglect or inexperience of defendant, his agents and employes. The evidence was conflicting upon the issue of the time in which the canals and laterals were constructed, as well as their manner of construction, and upon the issue of whether the plant was properly operated. The other issues found by the jury are clearly framed upon the theory that intervener was obligated to install the machinery in time to water the rice crop, and we are unable to conclude that this general obligation is in any way limited by the twentieth and twenty-first special issues, which, when construed in the light of the other issues, seem clearly to relate to matters not embraced within the general obligation imposed in the special issues upon intervener to install the machinery in time to water the crop.

It is our conclusion that there is error in the judgment of the trial court, in that the amount of defendant's recovery embraces damages resulting from delay in installation, for which under the terms of the contract intervener may not have become bound, and that this conclusion requires a reversal of the case.

The other questions presented have, in our opinion, been correctly determined by the Court of Civil Appeals.

We conclude that the judgments of the district court and Court of Civil Appeals should be reversed, and the cause remanded to the district court for a new trial.

PHILLIPS, C. J. The judgment recommended by the Commission of Appeals is adopted, and will be entered as the judgment of the Supreme Court. We approve the holding of the Commission on the questions discussed.

## DUGAN v. STATE. (No. 5076.)

(Court of Criminal Appeals of Texas. May 7 1919. Rehearing Denied June 18, 1919.)

1. HOMICIDE  $\S$ 144—SELF-DEFENSE; BURDEN OF PROVING HOMICIDE UNLAWFUL.

In murder prosecution, where defendant admitted killing deceased, but claimed to have done so in self-defense, burden was on state to prove an unlawful homicide, to overcome presumption of innocence.

2. HOMICIDE  $\S$ 145—PRESUMPTION OF INTENT FROM WEAPON USED.

In murder prosecution, involving self-defense issue, presumption of intent from character of weapon used, under Pen. Code 1911, art. 1147, was inapplicable, since, the killing by defendant being admitted, defendant's intent was not in issue; the only question being whether homicide was lawful or unlawful.

3. CRIMINAL LAW  $\S$ 778(3)—HOMICIDE  $\S$ 286(1)—INSTRUCTIONS AS TO PRESUMPTION OF INTENT FROM WEAPON USED; PRESUMPTION OF INNOCENCE.

Pen. Code 1911, art. 1147, relating to presumption of intent from character of instrument used in committing a homicide, is not to be made the basis of a charge against accused in any case of homicide, since it conflicts with charge on presumption of innocence, necessary in every case.

4. HOMICIDE  $\S$ 300(3)—CHARGE ON SELF-DEFENSE; LANGUAGE OF DECEASED.

Where evidence in murder case shows that language of deceased at time of killing may have given color to his acts, charge on self-defense should be so framed as to give accused benefit of language, as well as acts of deceased, under Pen. Code 1911, art. 1105.

5. HOMICIDE  $\S$ 341—PREJUDICIAL ERROR; FAILURE TO INSTRUCT.

In homicide prosecution, wherein accused relief on self-defense, court's refusal to instruct jury, to consider language as well as acts of deceased, in determining question of whether accused was justified in shooting deceased, held prejudicial error, under Pen. Code 1911, art. 1105, where there was a conflict in evidence as to conduct of the parties immediately preceding homicide, and there was evidence that deceased, immediately before slaying accused with a knife, said, "D—n you, I will kill you."

6. HOMICIDE  $\S$ 116(2)—SELF-DEFENSE; APPREHENSION OF DANGER.

In measuring culpability of accused, who is relying on self-defense, incidents at time of homicide are to be viewed from accused's standpoint at the time.

7. HOMICIDE  $\S$ 300(7)—CHARGE ON PROVOKING THE DIFFICULTY.

Charge on provoking the difficulty is proper, where first attack was made by deceased, but was induced by words and conduct of accused reasonably calculated and intended to provoke an attack, to be used by accused as an occasion for harm to deceased.

8. HOMICIDE  $\S$  300(7)—INSTRUCTION ON PROVOKING THE DIFFICULTY.

Issue of provoking the difficulty, justifying instruction thereon, does not arise from evidence which is merely conflicting as to who made the first attack.

9. HOMICIDE  $\S$  300(7)—CHARGE ON PROVOKING THE DIFFICULTY.

Charge on provoking the difficulty *held* improper under the evidence, which was insufficient to raise the issue.

10. CRIMINAL LAW  $\S$  388—EVIDENCE OF EXPERIMENT.

In murder prosecution, evidence of experiment on body of deceased, to determine whether blows on his face could have been made with a pistol, *held* improper.

Appeal from District Court, Tom Green County; C. E. Dubois, Judge.

Ed Dugan was convicted of murder, and he appeals. Reversed and remanded.

Anderson & Upton and Alex Collins, all of San Angelo, for appellant.

J. A. Thomas, Dist. Atty., and Wright & Harris, all of San Angelo, and E. B. Hendricks, Asst. Atty. Gen., for the State.

MORROW, J. Appellant shot and killed James A. Pasley, and appeals from a judgment convicting him of murder.

The deceased was a grocery merchant, and the appellant was an employé in a butcher shop; both occupying the same building for business purposes. There was evidence that on the day of the homicide, near the time of closing, a controversy arose between appellant and deceased with reference to the failure to deliver some articles that had been purchased by a customer of the deceased. Some harsh words passed between them, but both proceeded to the conduct of their business, and some half an hour later they went together in the back end of the store building and engaged in conversation, and it was there that the homicide took place. It appears that they went to the rear of the building upon the suggestion of the deceased to talk the matter over. When they were in the rear of the building, they were obscured more or less from the view of parties in the building by an ice chest.

The theory presented by the state's testimony is that, while the appellant and deceased were engaged in conversation, the appellant struck the deceased with some object which he reached up and obtained from a meat rack; that a scuffle ensued, and when they became disengaged and were about six or eight feet apart, facing each other, appellant drew his pistol and fired the first shot. Deceased turned and retreated when he was shot; the bullet striking him in the back of the neck, killing him.

The appellant's theory was that, when he went into the back of the building upon the invitation of the deceased, he was unaware of any hostile intention upon the part of deceased and had none himself, but assumed that in their talk they would adjust the matters amicably; that deceased stopped and asked appellant what in hell he meant by talking to him in the manner that he did, to which the appellant replied that he did not consider his talk any worse than that of the deceased, whereupon the latter said, "Damn you, I will kill you," at the same time drawing a knife and cutting appellant under the arm; that they were close together, and appellant struck deceased with his hand, at the same time retreating backwards, deceased pursuing, and appellant fighting, until he finally struck deceased in the face with his fist, knocking him back, when appellant pulled his pistol from his pocket and fired, as he claims, solely for the purpose of protecting himself from what he believed to be the deadly intent of the deceased.

There were two gunshot wounds found upon the body of deceased on examination—one a flesh wound entering his neck in front; the other a fatal wound entering the neck in the back. In addition to these there were what were described as superficial wounds on the forehead and the nose. The deceased wore glasses, which were broken in the affray, and there is evidence that the wounds on his face may have been made in the fall after he was shot. The evidence also showed that the appellant received two stab wounds, one under the arm, the other near the shoulder blade, and there was evidence that these were inflicted by the deceased with a knife which he had in his hand at the time he was killed. These wounds upon appellant were examined by physicians soon after the difficulty, and the knife was found by parties immediately after the homicide. The appellant accounted for the possession of the pistol by the statement that he had some time previously brought the pistol to his place of business with a view of selling it to one of the witnesses in the case, whom he named, and that he had, a few moments before he was called by the deceased to confer about the matter mentioned, put the pistol in his pocket with a view of returning it to his home.

Instructions were given the jury on the law of murder, manslaughter, and self-defense. Appellant's special charge on the presumption of intent to kill, arising from the use of a deadly weapon by the deceased, was given, as was also a special charge for the state on the law of provoking the difficulty with intent to injure, but not to kill. Exceptions were reserved to the charge on self-defense, in failing to inform the jury that, in determining whether appellant acted upon a reasonable apprehension of danger, the de-

larations as well as the acts of the deceased were to be considered. He also excepted to the giving of any charge upon provoking the difficulty, as well as to the form and substance of that given, and complained of that part of the charge on murder in which the jury were told "that the instrument used in committing the homicide should be taken into consideration in judging the intent."

The fact that appellant intentionally shot and killed deceased was not questioned. The controverted issue was whether the intent to kill was formed from malice or passion, or from a belief in the necessity for self-defense.

[1, 2] The state's burden was to prove an unlawful homicide, to overcome the presumption of innocence. No presumption from the character of the weapon used was available to discharge this burden, and, the only matter for the decision of the jury being whether the homicide was lawful or unlawful, the jury could have given the charge in question application to no other question. On the subject this court, in *Burnett v. State*, 46 Tex. Cr. R. 119, 79 S. W. 551, said:

"Exception is reserved to the fifteenth paragraph of the charge, which is as follows: 'The instrument or means by which a homicide is committed are to be taken into consideration in judging the intent of the party offending. If the instrument be one not likely to produce death, it is not to be presumed that death was designed, unless, from the manner in which it was used, such intention evidently appears.' This charge, under the facts, should not have been given. There was no question as to the intent of the party, for appellant used the pistol and used it fatally. Article 717, Penal Code, does not apply to this character of case, and only becomes a part of the law of the given case when the intent is to be judged in part from the instrument used; that is, if it is one not likely to produce death, it is not to be presumed that the death was designed, unless from the manner in which the instrument is used such intent evidently appears. Where a party uses an instrument not likely to produce death by the manner and means of its use, but death does occur, this statute may become a part of the law. But, as we understand, it never applies unless the intent is an issue in the case. This was a case of self-defense from the defendant's standpoint; and if the acts and conduct of deceased induced appellant to believe his life was in danger, he had the right to draw his pistol and fire, and continue to fire until all danger was passed. So there was no question of his intent. He was seeking to justify his act, bringing about the homicide."

That case was followed in *Gallagher v. State*, 55 Tex. Cr. R. 51, 115 S. W. 46, and in *Andrus v. State*, 73 Tex. Cr. R. 329, 165 S. W. 190.

[3] We are of opinion that the statute mentioned (article 1147, P. C.) is not to be the basis of a charge against the accused in any case of homicide. It tends to conflict with the charge on the presumption of innocence,

necessary in every case. *Jones v. State*, 13 Tex. App. 7. It frequently happens, however, that the facts are such that it cannot harm the accused. *Campos v. State*, 50 Tex. Cr. R. 104, 95 S. W. 1042; *McKenzie v. State*, 96 S. W. 933; *Early v. State*, 51 Tex. Cr. R. 382, 103 S. W. 871, 123 Am. St. Rep. 889; *Manning v. State*, 51 Tex. Cr. R. 215, 98 S. W. 251; *Young v. State*, 102 S. W. 1144. The case of *Barbee v. State*, 50 Tex. Cr. R. 429, 97 S. W. 1058, on the point, was necessarily overruled in *Gallagher v. State* and *Andrus v. State*, *supra*.

[4, 5] The charge on self-defense directed the jury, in determining whether or not the appellant's conduct was justified in shooting the deceased, to consider the acts of the deceased. The language used is as follows:

"That if from the acts of the said James A. Pasley there was created in the mind of the defendant a reasonable apprehension," etc.

The statute (article 1105, P. C.) in terms declares that the unlawful intent of the person killed "must reasonably appear by the acts, or by words coupled with the acts, of the person killed." In a proper case—that is, one in which the evidence shows that the language of the deceased may have given color to his acts—the charge should be so framed as to give the accused the benefit of the language as well as the acts of the deceased, and in such case its limitation to the acts alone has been uniformly held harmful error. *Andrus v. State*, 73 Tex. Cr. R. 329, 165 S. W. 190; *Sanchez v. State*, 67 Tex. Cr. R. 453, 149 S. W. 124. There was a conflict in the evidence with reference to the position of the parties and the conduct immediately preceding the homicide, and it is possible the jury may have taken the view that the acts of the deceased, taken alone, were not sufficient to have created in the mind of the appellant a reasonable apprehension of danger, while, if they had been instructed that they might also consider his words, a different conclusion might have resulted.

[6] From the state's testimony it appears that, after the appellant and deceased went to the back of the building at the suggestion of deceased, there were words passed between them, but they were not understood by the witnesses. Appellant claims that the deceased said, "Damn you, I will kill you," and followed it with the use of the knife. The blade of the knife was small, as appeared from the evidence on the trial, and the wounds inflicted upon the appellant appeared not to have been of a serious character. However, it does not appear that at the time of the encounter he was aware of the size of the knife, and in measuring his culpability the incidents are to be viewed from his standpoint at the time. The probability of harm, in omitting from the charge on self-defense the reference to the words as well as the acts

of the deceased, is enhanced by the charge given by the court on provoking the difficulty. In that charge the jury was called upon to decide whether appellant made the first assault, and whether it was an unlawful assault upon the deceased. The words which were used by the deceased might have aided the jury in deciding these issues.

[7-9] The propriety of instructing the jury on the law of provoking the difficulty is, we think, justly challenged. That character of charge is applicable in instances in which the first attack is made by the deceased, but is induced by words and conduct of the accused reasonably calculated and intended to provoke an attack which may be used by him as an occasion for doing harm to his adversary. The issue of provoking the difficulty does not arise from evidence which is merely conflicting as to who made the first attack. From the state's standpoint the first overt act was the striking of deceased by appellant with some heavy instrument. A struggle followed, which continued until up to the time that appellant fired the first shot. From appellant's viewpoint, as developed by the evidence, the deceased begun the assault on his own initiative and pursued it, using the knife and attempting to do so until the shots were fired. From either standpoint, we think the issue of appellant provoking the difficulty, with the intent to avail himself of an attack by deceased, brought on thereby, to injure the deceased, was not raised. This conclusion we understand to be in accord with frequent expressions of this court, among them *Casner v. State*, 43 Tex. Cr. R. 12, 62 S. W. 914; *Lockhart v. State*, 53 Tex. Cr. R. 596, 111 S. W. 1024; *Beard v. State*, 45 Tex. Cr. R. 522, 78 S. W. 348; *Winters v. State*, 37 Tex. Cr. R. 582, 40 S. W. 303; *Airhart v. State*, 40 Tex. Cr. R. 470, 51 S. W. 214, 76 Am. St. Rep. 736; *Wilson v. State*, 46 Tex. Cr. R. 527, 81 S. W. 34; *Pollard v. State*, 45 Tex. Cr. R. 127, 73 S. W. 953.

[10] Upon another trial we think the evidence of experiment upon the body of the deceased to determine whether the blows on his face could have been made with a pistol should be omitted.

For the errors pointed out, the judgment is reversed, and the cause remanded.

#### GERLICH v. STATE. (No. 5444.)

(Court of Criminal Appeals of Texas. Nov. 19, 1919.)

#### 1. CRIMINAL LAW ~~§~~958(6)—NEW TRIAL FOR NEWLY DISCOVERED EVIDENCE.

An affidavit of only one witness to the effect that the main witness was hostile to accused was not sufficient to require the granting of a motion for a new trial on the ground of newly discovered evidence.

#### 2. CRIMINAL LAW ~~§~~939(1)—NEW TRIAL FOR NEWLY DISCOVERED EVIDENCE.

On motion for a new trial on the ground of newly discovered evidence, defendant should show why the evidence was not offered on the trial, or that it was unknown to defendant or his attorney and could not have been discovered by the use of reasonable diligence.

Appeal from District Court, McLennan County; Richard I. Munroe, Judge.

Anton Gerlich was convicted of manslaughter, and appeals. Affirmed.

W. H. Stewart and T. J. Leftwich, both of Waco, for appellant.

Alvin M. Owsley, Asst. Atty. Gen., for the State.

LATTIMORE, J. Appellant was indicted for the murder of Steve Cinek, convicted of manslaughter, and given a term of five years in the penitentiary.

No objections to any of the evidence, or to the charge of the court, appear in the record. The indictment is in correct form, and the charge of the court substantially presents the law of the case.

[1, 2] Appellant's motion for a new trial sets up newly discovered evidence, but is supported by no proof introduced. It is accompanied by the affidavit of only one witness, who swears, in effect, that the main witness was hostile to appellant. This is not sufficient; nor is it shown in any way why said evidence was not offered on the trial, nor that it was unknown to appellant or his attorney and could not have been discovered by the use of reasonable diligence. The contention that the evidence is insufficient is not borne out by the record.

No error appearing in the record, the judgment of the trial court is affirmed.

#### GRANDBERRY v. STATE. (No. 5549.)

(Court of Criminal Appeals of Texas. Nov. 12, 1919.)

#### 1. CRIMINAL LAW ~~§~~1137(7)—APPEAL; PERSONS ENTITLED TO URGE ERROR.

One charged with the unlawful manufacture of intoxicating liquors who has entered a plea of guilty and has been assessed the lowest penalty is not in position to urge on appeal as a ground for reversal the insufficiency of the evidence to prove his guilt.

#### 2. CRIMINAL LAW ~~§~~304(20)—JUDICIAL NOTICE; INTOXICANTS.

In a prosecution for the unlawful manufacture of intoxicating liquor, where defendant admitted that he made whisky, no further proof was required to show that the liquor was intoxicating.

Davidson, P. J., dissenting.



Appeal from District Court, Smith County;  
J. R. Warren, Judge.

Redic Grandberry was convicted of the unlawful manufacture of intoxicating liquors, and he appeals. Affirmed.

Alvin M. Owsley, Asst. Atty. Gen., for the State.

MORROW, J. The appellant is charged with the unlawful manufacture of intoxicating liquors. He entered a plea of guilty, and was assessed the lowest penalty.

[1] Under these circumstances, he is not in position to urge as a ground for reversal the insufficiency of the evidence to prove his guilt. *Doans v. State*, 36 Tex. Cr. R. 468, 37 S. W. 751; *Shelton v. State*, 30 Tex. Cr. R. 431; *Woodall v. State*, 58 Tex. Cr. R. 513, 126 S. W. 592; *Josef v. State*, 33 Tex. Cr. R. 251, 26 S. W. 213.

[2] If we were to look to the evidence, however, it is sufficient to sustain the verdict. He admitted that he made whisky, and further proof was not required to show that the liquor was intoxicating. *Rutherford v. State*, 49 Tex. Cr. R. 21, 90 S. W. 172.

The judgment is affirmed.

DAVIDSON, P. J. (dissenting). This is a conviction for violating what is known as the state-wide prohibition statute, passed by the Fourth Called Session of the Thirty-Fifth Legislature, page 37 of the acts of that body. It prohibits, among other things, the manufacture of intoxicants except for medicinal, sacramental, scientific, and mechanical purposes. The evidence may be sufficient to show that appellant manufactured intoxicants. Except by deduction and inferences it is not shown that it was not manufactured for medicinal purposes, or for any specific purpose, but, without discussing that feature of the case, I am persuaded that this conviction ought not to stand; that the act is invalid and should not be upheld in any of its phases. I do not purpose to discuss that view further than to refer to my dissenting opinions in *Ex parte Fulton*, 215 S. W. 331, and *Ex parte Davis*, 215 S. W. 341, both of which cases have been decided by this court recently. I might add other and different reasons for disagreeing with the majority opinion, but deem it unnecessary. Without writing further, I am still of opinion that the act under which this conviction occurred is invalid. What I say here will apply to several other cases that are now pending involving the same question, tried by the same judge, and from the same county, to wit, Smith county.

#### BRADFORD v. STATE. (No. 5548.)

(Court of Criminal Appeals of Texas. Nov. 12, 1919.)

Appeal from District Court, Smith County;  
J. R. Warren, Judge.

John A. Bradford was convicted of the illegal manufacture of intoxicants, and he appeals. Judgment affirmed.

Alvin M. Owsley, Asst. Atty. Gen., for the State.

DAVIDSON, P. J. This conviction occurred for the illegal manufacture of intoxicants, and is a companion case to *Grandberry v. State* (No. 5549) 216 S. W. 164, and other cases of a like nature from the same county and from the same court, all charging a violation of the same statute.

On the authority of the majority opinions in *Ex parte Davis*, 215 S. W. 341, and *Ex parte Fulton*, 215 S. W. 331, recently decided, and other opinions of this court in regard to the same matter this judgment will be affirmed.

#### CURRY v. STATE. (No. 5551.)

(Court of Criminal Appeals of Texas. Nov. 12, 1919.)

Appeal from District Court, Smith County;  
J. R. Warren, Judge.

Tom Curry was convicted of manufacturing intoxicating liquor, and he appeals. Affirmed.

Alvin M. Owsley, Asst. Atty. Gen., for the State.

DAVIDSON, P. J. This conviction was for manufacturing intoxicating liquors in violation of the state-wide prohibition statute, passed by the Fourth Called Session of the Thirty-Fifth Legislature, found on page 37 of those acts. The majority opinion of this court has held this law valid in *Ex parte Davis*, 215 S. W. 341, and *Ex parte Fulton*, 215 S. W. 331, recently decided. I gave my reasons for believing otherwise, which are of record.

It is unnecessary for me to write further on that subject, and in obedience to the opinion of the majority the judgment herein will be affirmed.

#### MOSS v. STATE. (No. 5543.)

(Court of Criminal Appeals of Texas. Nov. 12, 1919.)

Appeal from District Court, Smith County;  
J. R. Warren, Judge.

Andrew Moss was convicted of illegally manufacturing intoxicating liquor, and he appeals. Affirmed.

Alvin M. Owsley, Asst. Atty. Gen., for the State.

DAVIDSON, P. J. This is a companion case to *Curry v. State*, 216 S. W. 165, *Grandberry v. State*, 216 S. W. 164, and *Bradford v. State*, 216 S. W. 165, this day decided, involving the same character of conviction as well as the same questions.

In accordance with the views of the majority of the court, this judgment will be affirmed.

**McDONALD v. STATE. (No. 5607.)**

(Court of Criminal Appeals of Texas. Nov. 26, 1919.)

**1. INDICTMENT AND INFORMATION §41(2) — COMPLAINT AS BASIS FOR INFORMATION IN MISDEMEANOR CASES.**

A misdemeanor cannot be prosecuted in the county court without a complaint as a predicate for the information.

**2. CRIMINAL LAW §594(4) — CONTINUANCE ON ACCOUNT OF SICK WITNESS.**

Where defendant duly subpoenaed his wife to testify in his behalf, and at the time of trial moved for a continuance on account of her absence, and it appeared that the sheriff, when he attempted to bring her in by attachment, found her in bed in an advanced condition of pregnancy, defendant's motion for continuance on the ground of absence of his wife, who was a material witness, should have been granted.

**3. CRIMINAL LAW §600(1) — CONTINUANCE FOR ABSENCE OF WITNESS.**

Defendant's motion for continuance on the ground of the absence of a female witness, who, though duly subpoenaed, was unable to attend on account of her physical condition, cannot be denied because of the offer of the state to merely admit that, if she were present, she would testify as claimed by defendant.

Appeal from Lamar County Court; W. L. Hutchison, Judge.

Walter McDonald was convicted of violating the local option law, and he appeals. Reversed and remanded.

Alvin M. Owsley, Asst. Atty. Gen., for the State.

DAVIDSON, P. J. Appellant was convicted of violating the local option law.

[1] The transcript does not contain a complaint as a predicate for the information. Appellant, under the record, was tried on an information without a complaint. This would necessitate a reversal and dismissal of the prosecution. A misdemeanor in the county court cannot be prosecuted without a complaint as a predicate for the information. It may be, however, the clerk omitted to insert it in the transcript, and the defect could be cured by legal procedure.

[2] There is another question that requires a reversal of the judgment, even if the complaint had been inserted in the transcript; that is, the failure of the court to grant the continuance applied for by appellant. Application was made by appellant for the testimony of his wife, who was alleged to be pregnant and sick. We think the diligence is sufficient; but even this is not always the criterion. A great many cases have been written upon this subject. Appellant alleges in his application that his wife had been duly subpoenaed, making the process an exhibit in

the application, but it is not contained in the record. When the application was overruled, it seems the court sent an officer with an attachment for the witness. The sheriff testified he went to the residence of appellant to serve the attachment upon and bring the wife to court. The evidence discloses they lived in the town of Paris, where the county court held its sessions, in the eastern part of the city. The sheriff testified:

"I went to her home and found her in bed. She stated that she was unable to go to court, and I did not bring her into court."

Dr. Lewis testified that he was a physician, and just before this case was tried in the county court he called on Mrs. McDonald at her home in Paris and found her in bed.

"She is about 8½ months pregnant. I see no reason why she could not come to court, other than her statement that she was unable to do so. I was family physician for Mr. McDonald, and had received no recent calls to his home."

We hardly think it is the policy of the law to force women into court when they are sick in bed and 8½ months advanced in pregnancy, as shown by this record. The sheriff shows, when he went to the house, that she was in such condition that he would not serve the attachment on or bring her to court. Appellant had applied for and been refused his continuance, and an attachment was sent, and witness not brought. We think this is a sufficient showing as to diligence.

In *Phillips v. State*, 35 Tex. Cr. R. 483, 34 S. W. 272, the witness had not been subpoenaed, either by the state or the appellant, but had attended the trial the day before, and was taken sick on the day after she had testified in a companion case, and at the time was in an advanced state of pregnancy. Appellant moved for a continuance on account of the absent witness, who was his wife, setting up these facts. There were three affidavits filed by the state contesting this matter, showing that Mrs. Phillips was able to attend and be present as a witness. The opinion states these affidavits are not in conflict with those which show that she was sick. In fact, the question of whether she was sick or not is placed beyond any sort of doubt. The court below seems to have held in that case, because she had not been subpoenaed, appellant was not entitled to a continuance. This court did not concur in that view and reversed the judgment, using this language:

"But under the peculiar circumstances of this case, there being no evidence tending to show that the witness was acting in bad faith, or had left at the instigation of her husband, we think the rule too rigid, when applied to the facts in this case."

In *Steger v. State*, 105 S. W. 789, it was said:

"While the diligence was not of the strictest character, yet it is made to appear that no reasonable amount of diligence could have procured the attendance of a female witness, who was expecting daily to be confined, and therefore unable to attend court."

In *Davis v. State*, 64 Tex. Cr. R. 9, 141 S. W. 266, this language is found:

"The wife of defendant was in such condition that she could not attend the trial. She had recently been confined, and had not sufficiently recovered to leave home and attend the court."

Then follows a statement of the evidence proposed to be shown by the wife, which was held material.

To the same effect is *Ball v. State*, 44 Tex. Cr. R. 489, 72 S. W. 384, and *Donahoe v. State*, 28 Tex. App. 13, 11 S. W. 677. See, also, for collation of authorities, *Branch's Ann. P. C.* p. 187, note 318, and page 188, § 319. The authorities are there collated and are too numerous to be inserted in the opinion.

[3] The court qualifies the bill by stating that the state offered the defendant the right to place before the jury the testimony expected to be proved by the absent wife. This was declined by the appellant. This would not defeat the application. The state may have been able to defeat it, if the admission had been made that the testimony of the absent witness was true, and the authorities so hold; but it was not sufficient simply to admit that she would testify as set out in the application. Her testimony was very material, and would have been in direct contradiction of the state's testimony.

The evidence for the state is to the effect that the county attorney and a deputy sheriff, and two brothers named Rodgers, went in an auto from the courthouse to the residence of appellant at night, something like a mile or more from the courthouse, in quest of whisky. When they reached or were near the residence of appellant, the two Rodgers left the car and went to appellant's house. One of the Rodgers testified that he went in and knocked at the door, and finally, after some conversation with appellant, obtained a pint of whisky, for which he paid \$7. The other Rodgers was standing near by, heard some of the conversation, and testified to facts confirmatory of the evidence of his brother. It was a cold night, and they all wore overcoats.

Defendant's theory was that Rodgers carried the whiskey to appellant's house and did not purchase it from appellant. The Rodgers who did not make the purchase testified that his brother did not have any whisky; that is, that he had been with him during the day, and had not seen him with any, but that he had not examined him or his overcoat that

night to see whether he had any or not before he went to appellant's residence. Mr. Eubank, the county attorney, did not testify; but the deputy sheriff, John Brown, and the two Rodgerses did. The deputy sheriff and one of the Rodgerses testified they all went into the residence of appellant, and that he had two quarts of whisky and a fraction of another bottle, and that they took several drinks with him there in his house, enjoyed his friendly hospitality, and went away. This prosecution followed.

Mrs. McDonald, had she been present, would have testified that her husband did not sell whisky to Rodgers; that she was there, where she could see and hear, lying in bed sick. Her testimony would have been confirmatory of her husband. He testified, denying the sale of whisky. The state showed that his wife was present and in such position that she could hear and know all about the transaction and what did occur between them.

The judgment is reversed, and the cause remanded.

#### ALSOBROOK v. STATE. (No. 5482.)

(Court of Criminal Appeals of Texas. Nov. 26, 1919.)

##### 1. ANIMALS §57—INDICTMENT FOR PERMITTING TO RUN AT LARGE INSUFFICIENT.

A complaint and information, charging the offense of willfully permitting hogs to run at large in violation of Vernon's Ann. Pen. Code 1916, art. 1241, are insufficient, where they do not allege a legal petition for an election by the commissioners' court for the election, the order by the county judge declaring the result of the election as provided by law, and a proclamation by publication or otherwise for 30 days of the result of the election.

##### 2. ANIMALS §50(2)—SUFFICIENCY OF PETITION FOR STOCK LAW ELECTION.

Under Vernon's Sayles' Ann. Civ. St. 1914, art. 7211, it is imperative that a petition for a stock law election in a subdivision of a county shall particularly describe such subdivision and designate the boundaries thereof.

##### 3. ANIMALS §50(2)—SUFFICIENCY OF PETITION FOR STOCK LAW ELECTION.

A petition for a stock law election, describing a subdivision of a county as "beginning at a point on the west boundary line of Franklin county; the N. W. corner of general stock law district; thence east with the N. B. line general stock law to where same connects with," etc., was insufficient under Vernon's Sayles' Ann. Civ. St. 1914, art. 7211.

Appeal from Franklin County Court, W. R. Irby, Judge.

R. G. Alsobrook was convicted of willfully permitting hogs to run at large, and he ap-

peals. Reversed, and prosecution ordered dismissed.

Wilkinson & Davidson, of Mt. Vernon, for appellant.

Alvin M. Owsley, Asst. Atty. Gen., for the State.

**LATTIMORE, J.** Appellant was convicted in the county court of Franklin county, Tex., of willfully permitting hogs to run at large in alleged violation of the terms of article 1241, Vernon's Penal Code, and his punishment fixed at a fine of \$5. The trial was before the court, a jury having been waived.

[1] Appellant made a motion to quash the complaint and information, the overruling of which is assigned as error. We believe, under the decisions heretofore rendered by this court, the motion was well taken. It was held in the case of *King v. State*, 74 S. W. 773, that the indictment should allege: (1) A legal petition for the election; (2) an order by the commissioners' court for the election; (3) the order by the county judge, declaring the result of the election as provided by law; and (4) a proclamation, by publication or otherwise, for 30 days, of the result of the election. See, also, *Hill v. State*, 58 Tex. Cr. R. 79, 124 S. W. 940. None of these allegations appear in the pleadings in the instant case.

[2] We are further of the opinion that the petition for the election, which is in the record, does not measure up to the requirements of our statute, and that all proceedings had thereunder were invalid. By the terms of article 7211, Vernon's Civil Statutes, it is made imperative that a petition for a stock law election in a subdivision of a county "shall particularly describe such subdivision, and designate the boundaries thereof." This provision has been held mandatory both by this court and our Supreme Court. *Ex parte Gilledge*, 57 Tex. Cr. R. 156, 122 S. W. 21; *Railway Co. v. Tolbert*, 100 Tex. 483, 101 S. W. 206.

[3] Referring to the petition for the election in the instant case, we note that in describing said alleged subdivision, its beginning call is as follows:

"Beginning at a point on the west boundary line of Franklin county; the N. W. corner of general stock law district; thence east with the N. B. line general stock law to where same connects with," etc.

We know of no possible construction which could make of this a legally sufficient call for the beginning or a boundary line for a subdivision so attempted to be set off and described under the terms of said statute. We have no recognized or known quantity of land or amount of territory which may be classified or described as "General Stock Law district," nor is the same any natural ob-

ject or political line known to this court; and hence it must follow that such beginning call, and any subsequent boundary call referring to a general stock law district, would, in our view, be insufficient. We hold the election without any legal petition, which would vitiate each step in the proceeding.

The judgment of the trial court will be reversed, and the prosecution ordered dismissed.

#### HOWARD v. STATE. (No. 5535.)

(Court of Criminal Appeals of Texas. Nov. 26, 1919.)

##### 1. BAIL §70—APPROVAL BY SHERIFF OF BOND ON APPEAL FROM CONVICTION OF MISDEMEANOR.

Under Code Cr. Proc. art. 918, as amended by Acts 36th Leg. (1919) p. 23, it is sufficient where the sheriff approves the bond given on appeal from conviction of misdemeanor.

##### 2. CRIMINAL LAW §1099(6)—TIME FOR FILING STATEMENT OF FACTS IN MISDEMEANOR CASE.

Where the court which tried a prosecution for misdemeanor entered an order allowing 60 days after adjournment in which to file statement of facts, and such statement was in fact filed within the 60 days, it will not be stricken out because filed more than 20 days after adjournment, the same rule applying in regard to statements of fact and bills of exception in misdemeanor as in felony cases.

##### 3. HIGHWAYS §164(3)—EVIDENCE SHOWING OBSTRUCTION.

In a prosecution for obstructing a public road, evidence held to sustain conviction.

##### 4. CRIMINAL LAW §1092(11)—DOUBT OF APPROVAL OF EXCEPTIONS.

It is in serious doubt whether the court intended to approve exceptions where the exceptions and special charges are all included in the same document indorsed "refused" by the court.

##### 5. CRIMINAL LAW §800(6)—DEFINITION OF "WILLFUL" OBSTRUCTION OF PUBLIC ROAD.

In a prosecution for obstructing a public road, the definition of "willful" by the court in his charge that by the term it was meant that defendant knew at the time of the alleged obstruction that the road was public, and that the obstruction was placed, if it was obstructed, with an evil intent, held sufficient.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Willful.]

Appeal from Montague County Court; W. T. Russell, Judge.

J. G. Howard was convicted of obstructing a public road, and he appeals. Affirmed.

Alvin M. Owsley, Asst. Atty. Gen., for the State.

DAVIDSON, P. J. Appellant was convicted of obstructing a public road.

[1] The Assistant Attorney General moves to dismiss the appeal because the appeal bond nowhere shows that it was approved by the court, and, being thus defective, did not attach the jurisdiction of this court. On page 23 of the Acts of the Thirty-Sixth Legislature will be found article 918, C. C. P., as amended. Prior to its amendment the convicted party in a misdemeanor was required to enter into a recognizance during the term of court at which the conviction was obtained. As amended, it does not require the defendant to enter into a recognizance during the term, but after giving notice of appeal he shall be permitted to enter into bond after the expiration of the term of court in an amount to be fixed by the court. It further provides that before the defendant shall be released on such bail bond same must be approved by the sheriff or the judge trying the case, or his successor in office, and when such bail bond has been accepted and approved the defendant shall be released from custody the same as though he entered into a recognizance during the term at which he was convicted. This appeal bond was taken after the expiration of the term of court and approved only by the sheriff, so far as the record shows. We are of opinion it is sufficient where the sheriff approves the bond. We think so far as that phase of the motion is concerned it should be overruled.

[2] The Assistant Attorney General also moves to strike out and not consider the statement of facts because filed more than 20 days after the adjournment of court. The court entered an order allowing 60 days after the adjournment of court in which to file the statement of facts. Such statement was in fact filed within the 60 days. Those cases cited by the Assistant Attorney General in support of this motion would sustain his contention, but in *Gribble v. State*, 210 S. W. 215, decided during last term of the court, those cases were overruled. The *Gribble* Case was followed in the case of *Wales v. State*, 212 S. W. 503, also decided during the last term of this court. The proposition announced in the *Gribble* Case is to the effect that under the stenographic act of the Legislature, discussed in that case, the rights of the accused in regard to statement of facts and bills of exception would be the same in misdemeanors as in felonies. The former decisions were based upon the idea that the statute, only allowing 20 days in cases appealed from the county court, was not repealed by the later act. This ruling seems to have been based upon the proposition that it was only in cases where there was a stenographer used that the statute authorizing 20 days would control. The *Gribble* Case overrules those cases, and to the mind of the writer correctly so. The writer is of opinion, and is supported by the *Gribble* and *Wales* Cases, *supra*, that the same rule would apply in regard to statement of facts and bills of ex-

ception in misdemeanors as in felony cases. Believing this view to be correct, the motion of the Assistant Attorney General to disregard the statement of facts will also be overruled.

[3] Upon the merits of the case the facts show that appellant obstructed a public road by building a fence across it. This fence is described as being of a permanent nature and intended to obstruct the road. Under the evidence this road was laid out by a jury of view appointed by the commissioners' court of Montague county, and Mr. Willett had been appointed road overseer. He says:

"I had the road opened and laid out according to instructions that I received at the time I was appointed overseer. I had the road worked by county hands and by other hands. The road was obstructed when I was overseer."

Then follows his denial giving appellant his consent or permission to fence the road. The road extended through the lands of appellant to Red river. Another witness testified that he traveled along the road, and saw the fence posts put up and wire nailed to the same and fastened up in a very substantial way, and saw appellant putting up this fence across the road. The sheriff testified he knew the road; that he tore the fence down; that appellant was present when he tore the fence down; that the fence was put up in a very substantial way; the posts were set in the ground and "tamped with rock." Appellant stated he would help witness take the fence down, but he did not want to tear down his own fence. Appellant also stated to the sheriff that the fence was put up good; that the posts were well in the ground and tamped with rock, and that he put them up himself. The appellant introduced no testimony.

[4, 5] We are of opinion the evidence supports the verdict of the jury. There is what purports to be exceptions to the court's charge contained in the record, and included in the same document are special charges requested by appellant but refused by the court. Whether the court intended to approve these exceptions or not is left in serious doubt. The exceptions and special charges are all included in the same document, which was indorsed "refused" by the court. The record, it occurs to us, fails to show that the court approved the exceptions, if we take his indorsement as the criterion. The main objection urged by appellant was to the definition the court gave of the word "willful," which is in the following language:

"By the term 'willful' is meant that the defendant knew at the time of the alleged obstruction that said road was a public road, and that said obstruction was placed there, if it was obstructed, with an evil intent."

We are of opinion that this is a sufficient definition of the word "willful." See *Cornellson v. State*, 40 Tex. Cr. R. 159, 49 S. W. 384.

It seems the court here gave the identical charge that was held in the above-cited case as being a sufficient definition of "willful."

There being no error in the record authorizing a reversal, the judgment is ordered to be affirmed.

### POLDRACK v. STATE. (No. 5483.)

(Court of Criminal Appeals of Texas. Nov. 26, 1919.)

#### 1. ASSAULT AND BATTERY §91—SUFFICIENCY OF EVIDENCE OF ASSAULT UPON WOMAN.

Evidence that defendant grabbed the alleged injured female with one hand, and put his other hand on her body at or near her privates, accompanying such acts with an insulting proposal to her, if believed by the jury, would justify a verdict of guilty of assault and battery under Vernon's Ann. Pen. Code 1916, art. 1009.

#### 2. ASSAULT AND BATTERY §48—ELEMENTS.

A man's taking hold of a woman without her consent, and in such a way as to cause in her a sense of shame, or a disagreeable emotion of the mind, is sufficient to constitute an assault under Vernon's Ann. Pen. Code 1916, art. 1009, and the slightest degree of force would constitute a battery.

#### 3. NAMES §16(2)—IDEM SONANS.

In a prosecution for simple assault, the alleged name of the injured party, "Matoska," and her name as testified to, "Matosky," are idem sonans.

#### 4. CRIMINAL LAW §829(3) — INSTRUCTION JUSTIFYING REFUSAL OF SIMILAR REQUESTS.

In a prosecution for an assault upon a woman, an instruction that before they could convict the jury must believe that the assault was committed "as alleged in the indictment" was sufficient, and justified refusal of requested charges thereon.

Appeal from Williamson County Court; F. D. Love, Judge.

Herman Poldrack was convicted of simple assault, and he appeals. Affirmed.

J. F. Taulbee, of Georgetown, for appellant.  
Alvin M. Owsley, Asst. Atty. Gen., for the State.

LATTIMORE, J. Appellant was convicted in the county court of Williamson county of simple assault, and his punishment fixed at a fine of \$5.

The charge as made in the indictment was that appellant unlawfully made an assault upon one Annie Matoska, by striking, wounding, and bruising her with his hands and fists.

[1] The facts, as contended for by the state, show that appellant "grabbed" the alleged injured female with one hand, and put his other hand on her body at or near her privates, accompanying such acts with an in-

sulting proposal to her. These facts, if believed by the jury, would constitute such a striking as to amount to an assault and battery.

[2] The slightest degree of force would be such battery. *Donaldson v. State*, 10 Tex. App. 307; *Ware v. State*, 24 Tex. App. 521, 7 S. W. 240.

Taking hold of a woman without her consent, and in such a way as to cause in her a sense of shame, or a disagreeable emotion of the mind, is sufficient, under our statute, to constitute an assault. Article 1009, Vernon's Penal Code, and authorities cited.

[3] The name of the injured party was alleged to be Matoska. Her husband said he always spelled it Matosky. We think the names idem sonans. *Dickson v. State*, 34 Tex. Cr. R. 1, 28 S. W. 815, 30 S. W. 807, 53 Am. St. Rep. 694; *Alexander v. State*, 25 S. W. 127; *State v. Griffie*, 118 Mo. 188, 23 S. W. 878; *Foster v. State*, 1 Tex. App. 531; *Cline v. State*, 34 Tex. Cr. R. 415, 31 S. W. 175; *Ex parte Holland*, 53 Tex. Cr. R. 301, 108 S. W. 1181.

[4] The court charged the jury that before they could convict appellant they must believe that the assault was committed "as alleged in the indictment." This was sufficient, and the court did not err in refusing the special charges asked by appellant.

Finding no error in the record, the judgment of the trial court is affirmed.

### FLORES et al. v. STATE. (No. 5452.)

(Court of Criminal Appeals of Texas. Nov. 19, 1919.)

#### 1. CRIMINAL LAW §1056(2)—FAILURE TO EXCEPT TO CHARGE.

Under Vernon's Ann. Code Cr. Proc. 1916, arts. 735-737, errors in charges, not properly excepted to, will not be considered by the Court of Criminal Appeals, unless fundamental.

#### 2. CRIMINAL LAW §1056(2)—MISDIRECTION AS TO PENALTY FUNDAMENTAL ERROR, REVIEWABLE IN ABSENCE OF EXCEPTION.

In a prosecution for cutting fences, misdirection of the jury as to the punishment to be awarded, resulting in infliction of a penalty of two years, greater than the minimum of one year fixed by law, held fundamental error, reviewable despite the absence of proper exception to the charge.

Appeal from District Court, Sutton County; James Cornell, Judge.

Juan and Dan Flores and another were convicted of fence cutting, and the named defendants appeal. Reversed, and cause remanded for another trial.

Anderson & Upton, of San Angelo, and Wardlaw & Elliott, of Sonora, for appellants.

Alvin M. Owsley, Asst. Atty. Gen., for the State.

LATTIMORE, J. Juan and Dan Flores and one Simon Campos were convicted in the district court of Sutton county, of the offense of fence cutting, and were sentenced to two years' confinement in the penitentiary, from which conviction the Flores have appealed to this court; but, the sentence against Campos having been suspended, no appeal was taken by him.

There is one bill of exceptions, which effectually disposes of this appeal, and presents substantially the state of facts herein-after set forth. On the trial the court instructed the jury that, if they found appellants guilty, the punishment awarded should be not less than two nor more than five years' confinement in the penitentiary. This charge was not excepted to, and the jury found appellants guilty, and fixed their punishment at two years' confinement. Subsequently it was discovered by counsel for appellants that the statutory punishment was confinement from one to five years, and within two days after the rendition of said verdict a motion for a new trial was filed by said counsel, based in part upon the said misstatement of the punishment. It is made to appear that the jury which tried the case had been discharged, and had separated, and the inference is that they had been discharged for the week, although this latter statement would make no difference.

After the filing of said motion, the trial court reassembled said jury, and stated to them, in a charge set forth, that he had made the aforesaid mistake, and they were directed to consider again, under a correct statement of the punishment, what term of imprisonment should be allotted to these appellants; they promptly returned a verdict fixing the same at one year's confinement. It is further made to appear that there was offered to appellants and their counsel, the option of accepting under either of said verdicts, which verdict they should choose, and upon their refusal to indicate which, the court overruled appellants' motion for a new trial, and sentenced them to two years' confinement in the penitentiary, under the first verdict referred to.

[1] Since the passage of the present articles 735, 736, and 737, this court has adhered to the rule that errors in charges not properly excepted to will not be considered by us, unless the same be fundamental. *Sampson v. State*, 78 Tex. Cr. R. 432, 181 S. W. 193; *Debth v. State*, 80 Tex. Cr. R. 4, 187 S. W. 341; *Childs v. State*, 81 Tex. Cr. R. 21, 193 S. W. 664.

[2] Misdirection of the jury in a felony case is held to be fundamental error in every case where the same results in the infliction of a greater penalty than the minimum fixed by law. *Branch's Ann. Penal Code*, p. 330, § 644. In the instant case, there can be no question as to the injury from said incorrect statement of said penalty in the charge. This fact could not be more forcibly shown than results from the statement that the same jurors who gave appellants two years' punishment, when they thought that the minimum, reduced said punishment to one year when told by the court, upon recall, that the minimum punishment was one year, notwithstanding which fact the sentences imposed were under the first verdicts, as stated.

[3] Another question is raised by the record, in that there is some evidence showing that, within the inclosure whose fence is alleged to have been cut by the appellants, were certain properties, which had theretofore been dedicated by the owners to the public as additions and contained alleys and streets. It is not shown by any evidence that there had ever been any acceptance by the city of Sonora, or the authorities thereof, or the public, of any such dedication; nor are the terms of such dedication shown; nor does any evidence attempt to set up that the said streets and alleys had ever been used by the public, or that said dedication, if any, had ever been recognized in any way; nor is it shown that the places where the said fence was cut were in said portions claimed to be streets and alleys. In this condition of the record, we do not think this contention presents any question upon which our judgment is invoked. In view of the fact that there must be another trial, we forego further discussion of the other questions presented.

For the error pointed out, the judgment of the trial court will be reversed, and the cause remanded for another trial.

**Ex parte KEMPER. (No. 5453.)**

(Court of Criminal Appeals of Texas. Nov. 19, 1919.)

**1. CONTEMPT  $\S$ 14—APPROACHING RELATIVE OF JUROR.**

If conversation between relator and a brother-in-law of a juror summoned on jury for week, relative to corrupting such juror, occurred after the juror had been actually discharged by the court, there would have been no contempt.

**2. CONTEMPT  $\S$ 14—APPROACHING RELATIVE OF JUROR.**

Though relator approached a brother-in-law of a juror summoned on jury for week and sought to have juror corrupted, yet where corruptive matters were never communicated to the juror, who was discharged from service, the district court had no jurisdiction to punish relator for contempt.

**3. HABEAS CORPUS  $\S$ 28—CONTEMPT PROCEEDINGS BEYOND JURISDICTION OF TRIAL COURT.**

Under Vernon's Ann. Code Cr. Proc. 1916, art. 183, where the act penalized for contempt is beyond the jurisdiction to the trial court to punish, the Court of Criminal Appeals will review the case and relieve under a writ of habeas corpus.

Original habeas corpus proceeding by Bob Kemper. Relator ordered released from custody.

Herbert Scharff and Williams & Williams, all of Waco, and W. M. Kennedy, of Groesbeck, for appellant

Alvin M. Owsley, Asst. Atty. Gen., for the State.

**LATTIMORE, J.** Relator was held in contempt of the district court of Limestone county, punished by fine and imprisonment, and sued out an original writ of habeas corpus before this court.

[1] Substantially the criminative facts are that one Richardson had been summoned on the jury for the week in said court, that relatives of relator had criminal cases set for trial during said week, and that relator approached a brother-in-law of said Richardson and sought to have said juror corrupted by the promise to him, through said brother-in-law, of the sum of \$50, if said juror would hold out for a hung jury or an acquittal, if taken on the jury in said cases. It is undisputed that the matters corruptive were never communicated to said juror, who was discharged from service at his own request, by the court, on convening at 9 o'clock on Monday morning of said week. It is questionable if the conversation between relator and said brother-in-law, in which said matters were broached, did not take place after said juror had been actually discharged by the court, in

which event we think there would have been no contempt.

[2] The conduct of relator, if the above facts are true, was such as to merit the strong condemnation of men who desire that the processes of the law be kept free from contamination, and the judgments of the courts be above suspicion and reflect justice, and, if we had any doubt as to the jurisdiction of the trial court in the matter we would uphold his judgment.

[3] In our opinion, when the alleged contempt is an attempt to interfere with the jurisdiction or processes of the courts and same has never reached the point of any kind or color of communication, or contact between the corruptive effort and the officers, processes, or matters sought to be interfered with, the power to condemn is lacking. Under article 183, Vernon's C. O. P., and the opinions rendered by this court since the case of *Ex parte Degener*, 30 Tex. App. 566, 17 S. W. 1111, it has uniformly been held that, where the act penalized for contempt is one beyond the jurisdiction of the trial court to punish, this court would review the case and relieve under a writ of habeas corpus. In the case of *In re Ellison*, 256 Mo. 378, 165 S. W. 987, the Supreme Court of Missouri, on an almost identical state of facts, held that where the effort was made through a third person, but was in no way communicated to the juror, the relator was not guilty of contempt. See, also, *U. S. v. Carroll* (D. C.) 147 Fed. 947.

It is ordered that relator be released from custody or restraint under such judgment of contempt, and that the same be held void.

**BARGAS v. STATE. (No. 5513.)**

(Court of Criminal Appeals of Texas. Nov. 12, 1919.)

**1. CRIMINAL LAW  $\S$ 1090(19)—NECESSITY OF BILL OF EXCEPTIONS TO REVIEW RULINGS ON EVIDENCE.**

One dissatisfied with the rulings of the court in a criminal case as to the receipt or rejection of evidence must, to obtain review, bring the matter before the Court of Criminal Appeals in a bill of exceptions, certified in the manner provided by law, and it is not sufficient to complain of the court's rulings on motion for new trial.

**2. CRIMINAL LAW  $\S$ 1122(6)—CONSIDERATION OF INSTRUCTIONS ON APPEAL.**

On appeal in a criminal case, to authorize the consideration of objections to the charge, or the refusal of special charges, the record must disclose that the requirements of Vernon's Ann. Code Cr. Proc. 1916, arts. 735, 737, 737a, and 743, providing for presentation of charges to the court, were fulfilled.



## 3. CRIMINAL LAW §1144(6)—PRESUMPTION OF VENUE ON APPEAL.

Where, on appeal in a criminal case, it does not appear that an issue was made upon the failure to prove venue, venue will be presumed under the provisions of Vernon's Ann. Code Cr. Proc. 1916, art. 938.

## 4. CRIMINAL LAW §915—WAIVER OF OBJECTIONS TO FORM OF INDICTMENT.

Where defendant in a criminal case does not complain that his name is incorrectly stated or spelled in the indictment until a motion for new trial is filed, he has waived such point under the express provisions of Vernon's Ann. Code Cr. Proc. 1916, art. 559.

Appeal from District Court, Medina County; R. H. Burney, Judge.

Martin Bargas was convicted of cattle theft, and he appeals. Affirmed.

Diedrich A. Meyer, of San Antonio, for appellant.

C. M. Cureton, Atty. Gen., and W. A. Keeling, Asst. Atty. Gen., for the State.

MORROW, J. Appellant's conviction was for theft of cattle.

[1, 2] The evidence is sufficient to prove the appellant's guilt. There are no bills of exceptions or complaints of the court's charge or refusal of special charges presented in a manner authorizing consideration. One dissatisfied with the rulings of the court in the receipt or rejection of evidence must, to obtain review, bring the matter before this court in a bill of exceptions, certified in the manner provided by law. This is not effected by complaining of the court's ruling on such matters in motion for new trial. *Sessions v. State*, 81 Tex. Cr. R. 424, 197 S. W. 718. To authorize the consideration of objections to the charge or the refusal of special charges, the record must disclose that the requirements of the statute, article 735, 737, 737a, 743, Code of Criminal Procedure, were fulfilled. Objections to the charge and special charges refused cannot be considered on appeal when there is a failure in the record to show that they were presented to and acted upon by the court as required by the provisions mentioned. See Vernon's Texas Crim. Statutes, vol. 2, p. 526, notes 64 and 65.

[3] There is a suggestion in the motion for a new trial that there was a failure to prove venue. There is no indication that an issue was made on the subject on the trial of the case, in the absence of which article 938, O. C. P., provides that on appeal proof of venue shall be presumed. See Vernon's Texas Crim. Statutes, vol. 2, p. 897. The examination of the statement of facts, however, in the instant case discloses that there was sufficient proof that the offense was committed in Medina county where the prosecution was had.

[4] In the motion for new trial the complaint is also made that appellant's name is incorrectly stated or spelled in the indictment. No point appears to have been made upon this subject until the motion for a new trial was filed, at which time under our statute, article 559, Code of Criminal Procedure, the point had been waived. That statute says that at the time of arraignment, unless the appellant or his counsel suggests that the indictment is not in his true name, "it shall be taken that his name is truly set forth, and he shall not thereafter be allowed to deny the same by way of defense." See other articles upon the same subject, Vernon's Texas Criminal Statutes, vol. 2, p. 287.

Failing to find any error in the record, the judgment of the lower court is ordered affirmed.

## BARGAS v. STATE. (No. 5514.)

(Court of Criminal Appeals of Texas. Nov. 12, 1919.)

## 1. CRIMINAL LAW §1090(19), 1092(4, 14)—REQUISITES OF BILL OF EXCEPTIONS.

A purported transcript of what occurred on the trial as shown by the stenographer's notes and certified to by the stenographer, but not presented to or approved by the judge, cannot be considered; since to constitute a bill of exceptions it must be first approved by the court certifying its correctness, and must be filed, either in term time or within such time as may be authorized by law.

## 2. CRIMINAL LAW §1032(7)—WAIVER OF OBJECTION TO VARIANCE.

Where defendant in a prosecution for cattle theft was indicted under the name of "Bargas," to which he pleaded without objection, he could not on appeal contend that his true name was "Vargas," and that hence there was a variance.

## 3. CRIMINAL LAW §1090(7)—REVIEW OF REFUSAL OF CONTINUANCE IN ABSENCE OF BILL OF EXCEPTIONS.

Where a bill of exceptions was not reserved to the refusal of a continuance in a criminal prosecution, it will not be considered on appeal.

Appeal from District Court, Medina County; R. H. Burney, Judge.

Martin Bargas was convicted of cattle theft, and he appeals. Affirmed.

Diedrich A. Meyer, of San Antonio, for appellant.

C. M. Cureton, Atty. Gen., and W. A. Keeling, Asst. Atty. Gen., for the State.

DAVIDSON, P. J. This conviction was for theft of cattle, the punishment being assessed at two years in the penitentiary.

[1] There are no bills of exception contained in the record. Appellant filed in this

court on the 5th of the current month what he terms bills of exception. This purports to be a transcript of what occurred on the trial as shown by the stenographer's notes, and is so certified by the stenographer. The court adjourned on the 2d of May last. These exceptions are not approved by the judge, nor were they presented to him. This document cannot be considered. In order to constitute a bill of exceptions, it must first be approved by the court certifying its correctness, and, second, it must be filed either in term time or within such time as may be authorized by law.

[2] Appellant contends that, inasmuch as it developed upon the trial that his name was "Vargas" instead of "Bargas" as alleged in the indictment, therefore there was a variance. In this contention there is no merit. Appellant when arraigned pleaded to the indictment as charged. Had he desired to have the indictment corrected or pleaded under his proper name, he should have so suggested to the court, and the indictment would then have been changed to meet the request so as to show his real name. The law makes a distinction between the name of the defendant alleged in the indictment and the supposed variance by the proof and that of the alleged owner. The defendant may plead by any name if he sees proper; but if he pleads to the name as alleged in the indictment a reversal will not occur, nor would any error be shown. The decisions are quite numerous to this effect.

[3] Appellant filed an application for a continuance. This matter can be disposed of with the statement that a bill of exceptions was not reserved to its refusal, and therefore it cannot be considered.

The motion for new trial contains several grounds which cannot be considered in the absence of exceptions. While the evidence is circumstantial, we are of opinion it is sufficient to sustain the conviction. A statement of this testimony would be of no service or value, and therefore it is not included in the opinion.

The judgment will be affirmed.

#### BISCOE v. STATE. (No. 5454.)

(Court of Criminal Appeals of Texas. Nov. 19, 1919.)

WITNESSES  $\Rightarrow$  379(9) — IMPEACHMENT BY GRAND JURY TESTIMONY.

A witness may be asked what he testified to before the grand jury, for the purpose of impeachment.

Appeal from Smith County Court; W. R. Castle, Judge.

Hun Biscoe was convicted of violating the local option laws, and appeals. Reversed and remanded.

Simpson, Lasseter & Gentry, of Tyler, for appellant.

E. A. Berry, Asst. Atty. Gen., for the State.

LATTIMORE, J. Appellant was convicted of violating the local option laws of this state, and his punishment fixed at a fine of \$25 and 20 days in jail. But one error is here presented, being raised by two bills of exception, which were duly approved by the county judge.

When the prosecuting witness, alleged to be the purchaser at the illegal sale, was on the stand and gave evidence for the state, he testified, as alleged in the information, that he did purchase said whisky from appellant. He was then asked by appellant's counsel to state, and affirmatively answered, if he had not been before the grand jury and there interrogated in regard to this same matter, and if he had not then stated under oath that he had not bought whisky from appellant, or that he did not remember having bought the same, and, after making such statement, if he was not then sent to jail by the grand jury, and there kept until the afternoon of the same day; and then, when brought back before said body, if he did not then for the first time state that he had bought said whisky from the appellant. The county attorney moved the court to strike out said evidence, and to instruct the jury not to consider the same, which was done over appellant's objection.

In this same connection, as appears from the other bill of exception, said witness was asked if he did not state to said grand jury, when he was first before them, that he did not buy any whisky from appellant, or that he did not then state that he did not remember having bought any whisky from appellant, and if he did not then refuse to admit that he had bought said whisky, until he had been confined in the county jail, all of which questions would have been answered by the witness in the affirmative, but for the objections thereto. It seems that the objection to this testimony was based on the ground that a witness could not be asked to state what occurred in the grand jury room, and that he could not be impeached by proof of what did there transpire. This was error, and, a timely exception having been reserved thereto, it is such error as necessitates the reversal of this case. The contrary doctrine to that adhered to by the trial court has often been held by us. *Wisdom v. State*, 42 Tex. Cr. R. 579, 61 S. W. 926; *Gibson v. State*, 45 Tex. Cr. R. 312, 77 S. W. 812;

Gallegos v. State, 48 Tex. Cr. R. 58, 85 S. W. 1150; Addison v. State, 211 S. W. 225.

For the errors indicated, the judgment of the trial court must be reversed, and the cause remanded; and it is so ordered.

### MEDFORD v. STATE. (No. 5439.)

(Court of Criminal Appeals of Texas. Nov. 19, 1919.)

#### 1. WITNESSES $\S$ 395, 414(2)—CORROBORATIVE DECLARATIONS OF ACCUSED.

Statements made by accused cannot be testified to by him as corroborative of his testimony; such statements being only admissible to corroborate one impeached by proof of former contradictory statements.

#### 2. CRIMINAL LAW $\S$ 413(1)—STATEMENTS OF ACCUSED INADMISSIBLE TO REBUT MALICE.

One being prosecuted for homicide cannot rebut evidence of threats or malice, or show who was the aggressor in the fatal encounter, by proof that he had previously stated to officers that he owed deceased no ill will and would have been friends with him if deceased would permit him to be so, and that he would like to have deceased put under a peace bond; such statements being self-serving and unaccompanied by any acts of which they would be explanatory.

#### 3. HOMICIDE $\S$ 244(8)—DEGREE OF PROOF AS TO SELF-DEFENSE.

A request to instruct that, if jury have a reasonable doubt as to whether the defendant killed the deceased in self-defense, they should find him not guilty, was properly refused.

#### 4. CRIMINAL LAW $\S$ 770(2) — INSTRUCTIONS MUST COVER ALL ISSUES RAISED.

It is a duty of the trial court to charge on all the issues made by the testimony, no matter whether the same are raised by the testimony of the accused or some other witness.

#### 5. HOMICIDE $\S$ 301 — INSTRUCTION ON DEFENSE OF SON ERRONEOUSLY REFUSED.

In a homicide case, held error, in view of the evidence, to refuse to instruct as to the right of accused to arm himself and interpose in a difficulty to protect his son from unlawful violence.

#### 6. HOMICIDE $\S$ 112(4)—RIGHT OF ACCUSED TO ARM HIMSELF AGAINST ATTACK.

Where one procured a gun to protect himself or himself and his son from unlawful violence, and such preparatory act caused an unlawful attack upon him, and in his own necessary self-defense he shot and killed the assaulting party, he was not guilty of any offense.

#### 7. HOMICIDE $\S$ 300(3)—INSTRUCTION AS TO THREATS PROPERLY REFUSED.

In a homicide case, court properly refused to instruct that, if one has made threats and at the time of the homicide did something show-

ing the intention of executing such threats, his slayer should be held not guilty; such an instruction not being full and correct statement of the law.

#### 8. HOMICIDE $\S$ 145—USE OF WEAPON CALCULATED TO PRODUCE DEATH.

The use of a weapon calculated to produce death does not always carry with it the presumption of an intent to kill or inflict serious bodily injury, as the manner of use of the weapon must always be taken into consideration.

#### 9. HOMICIDE $\S$ 3 — SHOTGUN NOT DEADLY WEAPON AT LONG RANGE.

A shotgun at such long range as to make it apparent that death or serious bodily injury could not result from its use would not be legally a deadly weapon.

#### 10. HOMICIDE $\S$ 325—INSTRUCTIONS REVIEWED ONLY WHEN EXCEPTED TO.

Where there was no exception to the court's charge, a claim of failure to submit the proposition in a homicide case, in reference to self-defense, that the occurrence must be viewed from defendants' standpoint, cannot be considered on appeal.

Appeal from District Court, Coryell County; J. H. Arnold, Judge.

I. W. Medford was convicted of murder, and appeals. Reversed and remanded.

McClellan & McClellan, of Gatesville, and A. R. Eldson, of Hamilton, for appellant.

G. E. Johnson, Dist. Atty., of Hamilton, and H. E. Bell, of Gatesville, and John Maxwell, Asst. Atty. Gen., for the State.

LATTIMORE, J. Appellant was given a sentence of five years in the district court of Coryell county, for the murder of one Pieper.

The two men were neighbors—tenants on the same farm, used water from the same well, and worked adjoining fields.

About two years before the homicide, they had a difficulty, in which appellant made the first assault, and in which he cut deceased with a knife and about which trouble there was the usual difference in the testimony of the state and appellant. It is agreed that from that time the two men had no communication with each other, and did not speak when they met.

On the occasion of the homicide, appellant and deceased, with their children, were leaving their respective fields to go home, in the late afternoon. Near the well, a fist fight took place between a young son of each of the parties. As to what followed, the version of appellant and his family was that deceased called to his son not to run from appellant's boy, and that he would go to the house and get his gun and come and kill him, or them, and that he did go and get his gun

and a number of shells filled with BB shot, and came out into his corn, from which place the shooting occurred. The version of the family of deceased of what occurred after the fight between the boys is that appellant made a very ugly threat, ran to his home, got his Winchester rifle, and came out into his yard near a tree and fired at deceased, then to his barn, from which place he fired other shots at deceased; one of said shots taking effect in the wrist of deceased, and the last shot going through the body of deceased, producing almost instant death.

There was testimony from a neighbor, at work in his field near by, to the effect that deceased fired the first shot, but that, when that last shot was fired, deceased was walking from where he had been during the firing, towards his house; appellant firing the shot that killed him from within his own barn. Appellant testified that several shots, from the first firing by deceased struck him, but caused no serious injury. He claimed to have shown to the sheriff a place on his finger where one of the shot struck, but the sheriff said he saw no signs of injury.

The first contention made by appellant here is that he should have been allowed to testify himself, and to prove by the justice of the peace and constable of a nearby precinct in the adjoining county of McLennan, that, a month or two before the killing, appellant talked with said officers, and as to what was then said. It appears, from the recitals of the bill taken to the refusal of this testimony, that he offered to state that he advised with said officers with reference to putting deceased under a peace bond, because he was afraid of deceased; that deceased had threatened him, and had bought a shotgun, and he was afraid deceased would kill him with said gun. He further proposed to show that he told said officers about the previous trouble he and deceased had some two years before; that he wanted to get along at peace with deceased, and have no trouble with him, as he had no ill will or hatred toward deceased, and would be friendly with him if deceased would permit him to be so; that he was afraid of serious trouble, and all he wanted was protection by the officers of the law.

Substantially the same matters appear in bills of exceptions to the refusal of the evidence of said officers.

It is urged that as the state had introduced various statements of appellant, in the nature of threats, and as showing malice resulting from the former difficulty between the parties, appellant should be allowed to introduce this conversation with said officers on the issue of manslaughter, and as tending to show who was the aggressor at the time of the killing, and as rebutting the evidence of the state of threats and malicious statements by appellant, and as corrobora-

tive of the statements of appellant on the witness stand in the instant case.

[1, 2] The statements offered cannot be admissible as corroborative of the testimony of appellant as a witness. One who is impeached by proof of a former statement contradicting those now given may be sustained by proof that on other occasions said witness made the same or similar statements, but that is as far as the permission goes. The statements offered were not the same or similar statements to those testified to by the state's witnesses as growing out of the former difficulty of the parties. Neither do we think one can rebut evidence of threats or malice, or show who was the aggressor in the fatal encounter, by such proof as that offered, and we think the authorities cited by counsel for appellant were misapprehended. No effort of appellant to place deceased under a peace bond was in fact shown or offered. The proposed testimony was not explanatory of any act of appellant in evidence, nor was it claimed that at the time of such purported conversations appellant was making any effort to pacify deceased, or settle any difference or difficulty, or to effect an understanding with him. In each of the authorities cited by appellant, the accused was actually seeking peace or protection, or a settlement of impending trouble, and the statements offered, and held by this court to be admissible, were accompanied by acts of which the same were explanatory and became a necessary part. *Poole v. State*, 45 Tex. Cr. R. 348, 76 S. W. 565; *Everett v. State*, 30 Tex. App. 682, 18 S. W. 674; *Butler v. State*, 33 Tex. Cr. R. 232, 26 S. W. 201; *Schauer v. State*, 60 S. W. 249; *Nelson v. State*, 58 S. W. 107.

The statements of appellant were unaccompanied by any acts, and were self-serving and inadmissible. *Hutchinson v. State*, 58 Tex. Cr. R. 228, 125 S. W. 19; *Hardeman v. State*, 61 Tex. Cr. R. 111, 133 S. W. 1056; *Atkinson v. State*, 34 Tex. Cr. R. 424, 30 S. W. 1035.

[3] Appellant's bill of exceptions No. 8 complains of the court's charge on self-defense, and, in connection therewith, we are asked to consider appellant's special charge No. 1. Said bill of exceptions contains no quotation from the charge, and refers to no paragraph thereof, and uses the following language:

"Defendant presented objections and exceptions to the court's charge on the law of self-defense, and to that part of the court's charge wherein he applies the law directly to this case, and especially to the court's charge, because said charge did not," etc.

This is manifestly not sufficient to call for our consideration. We are not called upon, under the rules, to inspect the entire charge, nor to speculate as to which particular portion of the various paragraphs on self-defense might be meant. The special charge No. 1

contains a statement just the reverse of the law, as we understand it, as same seeks to instruct the jury that, if they have a reasonable doubt as to whether the defendant killed the deceased in self-defense, they should find him not guilty.

Appellant asked the following special charge, which was refused, to wit:

"You are charged that the defendant had the same right to protect his son against death or serious bodily injury that he would have to protect his own person. You are therefore charged that the defendant had the right, if it reasonably appeared to him, viewed from his standpoint, that the deceased was about to make an assault upon his said son, to arm himself and come to the rescue and protection of his said son, and if the defendant, in preparing to protect his son, was assaulted by the deceased, or it reasonably appeared to defendant, from the words, coupled with the acts of the deceased, that defendant was in danger of death or serious bodily injury, and he fired and killed deceased, defendant should not be guilty, and you will so find. In case you have a reasonable doubt, find him not guilty."

[4] It is the duty of the trial court to charge all the issues made by the testimony, no matter whether the same are raised by the testimony of the accused, or some other witness. Appellant testified as follows:

"I was something about 40 yards from the well, and Louis and Richard began to fight. Of my own knowledge I do not know what they began to fight about. When I got even with the well, they had done quit fighting, but Mr. Pieper jumped out of the old hack, and said: 'Don't run from the God damned son of a bitch, Richard. If you can't kill him with your knife, I am coming with my gun. Kill him!' That was the first words I heard. Those were Mr. Pieper's exact words. I heard him say them. He was, at that time, straight through, 350 yards from the boys, and he was about the same distance from me. I was about even with the well. I had nothing on earth to do with the boys' fighting. The fight was over before I got near the boys. When Mr. Pieper said what I have just stated, he went toward the house, and about that time some mules they had ran between him and myself, a pair of mules, and they ran out. I don't know how Mr. Pieper got the gun, but directly he came walking back waving the gun, and the mules were between him and myself. He must have gotten halfway to the well, waving that gun, and hallooing. I didn't hear what he was saying, but he had the gun going toward Louis and Richard. Louis and Richard had stopped fighting at that time, but I couldn't say how far apart they were. That was after Richard ran and Louis turned back, I suppose 8 or 10 steps toward the well, to get water. When I saw Mr. Pieper coming with his gun, I went

into the house and got my gun. I got my gun to protect my boy, and for no other cause on earth. When I came out with the gun, I stepped over the fence. I was still on my land. Mr. Pieper was in the road. I said: 'Go back, Pieper! The kids have quit fighting.' And I could see the bulk of him as he stepped into the corn, going back to the house, and as he got in a direct line with me, in the corn rows, he raised and shot at me."

[5, 6] Under the above testimony, appellant had a right to have substantially the issue contained in his special charge No. 8 submitted to the jury. If in fact there appeared to him to be a necessity for his interposition to protect his son from unlawful violence, which was a question of fact for the jury, and not for the court, and if appellant's acts in procuring his gun and arming himself were for that purpose alone, or for the purpose of protecting himself and his son, and if such preparatory acts caused an unlawful attack upon him, and in his own necessary self-defense he shot and killed deceased, he would not be guilty of any offense. This theory of appellant might be contradicted by other evidence in the case, but this would not relieve the trial court of the imperative duty of submitting the law thereof.

[7] Appellant's requested charges on threats and the use of a deadly weapon are both insufficient as we understand the law. It is manifest that an instruction that if one has made threats, and, at the time of the homicide did something showing an intention to execute such threats, his slayer should be held not guilty, is not a full and correct statement of the law. Such a charge says too much and too little.

[8, 9] Nor does the use of a weapon calculated to produce death always carry with it the presumption of intent to kill or inflict serious bodily injury. The element of the manner of use of such weapon must always be taken into consideration. A shotgun at such long range as to make it reasonably apparent that death or serious bodily injury could not result from its use would not be legally a deadly weapon. *Scott v State*, 46 Tex. Cr. R. 817, 81 S. W. 952.

[10] There was no exception to the court's charge for a claim of failure to submit the proposition that the occurrence must be viewed from appellant's standpoint, and we cannot consider this contention of appellant. The other errors complained of will probably not arise on another trial.

For the reasons herein stated, the judgment of the trial court is reversed, and the cause remanded.

## PARKER v. STATE. (No. 5430.)

(Court of Criminal Appeals of Texas. Nov. 12, 1919.)

1. HOMICIDE  $\S$ 276, 300(8)—INSTRUCTION AS TO PROVOCATION BY DEFENDANT.

In a prosecution for murder, evidence held sufficient to warrant an instruction given on the matter of accused's provoking the difficulty leading to the killing, and question as to whether defendant's acts and statements were for purpose of provoking attack was for the jury.

2. HOMICIDE  $\S$ 327—NECESSITY OF BILL OF EXCEPTIONS SHOWING INJURY AS WELL AS ERROR.

In a prosecution for murder, bills of exceptions to testimony that witness smelled whisky on appellant's breath on the day of the homicide, objected to as immaterial, irrelevant, and highly inflammatory, held to present nothing showing injury; since the bill not only stated the ground of objection but made apparent the injury claimed.

3. CRIMINAL LAW  $\S$ 338(4, 5)—EVIDENCE OF ABSENCE OF STATE'S WITNESS INADMISSIBLE WITHOUT SHOWING DEFENDANT'S CONNECTION THEREWITH.

In a prosecution for murder committed after a quarrel between defendant and deceased over a statement made by deceased that defendant had been out in a pasture with a woman, evidence that such woman was not present at the trial, although the state had applied for process for her appearance, and the return of the officer that she could not be found, was wrongly admitted, where no effort was made to connect defendant with the witness' failure to appear.

4. HOMICIDE  $\S$ 169(1)—EVIDENCE OF INCIDENT PRECEDING KILLING.

Evidence showing that defendant prosecuted for homicide was out with a woman on the Sunday night preceding the killing and their conduct with each other was admissible as shedding light on the frame of mind of defendant at the time of the homicide, which came after a quarrel in which deceased stated he had been told that defendant was out with the woman.

5. WITNESSES  $\S$ 370(6)—QUESTIONS TO DETERMINE MOTIVE FOR TESTIFYING ADMISSIBLE.

In a prosecution for a murder which followed a quarrel in which deceased accused defendant of being out with a certain woman on a certain date, in which the question whether defendant was out with such woman was sharply contested, defendant should have been allowed to ask a witness testifying thereto as to his friendship toward deceased and their relations and other questions which might throw light on the witness' motive for testifying.

6. CRIMINAL LAW  $\S$ 396(2), 419, 420(11)—HEARSAY EVIDENCE.

In a murder trial, a conversation between a witness and another out of the presence and hearing of the defendant was inadmissible as hearsay, and that the defendant asked a question of such witness which might have elicited

the same matters, but was withdrawn before it was answered, was no reason for permitting the state to bring out such hearsay testimony over defendant's objections.

7. HOMICIDE  $\S$ 169(2)—CORROBORATIVE EVIDENCE.

In a prosecution for murder, where deceased was killed by defendant after quarrel over a statement that defendant was out in a pasture at a certain time with a certain woman, evidence was properly admitted showing that witness saw tracks of men and women, cigar stubs, etc., in the pasture in question, which corroborated the state's claim that defendant was at such place at such time.

8. HOMICIDE  $\S$ 190(6), 244(1)—EVIDENCE INDICATING THREAT BY DECEASED TO KILL DEFENDANT.

In a prosecution for murder, evidence of a witness that shortly before the homicide he saw and heard deceased point through the door and say, "There goes a man I am going to shoot a hole through, I will put his lights out," was admissible, and the fact that no name was used by deceased could only affect the weight of the testimony, where the witness said that when the statement was made he looked through the door and saw no one except defendant.

Appeal from District Court, Van Zandt County; Joel R. Bond, Judge.

R. F. Parker was convicted of murder, and he appeals. Reversed and remanded for new trial.

Wynne, Wynne & Gilmore, of Wills Point, for appellant.

LATTIMORE, J. Appellant was convicted in the district court of Van Zandt county for the murder of Warren McWilliams, and his punishment fixed at five years in the penitentiary.

Deceased was a barber; appellant was constable of the precinct. There is abundant proof of enmity between the two men. Threats of each against the other were in evidence, and many witnesses testified to strongly abusive language used by deceased concerning appellant, much of which is shown to have been communicated to him.

The immediate circumstances antecedent to the homicide make it appear that one Downing and appellant, as claimed by the state, were out on the Sunday night preceding the killing on Wednesday, in a pasture or meadow, with a woman named Lottie Carpenter, who had been staying at the county farm, and with whom, if the state's testimony is believed, appellant indulged in reprehensible conduct on said occasion. The county farm was supervised by Henry Blackwell, Jr., commonly called "Little Henry Blackwell." Deceased went by the name of Happy McWilliams, and it appears that the Carpenter woman was red-headed.

Immediately after the occasion of being out

with the woman, testified to by the witness Downing, it began to be talked in the town of Canton that the constable was out at night with a red-headed woman. Several witnesses swore that the deceased made this statement to them. Roney Mathis testified that, on the morning of the killing, deceased told him that they had caught old Bob (meaning appellant) out with a woman, "and he wanted me to tell everybody I saw. \* \* \* He said he wanted to do everything except advertise it in the newspaper, and for me to tell everybody I saw in Canton. I believe he called him a 'son of a b——'. \* \* \* When Bob (appellant) rode through town, Warren said, 'There goes a damned son of a b——,' or something like that. Have heard him whistle at him and curse him."

Andrew Haynes testified that, on the morning of the killing, he met deceased in the meat market, and deceased asked him if he had heard the latest, and witness replied, "What is it?" Deceased said, "We have got our constable into it." Witness asked him what it was, and deceased replied that they had him tangled up with a red-headed woman, and the witness stated to deceased that he had better be careful, but deceased said they had the right man; that Henry Blackwell had just told him, and he further stated that he would advertise it in the newspaper if he could; that he was going to keep on advertising the transaction between Bob and the woman just as far as he could.

There is much more of the same sort of testimony in the record, but the above illustrates the attitude of deceased toward appellant.

It was proven by the state that appellant had said that if deceased ever started at him he was going to shoot him; and that appellant said, a short time before the fatal difficulty, that if deceased did not quit talking about him he was going to shoot him. The sheriff of the county testified that deceased was about 28 years old and weighed over 200 pounds; that appellant was 50 years old, and weighed about 130 pounds; that on one occasion he heard appellant say that if deceased did not quit fooling with him he was going to shoot part of his anatomy off. Other witnesses testified that he told them that he was going to shoot deceased if he did not let him alone.

Getting down to the immediate cause of the killing, Cyrus Walker swore that on that day appellant came to him and asked him who it was that had been telling it around that he had been out with that woman. Witness said:

"I told him that was all right, and he said, 'Who told you?' and I said, 'Little Henry Blackwell told the guy that told me,' and he put his hand in his pocket and said, 'By God, tell me!' I said, 'Warren McWilliams told me.'"

It further appears from the testimony of other witnesses that appellant made search

for Henry Blackwell, but failed to find him, and then went in search of deceased.

The killing occurred in a restaurant. The proprietor, who was an eyewitness, stated that deceased had come into his place of business, ordered food, and was eating, when appellant walked in and approached deceased, and said:

"'Hap, who says I was out with a woman Sunday night?' and Warren said, 'Little Henry Blackwell'—I believe that's what he said—and Bob Parker said 'Whoever says it is a damned liar and a son of a b——,' and Warren said, 'Little Henry Blackwell told me about it,' and I think Bob repeated what he had said, and Warren said, 'You don't want to be coming at me with that,' and said: 'Little Henry Blackwell told me, and I'm just repeating what he said; you tell him that, and he will whip you.' And Bob said, 'That's more than you or any one else will do,' and by that time Warren got up, and something was said about phoning Henry Blackwell. Warren said something about, 'Well, phone Little Henry Blackwell.' When Warren said that, I believe he had sat down again, and Bob had started out the door, and he came back and said, 'Who told Henry Blackwell this?' and Warren said: 'He saw you, I guess; he said he did.' And Bob said, 'Well, he is a damned lying son of a b——,' and Warren said, 'He would whip you if you would tell him that,' and Bob says, 'That's more than you or anybody else in this town can do.' Then they spoke of phoning Little Henry Blackwell. I don't just know what was said. And Warren told him if he would take the gun off he would show him; said he didn't know but what he could do it anyhow. Bob was, at that time, on the east side of the east counter. He was back a little southeast of the north counter. He was right here (indicating with pencil). Bob was sorter southeast of the east end of the north counter, about two feet southeast. In the meantime, Warren was standing up and was walking up toward the front north counter. He was walking north and facing north. Yes, Bob was sorter east of him. He was east of him part of the time. When Warren jumped up on the north counter, it was just like a man would jump over it, this way (witness jumps upon table and shows the jury the position of Warren McWilliams on the north counter); and Bob was standing back this way (indicating) kinder east, maybe southeast. Parker fired two shots, and it seems like Warren was in the position as indicated when the first shot was fired. The shots were fired as fast as a gun can shoot. After the shots were fired, Warren McWilliams 'slid' off the counter to the north and went out the door."

The witness Dubose, who was in the restaurant, and an eyewitness, testified as follows:

"Bob Parker asked if he had told that he was out with a woman the night before. Before Bob Parker asked that, Warren had not said anything to him. Warren replied that he had told it, and Bob asked him who had told him, and he told Bob that Little Henry Blackwell had told him, and Bob then said that any one who said that he was out with a woman was a 'damned lying son of a b——.' McWilliams got

up and said, 'You don't mean to call me that, do you?' In the meantime, I had gone around the west end of the west counter and the north end of the north counter and was standing near Bob. It was 'kinder' agreed that they should go and telephone Henry if there was any doubt about it. McWilliams suggested phoning; said that if he (Bob) didn't believe him to go and phone Henry. McWilliams was standing up there, or perhaps he had sat down; I don't really know whether he was standing up or sitting on the stool; he was near the stool. When I came around there, it seemed they were going to have some trouble, and I told Bob I wouldn't do that. I caught him by the right hand. He had his right hand about halfway in his pocket, and I saw a pistol. Warren was standing on the west side. I don't know whether Warren could see the pistol or not. It could have been that he could not have seen it on account of Bob not having it far enough out of his pocket. I just saw it like that (indicating.) Parker told me to go and 'tend to my own business,' and I turned and walked to the door. It seems that they agreed on calling Little Henry Blackwell up and seeing about it. I thought it was all over with, and Bob followed me to the east end of the north counter, and I walked out almost to the north door. Bob stopped there. I don't remember who said the first word after Bob stopped. I do remember that something was said about going and phoning to Henry, and Bob said, 'Well, if Henry Blackwell said that, or anybody else, if anybody said it, they are a damned lying son of a b——,' and Warren told him that he had better not tell Little Henry Blackwell or anybody else could do, and by that time McWilliams had walked to the south side of the north counter and was standing with his hands on the counter while they were talking, and when Bob Parker told him 'that's more than you or anybody else can do,' Warren said if he would lay that gun off he would show him, or if he didn't have a gun, or something like that; and he said that he didn't know but what he could do it anyhow, or something to that effect. Bob was at that time about five feet, I suppose, from Warren McWilliams. Warren got up on the south side of the north counter facing north. He was facing north when the shot was fired. Both of Warren's hands were on the counter. His feet were west and his hands east. He did not have anything in his hands. Warren was in that position when both shots were fired."

[1] The trial court charged on provoking the difficulty, which charge was excepted to and here complained of. No exception was taken to the manner and form of said charge, the only complaint being that there was no evidence authorizing the same. We cannot sustain this objection. It plainly appears from the evidence just quoted that appellant went armed to where deceased was, and repeatedly applied to the persons who had told of his being out with a woman the most insulting epithets known to the Anglo-Saxon—and this after deceased had stated that he was the one who had told it. After appellant had repeated this epithet, and used other language and gestures, deceased started over the counter toward appellant, who thereupon

shot him twice. Whether in fact the things said and done by appellant on that occasion were for the purpose of provoking such an attack, and using the same as a pretext for the killing, were questions for the jury under appropriate instructions.

[2] We see nothing in the bills of exception to the testimony of Fred Covert that he smelled whisky on appellant's breath on the day of the homicide. The ground of the objection, as stated, is that same was immaterial, irrelevant, and highly inflammatory to appellant. This presents nothing by which we may be informed that injury resulted. For aught shown in the bill, the evidence might have been very material, pertinent, and advantageous to the appellant. A bill of exceptions must not only state the ground of objection, but must go further and contain such matter as will make apparent the injury claimed, from the recitals of the bill itself. What we have just stated applies to appellant's bill of exceptions No. 4, to the testimony of John Anderson.

[3] The state was permitted, over objection, to show that the woman with whom appellant was supposed to have been out on the night in question was not present at the trial, and to place in evidence the application of the state for process for said woman, issued to Van Zandt county, and also to Dallas county, and the return of the officer on said process, showing that said witness could not be found. No effort was made to connect appellant with the failure of said witness to appear. The introduction of this evidence was erroneous, as was held by this court in *Funk v. State*, 208 S. W. 509, and authorities cited.

[4, 5] We think the evidence of the witness Downing, showing in fact that appellant was out with the woman, on the Sunday night preceding the killing, their conduct with each other that night, was admissible, as shedding light on the frame of mind of appellant at the time of the commission of the homicide. Inasmuch as this case must be reversed for other errors, we observe that appellant should have been allowed to ask the witness Downing as to his friendship toward deceased, and their relations to each other, and any other questions fairly calculated to elicit matter which might throw light on the motive of the witness for testifying. It was a sharply contested issue as to whether or not appellant was in fact out with the woman on said date, and Downing was the only witness who testified to such fact.

[6] The conversation of said witness Downing with Joe Lawler, out of the presence and hearing of appellant, should not have been admitted. That appellant asked a question of said witness Downing, which might have elicited said matters, but which question was withdrawn before the same was answered, was no reason for permitting the state to bring out such hearsay testimony over objection.



[7] The evidence of Henry Blackwell, Jr., was properly admitted, to the effect that he and others went down into Mrs. Smith's pasture and there saw the tracks of men and women, cigar stubs, etc. This is corroborative of the state's claim that appellant was at said place with the woman.

[8] The evidence of the witness Slaughter to the effect that a short time before the homicide he saw and heard deceased point through a door and say, "There goes a man I am going to shoot a hole through, I will put his lights out," was admissible, and should have been received. The fact that no name was used by the deceased could only affect the weight of the testimony; the witness said that, when deceased made the statement, he looked through the door, and saw no one except the appellant. If the surrounding circumstances reasonably indicated that appellant was the subject of the remark of the deceased, the jury were entitled to have the benefit of the statement for what it was worth.

The other errors complained of will likely not occur on another trial, and we will not discuss them.

For the errors pointed out, the cause is reversed and remanded for another trial.

#### BLACK v. STATE. (No. 5456.)

(Court of Criminal Appeals of Texas. Nov. 19, 1919.)

#### 1. PHYSICIANS AND SURGEONS — 6(1)—UNLAWFUL PRACTICE OF MEDICINE.

One who maintained offices where he treated any and all persons who might apply to him, for various and sundry disorders and diseases, without registering with the district clerk in the manner and form provided by Vernon's Ann. Pen. Code 1916, tit. 12, c. 6, art. 755, was unlawfully practicing medicine, whether or not he claimed to be a physician or a practitioner of medicine.

#### 2. INDICTMENT AND INFORMATION — 125(20)—PLEADING STATUTORY OFFENSES CONJUNCTIVELY.

Where there are various ways set forth in a statute by which an offense may be committed, an indictment may charge the various methods conjunctively.

Appeal from El Paso County Court; E. B. McClintock, Judge.

Byron L. Black was convicted of unlawfully practicing medicine, and appeals. Affirmed.

Alvin M. Owsley, Asst. Atty. Gen., for the State.

LATTIMORE, J. This appellant was indicted and convicted in the county court of

El Paso county, Tex., of unlawfully practicing medicine, and punished by a fine of \$250 and one day in jail.

[1] In 1907, the Legislature passed an act, making it unlawful for any one to practice medicine upon human beings in this state, without registering with the district clerk in the manner and form provided by said act, the same being chapter 6, tit. 12, of Vernon's Penal Code. By the terms of article 755 of said chapter is defined what is meant by "practicing medicine" within the proscription of said statute. Subdivision 2 of said last-named article is as follows:

"(2) Or who shall treat, or offer to treat, any disease or disorder, mental or physical, or any physical deformity or injury, by any system or method or to effect cures thereof, and charge therefor, directly or indirectly, money or other compensation."

This act has often been before this court for construction. It has been held constitutional both by this court and the Supreme Court of the United States. *Ex parte Collins*, 57 Tex. Cr. R. 2, 121 S. W. 501; *Collins v. State*, 223 U. S. 288, 32 S. Ct. 286, 56 L. Ed. 439.

It has been held to apply to a masseur. *Milling v. State*, 67 Tex. Cr. R. 551, 150 S. W. 434. Also to an osteopath. *Ex parte Collins*, supra. Also to one who claimed to cure by means of laying on of hands and prayer. *Singh v. State*, 66 Tex. Cr. R. 156, 146 S. W. 891—and this wholly regardless of whether such persons claimed to be physicians and practitioners of medicine or not.

It is entirely undisputed in this record that appellant had and maintained offices where he treated any and all persons, who might apply to him, for various and sundry disorders and diseases, for compensation; and that he had not registered with the district clerk of El Paso county, as required by the provisions of said chapter 6, supra. The particular act and treatment charged in the instant case was fully established as alleged.

[2] The complaints of appellant that the information is insufficient are not sustained by an examination of that instrument, which follows almost literally the language of the statute in both counts. Where there are various ways set forth in a statute by which an offense may be committed, if the pleader desires to allege more than one of such ways, it is proper that the various methods be charged conjunctively.

The special charge, as asked for, was properly refused. The provisions of subdivision 2, art. 755, supra, are broad enough to comprehend and forbid the practice by appellant of the acts testified about. With the wisdom or unwisdom of such law, we have nothing to do. It is on our statute books. It has evidently been violated, and this court has no

option but to declare the law as it is written by the Legislature and as we find it.

No error appearing in the record, the judgment of the trial court is affirmed.

### McCULLERS v. STATE. (No. 5481.)

(Court of Criminal Appeals of Texas. Nov. 19, 1919.)

#### 1. FENCES ⇨28(1)—CRIMINAL RESPONSIBILITY FOR DESTROYING.

In prosecution for unlawfully breaking, pulling down, and injuring fence of another without his consent, that fence was in possession of person in whom ownership was alleged under Code Cr. Proc. 1911, art. 457, and that such person did not consent to breaking down of fence, is essential to conviction.

#### 2. FENCES ⇨28(3)—SUFFICIENCY OF EVIDENCE IN PROSECUTION FOR TEARING DOWN FENCE.

In prosecution for unlawfully breaking, pulling down, and injuring fence of another without his consent, evidence held insufficient to prove possession of fence by person in whom ownership was alleged.

Appeal from Franklin County Court; W. B. Irby, Judge.

R. L. McCullers was convicted of unlawfully breaking, pulling down, and injuring the fence of another without owner's consent, and he appeals. Reversed and remanded.

Wilkinson & Davidson, of Mt. Vernon, for appellant.

Alvin M. Owsley, Asst. Atty. Gen., for the State.

MORROW, J. [1, 2] It was charged that appellant did unlawfully "break, pull down, and injure the fence of C. C. Vaughn without the consent of the said C. C. Vaughn." On the subject of ownership and want of consent, two witnesses testified, one of these testifying that he saw the appellant break down the fence, and said "the fence belonged to Wright and Vaughn." As to who Wright and Vaughn were, and as to whether one of them was the C. C. Vaughn named in the pleading, the record is silent. C. C. Vaughn testified that he owned a pasture on White Oak creek, and that, "if the appellant tore down a fence belonging to him, it was not with his consent." It was essential that the proof show that C. C. Vaughn named in the pleading was the owner of the fence within the meaning of the statute, and to prove that the injury to the fence was not with his consent. We are of the opinion that this proof was not made. Whether C. C. Vaughn was the person or one of the persons named by the witness who described the fence as belonging to Wright and Vaughn is not

shown; and, if it belonged to Wright and Vaughn, the record should disclose which was in possession. *Frazier v. State*, 18 Tex. App. 442.

Article 457, C. C. P., contains the following:

"Where one person owns the property, and another person has the possession, charge, or control of the same, the ownership thereof may be alleged to be in either. Where property is owned in common, or jointly, by two or more persons, the ownership may be alleged to be in all or either of them."

Speaking on this subject, Presiding Judge White, in *Frazier's Case*, expressed the following:

"With regard to the pleading in theft, it is expressly provided that 'where one person owns the property, and another person has the possession, charge or (and) control of the same, the ownership thereof may be alleged to be in either.' Code Crim. Proc. art. 426. It 'may be alleged to be in either,' that is, it may and in most instances should only be alleged to be in one, and that one should be the one having the actual charge, control, and management. It is not in such cases necessary to allege ownership in the actual or general owner; the special owner is the one from whose possession the property is actually taken, and it is only necessary to allege a taking from him, and that it was without his consent. In other words, as the criterion in determining how ownership should be alleged, it should first be ascertained who was in 'the exercise of actual control, care and management,' at the time the property was taken. If the actual owner, then 'the possession' was in him, and should be so alleged, though he may have agents or servants using the property at the time in subordination to his possession. But if the 'actual control, care and management' at the time of the taking is in another, then this other is the special owner in 'possession,' and it is his possession which has been despoiled, and the property should be alleged to be his and taken from his 'possession' and 'without his consent,' without any mention of the actual or general owner—because the property was not 'taken' from the latter's 'possession.' What constitutes the control, care, and management of property must depend upon the circumstances of the particular case, in many instances.

"Proof must be made that the property was taken from the possession of the party in whose possession it was alleged to be. If the owner was not in actual possession, but another was, then, if the allegation placed it in the owner and the proof showed it in another who had the 'actual control, care, and management,' then the variance between the proof and the allegation would be fatal, and a conviction could not be had."

The record fails to show that C. C. Vaughn was in possession of the particular property which was injured, and leaves entirely uncertain the question as to whether the fence to the pasture which he owned was injured. All that can be gathered from his testimony is that he owned a pasture, and that he did

not consent to the appellant tearing his fence down. The identity of the fence that he owned with the one torn down by the appellant should have been made to appear from the evidence.

There is a marked conflict in the evidence going to show that the injury to the fence was due to any act of appellant. The jury was authorized to settle this conflict of the evidence against the appellant, but we think was not authorized to find from the evidence that C. C. Vaughn was the owner of the fence, and for that reason the judgment of the trial court should be reversed and the cause remanded, and this order is made.

### JENKINS v. STATE. (No. 5573.)

(Court of Criminal Appeals of Texas. Nov. 26, 1919.)

#### CRIMINAL LAW §1087(1)—INSUFFICIENT RECORD AS TO RECOGNIZANCE.

Under Vernon's Ann. Code Cr. Proc. 1916, art. 920, the Court of Criminal Appeals cannot entertain an appeal from a conviction of aggravated assault, a misdemeanor, where the only record entry relative to the recognizance reads: "Recognizance fixed at \$1,000.00. Made and executed by G. J. [defendant], N. A. J., and G. T. S."—not a compliance with article 919, prescribing the form of recognizance in misdemeanor cases.

Appeal from District Court, Palo Pinto County; J. B. Keith, Judge.

Grady Jenkins was convicted of aggravated assault, and he appeals. Appeal dismissed.

Alvin M. Owsley, Asst. Atty. Gen., for the State.

MORROW, J. The appellant was convicted of aggravated assault. The only entry we find relating to a recognizance is as follows:

"Recognizance fixed at \$1,000.00. Made and executed by Grady Jenkins, N. A. Jenkins, and G. T. Sandige."

Our statute prescribes the form of recognizance in misdemeanor cases. See Vernon's Criminal Statutes, vol. 2, art. 919. And article 920 forbids this court from entertaining an appeal, where a recognizance is required, unless one is made in substantial compliance with the form prescribed in the statute. Because the record fails to show a compliance with these statutes, the state, through the Assistant Attorney General,

moves that the appeal be dismissed, which motion we are constrained to sustain.

The appeal is dismissed.

### JONES v. STATE. (No. 5586.)

(Court of Criminal Appeals of Texas. Nov. 26, 1919.)

#### 1. INTOXICATING LIQUORS §238(13)—EVIDENCE THAT LIQUOR WAS INTOXICATING.

In a prosecution for violating local option law, a witness' testimony that he bought what he believed to be a bottle of whisky of one accused, and facts and circumstances showing that it was whisky and that witness became intoxicated from the use of the contents of the bottle, held sufficient.

#### 2. CRIMINAL LAW §1090(7)—NECESSITY OF BILL OF EXCEPTIONS.

There was no error shown in refusal of continuance because of the absence of an alibi witness for whom no process had issued, where no bill of exceptions was reserved to the overruling of the application.

Appeal from District Court, Houston County; John S. Prince, Judge.

Bud Jones was convicted of violating the local option law, and he appeals. Affirmed.

Alvin M. Owsley, Asst. Atty. Gen., for the State.

DAVIDSON, P. J. Appellant was convicted of violating the local option law and awarded one year in the penitentiary.

[1] The state's case is made by the testimony of the alleged purchaser. Appellant offered no testimony. The state's witness testified he bought a bottle of whisky, or what he believed to be whisky, from the appellant, and the facts and circumstances show that it was whisky. It seems the witness became very much intoxicated from the use of the contents of the bottle. We think the evidence is sufficient.

[2] Appellant asked the court for a continuance on account of the absence of his mother, by whom he expected to prove an alibi. There was no process issued for the mother, and he relied upon her promise to attend court to testify in his behalf. There was no bill of exceptions reserved to the action of the court in overruling the application for continuance. There is no error shown in this matter.

The judgment will be affirmed.

## GORDON v. STATE. (No. 5585.)

(Court of Criminal Appeals of Texas. Nov. 26, 1919.)

## 1. CRIMINAL LAW §1159(6)—SETTING ASIDE VERDICT BASED ON CIRCUMSTANTIAL EVIDENCE.

The case being one of circumstantial evidence, and the jury having found against defendant, the court on appeal will not set aside the verdict based on conflicting evidence, though alibi was strongly proven.

## 2. WITNESSES §350 — IMPEACHMENT OF DEFENDANT BY CROSS-EXAMINATION AS TO PRIOR CONVICTION.

Where defendant testified in his own behalf, the state on cross-examination was authorized to show his previous conviction and suspended sentence as a means of affecting his credibility, though defendant had not placed his reputation before the jury as being an honest, law-abiding citizen.

## 3. CRIMINAL LAW §722½—ARGUMENT REFERRING TO PRIOR CONVICTION PROPER.

Argument of prosecuting officer, to the effect that defendant's former conviction and suspended sentence offered strong reasons why he might falsify his testimony, held justifiable.

Appeal from District Court, Houston County; John S. Prince, Judge.

Langston Gordon was convicted of horse theft, and he appeals. Affirmed.

Alvin M. Owsley, Asst. Atty. Gen., for the State.

DAVIDSON, P. J. Appellant was convicted of horse theft; his punishment being assessed at four years' confinement in the penitentiary.

[1] The case is one of circumstantial evidence. The horse was taken at night from its accustomed place of being kept, and found some miles away the next morning in the town of Crockett. Appellant was identified by two or three parties in the town of Crockett, in possession of the animal trying to sell or trade it. The witnesses had never seen appellant prior to this occasion. They described him as wearing a brown coat and a pair of overalls, and also wearing a cap, and that he had gold-filled teeth on both sides of his mouth. Appellant, however, offered testimony to show that he did not have gold-filled teeth on both sides of his mouth, but did have one tooth with a gold crown on it on one side of his mouth. Appellant proved an alibi, which placed him at a sawmill, where he was working the entire night of the theft of the animal and during the entire day he is

said to have been in Crockett, some miles distant. The alibi seems to be pretty strongly proved. However, the jury found against his contention. Under such circumstances this court would hardly feel justified in setting aside the verdict. The writer has serious doubt of the guilt of the appellant, under this record, but hardly feels justified in setting aside the verdict on this conflict of testimony. This much has been said because of the urgency of appellant as to the insufficiency of the facts to justify the conviction. Quite a number of witnesses, testified in detail as to the movements of appellant, and as to facts and circumstances which, if true, preclude the idea that he was the party who either took the animal or was in possession of it in the town of Crockett.

[2] Appellant took the witness stand in his own behalf, and testified as practically did the other witnesses who located him at the sawmill during the night of the theft and the following day. On cross-examination he was asked by the state if he had not been previously convicted and awarded a suspended sentence. Over objection he was permitted to state that he had been convicted and awarded a suspended sentence. When this occurred is not shown. The court overruled the objections, and permitted the testimony on the theory of impeachment and for the purpose of affecting his credibility as a witness. It is true appellant had not placed his reputation before the jury as to being an honest, law-abiding citizen. However, we are of opinion under the authorities that the state was authorized to show this previous conviction and suspended sentence as a means of affecting his credibility before the jury. The authorities sustain this ruling of the court.

[3] There is another bill of exceptions reserved to the argument of the prosecuting officer, who urged before the jury that the former conviction and suspended sentence afforded strong reasons why appellant might falsify his testimony; his contention being that, if he was convicted in the pending case, this would operate to set aside the suspended sentence and incarcerate him in the penitentiary in the case in which he was awarded a suspended sentence. We are of opinion that the argument of the district attorney was justified, and there was no error in the action of the court permitting such argument before the jury.

The case is before us without a brief for the appellant, but these are the questions presented by the record for revision. In view of what has been said we do not feel justified in reversing the judgment. It will therefore be affirmed.

## FLORES v. STATE. (No. 5571.)

(Court of Criminal Appeals of Texas. Nov. 26, 1919.)

## 1. CRIMINAL LAW §780(2) — NECESSITY OF INSTRUCTION ON ACCOMPLICE TESTIMONY.

Where it appeared that defendant, while in the presence of the witness for the prosecution, wrote a check, signing the name of a third person, and that such witness carried the check to the bank, where it was cashed, etc., the failure of the court to charge on accomplice testimony *held* error.

## 2. FORGERY §5 — PREPARATION OF FORGED INSTRUMENT WITHOUT CRIMINAL INTENT.

Where defendant, at the request of another, who represented that he could not write, drew a check and signed the name of a third person, and defendant acted innocently and without any intention to defraud, he is not guilty of a forgery.

Appeal from District Court, Reeves County; Chas. Gibbs, Judge.

Louis Flores was convicted of forgery, and he appeals. Reversed and remanded.

Jno. B. Howard and Clay Cooke, both of Pecos, for appellant.

Alvin M. Owsley, Asst. Atty. Gen., for the State.

DAVIDSON, P. J. Appellant was convicted of forging the following instrument:

"Pecos, Texas, 2-6-1919. No. —.

"The Pecos Valley State Bank 88-450  
of Pecos, Texas:

"Pay to Paulalio Valverde or bearer \$16.00,  
sixteen dollars. Nicholas Ramirez."

The evidence shows the document to be a forgery; Ramirez having testified he gave no authority either to appellant or the witness Ruiz to write it. The alleged payee, Valverde, was not used as a witness. Ruiz testified that he had known defendant about 1½ years, and loaned him \$5 in February, 1919; that he knew about the check, and that appellant gave it to him for the \$5 that appellant owed him; that appellant made out and signed the check, but witness did not know why he made out and signed it; that it was made in the store of John Hudson. There was no one present in the store when the check was made out, except himself and appellant, and no one seems to have known anything about it, under his testimony, except the two. He carried the check to the bank, indorsed it, and collected the money. He says that appellant paid him \$3 of the \$16; that appellant remained at the store where the check was made out, and when he returned from the bank appellant was on the outside of the store. On cross-examination, he stated he did not remember exactly how

long appellant owed him the \$5; that he went to the bank and got the money; that he did not know Ramirez at that time, but had seen him around the house of defendant. He says:

"I didn't take all the \$5 he owed me at the time I got the \$16 from the bank, because he told me that he needed the \$13 to buy provisions; that he would give me the other \$2 later."

He further testified that he did not know Valverde, the payee. He also testified that he was arrested about 4 o'clock that evening, after cashing the check, which occurred about 10 o'clock in the morning; that he did not have a nickel of the money in his pocket at the time he was arrested; that he had spent it. He also stated that he could write his own name, but otherwise could not write. Mr. Browning, who was assistant cashier at the bank, testified that Ruiz presented the check to the bank and it was paid; that he saw Ruiz indorse the check. Appellant says he had known Ruiz about 3 years; that he made out the check at the instance of Ruiz as a favor to him. He says:

"I didn't owe him a nickel. At the time he got the money out of the bank he didn't give me anything, but that evening he came and gave me a \$10 bill to buy anything that I wanted to buy. He says he gave me that to use it as I pleased. I took it that he was loaning it to me, and I expected to pay it back. I didn't take it as a gift. I intended to pay it back to him."

He says he had known Ramirez about 7 or 8 years, and had lived at his house; that he made the check out, and signed Ramirez's name to it, because Ruiz asked him to make it. He did not know whether Ruiz had any right to sign Ramirez's name or not; that Ruiz asked him to make out the check because he (Ruiz) could not write; that he was just doing it as a favor. He says he was innocent, and did not know whether he was stealing anything or not, and did not ask Ruiz whether he had authority to sign the paper, nor did he say that Ramirez owed him the money, but told him he wanted to use that money, and by the next week he could replace it. On cross-examination he testified that he wrote out the check in favor of Valverde, because Ruiz told him to place that name to the check, and wrote it on the back of the check, because Ruiz told him so to do. This constitutes, substantially, the case on the facts.

[1, 2] The court failed to charge on the law of accomplice testimony. To this failure exception was reserved, and a requested instruction on that phase of the case was refused, and a bill of exceptions making this apparent was approved by the trial judge.

We are of opinion that the charge on accomplice testimony should have been given. The testimony shows that the witness Ruiz was an accomplice, and the jury should have been appropriately instructed with reference to that phase of the law. It would be useless to discuss the force and effect of this testimony. The action of these parties makes it apparent that, if appellant was guilty in making the instrument for a fraudulent purpose, Ruiz was also connected with it. If appellant made out the check without an intent to defraud, or without any guilty purpose, at the instance of Ruiz, he would not be guilty; but these were issues made by the testimony, and the jury should have been appropriately instructed with reference to the law of accomplice testimony.

For this error, the judgment will be reversed, and the cause remanded.

#### PETTERSON v. STATE. (No. 5575.)

(Court of Criminal Appeals of Texas. Nov. 26, 1919.)

#### CRIMINAL LAW §1120(8)—BILL NOT PRESENTING ERROR IN ADMISSION OF CONFESSION.

In a prosecution for theft, a bill of exceptions against the admission of testimony claimed to have been in the nature of a confession made while under arrest, unaccompanied by the statutory formalities, which fails to show that defendant was under arrest at the time, and does not sufficiently show the surrounding facts to advise the Court of Criminal Appeals of the materiality of the evidence sought to be excluded, presents no error.

Appeal from Criminal District Court, Bowie County; P. A. Turner, Judge.

Willie Petterson was convicted of theft, and appeals. Affirmed.

Alvin M. Owsley, Asst. Atty. Gen., for the State.

MORROW, J. The appellant was convicted of theft. The evidence is sufficient to sustain the conviction.

The only other point suggested for review is in a bill of exception prepared by the court. It is directed against the admission of testimony claimed to have been in the nature of a confession, made while under arrest and not accompanied with the formalities required by statutes. The bill as presented fails to show that the appellant was under arrest at the time she made the statement complained of, and does not show sufficiently the surrounding facts to advise this court of the materiality of the evidence which the appellant sought to exclude. The stolen property

obtained from appellant was identified by other witnesses, and she on the witness stand—as we understand her testimony—admitted the possession of it, but claimed to have gotten it by purchase.

Finding no error disclosed in the record, the judgment is affirmed.

#### WEST v. STATE. (No. 5510.)

(Court of Criminal Appeals of Texas. Nov. 26, 1919.)

#### 1. WITNESSES §370(2)—IMPEACHMENT FOR BIAS.

In a prosecution for violation of the local option law, defendant should have been allowed to introduce evidence showing that a cousin of the state's witness was under indictment for the sale of intoxicating liquors, and that defendant was a witness against her; it being his theory that the state's witness was biased against him, and trying to obtain his conviction to prevent prosecution of his cousin.

#### 2. WITNESSES §268(10) — CROSS-EXAMINATION OF WITNESS WHO TESTIFIED AS TO CHARACTER OF LIQUID.

Where the state's witness identified a fluid which he claimed to have bought from defendant as whisky, stating that he tested it after medicine had been put in it, and that it then tasted like whisky, it was permissible to show, on cross-examination, the kind of medicine put into the fluid.

#### 3. CRIMINAL LAW §921, 923—RIGHT TO NEW TRIAL FOR MISCONDUCT OF JUDGE.

In a prosecution for violation of the local option law, where the court erroneously excluded testimony offered to show motive of the state's witness, defendant should have been granted a new trial, where it further appeared that the jury, upon inquiry by the judge as to whether they had reached a verdict, assumed that if verdict was not shortly reached they would be confined over Sunday, and that the jury rendered a verdict of guilty within a few hours, although at the time of the inquiry a majority were in favor of acquittal.

Appeal from District Court, Montgomery County; D. F. Singleton, Judge.

Foster West was convicted of violating the local option prohibition law, and he appeals. Reversed and remanded.

McCall, Crawford & McCall, of Conroe, for appellant.

Alvin M. Owsley, Asst. Atty. Gen., for the State.

MORROW, J. The conviction is for the sale of liquors in violation of the local option prohibition law.

The evidence is quite conflicting, but in view of the direct testimony of the state witness Hubbard that he purchased a pint of

whisky from the appellant, we would not feel authorized to order a reversal because the evidence was insufficient to sustain the conviction. The witness claimed to have obtained the whisky from appellant while at a station on the railroad, and that appellant had in possession a grip from which he took the whisky. The witness also said that he took the bottle of whisky to his mother's home, and that she put medicine into it, and that after she put medicine—but not before—he tasted it, and it had the taste of whisky. The mother's testimony was not given on the trial.

[1] The appellant sought to introduce evidence to show that Rachel Clark, a cousin and associate of the state witness Hubbard, was under indictment for the sale of intoxicating liquors, and that the appellant was a witness against her, he advancing the theory that the state's witness was giving false testimony against him, and that he was animated by his friendship and relationship to Rachel Clark and his desire to prevent her prosecution by the conviction of appellant. The motives which influence a witness are never regarded immaterial, and great latitude is extended in admission of testimony. *Mason v. State*, 7 Tex. App. 623, and other cases cited in Branch's Annotated Penal Code, p. 93, § 163, and we think the proffered evidence, in view of the record, should have been received.

[2] In view of the fact that one of the means by which the state's witness identified the fluid, which he claimed to have bought from the appellant, as whisky, was the fact that he had tasted it after medicine had been put in it, and that it then tasted like whisky, it was permissible that he show on cross-examination the kind of medicine that was in the mixture.

A continuance was sought to obtain the testimony of a witness who was with the appellant at the time it was charged that the offense took place, and by whom he could negative possession of the whisky or the grip which the state witness described. We think the trial court's ruling in denying the application was justified for the reason that the diligence was insufficient.

[3] In connection with the motion for a new trial, the appellant introduced affidavits of two witnesses, one of them to the effect that on the day that the offense was charged to have been committed he was in the village

of Willis—where the sale was charged to have taken place—and saw the appellant and state's witness Hubbard; that Hubbard got into the car with the witness and went to the home of the witness' brother and spent the night, and that Hubbard did not go to his mother's house as he claimed; and in the affidavit was set out circumstances tending to show that the witness Hubbard was not in possession of the pint of whisky which he claimed to have bought of the appellant and taken to his mother's house. This evidence, while tending to impeach the witness Hubbard, also tended to show that he did not obtain the whisky from appellant.

It appears that the case was submitted to the jury on Friday afternoon; that they deliberated until midnight without reaching a verdict, nine of the jurors at that time favoring acquittal. The jury occupied a room at the jail, and at about 7 o'clock (new time) the following morning, while some of the jurors were still in bed, the trial judge went to the jail and inquired of the sheriff whether the jury had agreed to a verdict. The sheriff made inquiry of them, and, receiving a negative answer, the judge remarked that he would return to his boarding house, get his grip, pay his bill, and be at the courthouse at 8 o'clock. The jury learned from the sheriff of the visit of the judge, and apparently got the impression that he wanted to leave for his home, 75 miles distant, on a train which would depart about 8 o'clock or shortly after; and that in consequence they would, unless they decided the matter at once, be detained until Monday following. They did bring in a verdict before 8 o'clock, and the judge was able to catch the train mentioned. It is patent that the judge had no intention to influence them or to improperly communicate with them, and it is a matter of doubt whether his visit to the jail had a direct effect upon the action of the jury. Appellant insists, however, that the circumstances indicate that the action of the judge in the matter detailed probably influenced the jury in compromising and bringing in a verdict immediately.

Considering the errors pointed out in the exclusion of testimony, and the whole record, we think the trial court was in error in refusing to grant the new trial. It is therefore ordered that the judgment of the trial court be reversed, and the cause remanded.

**KELLEY v. STATE. (No. 5383.)**

(Court of Criminal Appeals of Texas. Nov. 23, 1919.)

**1. CRIMINAL LAW §359—PROOF OF OPPORTUNITY OF ANOTHER TO COMMIT CRIME.**

Where circumstantial evidence is relied on to prove the guilt of defendant, he may introduce evidence tending to show that another having motive to commit the offense was in such proximity that he might have been the author.

**2. CRIMINAL LAW §940—NEWLY DISCOVERED EVIDENCE CALLING FOR NEW TRIAL.**

In a prosecution for arson, defendant's motion for new trial on the ground of newly discovered evidence, consisting of testimony of two farmers, residents in the community, should have been granted, where circumstances were relied on to prove defendant's guilt, and the farmers' testimony tended to show that when defendant was in his house another person, admittedly at least an accomplice, and one of the incendiaries, was in proximity to the destroyed property under suspicious circumstances.

**3. CRIMINAL LAW §719(1)—STATEMENT OF PROSECUTING ATTORNEY UNSUPPORTED BY EVIDENCE.**

In a prosecution for arson by burning defendant's own ties and lumber yard, in the total absence of evidence to show that the lumber market was bad at the time, and that defendant would have profited by collecting the fire insurance, statement of a prosecuting attorney in closing argument that just before the fire the lumber market was bad, etc., held an infringement of defendant's rights.

Appeal from District Court, Liberty County; J. Llewellyn, Judge.

T. T. Kelley was convicted of arson, and he appeals. Reversed, and cause remanded.

E. B. Pickett, Jr., of Liberty, for appellant.

E. A. Berry, Asst. Atty. Gen., for the State.

**MORROW, J.** The conviction is for arson. The appellant was under contract to supply a company in France with a large number of railroad ties, and near his saw-mill there were situated about 10,000 of these ties, and these, together with about 100,000 feet of lumber belonging to the appellant, were destroyed by fire on the night of December 1, 1917. The house in which the appellant and his employé, Barrett, lived, the ties, covering about a third of an acre of land, the mill, the lumber-pile, and a commissary or cook shack occupied by one Le Blanc, another employé, were situated near a public road in a thickly timbered country, and were situated from 50 to 250 feet apart. The ties and the lumber were insured, and the interest of the French company by reason of its advancement upon the ties was protected in the policies.

The incidents attending the fire are testi-

fied to by the appellant and his two employés and by four apparently disinterested witnesses, consisting of two separate parties, who came out from Houston in automobiles for the purpose of hunting squirrels. Two of these hunters, used as witnesses for the state, claimed to have arrived on the scene at about 1:30 at night, to have observed at that time that the ties were burning in a number of places, and to have observed sticks of kindling and signs of the use of coal oil in setting them afire. They talked to the appellant, and drew the inference from his manner and conversation that he felt no interest in preventing the destruction of the ties; the lumber at that time not having taken fire. Their suspicions were aroused, and after leaving the scene they, according to their testimony, returned and observed that the lumber, which was some 400 feet distant from the ties, had caught fire. They observed a person whom they identified as appellant near the lumber pile, stooping down at the corner of the pile of lumber, working with the fire. He was some 75 yards distant, and was apparently putting some kindling under the edge of the lumber. Later they saw a person, whom they identified as Barrett, coming from the direction of the mill, which was between the lumber and the ties, and joining the appellant; that Barrett dashed something on the fire, which was followed by a brilliant blaze. They afterwards saw a man dressed like the appellant, and whom they took to be him, in the tie field. They also saw a third party, whom they identified as Le Blanc.

Le Blanc, who occupied the commissary situated about 600 or 700 feet from and around a bend in the road, out of view of appellant's house, testified that he had on the previous day seen kindling about the ties; that he knew nothing of the fire until about 4 o'clock in the morning, when he was aroused by appellant, who came to his shack seeking some breakfast; and that, after arousing the witness, the appellant threw some oil on a part of the lumber which was not burning, and put a match to it, though whether he lit the fire is not stated.

The appellant testified that he retired between 8 and 9 o'clock, and slept until about 11 o'clock, when he went out of his house to attend a call of nature, and discovered the fire; that he aroused Barrett at once, and that the two of them worked with the fire; that the ties were heavy and difficult to handle, and the water supply meager, but that they used their best efforts to prevent the destruction of the property. The other party of hunters claimed to have arrived between 12 and 1 o'clock, and found the appellant and Barrett engaged in throwing water on the ties, getting the water from the boiler at the mill and packing it in buckets; that the wit-



nesses took part, and that the sparks were flying onto the mill, and, the effort to save the ties seeming futile, they turned their attention to preventing the destruction of the mill; that the appellant appeared to be exhausted by his efforts; that the fire obstructed the road to the place they expected to hunt, and they spent the remainder of the night in the house with appellant and Barrett; that when the car occupied by the other party of hunters arrived the appellant went out of the house and talked a short time, and returned, remaining the balance of the night.

[1, 2] The appellant, in a motion for a new trial, produced affidavits of two witnesses, farmers residing in the community, who declared that they passed the premises early in the night on which the fire occurred, driving their teams along the road, first passing the house which appellant occupied, and saw and recognized him there reading a newspaper; that on reaching the commissary they discovered three men, who, on the approach of the witnesses, disappeared, but one of them they recognized as Le Blanc. This evidence was newly discovered and it is affirmatively shown that it was considered by the court in passing upon the motion, which was not controverted, and upon which there was no evidence introduced by the state. We are aware of nothing in the record which would justify the conclusions that the statements of these witnesses were untrue. Admittedly the fire had made much progress before it was discovered by the witnesses for either the state or the appellant. The state, in opening its case, introduced appellant's statement that he first discovered the fire at about 11 o'clock; he having been asleep at the time it took fire. The state relies upon the inferences to be drawn from the facts that were developed to show that the appellant started the fire, and the facts testified to by the witnesses who claimed to have watched the premises after arriving from Houston, and circumstances from which they drew the conclusion that appellant was engaged in augmenting the fire which was burning the lumber. There was much testimony tending to show that by reason of the dense undergrowth the recognition of the appellant or the observation of appellant by these witnesses, while they claimed to have been watching, was impossible.

A well-known rule, often applied in this state, permits one accused of crime, where circumstantial evidence is relied upon to prove his guilt, to introduce evidence tending to show that another having motive to commit the offense was in such proximity to it that he might have been its author. *Dubose v. State*, 10 Tex. App. 230; *Taylor v. State*, 81 Tex. Cr. R. 359, 195 S. W. 1147. The state used the witness Le Blanc, and the court instructed the jury that he was an accomplice.

The newly discovered evidence put him and unknown companions in proximity to the destroyed property under suspicious circumstances a short time before the fires were lit, and at a time when, according to this new evidence, the appellant was in his dwelling, out of sight of and some distance from the locality of Le Blanc and his companions. Recalling that Le Blanc admittedly upon some motive was one of the incendiaries, the new evidence, putting him and companions whose identity was not disclosed upon the trial in proximity to the crime, both in time and locality, was such, we think, as might have been regarded by the jury as important in accounting for the fire in a manner consistent with the innocence of the appellant. Particularly is this true in view of the marked conflict in the evidence given by the witnesses for the state and the defendant, who, so far as the record shows, were not in any way interested in the result of the trial.

[3] In closing the argument of the case, one of the attorneys for the state stated to the jury in substance that just before the fire "the lumber market was bad, and that they [the jury] knew of a great many big stacks of old lumber around in the vicinity at different places that could not be sold." The bill of exceptions reserved to this argument, and the refusal of the court at the time to admonish the jury, shows affirmatively that there was no evidence admitted or offered showing or tending to show that the lumber market was bad at the time stated, or at any time, nor that there were any piles of old lumber in the vicinity which could not be sold. The statement of the attorney for the state in his argument appears, therefore, to have been the only evidence before the jury going to show that the appellant had aught to gain by setting fire to his lumber. The evidence connecting the appellant with the offense, as stated, is very conflicting, and the importance of showing a motive for the offense was extreme. That he desired to collect the insurance that covered the ties furnished the motive is by no means obvious, for the reason that it is difficult to point to any evidence showing that the appellant would have profited by collecting the insurance on the ties, instead of collecting their contract price. While he had no contract to sell the lumber, there was evidence introduced that it had a fixed price and that it was marketable. The state might have met this issue by the introduction of evidence before the jury upon the trial of the case, because, if untrue, it would have tended to support the state's theory that appellant would profit by obtaining the insurance money on the lumber. No such evidence having been introduced by the state, the omission could not lawfully be supplied by the unsworn statement of the attorney for the state. The statement was calculated to have a potent effect on the

jury. To what extent it is reflected in their verdict we are not able to determine. That it was an infringement of the rights of the appellant is clear.

The judgment is reversed, and the cause remanded.

### CONE v. STATE. (No. 5500.)

(Court of Criminal Appeals of Texas. Nov. 26, 1919.)

#### 1. CRIMINAL LAW §372(5)—EVIDENCE OF EX- TRANEOUS CRIMES TO SHOW SYSTEM.

In prosecution of defendant as an accomplice to the theft of an automobile, it was error to admit testimony that the principal committed the theft of perhaps as many as three additional autos at intervals covering several months, and that three of these reached defendant, on the theory of showing systematic thefts.

#### 2. LARCENY §27—WHO IS AN ACCOMPLICE.

To convict defendant as an accomplice to theft of automobile charged to have been stolen by P., it is necessary to prove that P. was a principal, and that defendant advised and encouraged him to commit the theft, and that defendant was to receive the stolen automobile and pay therefor.

#### 3. CRIMINAL LAW §780(3), 792(1)—INSTRUC- TION ON CORROBORATION OF ACCOMPLICE.

In prosecution of defendant as an accomplice to theft of automobile, held, that jury should have been instructed that the state must prove, first, that P. was a principal and committed the theft, and that he must be corroborated as to that issue, and, second, that defendant was an accomplice as charged, and that P.'s testimony was not sufficient to prove that fact, but must be corroborated.

#### 4. CRIMINAL LAW §59(5)—AGREEMENT TO COMMIT CRIME DOES NOT MAKE ONE AN AC- COMPLICE.

The mere agreement to commit a crime would not constitute one an accomplice, unless the crime was subsequently committed in pursuance to the conspiracy or agreement.

#### 5. CRIMINAL LAW §59(5)—CONSPIRATOR DIS- TINGUISHED FROM ACCOMPLICE.

A positive agreement to commit a felony constitutes a conspiracy, whether the felony is afterwards executed or not; but, where the party is charged as an accomplice, there must be a crime in pursuance to the agreement, and the accomplice must advise, commend, or agree to furnish means or aid in order to connect him with it.

#### 6. CRIMINAL LAW §424(3)—ACTS AND CON- DUCT OF OTHERS INADMISSIBLE AGAINST DE- FENDANT.

Acts and conduct of defendant's brother and P., the principal, in the absence of defendant and after stolen car had been delivered to defendant as claimed by P., were inadmissible unless defendant was in some way a party to the same or had knowledge or assented thereto.

Appeal from District Court, Camp County; J. A. Ward, Judge.

Gary Cone was convicted as an accomplice to the theft of an automobile, and appeals. Reversed and remanded.

M. B. Briggs, of Gilmer, Bass & Engledow, of Pittsburg, and C. E. Florence, of Gilmer, for appellant.

Alvin M. Owsley, Asst. Atty. Gen., for the State.

DAVIDSON, P. J. Appellant was convicted as an accomplice to the theft of an automobile.

The indictment charged that Joe Pullen committed the theft of an automobile from Ike Pitts, and that appellant prior to this theft advised and encouraged Pullen in committing the theft. Pullen testified that he entered into a conspiracy or agreement with appellant to steal automobiles, for which appellant was to pay him \$100 a piece; that Pullen was to bring them to appellant; that appellant lived in Upshur county, and it seems that this contract or agreement between them was entered into in that county. Pullen testifies that he went to Mt. Pleasant in Titus county and stole an auto, which proved to be the property of Pitts; that he brought this auto to appellant and turned it over to him. The auto belonged to Pitts and was stolen by somebody, and was subsequently recovered by Pitts in Tyler, Smith county. Pullen testified further that he committed the theft of perhaps as many as three additional autos at intervals covering several months, and that three of these reached appellant; it seems the last one did not, but from the view we take of the case it is immaterial whether it did or did not reach him.

[1] Over the objection of appellant, the evidence with reference to the three other automobiles was introduced in evidence. The court signing the bill of exceptions states he permitted this on the theory that there was a general conspiracy between the parties by which Pullen was to commit theft of autos, appellant receive them, and as long as this conspiracy was pending that all thefts in accordance therewith were admissible in each case. We are of opinion that the court was in error. The matter has been before the court on various propositions and under numerous authorities. It has been held by this court that evidence of extraneous crimes may be admitted to develop the *res gestæ*, connect the defendant with the case on trial, or to show intent; and also it is asserted as a general proposition that such evidence may be introduced when it tends to show system. It will be observed that the authorities draw a broad distinction between the doctrine of system and systematic crime.

This has been the subject of a number of decisions, and the question of system will not apply unless it is for some of the purposes stated. The court, speaking through Judge Henderson, discussed these matters at some length in Long's Case, 39 Tex. Cr. R. 537, 47 S. W. 363. See, also, Smith v. State, 52 Tex. Cr. R. 80, 105 S. W. 501. That case shows that it was the theory of the state that Smith and Capers entered into a conspiracy to commit the crime of arson as to different houses. Capers testified against Smith, and on the trial the court permitted testimony with reference to the arson of other houses than that charged. This court used the following language:

"These transactions were independent of the one for which this conviction was obtained. The court seemed to believe, from his qualification of the bill, that, if there was a conspiracy to burn houses, this would permit evidence of all the other cases of arson testified by Capers, on the theory of system. Where evidence of an extraneous kind is admitted, it must be to show intent to develop the res geste, identity of the defendant, or show system. That a party may be systematically a thief, or destroyer of houses by burning, or in the participancy or execution of a crime, does not necessarily come within the exceptions above mentioned. To prove system in order to identify a party, or to show intent, is one thing; but to prove systematic crime, or that an accused is a confirmed violator of the law, is a very different proposition. And extraneous crimes are not admissible, even under the exception to the rule, unless the testimony comes within one of the exceptions, and this to connect the defendant with the crime for which he is being tried. This evidence does not come within these exceptions. The fact that other houses may have been burned and appellant may have participated in them does not of itself connect the defendant with the arson charged in the indictment under this record. A party cannot be tried for various extraneous violations of the law in this way. He can only be tried for the offense for which he is being prosecuted, and not for those that are not charged against him in the particular indictment."

That case cites quite a number of authorities. Therefore we hold the court was in error in admitting evidence of the extraneous thefts.

[2] The court charged the jury with reference to accomplice testimony. Exceptions were reserved to this as being incomplete, and a special charge was refused. The charge on accomplice testimony was rather of stereotyped form. In order to convict the defendant, it was necessary for the state to prove, first, that Pullen was the principal, and, second, that appellant advised and encouraged him to commit the theft, and that he (appellant) was to receive the stolen auto and pay Pullen \$100. It was therefore necessary for the state to prove, among other things, that appellant was an accomplice as alleged, and in the manner alleged. It would be necessary, therefore, for the state to prove that in ac-

cordance with the conspiracy he (appellant) was to give or pay Pullen \$100 for the stolen car. It would be further necessary to corroborate Pullen in regard to the theft and the conspiracy as alleged, to constitute appellant an accomplice. Without discussing the facts, we are of opinion that the corroboration as to appellant being an accomplice is not sufficient. No witness testified to any fact, as we understand this record, that appellant was ever to pay Pullen \$100. In fact, the testimony is not sufficient to corroborate Pullen, as we understand the record, as to appellant being an accomplice. But that question is incidentally mentioned so that upon another trial these matters may be proved if the state has the evidence. The attack on the charge we think was justified.

[3-5] It is not sufficient to charge, in cases of this character, simply that appellant was an accomplice witness and as such to be corroborated. That was necessary, of course, both as to the theft and as to appellant being an accomplice as alleged. The court in directing the minds of the jury as to the law should have instructed them, first, that the state must prove that Pullen was a principal and committed the theft, and that he must be corroborated in his testimony as to that issue; second, that the state must prove that appellant was an accomplice as charged in the indictment, and in the manner charged, and that Pullen's testimony was not sufficient to prove this; that he must be corroborated as to that issue. The allegation of a party being an accomplice in crime as an offense is rather in the nature of a compound offense. Before there can be an accomplice there must be a principal, and the principal must have committed the act. There could be no accomplice to a crime until that crime has been committed by the principal. The mere agreement to commit a crime, however strong the facts may be as to that question, would not constitute the party an accomplice unless the crime was subsequently committed in pursuance to the conspiracy or agreement. That the party may be a conspirator and subject to prosecution under the conspiracy is not discussed, because the statute with reference to conspiracy provides the conspiracy is a complete and separate offense, and may be an offense whether the parties ever carried it into execution or not. A positive agreement to commit a felony constitutes a conspiracy, whether the felony be afterwards executed or not; but that is not so where the party is charged as an accomplice. There must be a crime in pursuance to the agreement, and the accomplice must advise, commend, or agree, or furnish means, or aid as required by the statute, in order to connect him with it. Upon another trial the court will so instruct the jury.

There are other matters involved which are of interest; among others, the applica-

tion for a continuance. This may not arise upon another trial, and it is unnecessary to discuss it.

[8] There is this general question which is noticed. The state introduced acts and conduct on the part of appellant's brother and Pullen in the absence of the defendant, and after the car had been delivered to appellant, as claimed by Pullen. We are of opinion the objections to this testimony were well taken. In order to connect the defendant with such acts and conduct, he must be in some way connected with same. These subsequent acts and statements of others would not be admissible, unless appellant was in some way a party to same, or had knowledge of or assented thereto. This is mentioned in a general way so that it may not occur upon another trial.

For the reasons indicated, the judgment is reversed, and the cause remanded.

### JOHNSON v. STATE. (No. 5368.)

(Court of Criminal Appeals of Texas. Nov. 26, 1919.)

#### 1. HOMICIDE $\S$ 142(1)—ISSUES OF MURDER, MANSLAUGHTER, AND SELF-DEFENSE.

In a prosecution for murder, contentions of the state and defendant *held* to present the issues of murder, manslaughter, and self-defense.

#### 2. HOMICIDE $\S$ 309(1) — INSTRUCTION ON MANSLAUGHTER.

In prosecution for murder, wherein defendant's testimony presented the issues of manslaughter and self-defense, in that the person he killed and another, acting together, attacked him, excerpt from a charge on manslaughter that the offense was of such grade if defendant killed when assaulted, believing that both decedent and the other attacking person were acting together, etc., *held* proper.

#### 3. HOMICIDE $\S$ 309(1) — INSTRUCTION ON MANSLAUGHTER.

In a prosecution for murder, wherein defendant testified that the killing was either manslaughter or in self-defense because he was attacked both by the person killed and another, an excerpt from a charge on manslaughter, that the killing was of such grade, if decedent and the other had combined, and the defendant believed they had, to do defendant some injury, and the conspirator with decedent had given the latter a knife to use against defendant, *held* not erroneous, as unduly limiting reduction of the offense to manslaughter only by an attack on defendant from both decedent and the other.

#### 4. CRIMINAL LAW $\S$ 822(17)—WHOLE CHARGE TO DETERMINE ERROR IN PART.

A whole charge, as one on manslaughter in a prosecution for murder, must be looked to

in determining whether it is erroneous on account of a particular part.

#### 5. CRIMINAL LAW $\S$ 822(17) — INSTRUCTION ON MANSLAUGHTER.

In a prosecution for murder, defendant seeking to reduce the offense to manslaughter on the theory that he was attacked by decedent and another, one or both, general charge on manslaughter, construed as a whole, *held* to present the issue in such manner as not to injure defendant by limiting reduction of the offense to manslaughter only if defendant was attacked by both decedent and the other, not by one alone; the parts complained of not fairly presenting their relation to the general charge.

#### 6. CRIMINAL LAW $\S$ 1059(2)—EXCEPTION INSUFFICIENT BECAUSE TOO GENERAL.

The ground of exception that the court did not allow defendant sufficient time to review a charge after it was written and before being read to the jury, reciting that the charge was handed to defendant's counsel at 11 o'clock in the evening, and that they were given until 8:45 the next morning to examine it, *held* insufficient, as too general.

#### 7. CRIMINAL LAW $\S$ 1092(11), 1115(2)—EXCEPTION TO REFUSAL TO QUASH VENIRE INSUFFICIENT AS QUALIFIED.

In a prosecution for murder, denial of defendant's motion to quash the venire on various grounds *held* not to present error or require revision, in view of the bill of exceptions merely repeating some of the grounds of the motion but containing no facts and not showing what evidence was introduced in regard to the matter, and in qualification thereto by the court.

#### 8. CRIMINAL LAW $\S$ 597(1)—DENIAL OF CONTINUANCE FOR ABSENCE OF WITNESSES.

In a prosecution for murder, denial of continuance for the absence of the witness stabbed by defendant at the time of the killing *held* not error, the facts expected to be proved by such witness on the face of the record not probably being his testimony.

#### 9. CRIMINAL LAW $\S$ 598(2) — NO CONTINUANCE FOR ABSENCE OF WITNESSES UNLESS DILIGENCE IS USED.

Continuance was properly denied on account of the absence of witnesses to procure whose attendance or depositions defendant did not exercise sufficient diligence.

#### 10. CRIMINAL LAW $\S$ 938(3)—NEW TRIAL DENIED FOR EVIDENCE NOT NEWLY DISCOVERED.

In a prosecution for murder of defendant's mistress, new trial was properly refused when asked on account of newly discovered evidence of the city marshal that decedent was a mean and vicious woman, who had previously attacked defendant two or three times, as such evidence could not be newly discovered so far as defendant was concerned.

Appeal from District Court, Angellina County; L. D. Guinn, Judge.

Henry Johnson was convicted of murder, and he appeals. Affirmed.

E. A. Berry, Asst. Atty. Gen., for the State.

DAVIDSON, P. J. Appellant was convicted of murder, his punishment being assessed at 20 years' confinement in the penitentiary.

The evidence is to the effect that appellant and deceased, a woman, had been living for several years in adultery, and had had a number of serious troubles; that she had on more than one occasion used a knife upon him, and once had struck him on the leg with an axe. She seems to have been, from the testimony, a woman of unusual high temper and of decided physical courage. We deem it unnecessary to go into a detailed statement of the troubles occurring between appellant and deceased.

Shortly prior to the homicide the deceased had taken up with another negro by the name of James Riley. This was rather displeasing to appellant. On the evening preceding the fight at night appellant claims he gave his mistress some money, or bought her a pair of shoes to attend some character of church gathering. Without his knowledge, as claimed by him, she went to a dance, in the country two or three miles, with James Riley. Appellant says he was not aware of that fact, and thought she was at the church social. He went also to the dance. Upon reaching there he found the deceased and Riley present. Shortly afterward a difficulty occurred, in which appellant stabbed Riley and killed deceased.

[1] The state's theory of the immediate transaction was that Riley was sitting or standing near a piano in the room, which was being played for the benefit of the dancers. Appellant approached Riley and engaged him in conversation; brought on a difficulty with and stabbed him; that deceased ran out of the door, followed by appellant. As appellant went out upon the gallery, or just off the gallery, he encountered deceased, and immediately attacked and killed her. Appellant's theory was that the deceased had a knife or went to where Riley was, and Riley gave her a knife, which he observed, and he went over and asked Riley why he gave deceased that knife; that he knew that she intended to kill him with it; that Riley called him a liar and struck him, and the fight began. His further contention is that while he and Riley were engaged in this trouble deceased ran up behind him, and was striking him in the back, as he thought, with a knife, and that the fight continued until they passed out of the door and on to the gallery, and perhaps the ground, and that he killed deceased under those circumstances. This presents the issues of murder, manslaughter, and self-defense.

[2] Some of the language of the charge on manslaughter is made the subject of criticism in appellant's exceptions. Among other things in the charge on manslaughter the court gave this:

"An assault and battery by the deceased, Tennessee Kitchens, and James Riley, or either of them, provided the defendant believed they both were acting together and causing pain or bloodshed, provided such assault occurs at the time of the killing, or so near the time that the party receiving such assault and battery would not have time to be capable of cool reflection."

This is an excerpt from the charge and made the subject of exception. The exception, specifically pointed out, is to the language as follows: "Provided the defendant believed they both were acting together and causing pain or bloodshed." His proposition is that, if either of them were acting alone and causing pain or bloodshed, defendant's right of self-defense would be just as complete on the ground of manslaughter as if he believed they both were acting together. Appellant's whole theory of the case is based upon the idea that the two, Riley and deceased, were attacking and fighting him in the dance room near the piano. The issues are sharply drawn. The state's theory did not present the issue of manslaughter from any angle of view as we understand this record. So it may be stated that any question of manslaughter suggested was from the testimony introduced by the defendant, to wit, that they were both acting together, in their attack on him. The court, however, in quotation above criticized, authorized manslaughter if either was so attacking appellant.

[3-5] There is also an exception to another portion of the court's charge on manslaughter. That phase of the charge reads as follows:

"That the deceased and James Riley had combined, if they had, or if the defendant believed they had, to do the defendant some bodily harm, or kill him, and that Riley had given the deceased a knife to cut the defendant with."

The reason given is that—

"Said second section would be just as complete in favor of defendant without the necessity of Tennessee Kitchens and James Riley acting together and without defendant having to believe they were acting together, and such defense was complete without the necessity of defendant having to believe that James Riley had given Tennessee Kitchens a knife, if defendant believed that she had a knife, whether it was given to Tennessee Kitchens by James Riley or not."

The same may be said of this as of the other, and possibly both, that they were short excerpts from the charge on manslaughter, based upon the idea that these excerpts were erroneous. As before stated, the whole theory of the defense was manslaughter and self-defense from the standpoint of an attack on him by both. If they in fact attacked appellant, or appellant believed that both of them were attacking him, he had the same right to defend from either standpoint; but,

further, as to both of these exceptions, it may be stated they are but short extracts from the body of the charge, without showing the relation of the particular excerpts to the full charge as given. The rule is that the whole charge must be looked to in discussion of the question of error. We are of opinion that in the face of these exceptions that the charge is sufficient on the question about which it was given. If we look to the state's testimony, there was no attack made on appellant by the deceased. The state's contention is that appellant made the attack on Riley, and not Riley upon him, and such testimony is rather strong on this proposition. But from any viewpoint of the exceptions, we are of opinion there is no error shown; that the two excerpts from the charge contained in the exceptions do not fairly present their relation to the general charge. We think the general charge on manslaughter, when looked to in the face of these exceptions, presents the issue in such manner as that appellant was not injured.

[6] There is another ground of exception stated in the bill, that is, that the court did not allow appellant sufficient time to review the charge after it was written and before being read to the jury. It recites that the charge was handed appellant's counsel at 11 o'clock in the evening, and they were given until 8:45 the next morning to examine the charge. This is rather too general, and does not show in any manner or point out how he was injured by not being given further time. This is but a general statement, without specifying the injury. We do not think this was sufficient.

[7] Appellant moved to quash the venire, alleging various grounds. The bill of exceptions in this respect is a repetition of some of the grounds of the motion to quash, but contains no facts, nor does it show what, if any, evidence was introduced in regard to the matter. The court signing the bill of exceptions states that all of the venire were in court, except "such as had been excused by legal excuses, or some sick, except four or five men, and these were challenged by the state." Without the facts before us, and this qualification by the judge, there is nothing presented in such tangible way as presents error or requires revision.

[8, 9] Appellant filed an application for a continuance for several witnesses. One of these was James Riley. Process had not been issued for him as we understand the application; the excuse being that he was temporarily absent from the state, and information led counsel to believe that he was in New Orleans, La. In the contest filed by the state it was alleged that he had been placed in the army under the selective draft system. The facts expected to be proved by Riley, in the

face of this record, would hardly be testified to by him as stated. He was the man engaged in the difficulty with appellant, and was stabbed during the mêlée. This phase of the application for continuance, we think, does not present merit. In regard to the other witnesses, the diligence we think is insufficient. They lived in the county; some of them either in the town of Lufkin or near by, and could have been reached in a few hours. Without discussing the diligence, we think it was insufficient as to all of the witnesses. Viewed in the light of the motion for a new trial, the court we think did not err in overruling the application for continuance. The contest by the state shows they lived near the town of Lufkin, where the case was tried and could have been obtained, and especially the affidavits and statements of these witnesses could have been secured for new trial to show they would testify as to the facts stated in the application. The contest further shows they would not have so testified, and states the reasons, facts, and circumstances. The affidavit of none of these witnesses is appended to the motion for new trial, nor was their testimony before the court on trial of the motion, so far as the record shows. Whether there was evidence introduced on the contest of the motion for new trial is not shown further than the general statement that the court heard the motion and the evidence and overruled it. The bill of exceptions does not undertake to show any of these matters, nor in fact was there an exception reserved to the overruling of the motion for new trial embodying this statement or evidence if it was introduced.

[10] The affidavit of a Mr. Cochran is attached to the motion for new trial on the theory that his statement would be newly discovered evidence. Appellant swearing to his motion for new trial fails to state this evidence was unknown to him, and the record shows that he either knew or could have known, and doubtless did know, the facts stated by Mr. Cochran in his affidavit. Cochran was foreman of the grand jury which returned the bill of indictment; he had been city marshal of Lufkin for a number of years, and evidently a prominent citizen. Some of the facts stated in the affidavit of Cochran are to the effect that deceased was a mean and vicious woman, and had attacked appellant two or three times, and had paid fines imposed for such conduct. This could not be newly discovered evidence so far as defendant was concerned. Take this record in its entirety, and in view of the attacks made by the motion for new trial, and the exceptions and the motion for new trial, we are of opinion there is no sufficient error urged that would require a reversal.

The judgment is affirmed.

**FIELDS v. FIELDS et al. (No. 9125.)**

(Court of Civil Appeals of Texas. Ft. Worth.  
June 14, 1919. Rehearing Denied  
Oct. 18, 1919.)

**LANDLORD AND TENANT — 249(1)—LIABILITY  
TO LANDLORD OF CREDITOR LEVYING ON TEN-  
ANT'S CROPS.**

Judgment creditor of tenant who levied upon the crops when the tenant was indebted to his landlord for rent, supplies, or advancements held liable to the landlord for conversion to the extent of so much of the converted crops as might be necessary to satisfy the landlord's claim, liability not being limited to the pro rata part of the tenant's debt to the landlord which the part of the crop levied on bore to the whole of the crop raised by the tenant; the principle of marshaling of securities not being involved.

Appeal from Bosque County Court; W. A. York, Judge.

Action by Mrs. Emmaus Fields against Jasper N. Fields and others. From judgment for plaintiff, she appeals. Judgment reformed so as to allow greater recovery, and, as reformed, affirmed.

B. J. Word, of Meridian, for appellant.

James M. Robertson, of Meridian, for appellees.

BUCK, J. Appellant, as plaintiff below, sued defendant for conversion of 166 bushels of wheat alleged to have been produced on plaintiff's farm by her tenant, and upon which she had a landlord's lien for rent due her on the premises and for advancements made to the tenant during the current year. She alleged that the defendant had levied an execution upon the said 166 bushels of wheat to satisfy a judgment held by the defendant against the tenant, and that the defendant unlawfully seized and removed from plaintiff's farm said wheat, which was subject to the payment of plaintiff's said rents and the supplies furnished. She alleged that the tenant had executed a note in the sum of \$225, with interest from maturity, and that provided for \$10 damages and 10 per cent. additional as attorney's fees in case of default and suit, which default had been made and suit brought. She further alleged that the tenant had executed a second note in the sum of \$135, with interest and attorney's fees, in payment of advancements made during the crop season. She sued to recover said amounts.

The court filed his findings of fact and conclusions of law as follows:

**"Conclusions of Fact.**

"The plaintiff, Mrs. Emmaus Fields, mother of Jasper N. Fields, is the owner of a farm located in Bosque county, Tex., which farm

plaintiff rented to defendant Jasper N. Fields for the year 1918, for which said defendant agreed to pay plaintiff therefor about \$429 as rents, and for farming implements to be used on said farm. Said defendant Jasper N. Fields made a crop of wheat on said farm in said year, 1918, amounting to 328 bushels of wheat, worth \$2 per bushel.

"The defendant Schow Bros. levied an execution against the defendant Jasper N. Fields on 166 bushels of said wheat.

"That before and after the said levy was made by said Schow Bros. the defendant Jasper N. Fields sold the remainder of said 328 bushels of wheat, without paying the plaintiff the amount or any part thereof due her for rents and supplies.

**"Conclusions of Law.**

"The plaintiff has a landlord's lien on all the said wheat levied on and sold by defendant Schow Bros. and that part of the wheat sold by defendant Jasper N. Fields.

"Plaintiff is entitled to judgment against defendant Schow Bros. only for such part of plaintiff's debt as the value of 328 bushels of wheat was to 166 bushels levied on."

It will be noted that the court concluded that the plaintiff was entitled to recover from defendant under her landlord's lien only the pro rata part of her debt which the 166 bushels levied upon bore to the 328 bushels of wheat raised on the premises by the tenant. We are of the opinion that the plaintiff was entitled to recover the full value of said 166 bushels, or so much of said value as the rent and advancements for the year amounted to. Article 5475, V. S. Civ. Stats.; Wilkes v. Adler, 68 Tex. 689, 5 S. W. 497; 3 Rose's Notes, 867; Leverett v. Meeks, 29 Tex. Civ. App. 523, 68 S. W. 302; Beckham v. Collins, 54 Tex. Civ. App. 241, 117 S. W. 432; Zapp v. Johnson, 87 Tex. 641, 30 S. W. 861; Boydston v. Morris, 71 Tex. 697, 10 S. W. 331; Jackson v. Corley, 30 Tex. Civ. App. 417, 70 S. W. 570. These authorities, and others which might be cited, hold that a purchaser of the crops of a tenant, who is indebted to his landlord for rent, supplies, or advancements is liable to the landlord for conversion and that his liability is to the extent of so much of the converted crops as may be necessary to satisfy the landlord's claim. The principle of marshaling of securities is not here involved, because the evidence shows that the tenant sold a part of the 166 bushels, disposed of by him, before the defendant levied its execution writ, to wit, June 22, 1918, and that he disposed of the remaining wheat during said June; that the plaintiff was at her home in another county when the tenant sold his wheat and when the execution was levied by defendant, and was not informed thereof until after the same had occurred.

We overrule appellees' objection to the consideration of appellant's two assignments, made on the stated ground that the same

constituted no part of her motion for a new trial in this case. We are of the opinion that in her motion for new trial plaintiff assigned substantially the same errors that are presented in her brief.

For the reasons stated, so much of the judgment as awarded plaintiff recovery against defendant for only \$217.15 will be reformed so as to allow her a recovery against defendant in the sum of \$332, with costs of suit, etc. As so reformed, the judgment will be affirmed.

Reformed and affirmed.

# **BROOKER v. WRIGHT et ux. (No. 9109.)**

(Court of Civil Appeals of Texas. Ft. Worth.  
June 14, 1919. Rehearing Denied  
Oct. 18, 1919.)

## **1. TRIAL ⚡350(4)—SPECIAL ISSUES REQUIRED BY EVIDENCE.**

In action to set aside a judgment based on trustee's sale of land, on ground that land was homestead and that sale was simulated for purpose of obtaining a loan, *held* error, in view of the evidence, to refuse to submit issues concerning defendant's actual or constructive notice that the land was a homestead, and that sale was simulated, defendant being a purchaser of secured vendor's lien note.

## **2. VENDOR AND PURCHASER ⚡261(4) — DEFENSE OF HOMESTEAD AGAINST INNOCENT PURCHASER OF VENDOR'S LIEN NOTE.**

Innocent purchaser of secured vendor's lien note may enforce it against the land, although it grew out of a simulated sale of a homestead made to raise a loan.

## **3. VENDOR AND PURCHASER ⚡232(5, 6)—POSSESSION OF PRIOR VENDOR AS NOTICE.**

A purchaser from a vendee, whose vendor remains in possession, is not bound to go beyond the deed from such vendor conveying the title, where it has been properly executed and registered.

## **4. VENDOR AND PURCHASER ⚡284—NOTICE TO PURCHASER OF VENDOR'S LIEN NOTE QUESTION FOR JURY.**

Whether purchaser of secured vendor's lien note had notice, constructive or actual, that note arose out of a simulated sale of a homestead, *held* for the jury.

## **5. VENDOR AND PURCHASER ⚡261(4)—PURCHASER FROM INNOCENT PURCHASER OF VENDOR'S LIEN NOTE.**

One purchasing a secured vendor's lien note from an innocent purchaser may enforce it against the land, although he had notice before the purchase that the note arose out of a simulated sale of a homestead.

## **6. VENDOR AND PURCHASER ⚡261(4)—INNOCENT PURCHASER FROM PURCHASER OF VENDOR'S LIEN NOTE WITH NOTICE.**

Innocent purchaser of a secured vendor's lien note may enforce it against the land, al-

though the person from whom he purchased it was a purchaser with notice that it arose out of a simulated sale of a homestead.

## **7. VENDOR AND PURCHASER ⚡232(9)—DUTY TO INQUIRE OF TENANT IN POSSESSION.**

The possession of a tenant of vendor's grantor, as a matter of law, merely puts proposed vendee upon "inquiry," and affects him with notice of such facts as would, by the exercise of due diligence, have brought home to an ordinarily prudent man knowledge of the real facts.

## **8. HOMESTEAD ⚡129(2)—HUSBAND'S LIABILITY TO LIEN NOTE PURCHASER.**

While trust deed and vendor's lien note arising out of a simulated sale of a homestead are void as against one having actual or constructive notice as far as wife is concerned, the husband should not be freed of liability as against purchaser of the note with constructive notice only.

Appeal from District Court, Tarrant County; Ben. M. Terrell, Judge.

Suit by Ben T. Wright and wife against J. N. Brooker. Judgment for plaintiffs, and defendant appeals. Reversed and remanded.

Sam J. Hunter, of Ft. Worth, for appellant.  
C. R. Bowlin and Stanley Boykin, both of Ft. Worth, for appellees.

CONNER, C. J. Ben T. Wright and his wife, Mrs. Ben T. Wright, instituted this suit on the 5th day of December, 1913, in the nature of a bill of review against J. N. Brooker to set aside a judgment rendered in Brooker's favor in the district court of Tarrant county on the 7th day of June, 1913. The judgment mentioned was based upon a trustee's sale of certain lots or portion of lots in the city of Ft. Worth, at which Brooker became the purchaser, and for the possession of which Brooker had sued. The trustee's sale was by virtue of a trust deed given to secure a vendor's lien note in the sum of \$1,100, given by one Magness as part consideration for the sale of said premises by the Wrights to Magness and later purchased by Brooker.

The plaintiffs in their petition undertook to show cause why said judgment in favor of Brooker should be set aside and to account for the failure of the Wrights to earlier institute their action, and further specially alleged that at the time of the purported sale of the property to Magness by them the property mentioned was their homestead; that, while the deed to Magness purported to convey the fee-simple title, in fact the transaction was simulated for the purpose of borrowing \$1,000 on their said homestead; that Magness, in fact gave no money at the time, but executed the note mentioned, which, for the convenience and at the instance of W. P. Luse, had been made payable five years after date to one Price for the benefit of W. P. Luse, who advanced to Ben T. Wright the



desired \$1,000. It was further alleged that W. P. Luse had full notice of the simulated character of the transaction, and that the appellant herein, J. M. Brooker, also had actual and constructive notice of the same before and at the time he subsequently purchased from Luse the note referred to.

The case was submitted to a jury upon special issues, and upon the verdict rendered the court entered a judgment in favor of the Wrights, setting aside the judgment of June 7, 1913, in Brooker's favor, canceling the note referred to and also the trustee's deed, and decreed title to the plaintiffs with an award of execution and writ of possession, which had been secured by Brooker under his judgment in June, 1913. From the judgment so rendered, Brooker has duly appealed.

Appellant, through his counsel has waived all assignments of error relating to the plaintiffs' asserted right to set aside the judgment. We will therefore, in our disposition of the case, notice and discuss only such matters as we deem pertinent to the issues which relate to the merits of appellees' case as presented by them and as answered by appellant.

Appellant's first complaint is of the court's action in refusing to submit the issues which relate to the merits of the controversy. In order that our conclusion may be understood it will be necessary to state the substance of the court's charge and appellant's exception thereto. Briefly stated, the issues submitted were:

(1) Whether Mrs. Wright had requested her husband to employ attorneys in the suit by Brooker which resulted in the judgment of June 17, 1913.

(2) Whether the husband, Ben T. Wright, acted upon the request of his wife, and employed attorneys and instructed them to set up the homestead right of the wife.

To both of which questions the jury answered: "Yes."

(3) and (4) Whether Mrs. Wright had authorized her husband or attorneys so employed to agree that said judgment in 1913 should be entered against her, and whether she had knowledge of the agreement by virtue of which the judgment had been entered prior to the time that she had been served with the writ of possession.

These issues were both answered in the negative.

The fifth and last special issue requested a finding of the reasonable monthly rental value of the property from the time Brooker took possession of the same up until the time of the trial.

In connection with the special issues, and in addition to the usual charges upon the burden of proof and of the right of the jury to determine the credibility of the witnesses,

etc., the court gave the following further charge:

"If you find, in answer to the special issues submitted to you, that Mrs. Bessie E. Wright requested her husband, Ben T. Wright, to employ attorneys to set up and prosecute for her her homestead defenses, and that, acting upon said request, her said husband employed Slay, Simon & Wynn, and instructed them to set up and prosecute his wife's said homestead defense, and if you have further found that the said attorneys, without the authority or consent of the said Mrs. Bessie E. Wright, agreed that a judgment might be rendered against her, and if you further find that such judgment was so rendered, and that the said Mrs. Bessie E. Wright had no knowledge of the said agreement, or the rendition of said judgment, until the writ of possession was served upon her, then you will find the following verdict, to wit: 'We, the jury, find a verdict in favor of the plaintiffs against the defendant, canceling the \$1,100 note in evidence, and canceling and holding for naught the sale under the deed of trust in evidence, and the judgment rendered in the Seventeenth district court in favor of the defendant against the plaintiffs, and the writ of possession, and all the pleadings in said judgment. We also by our verdict remove the trustee's deed, and the judgment and writ of possession, as clouds upon the plaintiff's title. We also vest title to the property in controversy in the plaintiffs.'"

At the same time the defendant requested, among others, the submission of the following special issues, which were refused by the court, and to which refusal the defendant excepted, to wit:

"(5) At the time J. N. Brooker bought said \$1,100 note in controversy in this suit, did he or not know that the premises in question were the homestead of the plaintiffs? Answer Yes or No.

"(6) At the time he bought said \$1,100 note in controversy, did said J. N. Brooker have any knowledge or information or other notice that the premises in controversy were the homestead of the plaintiffs in this case? Answer Yes or No. \* \* \*

"(13) Is it a fact or not that J. N. Brooker paid to W. P. Luse the sum of \$1,000 for said \$1,100 note? Answer Yes or No.

"(14) Did the said Brooker buy said note in good faith, believing that he was getting a good title to the same, and believing that it was a vendor's lien upon the premises in question? Answer Yes or No.

"(15) Did W. P. Luse, at the time he purchased said \$1,100 note, believe that he was purchasing a good title, and that it was a vendor's lien upon the land and premises in question? Answer Yes or No.

"(16) What amount did W. P. Luse pay for said note?

"(17) Did W. P. Luse have any notice, actual or constructive, at the time he bought said note from the Wrights, that the Wrights were claiming that the sale to Magness was a pretended sale of the homestead and an attempted mortgage upon the homestead? Answer Yes or No. \* \* \*

"(20) Did J. N. Brooker, the defendant, ever find anybody in occupation of said premises at any time that he went to look at them? Answer Yes or No.

"(21) Did J. N. Brooker ever find anybody in possession of said premises, so as to make inquiry of them by what right they occupied the same, or to whom they paid the rent? Answer Yes or No."

To the court's charge, and to the action of the court in refusing the special instructions noted, the defendant duly objected and excepted, on the ground:

That the charge "stops short of presenting any issue or any charge upon the defense to the plaintiff's claim or right to recover said property back from the defendant, Brooker, thereby denying to the defendant the right to be heard by the jury on his defenses," and that "by reason of the court's action in refusing to submit to the jury the defendant's special issues, and refusing to instruct the jury, as requested by the defendant in his five special charges asked for, the court is denying to defendant, Brooker, the right to have his defenses submitted to a jury."

[1] It seems clear to us that the objections noted were well taken, and that appellant's first assignment and propositions relating thereto must be sustained. It is evident, we think, that the special issues submitted are only pertinent to that phase of the plaintiff's case directed to the effort to set aside the judgment in Brooker's favor. The verdict of the jury was in the exact wording of that paragraph of the court's charge which we have quoted, and which was submitted in connection with the special issues, and the judgment appealed from follows this verdict. The charge, verdict, and judgment can only be justified by an assumption that the evidence without dispute showed, first, that the transaction which culminated in the Wrights conveying to Magness the premises in controversy was a simulated one, as the Wrights alleged; and, second, that W. P. Luse, at the time he acquired the note referred to, had actual or constructive notice of the simulated character of the transaction, and that likewise the appellant, Brooker, had such notice at the time of his purchase of the note. The evidence has been carefully considered, and we think no such assumption can be made. Indeed, appellant insists under other assignments that the evidence shows without dispute that at least appellant, Brooker, was a purchaser of the note in question for a valuable consideration and without notice, actual or constructive, of the vice upon which the plaintiffs sought to recover.

W. P. Luse testified, in substance, among other things, as follows:

That on the occasion in question he had been approached by a man named Swofford, inquiring if he (Luse) had money to loan; that he (Luse) replied in the affirmative, if he "could

get a bonus by discounting the note," and that Swofford told him where he was "making a deal to sell some parties some property, where there would be an \$1,100 note to be sold, and asked me would I give \$1,000 for the \$1,100 note, due in three years, and bearing 10 per cent. interest"; that the next day Swofford came to him (Luse) and carried him out to look at the house; that it suited him (Luse), and he agreed to give \$1,000 for the note; that in a day or two afterwards Swofford came to Luse and said that he was ready to sell the note; that the parties went to Mr. Ross to have the abstract examined, and that he (Luse) left his \$1,000 with Mr. Ross, with instructions to deliver the money to "the fellow who delivered the note to him, when he was satisfied of the title being good"; that "during the pendency of the deal for the purchase of the note I did not have any information from any one as to this deal being other than a genuine one"; and that he later sold the note for \$1,000 in cash to Brooker, the appellant in this case.

Mr. Ross testified, among other things, to the effect:

That he examined the abstract of title to the property in question for both Luse and Brooker; that his opinion was favorable; that Swofford appeared to be conducting the negotiations, and that Mr. Wright was in his office once or twice; that because of the recent character of the transaction he inquired of Wright and Swofford as to whether the property was a homestead or not, and "whether it was a bona fide transaction, and whether it was a simulated transaction, for the purpose of evading a homestead and obtaining a loan on the homestead"; and that "Mr. Swofford assured me that it was a bona fide transaction, that he was the agent who had conducted the sale, and knew that it was a genuine sale."

Mr. Ross testified:

"I asked Mr. Wright whether that was his homestead or not. I asked him orally and I inquired very carefully about that, because it was a recent transaction. His answer, when I asked him that, was that it was not his homestead. He said his homestead was in San Antonio, and that this was not his homestead, and I afterward required him to make an affidavit on the subject, and the affidavit was made by him, and also by Mr. Swofford. I inquired of Mr. Swofford whether it was a bona fide transaction, and he said that it was; that he was the agent in the transaction, and knew that it was a bona fide transaction, and not a simulated transaction; that it was a sale of the land; and they both stated that to me orally, and I then required them to reduce the statement to an affidavit. I afterwards examined the title again for Mr. Brooker. Assuming that that transaction was regular, I examined it from that time down to the present time, having examined it previously. I had investigated the transaction between Wright and Magness, and had become satisfied that it was a bona fide transaction."

In this connection it should be further stated that the deed to Magness was a regu-

lar warranty deed purporting on its face to convey the full fee-simple title to the premises in controversy, with the usual habendum and tenendum clauses. It was duly executed and acknowledged by both Mr. and Mrs. Wright in the usual form required in conveyance of a homestead. The deed to Magness, and the note for \$1,100 payable to Price, and the trust deed given to secure the note, were all executed on the 16th day of December, 1911, and Mr. Wright testified upon the trial that at this time he and his wife and children were occupying the premises as their homestead; that Magness in fact paid nothing upon the purported purchase, and soon thereafter reconveyed the property to himself and wife; that he discounted the note in order to go into business in San Antonio, where he went in a few days, and to which place his wife and children also moved about the 10th day of January, 1912. It appears that the deed from Magness, reconveying the property to the Wrights, was not recorded; but Wright therein assumed the payment of the price note.

There was further testimony to the effect that in June, 1912, Luse became desirous of selling the note in question, and came to Ft. Worth and proposed its sale to appellant, Brooker, who purchased it, paying therefor \$1,000 in cash; but before purchasing the note Brooker required an examination of the title by Mr. Ross, the same attorney who examined the title for Luse. He testified as follows:

"At the time I bought this note I did not have any knowledge or notice that the Wrights were occupying that property as a homestead. I did not know anything about it being a simulated or sham transaction for the purpose of borrowing money on a homestead. I would not have bought the note, if I had had a hint even of it. I thought it was a perfectly good title, and I bought it in good faith. Luse said he had fully examined the title—that is, the security—and said he had satisfied himself; after he went out and looked at the property, and satisfied himself as to the security, he came there and gave the money to Mr. Ross, and told him to satisfy himself as to the title, and if the title was in every way satisfactory to him to pay the note off; he gave the money to Mr. Ross, and went off and left the title to be passed on by Mr. Ross, and I bought it largely on the same conclusion; on Ross' certificate I bought it. I regarded him as one of the best land lawyers in the state, and I had a talk with him, and he said the title was good. If I had had any suspicion that it was wrong, I would not have bought it. I went further than Mr. Ross with the title; I found out that the Wrights had moved out of the property, and that a man named Briscow had rented the property, and he was paying the rents to Swofford, representing the C. N. Brooks Realty Company; that Mr. Ross told me the title was good. Briscow told me they had moved out of the property. I asked him if they had

ed everything out; there was nothing left in the house at all; that he moved back, and took possession, and paid rent to the real estate people down on Tenth street. Briscow told me they had moved in, and the others had moved—moved everything out and out of the country; moved to San Antonio. The title with Mr. Ross was good; the people had moved out and left the country; and I just thought if I could not loan on that kind of title—could not buy or speculate on that kind of paper—I couldn't handle no paper. I took it as absolutely satisfactory, and I had no question in my mind about it. As to hearing that Mr. Ross had talked, or examined Mr. Wright and Swofford as to whether it was a homestead, I will say Mr. Ross told me that he had talked to all parties concerned, and was satisfied, and was willing to give a perfectly clean title on it. He said he made this investigation. I went to talk to him about it, and he said, 'Luse left the matter largely with me and he satisfied himself as to the security;' and he said, 'I talked to all parties concerned, and satisfied myself the title was good, and gave an opinion on the title.'"

[2] We cannot, in view of the testimony we have quoted and to which we have referred, see how it could be assumed that there was no abandonment of the homestead, and that neither Luse nor Brooker were innocent purchasers of the note for value and without notice of the defense upon which appellees rely. If it be assumed that the transaction was a simulated one, as appellees alleged, it is nevertheless clear that, if either Luse or Brooker were innocent purchasers of the note for value and without notice, as alleged by appellant, appellees would be bound by the proceedings as they appeared. See *Graves v. Kinney*, 95 Tex. 210, 66 S. W. 293; *Heidenheimer v. Stewart*, 65 Tex. 321.

[3-5] We presume that the honorable judge must have concluded that Luse was affected with notice, as a matter of law, because of the fact that at the time of his purchase of the note appellees were in possession of the premises. This fact alone, however, under the rule announced in the case of *Eylar v. Eylar*, 60 Tex. 315, would not be sufficient. It was held in that case that a purchaser from a vendee whose vendor remains in possession, is not bound to go beyond the deed from such vendor conveying the title, where it has been properly executed and registered. It was there said that the sole office which possession performs in the matter of notice is to put a person desiring to purchase upon inquiry, and it has no effect in determining what the inquiry shall be, or of whom it shall be made, and that in such case the purchaser, not having notice otherwise, would have a right to rely upon the declaration of the grantors in the deed that the title was in fact in the person to whom it had been conveyed. There were some other circumstances, perhaps, tending to show that Luse had such knowledge as would put him upon inquiry,

but these circumstances were by no means conclusive, and it was at all events a matter for the jury's determination. If Luse was in fact an innocent purchaser without knowledge of the simulated character of the transaction, it cannot be doubted that Brooker in his purchase took good title to the note, free from the vice alleged by appellees, even though he, Brooker, had notice. This proposition is so well settled we deem it unnecessary to cite authorities in its aid.

[6] But if it be admitted that Luse was not an innocent purchaser, yet, if Brooker was, he is entitled to protection, as it is undisputed that he bought the note before its maturity, paid therefor a valuable consideration, and there is no sufficient evidence that he had actual notice. An effort seems to have been made in the testimony to show that the note on its face had an indorsement showing that it was a loan; but Brooker's testimony tended to show that the original indorsement had been changed, and the word "loan" written thereon, and it cannot therefore be said that the indorsement can be here accepted as conclusive evidence that Brooker was affected with notice. We think it must have been assumed by the trial judge that the fact that at the time of Brooker's purchase the premises were in possession of a Mr. Briscow, who, it was developed in the testimony, was a tenant of appellees, was as a matter of law sufficient to affect Brooker with notice of appellees' asserted rights. It is true that a distinction has been made in the cases where the possession remains with the vendor and where the possession is by a tenant of the vendor. In the latter class of cases it seems to have been held that the possession of a tenant, as a matter of law, affects a proposed purchaser with notice of the right of his landlord. See *Chamberlain v. Trammell*, 61 Tex. Civ. App. 660, 131 S. W. 227; *Moore v. Chamberlain* (Sup.) 195 S. W. 1135.

[7] But, as we understand these cases, the possession of the tenant is not necessarily conclusive on the issue of notice to a purchaser. The possession of the tenant as a matter of law merely puts the proposed purchaser upon "inquiry," and affects him with notice of such facts as would, by the exercise of due diligence, have brought home to an ordinarily prudent man knowledge of the real facts. The editor of *Ruling Case Law*, p. 346, § 7, thus states the rule on the subject:

"Whatever fairly puts a person on inquiry is sufficient notice, where the means of knowledge are at hand; and if he omits to inquire, he is then chargeable with all the facts which, by a proper inquiry, he might have ascertained. This, in effect, means that notice of facts which would lead an ordinarily prudent man to make an examination which, if made, would disclose the existence of other facts is sufficient notice of such other facts."

In *Wethered's Adm'r v. Boon*, 17 Tex. 143, it was said by Mr. Justice Wheeler of our Supreme Court:

"Notice may be either actual or constructive. The former is said to exist where the party to be affected by it is proved to have had actual knowledge of the fact; where the knowledge of it is brought directly home to him by the evidence. Of this there is no pretense in the present case. Or there may be constructive notice, as when the party, by any circumstance whatever, is put upon inquiry, which amounts in judgment of law to notice, provided the inquiry becomes a duty. *Bouv. L. D. tit. 'Notice'; 4 Kent, Com. 179; Sugden on Vendors, c. 23; 1 Story, Eq. § 399, and notes.* 'The general doctrine is that whatever puts a party upon an inquiry amounts, in judgment of law, to notice, provided the inquiry becomes a duty, as in the case of purchasers and creditors, and would lead to the knowledge of the requisite fact, by the exercise of ordinary diligence and understanding.' 4 Kent, 179. In a great variety of cases, it must be a matter of doubt and difficulty to devise what circumstances are sufficient to put a party upon inquiry; and each case must depend upon its own circumstances. But it is clearly settled that 'vague and indeterminate rumor or suspicion is quite too loose and inconvenient in practice to be admitted to be sufficient.' 1 Story, Eq. § 400, note. In *Flagg v. Mann et al.*, 2 Sumner, 551 [Fed. Cas. No. 4847], Judge Story said, 'Vague reports and rumors from strangers are not a sufficient foundation on which to charge a purchaser with notice of a title in a third person. And I think that Lord Hardwicke stated the true doctrine when, in *Hine v. Dodd*, 2 Atk. 270, he said that there ought to be clear undoubted notice; and that suspicion of notice, though a strong suspicion, is not sufficient to justify the court in breaking in upon an act of Parliament, or (as I would add) upon the legal rights of a purchaser.' In *Hine v. Dodd*, cited by Judge Story, the question was whether the defendant's claim under a registered mortgage should be postponed to the plaintiff's claim under a prior judgment upon the ground that the defendant had notice of the judgment before the mortgage was executed; and the words of Lord Hardwicke were that 'apparent fraud, or clear and undoubted notice, would be a proper ground for relief; but suspicion of notice, though a strong suspicion, is not sufficient to justify the court in breaking in upon an act of Parliament;' 'or' (Judge Story adds) 'upon the legal rights of a purchaser.'"

In the case of *Wilson v. Williams*, 25 Tex. 55, the same able judge had this to say on the subject:

"Indeed, it has been said it will be a sufficient answer in all cases to the allegation of notice to show that the party to be affected by it could not have obtained the necessary information by an investigation conducted in the usual course of business. [*Bellas v. McCarty*] 10 Watts [Pa.] 26. And even where circumstances are brought home to the knowledge of the party, which would have been sufficient in themselves to put him on inquiry and thus amount to notice, he will be entitled to rebut the presumption of notice, which would oth-

erwise arise, by showing the existence of other attendant circumstances of a nature to satisfy the mind that further inquiry was unnecessary. [Rogers v. Jones], 8 N. H. 264. And see 2 Lead. Cas. in Eq. part 1, notes to Leneve v. Leneve; Wethered v. Boon, 17 Tex. 143."

Applying the spirit of the rule as indicated by these authorities, we think that the most that can be said of the issue as involved in this case is that it was one of fact to be determined by the jury. As will be seen from the testimony of Brooker that we have quoted, not only did Mr. Ross make inquiry which satisfied him that the transaction between the appellees and Magness was genuine, but Mr. Brooker also, before his purchase, as he testified, went to the premises and at first found no one there, but later found the tenant, Briscow, who, it appears, did not inform Brooker that the Wrights were his landlord, but, on the contrary, informed Brooker that he was paying rent to Mr. Swofford, who had originated and carried out the original transaction with the Wrights, and who, Ross testified, made affidavit to the effect that the transaction between the Wrights and Magness was what it purported to be. Under such circumstances, as stated, we do not think the trial court was authorized to assume, and, in effect, declare as a matter of law, that appellant had notice of the defect in the title, set up in answer by the appellees. The issue should be submitted to the jury, we think, to determine whether, under all of the circumstances, it was the duty of Brooker, in the exercise of due diligence, to prosecute his inquiry further. It is true that in the case of *Moore v. Chamberlain*, supra, it was held by our Supreme Court that the possession of tenants in that case affected one who claimed to be an innocent purchaser without notice or knowledge of a simulated transaction such as is involved in the case here. But in so holding this is what was said:

"When the plaintiff in error purchased the land from the trustee, it was in possession of the tenants of the Chamberlains. This placed him upon inquiry, as a matter of law, as to whether the deed from the Chamberlains to Carson and from Carson to Trammell were absolute, or were intended only as mortgages. There being no finding that he exercised any diligence by making inquiry, the possession of

the tenants constituted actual notice to him that the deeds were intended as mortgages."

Therefrom it seems evident that the decision does not rest alone on the mere fact that possession of the premises was held by tenants. The further conclusion that there was no finding of diligence was made important, and illuminates the decision.

[8] There is another phase of the case, not adverted to in the briefs of counsel, which present a question arising upon the face of the record, and which we wish to briefly notice. It is undisputed, as we have before stated, that appellees in due form executed a deed, regular upon its face, purporting to convey the full title to the premises involved in this controversy, and in due form executed the note now held by the appellant and knowingly put it into circulation. Appellees, in effect, both admitted these facts, but assert that the transaction was a simulated one, and therefore void under the Constitution of the state. If so, both appellees knew better than any one else of the illegality of the transaction. While it may be true, and it must be so held, that under our constitutional provisions the lien evidenced by the note and deed is void and without effect as against one having actual or constructive notice of the simulated character of the transaction, yet we know of no rule of law nor of any decision going so far as to hold that under the circumstances detailed the appellee, Ben T. Wright, the husband, is free from all liability to pay the sum specified in the note. The wife may not be so held because of an inability under our law to make a contract of the kind, but as to the husband, not being under such disability, he should be held, as against one without actual notice of the vice, to the terms of his written agreement as far as may be done. To hold otherwise is to say that he may knowingly and deliberately perpetrate a fraud and interpose the constitutional provision forbidding an incumbrance of the homestead as a shield to protect him from wrong.

We conclude that there was error in the proceedings and that the judgment should be reversed, and the cause remanded for a new trial on the issues discussed in accordance with the views expressed.

**GRIMES v. GOODMAN DRILLING CO. et al.**  
(No. 9213.)

(Court of Civil Appeals of Texas. Ft. Worth.  
June 14, 1919. Rehearing Denied  
Oct. 18, 1919.)

**1. MINES AND MINERALS — 78(1) — NUMBER OF WELLS PERMISSIBLE UNDER OIL AND GAS LEASE.**

Under written oil and gas lease between lot owners and trustees of oil company, trustee lessees held not precluded from drilling more than one well on the lots, or from drilling as many wells as appeared reasonably necessary to develop the land for oil and gas, provided the drilling of any subsequent wells would not necessitate the removal of any of the houses on the land when the lease contract was made.

**2. MINES AND MINERALS — 74 — PURCHASE OF LOTS SUBJECT TO OIL AND GAS LEASE.**

In purchasing the surface rights of land from lessors of the oil and gas rights to a company and its trustees, plaintiff must be presumed to have known that the trustee lessees had the right to sink a well on his lot, and that thereby he and his family, if in occupancy, would be inconvenienced and perhaps endangered during drilling.

**3. MINES AND MINERALS — 74 — PURCHASE OF SURFACE SUBJECT TO TERMS OF OIL AND GAS LEASE.**

Where plaintiff purchased the surface rights of a lot burdened with the terms of an oil and gas lease, he cannot complain of conditions produced by the trustee lessees and others such as are usual and customary during the drilling of an oil well.

Appeal from District Court, Wichita County; Edgar Scurry, Judge.

Suit by Ottis Grimes against the Goodman Drilling Company and others. From judgment for defendants, plaintiff appeals. Affirmed.

W. D. Cardwell and Warren J. Dale, both of Burkburnett, for appellant.

Carrigan, Britain & Morgan and Bert King, all of Wichita Falls, for appellees.

**BUCK, J.** This is an appeal from an order and judgment of the Seventy-Eighth district court of Wichita county denying plaintiff, Ottis Grimes, an injunctive writ against the Goodman Drilling Company et al. Plaintiff alleged that he was the owner in fee of lot 6, block 6, in the town of Burkburnett. The evidence shows that on and prior to August 20, 1918, H. L. Bunstine and wife owned lot 6 in said block, and that other parties owned other lots in the same block, and on said date the owners entered into a written oil and gas lease with the trustees of the Block Six Oil Company, an unincorporated oil association. This contract contains the following provisions, to wit:

"Whereas, all of the owners above named desire to pool all of their interests in the lots above described for the purpose of having an oil or gas well drilled on one of the lots or tracts of land above mentioned, said well to be drilled on any portion of either of said lots, the location of said well to be selected by the lessees herein. \* \* \*

"That the lessors in consideration of the sum of thirty thousand dollars to them in hand paid by the lessees, the receipt of which is hereby acknowledged as well as in consideration of the covenants and agreements hereinafter contained on the part of the lessees, do hereby grant, sell, convey and lease unto the lessees in trust for said oil company all of the oil and gas in and under the above described tracts of land, and the possession thereof for the purpose of entering upon and operating thereon, and removing therefrom said oil and gas, \* \* \* to operate said property with the right of ingress and egress at all times for such purposes, and rights and privileges therefor. \* \* \*

"To have and to hold the same for a term of three years and as much longer thereafter as oil or gas is found thereon and therein in paying quantities, provided a well herein mentioned shall be drilled in compliance with this contract. \* \* \*

"Lessees agree to begin the actual drilling of a well upon some portion of said lots within sixty days from the date hereof, and when said well is once commenced, the drilling thereof shall be prosecuted with due diligence until same is completed, said well to be drilled to a depth of 2000 feet unless oil or gas is obtained at a less depth in paying quantities.

"In the event lessees should fail to commence the drilling of said well in compliance with this contract, then this lease shall terminate. \* \* \*

"It is agreed by all the parties hereto that the drilling of one well upon any portion of any of said lots, the location thereof to be made by the lessees, shall be a complete fulfillment of this contract and will be sufficient to hold the lease upon all of said lots, provided that none of the residences now located on said lots shall be removed therefrom."

The evidence further shows that about March, 1919, plaintiff bought from Bunstine and wife said lot 6, subject to the oil and gas lease above set out; the grantors retaining the interest held by them in the royalties. At this time two wells had been drilled on the block, "one on each half block," but no well had been started on lot 6. On or about April 7, 1919, the Goodman Drilling Company, drilling for the Block Six Oil Company or its assignee, began to erect a derrick and take other steps to drill a well on plaintiff's lot, and the front part thereof. No permission was asked of plaintiff and no compensation was paid or offered him to drill the well on his lot, but the same was done over his protest; the lessees claiming the right to sink a well on his place under their contract with Bunstine and other lessors.

The evidence shows that the derrick in question is a structure 96 feet high, with guy or stay wires extending out to make it secure, and each attached to a buried timber called a "dead man"; the distance from the dead man to the center of the base of the derrick being equal to the distance from the ground to the point of attachment of the wire to the derrick. Ordinarily, there are three sets of four each of these wires; the wires being attached to the four corners of the derrick. Owing to the fact that it was impracticable to run the wires across the street in front of plaintiff's house, the wires on that side of the derrick did not extend the usual distance. The evidence further shows that on top of the derrick are heavy tools and appliances, four casing pulleys, weighing approximately 200 pounds each, and the crown block weighing approximately 500 pounds. There are derricks all over the town of Burkburnett, and that during a recent windstorm a number of them blew down. The slush pit connected with the well is near to and runs along the side of plaintiff's house, and slush spatters therefrom onto the sides of the house, the doors, and windows, and necessitates that side of the house being closed up. The running of the engine is very objectionable to the plaintiff's family and often prevents their sleeping at nights, and is so loud as to require them in ordinary conversation to speak in very loud tones. The evidence shows that conditions about this well, the noise, the slush, the grease, etc., are similar to conditions prevailing around oil wells generally; that plaintiff has continued with his wife to occupy the premises, though he has suffered great inconvenience and has been disturbed considerably in the use of the premises.

Without passing for the present upon the question of whether or not the evidence shows that the defendant has exercised ordinary care in the construction of the derrick and has exercised such care in the drilling of the well, we will consider the vital question of whether or not the lessees, under the contract made with plaintiff's grantor and others, have authority to go upon plaintiff's premises for the purpose of sinking a well and taking other steps toward developing the land for oil and gas. Appellant contends that, under the terms of the contract of the lease, the lessees were restricted to the drilling of one well. Appellant cites *Thornton on Oil and Gas* (2d Ed.) § 91, p. 129, which, in part, reads as follows:

"There is also an implied covenant on the part of the lessee that he will put down enough wells to protect the leased premises from being drained by wells on adjacent territory. If, however, the lease specifies the number of wells that are to be drilled, there is no implied covenant that more than the number specified are to be drilled, even though more are needed

to fully develop the territory, or to protect the premises from wells on adjoining territory."

Here the author is discussing the question of the lessee's implied covenant duty. One of the considerations moving from the lessees in the instant case was the sinking of a well to a depth of 2,000 feet, unless oil or gas should be obtained at a less depth. The subsequent provision in the contract, to the effect that it is agreed by all parties that the drilling of one well upon any portion of any of said lots shall be a complete fulfillment of this contract, is a stipulation for the benefit of the lessees, and not for the benefit of the lessors, except that portion of said paragraph that provides "that none of the residences now located on said lots shall be removed therefrom" may be said to be a provision for the benefit of the lessors, and to require that the lessees prosecute their operations and drilling so as not to require the removal of any of said houses. To support his contention, appellant cites the following authorities: *Colgan v. Forest City Oil Co.*, 194 Pa. 234, 45 Atl. 119, 74 Am. St. Rep. 695; *Brewster v. Lanyon Zinc Co.*, 140 Fed. 801, 72 C. C. A. 213; *Aye et al. v. Phila. Co.*, 193 Pa. 451, 44 Atl. 555, 74 Am. St. Rep. 696; *Stoddard v. Emery*, 128 Pa. 436, 18 Atl. 339; *Harris v. Ohio Oil Co.*, 57 Ohio St. 118, 48 N. E. 502. We have examined all of these authorities and find that they are in harmony with our conclusion heretofore expressed. For instance, it is said in *Colgan v. Oil Co.*, supra, quoting from the syllabus (45 Atl. 119):

"A lessee of oil lands, who has expressly covenanted only to put down one oil well on the premises, and who has put down several on one side of the lands, cannot be compelled, under any implied covenant, to put down a well on the other half, or to surrender such half, unless it is clearly shown that he is not acting in good faith on his business judgment, but fraudulently with an intention to obtain a dishonest advantage."

In *Aye v. Phila. Co.*, supra, it was held that where the parties to a lease of oil land provide for a test well, and what shall be done if it produces oil in paying quantities, but make no provision if the well proves dry, there is an implied obligation on the part of the lessee, in the event the test well proves dry, to proceed with the exploration with reasonable diligence, according to the usual course of the business. To the same effect is *Stoddard v. Emery*, supra. It was held that, where a lease provides for the drilling of one oil well in eight months and a second at a time not specified, there was no implied covenant to drill wells as often as customary, in the absence of an expressed contract.

The evidence shows from plaintiff's own testimony that there are several wells across the street from plaintiff's home where the well in question is located, and that his lot

is practically surrounded by oil wells which are taking the oil from underneath his lot, and that, if the drilling of this well should be held up for 60 days, these other wells would take a considerable quantity of any oil which might be under plaintiff's lot. Plaintiff further testified that he paid \$1,300 for the lot and improvements and did not get the royalty, but only purchased the surface right; that he knew that the block was leased for oil and gas purposes when he bought the lot; that he was a tool dresser and familiar with the nature of oil derricks, and of the noises that the drilling of an oil well carries with it, and was so acquainted at the time he bought the house; that he knew that practically every block in Burkburnett was being drilled for oil, and gas; that he had read the lease contract between the Block Six Oil Company and the owners of the several lots in block 6.

[1, 2] We conclude that under the written contract the lessees were not precluded from drilling more than one well, or from drilling as many wells as appeared reasonably necessary to develop the land for oil and gas, provided the drilling of any subsequent wells would not necessitate the removal of any of the houses on the land at the time the lease contract was made. The plaintiff in this case had no interest in the development of the block for oil, but his grantor, who still owns his pro rata part of the royalty, did have such interest, and the other lessors and lessees and their assignees have an interest in the development of said territory to the fullest extent for oil and gas. In purchasing the lot, as we think, plaintiff must be presumed to have known that the lessees had the right to sink a well on his lot, and that thereby he and his family, if occupying the premises, would be subjected to more or less inconvenience and perhaps some danger while said drilling was going on. But he bought the premises so burdened, and has no just ground for complaint by reason of the entry upon his premises and the drilling of the well.

[3] But appellant further urges that he is entitled to an abatement of the nuisance created by appellees on his property, in the erection and maintenance of the derrick on his premises in a dangerous condition, so as to endanger the life and limb of appellant and his household, and by placing the engine,

boiler, and slush pit to such close proximity to appellant's house as to be a source of great danger from fire and also a great source of annoyance and inconvenience to his family and property. As appellant purchased the premises burdened with the terms of the lease, he is in no position to complain of conditions produced by appellees, such as are usual and customary during the drilling of an oil well. If he is presumed to have known, as we think he is, that the lessees had the right to sink a well on lot 6 of the block, he is further presumed to have known that conditions would naturally arise during the drilling of said well which would make the use of the premises as a home disagreeable, inconvenient, and perhaps dangerous. Appellant must have known that in the drilling of a well a derrick was essential, and that it would be necessary to have an engine and boiler placed on the lot and a slush pit. While the slush pit is shown to be close to appellant's house, there is no evidence that appellees were negligent in placing it there, or that it could be placed elsewhere on the lot and still perform the purposes for which it is designed. The evidence shows that the boiler was placed close to a door of a stormhouse on said premises that appellant used as a bedroom, and that, when complaint was made that the door to the stormhouse could not be opened by reason of the proximity of the boiler, the boiler was moved so that the door could be opened. The location of the well in the front part of the lot, rather than in the back part, seems to have been justified by reason of the fact that another well across the street would have a tendency to draw the oil from under the street and from under the front part of plaintiff's lot. While plaintiff's witness Foote testified as to some alleged defect in the placing of the guy wires supporting the derrick, the defendant Goodman also testified that he had used the same means of protection and precaution in preparing to drill this well; that he had built derricks in this field and had built 300 or 400 in other fields; and that he thought the derrick was sufficiently guyed to make it safe. Under the circumstances, we think the trial court was justified in denying the temporary writ as prayed for, and the judgment of the trial court is hereby affirmed.

Judgment affirmed.



## MOYE v. PARK. (No. 1020.)

(Court of Civil Appeals of Texas. El Paso.  
Nov. 6, 1919.)1. BROKERS  $\S$  88(3)—PROCURING CAUSE JURY QUESTION.

Question of whether real estate broker, suing for commission, was procuring cause of sale, *held* for jury.

2. APPEAL AND ERROR  $\S$  1062(2)—REVERSIBLE ERROR; FAILURE TO SUBMIT ISSUES.

In broker's action for commission, where evidence raised issue of fact as to whether plaintiff or a third party was procuring cause of sale, refusal to submit such issue to jury on defendant owner's request therefor *held* reversible error under Rev. St. 1911, art. 1985.

3. TRIAL  $\S$  260(1)—INSTRUCTIONS; REQUESTS COVERED.

Refusal to submit special charge which was sufficiently covered by special issue submitted was not error.

Appeal from County Court at Law, El Paso County; W. P. Brady, Judge.

Suit by Edgar D. Park against Edward Moye. Judgment for plaintiff and defendant appeals. Reversed and remanded.

Goldstein & Miller, of El Paso, for appellant.

Hudspeth, Wallace, Harper & Berkshire, of El Paso, for appellee.

HIGGINS, J. Park sued Moye to recover a commission of 5 per cent. alleged to be due for his services in effecting a sale of the Leon Hotel in the city of El Paso. The case was tried before a jury and submitted upon one special issue. The issue thus submitted was whether there was a contract between Moye and Park at any time between July 11, 1918, and February 15, 1919, that Park could have the privilege of making a sale of the Leon Hotel. This was found in Park's favor, and upon such finding judgment was rendered in favor of Park for \$225; that being the amount for which he sued.

## Opinion.

The defendant requested the submission of the issue of whether Park was the procuring and efficient cause of the sale, and the refusal to submit such issue is the basis of one of the errors assigned.

[1] It was a closely contested issue as to whether Park was an authorized agent, but the jury has resolved that question in his favor. A Mrs. Marsh was employed by appellant to run the hotel for him, and, according to the testimony of Moye and Mrs. Marsh, she was his only authorized sale agent. The purchaser was a Mrs. McDaniels, who came to El Paso from Roswell, N. M.,

for the purpose of purchasing a hotel. She called upon appellee, who was engaged in the real estate business in El Paso. A Mr. Trowl was employed by Park and all of Mrs. McDaniels' negotiations through the Park's agency were with Mr. Trowl, who represented Park. According to the testimony of Mr. Trowl, he, as the representative of Mr. Park, produced the purchaser, first brought the parties together, showed the hotel and its furnishings to the purchaser, and was thus the procuring and efficient cause of the sale, and thereby earned the commission for his principal, though the deal was finally consummated through Mrs. Marsh.

But as we view the evidence an issue was raised with respect to who was the procuring and efficient cause of the sale, and the refusal to submit such issue necessitates a reversal. Without reviewing all of Mr. Trowl's testimony, it is sufficient to say that he testified that, when Mrs. McDaniels came to their office to buy a hotel, he first showed her the Grand Hotel, then the Fisher, and then went to the Leon, which was a short distance from the Fisher; that upon arriving at the Leon he conducted the purchaser, with the consent and permission of Mrs. Marsh, over the house and showed the same; that the next day he again took the purchaser there, and they looked all over it, and also looked at some other hotels. Thereafter, the purchase of the hotel was consummated through Mrs. Marsh. The purchase price was \$4,800, and under Moye's agreement with Mrs. Marsh the latter was to receive, as her commission, all that was obtained over \$4,500. The difference of \$300 was in fact paid by Moye to Mrs. Marsh.

Mrs. McDaniels testified:

"When I came here, I went to see some of these men, and they showed me some places, and they did not suit me, so I went to Park Bros. to see what they had. Mr. Trowl was in the office. This was about the 5th of February. I had a conversation with Mr. Trowl. At the time I had the conversation with him, he took me to see the Grand Hotel and the Fisher, and the Cody, I believe, is the name of the other. I looked at the Hotel Leon at that time.

"Q. How did you come to look at the Leon Hotel? A. Well, when I came out of the Fisher, I said, 'Where is the Leon Hotel?' He said: 'It is just down the street. I will take you to look at it.' The reason I asked about it, a friend of ours told us that, if we were going to El Paso, to go and look at the Hotel Leon. That friend was Mr. Cummings. He roomed at my sister's. I cannot give his first name, because I do not know it. And he said, 'I will take you down to it,' and I said I would like to see it, and he took us to the hotel, and when he entered the office and talked to Mrs. Marsh, of course I don't know what he said. He came back later with Mrs. Marsh. Mrs. Marsh was

unconcerned about showing the place to me, but I never thought anything about it at the time. But Mrs. Marsh said to me in a whisper that she was the agent for Mr. Moye, and that Mr. Moye would not sell the hotel through Trowl. 'It is not in his hands. If you want to buy it, you will have to buy it from me and Mr. Moye.' So I did not know what to do, so I said I would just go back to my room. So the next morning Mrs. Marsh phoned me and told me that if I wanted to do any business with her or with Mr. Moye I would have to trade with her. So I went to the hotel and made my trade with Mrs. Marsh. The first trip I went there Mr. Trowl did not show all over the hotel. Mrs. Marsh showed me a few rooms. She did not seem to care much and was unconcerned about it, and he never showed me the rooms. He didn't tell me the price, nor anything. Mrs. Marsh did tell me that she was the agent, that I would have to trade with her or with Mr. Moye, and that Mr. Moye would not sell through Park Bros. Mr. Trowl did not go back there with me the next morning. Mrs. Marsh phoned me and said, 'Come by yourself, because you can't trade with Mr. Trowl.' So I went. Mr. Trowl did not go back the next morning. Only the first time that I went there, and at that time I asked him about it because I had heard about it. He did not mention it to me. I mentioned it to him, because I had heard of it. He never mentioned any name at all until I had. At the time we got through looking at the other places and before we left the Fisher, I mentioned the Leon. I mentioned it first myself, right there by the Fisher Hotel, near the door. This friend had told me about it, this friend Mr. Cummings. He told me he had heard it was for sale, but he did not say positively that it was for sale. He told me to look at it. He had roomed there two years ago. I had that in mind when I finally went down there. \* \* \*

"I did come to Park Bros. to see about a property, and they proceeded to show me three or four hotels. I did not know which hotels we were going to before we started. He just showed me three or four hotels. Some rooming houses were mentioned before I left. He spoke of one and said that two weeks before it was for sale, but he didn't know anything about it now; but just by looking at it it appeared to be a good place. I didn't ask Mr. Trowl to take me there. I said, 'Whereabouts is the Hotel Leon?' He said: 'It is down the street. Would you like to see it?' And I said, 'Yes.' He took me down there. My sister and Mr. McDaniels went there with us. My sister went there with me the next morning. Mr. Trowl called up, and Mr. McDaniels went to the phone, and he called the automobile and took Mr. Trowl down there, and Mr. Thompson was with them. Mr. McDaniels went by the office next morning and brought Mr. Trowl down there. Mrs. Marsh talked to me just before Mr. Trowl. They both ran just a few minutes apart. Mrs. Marsh didn't say that they would not trade through Park Bros., but to come and see her. She said, 'Mr. Moye hasn't given it in their hands, and you can't deal with them, because it is in my hands or Mr. Moye's hands.' I don't know that her exact words were, 'You come down here and see us, by ourselves.' I don't

remember if that was the effect of the conversation.

"Q. But you did go down by yourself, and did not make the deal through Park Bros.? A. I told Mr. Trowl in the office: 'I am dropping trading with you. I am going to trade with Mrs. Marsh, because she is the agent. \* \* \*' The morning before I went to the Hotel Leon the second time, I told Mr. Trowl, I don't know the exact words that I told him. I told him, though, that I was not going to deal any more about that place with him or with Park Bros. But that was the reason I didn't want to deal any more with him. I had not made up my mind to buy this property, and I told Mr. Trowl that I would not deal with him for the place; that I would have to deal with Mrs. Marsh about it. I went and looked at the Cody and the Savoy after that. It was after the second day that I made up my mind about it. I never made up my mind until day before I left."

#### Mrs. Marsh testified:

"I remember when Mr. Trowl came there with Mrs. McDaniels. I told him it was my sale, and he wanted the people to look at the house, and I showed it. I told him at that time it was my sale. I told him at that time it was my place to sell. What I meant by telling him it was my sale, was that he wanted to get in on the sale of it. He had some other places that he wanted to sell, too. He said he had showed them some other places, and that they wanted to see this one. He said: 'Of course, if you would sell the house, they would never do any good here. You can do good here, but they cannot.' I told him it was my place to sell and I had promised to sell it, and, if I sold it, it was my sale. He didn't ask me for permission to sell it at that time. He just talked like he was going to sell it. I told him it was my sale, and let him think what he wanted to. He didn't ask me to split commission with him. He didn't say anything about it at all. \* \* \* A friend of mine had told these people about this house. His name was Cummings. He had been stopping at the hotel."

[2] According to the testimony of Mrs. McDaniels, she went to inspect the Leon Hotel upon her own initiative; that in so doing she acted upon the suggestion of a Mr. Cummings, who had formerly resided at the hotel. It is true, Trowl conducted her to the hotel; but, if the purchaser's testimony is to be believed, he acted merely as her guide to it. Of course, if Trowl procured the purchaser and his efforts were the efficient cause of the sale, his principal, Park, would be entitled to the commission, and this would be true notwithstanding the fact that the concluding negotiations were conducted by Mrs. Marsh and the sale finally consummated by her. *Graves v. Bains & Woodward*, 78 Tex. 92, 14 S. W. 256. But the quoted testimony raised an issue of fact as to who was the procuring and efficient cause of the sale. This being true, the refusal to submit such issue to the jury is re-

versible error. Article 1985, R. S. As to the liability of the seller for the commission where he has two sales agents, see the rule announced in *Edwards v. Pike*, 49 Tex. Civ. App. 30, 107 S. W. 586; *Griffith v. Shofner*, 184 S. W. 341; *Shaw v. Faires*, 165 S. W. 502; and *Bellis v. Hann*, 157 S. W. 427.

Another assignment complains of the refusal of a peremptory instruction in favor of the defendant. The first two propositions under this assignment question the sufficiency of the evidence to support a verdict for plaintiff. The evidence in behalf of appellee raises issues which must be submitted to the jury. In view of the necessity for a retrial, we refrain from discussing its probative force. The third proposition under this assignment, as well as other assignments, present questions arising upon variance of the evidence from appellee's pleadings. There is no occasion to consider these questions, as appellee has the right to amend his petition to meet the varying phases of the evidence.

[3] The fifth assignment complains of the refusal to submit a special charge. The special issue submitted by the court sufficiently covered the subject-matter of the requested charge, and its refusal presents no error.

Reversed and remanded.

# CITY OF SAN ANTONIO v. PFEIFFER. (No. 6253.)

(Court of Civil Appeals of Texas. San Antonio.  
Oct. 15, 1919. On Motion for Rehearing, Nov. 19, 1919.)

## 1. MUNICIPAL CORPORATIONS § 741(1), § 45(1) —NOTICE OF INJURIES TO PROPERTY BY OBSTRUCTION OF SEWER.

As provisions requiring notice are in derogation of common right and should be construed with reasonable strictness and not extended by implication, the provision in the San Antonio charter that before the city should be liable for damages of any kind the person injured or some one in behalf of such person shall give written notice *held* to apply to personal injuries, and not injuries to property, as resulting from the obstruction of sewer which caused the flooding of basement of plaintiff's store, or injuries to plaintiff's automobile, which was struck by street sprinkler.

## 2. JUDGMENT § 256(7)—ADDITION OF INTEREST BY COURT TO AWARD OF JURY.

Where the question of the amount of damage suffered by plaintiff when the basement of his store was flooded, due to the obstruction of a sewer, was submitted to the jury, and a verdict was returned thereon fixing the damage, the court cannot add to the assessment an allowance of interest.

## 3. JUDGMENT § 256(7)—ADDITION OF INTEREST BY COURT TO AWARD OF JURY.

In an action for injuries to an automobile, where the jury was only required to find facts from which the court could ascertain the damage, interest may be awarded by the court, provided it is sued for.

## 4. INTEREST § 66—PLEADING OF DEMAND FOR INTEREST.

Where interest is not claimed by the pleadings, none can be recovered.

## 5. INTEREST § 66—SUFFICIENCY OF DEMAND IN PLEADING.

In suit against city on two causes of action, overflow of sewer, damaging plaintiff's goods, and injury to his automobile by street sprinkler, where damages from the first cause were alleged to be \$2,000, and by an exhibit attached it was shown that the total damage was \$2,019, and, as to the second claim, his general averment of \$1,000 damages was explained by subsequent allegation that the automobile was worth at least \$1,000 less after the damage than it was before, the petition affirmatively disclosed that interest was not included in the amounts sued for, so that interest could not be deemed to be included in the prayer for general relief; and, there being no specific prayer for interest, the petition could not be deemed to claim interest.

Appeal from District Court, Bexar County;  
J. T. Sluder, Judge.

Action by John Pfeiffer against the City of San Antonio. From a judgment for plaintiff, defendant appeals. Reformed and affirmed.

R. J. McMillan and J. D. Dodson, both of San Antonio, for appellant.

Leo Tarleton and Ryan & Matlock, both of San Antonio, for appellee.

MOURSUND, J. Appellee sued appellant for damages upon two causes of action: First, for negligently permitting debris to accumulate in Commerce street, while said street was being widened and paved, thereby causing a storm sewer to become stopped up and storm waters to overflow into the basement of appellee's drug store, damaging goods and property therein; second, for damages alleged to have been received by an automobile being negligently struck by a street sprinkler of appellant. In answer to special issues the jury found against appellant upon both causes of action.

The issue relating to assessment of damages upon the first cause of action is as follows:

"If you have answered the foregoing question that plaintiff's property was damaged by the overflow, then how much damage has the plaintiff suffered by reason of such overflow, if any?"

The answer was, "\$1,000." In answer to appropriate questions the jury found that the difference between the reasonable market value of the automobile immediately before

it was struck and immediately after it was struck was \$500.

[1] The court rendered judgment for the damages thus found, but in addition awarded interest upon each item from the time when the damage occurred.

Appellant relies upon certain charter provisions to defeat the claim for the damages caused by the overflow. These provisions are embraced in section 46, which reads as follows:

"Sec. 46. Before the city of San Antonio shall be liable for damages of any kind, the person injured, or some one in behalf of such person, shall give the mayor notice in writing of such injury within twenty days after the same has been received, stating in such notice, when, where and how the injury occurred and the extent thereof; provided, however, that in no event shall the city of San Antonio be liable in damages to any one on account of any defect in, obstruction on, or anything else in connection with any sidewalk in the city. And provided, further, that in order to hold the city of San Antonio liable in damages to any one on account of any injury caused by any defect in, obstruction on, or anything else in connection with any street, alley or plaza, outside of the said sidewalks along the same, it must be shown that the mayor or some person having superintendence or control of work on the streets for the city had actual knowledge or actual notice of such defect, obstruction or other thing for a sufficient length of time before such injury was received, to have remedied such condition of the street, alley or plaza before the injury was received."

No notice was given the mayor as provided in the first part of the section, and it is also contended that the evidence fails to disclose such knowledge or notice by the mayor, or some person having superintendence or control of the work, as is provided for in the latter part of the section, as a prerequisite to liability on the part of the city. Appellee contends that the charter provision relates only to damages caused by injuries to the person, and not to damages to property.

That part of section 46 of the charter extending to the first semicolon was enacted in 1903, and the subsequent portions were added in 1907 and re-enacted in 1911. Gammel's Laws, vol. 12, p. 331; vol. 13, p. 5641; vol. 15, p. 880. A provision requiring notice "is in derogation of common right, and should therefore be construed with reasonable strictness and not extended by implication beyond its own terms or held to apply to such damages as are not within its clear intent." *City of Dallas v. Shows* (Com. App.) 212 S. W. 633. It is by no means clear that section 46 was intended to apply to damages to property. This being the case, we believe it should be construed to apply only to personal injuries. We, therefore, overrule the first and second assignments of error.

[2] The further contention is made that the court erred in awarding a recovery of in-

terest. The plaintiff alleged his damage to goods, fixtures, etc., by reason of the overflow, to have been \$2,000, and attached an itemized statement of the merchandise and fixtures destroyed and damaged, stating the value of the property destroyed and the damages to fixtures, etc. This statement showed the total damage to be \$2,019.39. He alleged that the automobile was broken, scarred, and disfigured, "to plaintiff's damage in the sum of \$1,000." After describing the injuries he alleged further that the market value of the automobile immediately before the injury was \$2,500, and immediately after the injury occurred the market value thereof did not exceed the sum of \$1,500. He prayed that he recover judgment against defendant "for his damages as herein set forth." There was a prayer for general relief, but no prayer for recovery of interest. No instruction was given the jury with respect to interest.

The issue as to the amount of damages suffered on account of the overflow was submitted to the jury, and a verdict returned thereon. That the court cannot add to the assessment thus made by awarding interest thereon is established by the ruling of the Supreme Court in the case of *S. A. & A. P. Ry. v. Addison*, 98 Tex. 61, 70 S. W. 200, in answering the first question certified in that case. The court based its ruling upon the principle that the judgment must follow the verdict. Although a case may be submitted on special issues, if an issue is submitted requiring the jury to ascertain the amount of damages sustained, the principle is just as applicable as when a general verdict is returned. The opinion of the court discloses that two of the cases cited by appellee in this case, namely, *Railway v. Jackson*, 62 Tex. 209, and *Railway v. Greathouse*, 82 Tex. 104, 17 S. W. 834, were called to the attention of the Supreme Court by the Court of Civil Appeals.

[3] The jury was not required to ascertain the amount of the damages suffered by appellee with respect to the automobile, but was only required to find facts from which the court could estimate the damages. In such a case it has been held by this and other courts, and we believe correctly, that interest may be awarded by the court, provided it is sued for. *S. A. & A. P. Ry. Co. v. Sutherland*, 199 S. W. 521; *T. & P. Ry. Co. v. Erwin*, 180 S. W. 662.

[4, 5] We conclude, however, that in this case interest is not recoverable upon either item of damages for the reason that the appellee failed to sue for the same. There can be no doubt that appellee could omit to sue for interest, and that such omission precludes a recovery of that item. The petition affirmatively discloses as to both causes of action that, in mentioning the amounts of the damages sued for, interest was not included. Plaintiff alleged his damages at \$2,000 on account of the overflow, and by exhibit showed that the damages claimed by

him exceeded \$2,000 at the very time the damage occurred, thus excluding the idea that interest was claimed and sued for. His general averment of damages to the extent of \$1,000 upon the second cause of action is explained by his subsequent allegation to the effect that the automobile was worth at least \$1,000 less immediately after it was damaged than it was immediately before the damage occurred. This being true, it follows that no interest could have been included in the claim of damages to the extent of \$1,000. The petition contains no averment in the prayer or elsewhere showing that a recovery of interest was sought. Under the circumstances it must be held that interest was not sued for. *Railway v. Mathews*, 108 Tex. 228, 191 S. W. 559; *Railway v. Rayzor*, 106 Tex. 544, 172 S. W. 1103; *Railway v. Lyon*, 200 S. W. 228. Of course the damage may be alleged at such a high amount that in view of the facts stated it becomes apparent that interest is sought to be recovered. The question whether plaintiff has sued for interest must be determined from the petition, and a finding by the jury that plaintiff overestimated the value of his property or the extent of the damages thereto cannot affect the construction to be placed upon the petition.

The judgment will be reformed so as to eliminate the recovery of interest, and will be affirmed for the two sums stated in the verdict of the jury.

#### On Motion for Rehearing.

Appellant contends that the language of the charter provision is plain and unambiguous. In order to arrive at this conclusion the words "damages of any kind" must be construed to mean damages, whether arising from breach of contract or tort of any kind, and the words "person injured" must be construed to mean person who has suffered damages. Although the language is subject to that construction it does not follow that it must be so construed, for if it is susceptible of a different construction not in derogation of common right, such latter construction must be given thereto. When we speak of "damages of any kind," reference may be had either to the method in which the damages were caused or the description of the damages with respect to class. The words "person injured" may mean person who has sustained bodily injuries or person who has sustained damages by virtue of any deprivation of a right. Appellant relies particularly upon the statement in the opinion in the case of *City of Dallas v. Shows*, which reads as follows:

"The phrase in this provision 'damages of any kind,' considered alone, would, of course, be sufficiently broad to include damages to either person or property."

The same might be said if the words, "of any kind," had been omitted. The statement

made by the court, as we understand it, is simply that the language is subject to the construction that it relates to damages to either person or property, but not that it cannot be given any other construction. The court recognizes the fact that the words "person injured," are subject to more than one construction. If there had been no ambiguity or doubt as to the meaning of the provision with respect to notice of claims, the court would doubtless not have injected any ambiguity or doubt into it by referring to a provision regarding notice of a different kind. We do not find anything in the opinion in said case which leads us to believe that the rule of law quoted by us therefrom would not be applicable to the facts of this case.

Appellant also relies upon the case of *Nichols v. City of Minneapolis*, 30 Minn. 545, 16 N. W. 410. In that case the word "injuries" is explained by the subsequent use of the words "injury or damage." The reasoning of the court as to the purpose to be accomplished by notice of claims would apply in this case and also in the *City of Dallas* Case above referred to. There may be wisdom in requiring notice of any character of claim for damages caused by a defect in street or sidewalk, but nevertheless claims for property damage may so seldom arise and be of such small amount that the Legislature would deem it unnecessary to place them upon the same plane as damages on account of personal injuries. It is also to be borne in mind that if the first part of the San Antonio charter section is construed as appellant contends it must be construed, it would even require notice of damages suffered by reason of a breach of contract by the city.

Appellees, in their motion for rehearing, assume that in deciding the questions relating to interest we relied principally upon the *Addison* Case. That case was cited and relied upon on the proposition that the judgment must follow the verdict, and that the court cannot add interest to the verdict in cases where it is recoverable as part of the damages when the verdict constitutes a general finding of the amount of damages sustained.

In support of the proposition that no interest is sued for, and therefore none can be recovered, we relied upon the cases of *Railway v. Mathews* and *Railway v. Rayzor*, but the *Addison* Case is also authority for such holding. There can of course be no doubt that if interest is not a part of the amount in controversy, for jurisdictional purposes, it is also not in controversy for the purpose of being awarded in the judgment. The reasons relied on by us for holding that under said decisions interest was not sued for in this case are sufficiently disclosed in the original opinion. Appellees do not undertake to show why the rules laid down in the *Ray-*

zor and Mathews Cases would not apply in this case, but rely upon other cases, most of which do not relate to the question of pleading involved, but merely the question whether interest is recoverable if sued for. They cite, however, a late case, that of Wiess v. Gordon, 209 S. W. 486, which we are unable to distinguish from this case. We regret this conflict, but, being of the opinion that said case is in conflict with other decisions and incorrectly decided, must decline to follow it. In that case the court undertook to distinguish same from the case of St. L. S. W. Ry. Co. v. Starks, 109 S. W. 1003. The distinction drawn was that in the Wiess v. Gordon Case there was a prayer for general relief, while in the other case the court failed to state that there was such a prayer. The prayer for general relief has become such a well-understood feature of our pleading that it is difficult to conceive of its omission, and we think the assumption that it was omitted cannot well be indulged from the mere fact that an appellate court failed to mention it. We do not understand Judge Hodges' opinion as containing any expression from which it might be inferred that the court found no prayer for general relief in the petition, or that it regarded such a prayer as material in determining what was put in controversy by the pleadings. As we understand Judge Hodges' opinion the court held that in order to recover interest it should either be specially claimed, or the damages should be alleged at a sum in excess of the value of the property, so that the inference would arise that interest was claimed. In that case and in this the averments with respect to damages exclude the idea that interest was claimed. The prayer for general relief does not put that in controversy which is not in controversy in the averments relating to the damages suffered. In the Rayzor Case, supra, the prayer was for "judgment for his said damages in the sum of \$975, with legal interest thereon, for costs of suit, and for general relief." The court held the words "with legal interest thereon" to be subject to the construction that interest on the judgment was prayed for, and that therefore only \$975 was involved in the controversy. The prayer for general relief did not affect the ruling.

In the case of Wiess v. Gordon the court relies strongly on the cases of Watkins v. Junker, 90 Tex. 588, 40 S. W. 11, and Railway v. Greathouse, 82 Tex. 111, 17 S. W. 834. The first of these cases does no more than lay down the general rule that interest is recoverable as part of the damages in certain cases. The second contains language which, if not read in the light of the pleading, might be construed as a holding that interest could be recovered, although not

sued for, but as a matter of fact in said case the items of damage sustained aggregated about \$1,033, but the damages were alleged at \$1,200. It was a case in which the pleadings were subject to the construction that interest was claimed, for upon no other hypothesis could the discrepancy between the damages claimed and the items of loss be accounted for. It therefore appears that what the court held was that, although there was no prayer for interest, and although it was not specifically mentioned in the pleadings, it could be recovered under a prayer for general relief if it appeared that it must have been claimed as a part of the damages alleged. The fact that the court had in mind the proposition that there was no prayer for interest is shown by the citation of the case of Railway v. Jackson, 62 Tex. 209, in which the court stated there was no prayer for interest, but that, as plaintiff sought to recover an item of interest paid out by him, and in connection therewith asked for the recovery of interest at the rate of 1 per cent. per month during the time the cotton was detained, it sufficiently appeared that interest was sued for, and it was therefore recoverable.

Railway v. Addison, supra, is not in conflict with any of the cases herein referred to except, as we understand it, that of Wiess v. Gordon. In the Greathouse Case the court did not undertake to add interest to the verdict, and the Jackson Case was tried before the court, so there can be no conflict on the point decided in the Addison Case in answer to the first question certified. In the Addison Case the suit was for \$130; no prayer for interest but a prayer for general relief. The court held that the recovery was necessarily limited to \$130. In the Greathouse Case the damages were alleged at \$1,200, which sum exceeded the items of actual loss, about \$160. Therefore interest was recoverable, but not more than \$1,200 could be recovered. The verdict and judgment were for \$900. The court's discussion related to the point whether interest could be estimated in deciding whether the \$900 was excessive. It is obvious that there is no conflict between the Addison Case and the cases of Railway v. Greathouse and Railway v. Jackson with respect to the holding concerning the recovery being limited to the pleadings. In the Wiess v. Gordon Case the court appears to have approved a judgment for \$297.50 and interest, although the damages were alleged at \$297.50, and there was no prayer for interest, but only for general relief. If we understand that case, it appears to us to be in conflict with the Addison Case, as well as the case of Railway v. Starks.

The motions for rehearing are overruled.

## MEADOWS v. WESTERN UNION TELEGRAPH CO. (No. 428.)

(Court of Civil Appeals of Texas. Beaumont.  
Oct. 20, 1919.)1. TELEGRAPHS AND TELEPHONES  $\S$  67(2) —  
FAILURE TO DELIVER MESSAGE PROMPTLY;  
NOTICE OF RELATIONSHIP.

Where a telegram announcing a death was addressed to husband and did not mention his wife, defendant company was not chargeable from the message itself with knowledge of the relationship between the wife and deceased person mentioned in message.

2. TELEGRAPHS AND TELEPHONES  $\S$  73(1) —  
EVIDENCE INSUFFICIENT TO SHOW NEGLIGENCE IN DELIVERING DEATH MESSAGE.

In suit by husband for the benefit of his wife against defendant company for damages due to negligence in transmitting and delivering two death messages, *held* that peremptory instruction for defendant should be sustained on the ground that no negligence was shown either in the transmission of the message or in its delivery.

Appeal from District Court, Angelina County; L. D. Guinn, Judge.

Suit by Henry Meadows for the benefit of his wife against the Western Union Telegraph Company. Judgment for defendant, and plaintiff appeals. Affirmed.

K. W. Denman, of Lufkin, for appellant.  
Young & Stinchcomb, of Longview, and Mantooth & Collins, of Lufkin, for appellee.

**WALKER, J.** This suit was brought by Henry Meadows for the benefit of his wife, Evie Meadows, against the Western Union Telegraph Company, for damages alleged to be due to the negligence on the part of the defendant in transmitting and delivering two death messages from Lufkin, Tex., to Humble, Tex., on August 19 and 20, 1915. The message of the 19th is as follows:

Dated Lufkin, Texas, 8/19/15.  
To Henry Meadows, Humble, Texas.

Alien died last night. Will bury her at Keltys tomorrow the twentieth.

[Signed] O. D. Davis.

This message was received at Humble at 9 a. m., August 20, 1915. The message of the 20th was dated Lufkin, Texas. August 20, 1915, and was as follows:

To Henry Meadows, Humble, Texas.

Evie's three year old sister died last night. Will bury her at Keltys tomorrow evening. Come if possible. [Signed] Douglas Dunn.

Received at Humble at 7:20 a. m. 8/20/15.

This case was tried before a jury, and at the conclusion of the testimony the court instructed a verdict for the defendant. From

this judgment the plaintiff has appealed to this court. The plaintiff duly excepted to this peremptory instruction, and also requested the court to submit to the jury the different issues raised by the pleadings.

[1] Without discussing the assignments of error of appellant in the order presented in his brief, we believe this case is controlled by *Western Union Telegraph Co. v. Carter*, 85 Tex. 581, 22 S. W. 962, 34 Am. St. Rep. 826, and *Southwestern Telegraph & Telephone Co. v. Gotcher*, 93 Tex. 114, 53 S. W. 686. As said in the *Carter Case*, supra, discussing this telegram:

"W. S. Carter, Taylor, Texas: N. B. Gorsuch dead. Answer. F. S. Faust,"—the telegraph company is chargeable with notice of the relationship that exists, if any, between all the parties named in the message."

Carter sued for damages caused by the mental anguish of his wife on account of the failure to get to her deceased father, N. B. Gorsuch. This telegram, in its terms, is almost identical with the telegram sent by O. D. Davis, as shown above. In discussing the rights of Mrs. M. E. Carter, the wife of W. S. Carter, to recover because of the negligence of the telegraph company in handling the telegram, the Supreme Court said:

"The plaintiff in error presents this assignment: \* \* \* 'The court erred in its conclusions of law, that defendant is chargeable with notice, or is affected with notice, by the terms of the message, of the relationship of either W. S. Carter (who is named) or M. E. Carter (who is not named in the message) to N. B. Gorsuch. \* \* \*' As to M. E. Carter, the objection is well taken. She is neither mentioned in the message, nor was there any actual notice of her relationship to deceased."

In the *Gotcher Case*, supra, the Supreme Court makes this statement of the facts:

"Spaugh went to the office in Farmersville, about 12 o'clock m., and told the agent of plaintiff in error that Mr. Hartman had sent him to the telephone to send W. E. Gotcher word that his wife's brother was dead, and for him (W. E. Gotcher) to come at once."

Gotcher brought suit for damages for the mental anguish suffered by his wife caused by the negligence of the telephone company in failing to get Gotcher to the telephone. In discussing plaintiff's right to recover because of the mental anguish of his wife, Justice Williams, speaking for the Supreme Court, said:

"The difference between the cases referred to and this is the fact that plaintiff's wife was mentioned in the communication made by Spaugh to the agent of plaintiff in error. She was mentioned in such a way, however, as to indicate, not that the message was intended for her benefit, but rather that it was not so intended. It was expressly stated that Gotcher

was the person wanted at the funeral, and his wife was only mentioned in identifying the deceased as her brother. \* \* \* The statement in no way implied that the purpose was to give Mrs. Gotcher the privilege of going to the funeral. On the contrary, it might well have been assumed that she was already at her father's, and that only her husband's presence was sought."

This information given to the telephone company verbally is the same given to the telegraph company by the message sent in this case by Douglas Dunn. Davis and Dunn, in delivering these telegrams to the defendant, gave the operator no information, except what the messages themselves gave. The Carter Case and the Gotcher Case, as we follow their history through our reports, have never been modified in any way, extending the liability of the defendant on the character of messages discussed in those cases.

Citing *Telegraph Co. v. Edmondson*, 91 Tex. 209, 42 S. W. 551, the court said in the Gotcher Case:

"And this court has already expressed its disinclination to extend the right of recovery in this class of cases beyond the limits already fixed by the decisions of this court."

We believe this case and the Carter and Gotcher Cases are clearly to be distinguished from the authorities cited by appellant. *Telegraph Co. v. Tucker*, 108 Tex. 371, 194 S. W. 130; *Herring v. Telegraph Co.*, 108 Tex. 77, 185 S. W. 293; *Telegraph Co. v. Adams*, 75 Tex. 531, 12 S. W. 857, 6 L. R. A. 844, 16 Am. St. Rep. 920; *Telegraph Co. v. Goodson*, 202 S. W. 766; *Telegraph Co. v. Streeter*, 205 S. W. 940; *Telegraph Co. v. Landry*, 134 S. W. 848. The Landry Case is more nearly in point than any other authority cited by appellant. In that case the telegram read:

"Sam Roundtree, Schriever, La. Gus very low. Send someone to me. Answer."

Discussing the following proposition made by appellant:

"The telegraph company will only be held liable for such damages as it may reasonably be expected to foresee under the circumstances at the time the contract was made, and unless it had notice of the fact that plaintiff's father was expected to come in response to the message, it cannot be held liable for the damages sustained on account of his absence,"

—speaking for the court, Chief Justice James said:

"Defendant had notice that some person in close relationship to plaintiff that could come was expected to come, and this included the father. The assignments are overruled."

In the Goodson Case, the telegram read:

"W. A. Goodson. \* \* \* Send Oscar at once to help wait on his father. Lida sick."

This court, in an opinion by Chief Justice Hightower, held that this message gave no notice to the defendant that W. A. Goodson would be expected to go to his father, and that he could not recover for mental anguish caused by negligence of the defendant in failing to deliver the message to him in time to go to his father, thus limiting his recovery to such mental anguish as he suffered by reason of his not being able to send Oscar to his father. The telegram in the Goodson Case is distinguished from the telegram in the Landry Case, in that the Goodson telegram read "Send Oscar," and the telegram in the Landry Case read "Send someone."

[2] We believe that this peremptory instruction should also be sustained on the ground that no negligence was shown as against the defendant, either in the transmission of the Dunn telegram or in its delivery. August 19th was immediately after the great Galveston storm, and defendant's lines between Houston and Humble and between Humble and Lufkin were down, and no messages of any kind could be sent from Lufkin to Humble, nor from Humble to Lufkin on the 19th. On the 20th the operator went to his office at Humble at 7 o'clock, grounded his wires, made connection with Houston, and received the Dunn telegram at 7:20 a. m. The train going from Humble to Lufkin passed through Humble at 8 a. m. There was no other train by which plaintiff's wife could have reached Lufkin that day in time for the funeral. Plaintiff and his wife lived about six blocks from the telegraph office. She and her husband, Henry Meadows, were not known to the operator. She testified that if the message had been delivered to her 30 minutes before train time she could have gotten ready and could have gone on the train. The agent, not knowing Mr. and Mrs. Meadows, was forced to make inquiry for them. He phoned to all of the oil companies and oil operators having offices at Humble, and, not finding him on their pay rolls, he then went to the business section of town, inquired at the drug stores, grocery stores, post office, saloons, and other places where he thought Mr. Meadows would be known. No one knew him, nor was he able to get any information regarding where Mr. Meadows lived. At that time Humble had a population of about 6,000. The failure of the defendant to deliver this telegram within ten minutes after it was received, thus allowing plaintiff's wife the 30 minutes which she said would have been required by them in order to take the 8 o'clock train, under the facts of this record, does not raise a question of negligence. Even though we concede that plaintiff's wife could have gotten ready to the train in less time than 30 minutes, that would not raise an issue of negligence.

Appellee makes this proposition:



"If this court should conclude that it was the duty of the operator receiving the message for transmission to make inquiry as to whether or not the wife of Meadows was expected to attend the funeral in response to the telegraphic message, we then say that there was no allegation in the plaintiff's petition to that effect, and the plaintiff cannot ask a recovery on a ground not covered by allegations in his petition."

This is a correct statement of plaintiff's petition, but, having affirmed this case on the two grounds discussed above, we do not think it necessary for a proper disposition of this case to discuss this proposition.

Finding no errors in this record, the judgment of the trial court is in all things affirmed.

### TEXARKANA TELEPHONE CO. v. BLISARD. (No. 8974.)

(Court of Civil Appeals of Texas. Ft. Worth. Oct. 18, 1919.)

TELEGRAPHS AND TELEPHONES  $\Leftrightarrow$  62—VENUE OF ACTION; NEGLIGENCE IN MESSAGE TO OTHER COUNTY OVER OTHER COMPANY'S LINES.

Where a telephone company was a domestic corporation domiciled in B. county and had no property in J. county, its transfer over its switchboard to another telephone company, with which it had an agreement to pay for connections, and with which it was required by Vernon's Sayles' Ann. Civ. St. 1914, art. 1238, to make physical connections, of a call for a party in J. county, *held* not to support a contention that defendant had contracted to deliver the message in J. county so as to make one company liable for the negligence of the other and authorize suing defendant in J. county.

Appeal from District Court, Johnson County; O. L. Lockett, Judge.

Suit by W. L. Blisard against the Texarkana Telephone Company and another. From an order overruling the named defendant's plea of privilege to be sued in Bowie County, Tex., it appeals. Reversed, with directions to transfer cause as to named defendant.

Stanley Boykin, of Ft. Worth, for appellant.

J. B. Haynes and F. E. Johnson, both of Cleburne, for appellee.

CONNER, C. J. Appellant is a domestic corporation and appeals from an order overruling its plea of privilege to be sued in Bowie county, Tex., where it has its office and place of business.

The suit was instituted by the appellee in the district court of Johnson county, Tex., against the appellant company and against the Southwestern Telegraph & Telephone Company upon allegations that Mrs. Lonie

Mauldin, the operator of a telephone line or exchange at Cuthand in Red River county, put in a long-distance telephone call for the appellee at Cleburne in Johnson county, Tex., to the end that Elsie Blisard, a sister might communicate to her brother, W. L. Blisard, the fact that Mrs. Sadie McLean, another sister of the appellee, was very ill and not expected to live.

It was alleged that the defendants negligently failed to establish the necessary connection sought as they had agreed to do, and that by reason of such failure appellee was denied the privilege of attending the bedside of his sister Mrs. McLean prior to her death.

Upon the trial of the plea of privilege, it was shown without dispute that the appellant company was a domestic corporation with its domicile in the city of Texarkana, Bowie county; that it had no property in Johnson county; and that no condition existed which, under our venue statute, would give jurisdiction in Johnson county unless it is to be said that the evidence establishes a contractual obligation on the part of the appellant to deliver the message in controversy in Johnson county. The facts relied upon as establishing the alleged contractual obligation to deliver the desired message to W. L. Blisard in Johnson county are, without dispute, as follows: It appears that the appellant company has a telephone exchange at Clarksville in Red River county, at which point it connects with the telephone line of the other defendant in this case, the Southwestern Telegraph & Telephone Company, whose line extends from Clarksville to Cleburne in Johnson county; that at Cuthand there is a private exchange or telephone line extending into Clarksville which there connects with the exchange or lines of the appellant company; that the Cuthand exchange, by agreement between it and the appellant company, pays \$10 per month for the right to connect with the Clarksville exchange and to communicate messages over the Cuthand line to long distance points; that on the occasion in question, when the operator at Cuthand received the call for W. L. Blisard at Cleburne, she called up the appellant's Clarksville office and called for "long distance"; that appellant's Clarksville operator connected the Cuthand line and operator with the exchange and line of the Southwestern Telegraph & Telephone Company, which had an exchange system located in appellant's Clarksville station. "Long distance," upon the call and connection stated, answered, and thereupon the Cuthand operator delivered the message calling for W. L. Blisard at Cleburne with a statement of the character of the message which the sender desired to communicate.

It seems undisputed that the long-distance operator at Clarksville communicated the

call to the operator of the Southwestern Telegraph & Telephone Company at Cleburne, and that the failure to call or reach the appellee and communicate to him the call and message from Cuthand was due wholly to the failure or negligence of the Cleburne force. There is no evidence whatever of any agreement or undertaking on the part of the appellant company to deliver the message in question to the appellee. Its obligation, if any, to do so can only spring from its undertaking with the Cuthand exchange to make the long-distance connection called for with the Southwestern Telegraph & Telephone Company. Nor is there any evidence of any agency or joint undertakings between the appellant company and the Southwestern Telegraph & Telephone Company so as to make one company liable for the misfeasances of the other, except the fact already stated that the appellant company was obligated to the Cuthand exchange to transfer calls over the Cuthand line for long-distance points over the line of the Southwestern Telegraph & Telephone Company.

Under the state of the facts given, we think the court erred in overruling appellant's plea of privilege. Article 1238, Vernon's Sayles' Statutes, reads as follows:

"All companies, individuals, firms or corporations doing a telephone business in this state shall be compelled to make physical connections between their toll line at common points, for the transmission of messages or conversations from one line to another; such connection to be made through the switchboard of such individuals, companies, firms or corporations, if any is maintained at such points, so that persons so desiring may converse from points on one of such lines to points on another."

The mere fact, therefore, that the appellant company transferred over its switchboard the call from Cuthand to the switchboard or operator of the Southwestern Telegraph & Telephone Company at Clarksville, cannot legally support a contention that the appellant company either contracted that the message from Cuthand should be delivered in Cleburne, or that the connection between the two telephone companies was such as to make one liable for the act or fault of the other. *Western Union Tel. Co. v. Lovely*, 52 S. W. 563, and cases therein cited. We think we may appropriately quote here the following from *Cannel Coal Co. v. Luna*, 144 S. W. 721:

"A corporation, like an individual, has the right and privilege secured to it by the laws of Texas to be sued in the county of its domicile, unless it is alleged and proved by the plaintiff that it has an agency or representative in the county in which the suit was instituted, other than the place in which its domicile is situated. The right to sue in another than the

county of domicile is for the benefit of the plaintiff, and he must present the facts necessary to show that his case comes within the countenance and support of the exceptions to the general rule that no person who is an inhabitant of this state shall be sued out of the county in which he has his domicile.

"To entitle a plaintiff to sue in a county other than the residence of the defendant, he must bring his case clearly within one of the exceptions of the statute." *Cohen v. Munson*, 59 Tex. 236; *Lindheim v. Muschamp*, 72 Tex. 33, 12 S. W. 125. As said in *Hilliard v. Wilson*, 76 Tex. 180, 13 S. W. 25: "The right to maintain a suit in a county other than that in which the statute fixes the venue must depend upon the existence of the fact or facts which constitute an exception to the statute, and not upon the mere averment of such fact or facts. Where jurisdiction of the person of a defendant is claimed under some exception to the general statute of venue, and he pleads the privilege of being sued in the county of his domicile, as provided by that statute, to defeat his plea and deprive him of that right, we think the facts relied on should be not only alleged but proved."

We conclude that the judgment below should be reversed, and that, in accord with the statute on the subject, the cause, in so far as urged against appellant, should be transferred to the district court of Bowie county having jurisdiction over the person of the appellant company.

COBB & GREGORY v. PARKER, County Judge, et al. (No. 501.)

(Court of Civil Appeals of Texas. Beaumont. Nov. 13, 1919. Rehearing Denied Nov. 19, 1919.)

ELECTION OF REMEDIES §3(1) — CLAIMS AGAINST COUNTY UNDER INDIVISIBLE CONTRACT.

Where a contract for roadwork between county and plaintiffs was an indivisible contract, although providing for estimates as the work progressed and for the issuance of time warrants upon such estimates, plaintiffs, by presenting a claim for the final and full amount due under the contract and obtaining action thereon by certain commissioners, acting as the county court or attempting to so act, allowing a certain amount as balance due settlement in full, and subsequently instituting and prosecuting to judgment a claim for this particular amount, as the balance due under the contract, whether they had success in recovering such amount or not, made an election to claim such sum as the balance due, and they cannot again sue to compel the county court to issue warrants applied for upon certain estimates made as the work progressed.

Appeal from District Court, Hardin County; C. A. Lord, Special Judge.

Mandamus by Cobb & Gregory to require W. S. Parker, County Judge, and others, to issue time warrants. Judgment for defendants, and the plaintiffs appeal. Affirmed.

W. D. Gordon, Jas. A. Harrison, and R. L. Durham, all of Beaumont, and Geo. C. Clough, of Houston, for appellants.

S. D. Tant, of Sour Lake, for appellees.

BROOKE, J. This is an action by appellants to require by mandamus appellees to properly issue and levy to appellants time warrant in the sum of \$9,689.23, with 5½ per cent. interest from June 9, 1916. On December 13, 1915, Hardin county, acting through appellees, entered into a contract with appellants by the terms of which appellants were to build certain gravel roads and certain bridges and culverts named in said contract, for which they were to receive \$79,500, to be given in time warrants of Hardin county in denominations of \$500 each, with due dates extending from the 1st day of January, 1917, to January 1, 1941, which warrants were to be issued from time to time as the work progressed, and there was a provision contained in said contract that estimates of work done should be audited and approved by the commissioners' court, and such audit and approval should be sufficient in all things to make them binding and legal evidence of the county, and that thereupon the clerk was authorized and instructed to deliver to appellants county road and bridge warrants to cover such audited claim. Acting under this contract, appellants began work in the construction of the roads and bridges covered by the contract, and at the March term of the commissioners' court presented their claim for services rendered under the contract amounting to \$18,970.91, which claim was duly audited by the court and allowed and time warrants ordered issued to the amount of \$1,800, leaving a balance of \$970.91 not provided for. At the June term of the court, appellants presented their account for \$16,198.32, which was audited and allowed and warrants issued for the sum of \$7,500, leaving a balance of \$8,698.32, and it is to require the issuance of time warrants for these two amounts that this action is brought; warrants having been issued for the \$7,500 and the \$18,000, respectively, as contained in said orders. The contract provides that the county may retain as much as 15 per cent. of the estimates until the final completion of the work, and it will be noted, in the order of the court allowing the two estimates under consideration, that the sums of \$18,000 and \$7,500, respectively, were named as being the amounts for which time warrants should issue, and no order of that court was made at any time authorizing or instructing the issuance of time warrants for the remaining sums shown to be

due on the estimates, nor was there anything said in any order about retaining said sums until the final completion of the work, and, in truth, the orders themselves are somewhat doubtful as to whether they intend to make a full allowance of the claim, or only such allowance as time warrants were ordered issued for.

Upon completion of the work under the contract, appellants presented a claim to the commissioners' court of Hardin county for work done under the contract, and, being unable to obtain action on their claim by the commissioners' court on account of the county judge and one of the commissioners absenting themselves, three commissioners, acting on August 7, 1916, had an order entered upon the minutes of the court, reading as follows:

"August 7, 1916.

"During a special session held of commissioners' court of Hardin county, Texas, there being present J. N. Newman, C. A. Anderson and J. S. Jackson, a motion was made by J. N. Newman and seconded by C. A. Anderson, and carried, that Cobb & Gregory be allowed the sum of \$6,811.02 as balance due, settlement in full for road and construction work on the Beaumont, Silsbee and Kountze roads, and the county clerk of Hardin county is hereby ordered to issue time warrants to said Cobb & Gregory as provided in said original contract covering same."

Never having received the time warrants under the above order, appellants here filed and prosecuted to final judgment, in the district court of Hardin county, a suit to compel the issuance to them of time warrants mentioned in said order for the sum named therein, alleging the making of said order, that the indebtedness was owing, and that it arose under and by virtue of the contract for roadwork between said county and appellants, dated December 13, 1916.

The contract under which appellants performed all of the work, although providing for estimates as the work progressed, and for the issuance of time warrants upon such estimates, is an indivisible contract, and as such, in our opinion, will support one cause of action only, and whether the other items mentioned in appellants' trial petition were allowed in full as claims against the county by the court or not and whether the same, if allowed were retained until the final completion of the contract, or not, it is sufficient, in our judgment, to say that where appellants presented a claim for the final and full amount due under the contract and obtained action thereon by the court, or by said commissioners acting as the court, or attempting to so act, allowing a certain amount as balance due, settlement in full and subsequently instituting and prosecuting to judgment a claim for this particular amount as the balance due under the contract, whether they had success in recovering that amount

or not, it is an election on their part to claim said sum as a balance due under the contract in full, and they cannot again carve from the contract a cause of action different upon some other claim or upon some other statement of facts; and for that reason, in our judgment, the writ of mandamus prayed for in this action was properly denied, and the judgment of the trial court is affirmed.

**LEEPER-CURD LUMBER CO. et al. v.  
BARBUZZA et al. (No. 8993.)**

(Court of Civil Appeals of Texas. Ft. Worth.  
Oct. 12, 1919. Rehearing Denied  
Nov. 8, 1919.)

**1. APPEAL AND ERROR ⇨1061(4)—HARMLESS  
ERROR IN PEREMPTORY INSTRUCTION.**

If money was in fact used in the completion of a contract which one had obligated himself to perform, and which he must have performed in order to show himself entitled to any balance due in the amount of the money used, he cannot demand further payments from the other parties to the contract who so used the money, where they used more than the amount claimed by the contractor, and a peremptory charge against him on the point was harmless.

**2. CONTRACTS ⇨232(1)—RIGHT TO COMPEN-  
SATION FOR EXTRAS.**

A contractor claiming extras must show, not only that he performed the services, furnished material, and did work outside of and in addition to the specifications agreed upon, but that such additions and alterations necessitated an expense in excess of the contract price.

**3. MECHANICS' LIENS ⇨114(2)—ORDER FROM  
CONTRACTOR FOR AMOUNT NOT OWED BY  
OWNER.**

Where no installment of the price of the work was due the contractor for work done when a materialman or a mechanic gave notice to the owner's agents for the purpose of receiving such notice, the material man or mechanic secured no right against the owner or the property, through the giving of such notice, accompanied by presentation of an order for payment from the contractor, claimed to operate as an assignment.

**4. MECHANICS' LIENS ⇨279—BURDEN TO ES-  
TABLISH EXISTENCE AS WELL AS VERITY.**

The burden was on claimants of liens as a materialman and as a mechanic to establish, not only the verity of their claims, but the existence of their liens under the contractor's order on funds in the hands of the owner or his agent.

Appeal from District Court, Tarrant County; Ben M. Terrell, Judge.

Suit by W. O. Roundtree against the Leeper-Curd Lumber Company, wherein Thomas Barbuzza and others intervened. From the

judgment, defendant lumber company and two others appeal. Affirmed.

Flournoy, Smith & Storer, Graves & Houtchens, and J. W. Stitt, all of Ft. Worth, for appellants.

Capps, Cantey, Hanger & Short and Hunter & Penry, all of Ft. Worth, and J. H. Synnott, of Dallas, for appellees.

BUCK, J. In May, 1913, L. L. Higby and wife owned a homestead at 915 Belknap street, Ft. Worth, Tex., which they would sell and Dr. W. C. Roundtree would buy if arrangements could be made to make certain additions and improvements, required by Dr. Roundtree for the use of the premises as a residence and sanitarium. These improvements consisted of a general overhauling of and addition to the existing building, the construction of a cook room and of a driveway. To this end, Higby made a contract May 5, 1913, with W. O. Hudgins, a contractor, to furnish the material and labor necessary to make the repairs and improvements, except the plumbing, for \$3,150. This building contract was signed by Higby, Hudgins, and Dr. Roundtree, but not by Mrs. Higby. In the contract it was provided, first, that in the case of any disagreement between the parties appeal should be had to L. L. Higby and Dr. W. C. Roundtree, "who have been hereby mutually selected, and for which no fee is to be charged, whose decision shall be final and binding on all parties, each party paying one-half of the fee. It is further agreed that in case any difference of opinion shall arise between the said parties in relation to the said contract, the work to be or that has been performed under it, or in relation to the plans, drawings and specifications hereto annexed, the decision of George Mulkey shall be final and binding on all parties hereto." This contract was not put of record, and it is not clear as to what effect should be given to the contract, or whether it was intended by all parties to be substituted by a contract entered into between Higby and wife and Hudgins of date May 16, 1913. The contract of May 5th is loosely written, as will be noted by the quotation set out above, and probably in reducing the contract to writing a printed form was used, the wording of which was not adapted to express the term of agreement of the parties without considerable change, which was not made.

On May 16th Higby and wife entered into a contract with Hudgins to do the work and construct the improvements hereinabove mentioned by the execution on the part of Higby and wife of a promissory note in the sum of \$4,000, payable to Hudgins on or before 60 days after date, etc. In this instrument, Higby and wife gave to Hudgins a mechanic's, materialman's, laborer's, and contractor's lien

on the land and premises described, and it was further provided that in case the note given to Hudgins should be taken up and extended by any person, said extension note might be secured by a deed of trust given by Higby and wife. It was further provided that any reasonable alterations and additions to the building might be made at the instance of Higby and wife, and that the contract price agreed upon should be augmented or diminished as in the judgment of Higby and wife might be proper in the premises. On the same day, Hudgins transferred, assigned, and conveyed the various liens created in the contract above mentioned, and the mechanic's lien note, to Thomas Barbuzza. On May 16th, also, Higby and wife executed to L. J. Laneri, trustee, a deed of trust to secure to Thomas Barbuzza, beneficiary payments of a note for \$4,000, payable four years after date, the same being in extension of the note given to Hudgins and by him transferred to Barbuzza. On May 24th, Higby and wife conveyed to Dr. Roundtree the premises described in the deed of trust and mechanic's lien contract, above mentioned, for a recited consideration of \$11,784.20, as follows: \$900 in cash, the assumption of the \$4,000 note payable to Barbuzza, and the execution and delivery of 77 vendor's lien notes to cover the balance of the purchase price. Shortly thereafter, the Higbys left Ft. Worth for Arizona, and Dr. Roundtree and family moved into the house and occupied the premises thereafter as a homestead.

Hudgins proceeded to carry out his building contract, and in September, 1913, he had received from Barbuzza, for the benefit of Higby, payments aggregating \$2,700, leaving only \$450 balance on the \$3,150 contract still due. Dr. Roundtree was insisting on the completion of the work, and Hudgins, out of funds, was unable to pay labor and material bills further. Barbuzza declined to pay out the remaining \$450 until the building was completed or some assurance was given that it would be completed according to contract. Higby wrote Barbuzza to withhold the payment of the balance due until he should receive a receipt from Hudgins acknowledging payment in full. At least a great preponderance of the testimony shows that at this juncture Hudgins, Roundtree, and Barbuzza had a conference, at which Roundtree agreed if Barbuzza would pay to him \$410 of the \$450 still due (\$40 being retained to pay attorney's fees and other items of expense) that he, Roundtree, would see that the work was completed, and pay all labor and material bills thereafter incurred; that Hudgins agreed to this plan, and executed his receipt in full to Higby, and gave an order on Barbuzza to pay Roundtree said amount. Whereupon Barbuzza did pay to Roundtree the \$410, and under the latter's direction the work was completed. Roundtree testified that it cost him more than \$500 to complete

the work provided for under the contract between the Higbys and Hudgins.

On September 9, 1913, Hudgins issued an order to Barbuzza to pay Leeper-Curd Lumber Company \$288, due for material furnished "for the construction of the addition to the Roundtree sanitarium." This order was presented to Barbuzza at his residence on September 10, 1913. L. B. Curd, of the lumber company, testified that Barbuzza stated to him that at that time he had \$450 of the original contract price, and that he would hold the amount of this order out of said \$450. Barbuzza testified that he refused to pay the order because he had to pay the balance due to Higby; that he believed he did tell Curd that he could not pay him any money until he got an order from Higby. On October 27, 1913, Hudgins gave to appellant Gurley an order on Dr. Roundtree for \$125 for balance due on plastering. Roundtree did not pay said amount, but wrote a memorandum to the effect that, "As soon as loan can be collected or matter adjusted I will use my influence in every way to protect this account." When the order was presented to Barbuzza, he stated that he could not pay out any more money until a final settlement was made. On September 29, 1913, Barbuzza paid a check to Higby for \$350, and to the Moncrief Furnace Company, \$200, and on November 2, 1913, to Dr. W. C. Roundtree, \$410.

On February 10, 1914, Leeper-Curd Lumber Company filed suit in the county court of Tarrant county, on its order and assignment, against Hudgins, Barbuzza, and Roundtree. On August 6, 1916, Barbuzza filed suit in the district court to foreclose his mechanic's and deed of trust liens. April 26, 1915, Roundtree filed a suit in the district court against Leeper-Curd Lumber Company. Gurley and a number of others, claiming laborer's, mechanic's and materialman's liens, intervened. The consolidated cause was tried on September, 27, 1917, and on an instructed verdict a judgment was rendered for Barbuzza, awarding him judgment for his debt and foreclosing his mechanic's lien, against defendant Higby and Roundtree, and judgment against the other defendants as to their cross-actions. Judgment was also rendered in favor of Barbuzza, Higby, and Hudgins.

Judgment was also rendered against Hudgins in favor of Leeper-Curd Lumber Company and J. M. Gurley, and others not necessary here to mention, for the amount of their claims. From this judgment, Gurley, Leeper-Curd Lumber Company, and Hudgins have appealed.

The record in this case is quite voluminous; the transcript consisting of some 142 pages and the statement of facts of 238 pages. There are three appellants and three appellees, and we have expended considerable time and effort in an endeavor to reach a clear understanding of the issues involved.

Our labors have been somewhat increased by many inaccuracies, some of them doubtless typographical, in the transcript, statement of facts, and briefs. In our earnest desire to get at the merits of the case within a reasonable length of time, we requested the counsel for the appellants and the appellees to rebrief the case. With this request, the attorneys have cheerfully complied, for which they have the thanks of the court.

We will first consider the appeal of W. O. Hudgins, and determine whether or not the trial court committed error in giving a peremptory instruction against him, denying him judgment against Higby, Roundtree, and Barbuza, and denying a contractor's lien on the premises involved. Hudgins pleaded that the contract price agreed upon between him and Higby was \$3,150. He further alleged that he had assigned to Barbuza all of his claim and title to the mechanic's lien secured by said contract, "or so much of said lien as said Barbuza should pay this defendant for in payment for said improvements, to the extent of \$3,150, but including no lien for any additional cost of changes, deviations, or extras in connection with this defendant's performance of his part of said contract." He further alleged in a general way that he had, at the special instance and request of Higby or Roundtree, alleging that Roundtree had been authorized by Higby to act for him in the premises, made certain changes, additions, and deviations from the original contract of the reasonable value of \$597.45. He further alleged that there was still due him \$450 under the original contract. He denied that he had authorized Barbuza to pay to Roundtree \$450 or any other sum for any advancements Roundtree had made, or was to make, towards the completion of the building.

The testimony upon this issue probably cannot be said to be uncontradicted. Barbuza testified that he paid the \$410 to Dr. Roundtree on an order from Hudgins, but that the order had been lost or he had misplaced it; that said order recited that the work was finished, and that said amount would pay Hudgins in full; that upon the presentation of this order from Hudgins he, Barbuza, gave a check to Dr. Roundtree for \$410, receiving a receipt in full from Hudgins. Roundtree testified that Hudgins agreed that if he would go ahead and furnish the money to pay the laborers, carpenters, etc., that he, Hudgins, would give to Barbuza an order for final settlement; that witness agreed to this, provided Hudgins would go to work on the job himself; that is, put in time as a carpenter; that Roundtree took the matter up with Higby, and he agreed to the plan, and that thereafter he paid Hudgins small amounts, from \$2.50 to \$7.50 at a time, and paid all the other bills; that he got an order from Higby to Barbuza, and also one from Hudgins to Barbuza, and

that he and Hudgins and a Mr. James, who had been working on the job, met Barbuza at the corner of Eight and Main streets in the city of Ft. Worth; that on receiving the check for \$410 from Barbuza, he went to the bank and cashed it, and paid James \$130 due him for labor; that he did not pay any bills prior to this agreement with Hudgins, but did do so subsequently. James testified, corroborating, substantially, Barbuza and Roundtree. Hudgins testified on the contrary, that he had no recollection of meeting with Roundtree and Barbuza at the corner of Eight and Main streets and giving them a written receipt or order for the payment to Roundtree of any balance in Barbuza's hands, under the original contract; that he did give an order, at an entirely different place, for what he thought was the difference between the \$3,150 specified in his contract with Higby and the \$4,000 evidenced by the notes; that he did not remember to whom he gave the order, but that it was his understanding that the order was to Barbuza; that he never did intend the \$450 or any part of it was to go to Dr. Roundtree for his expenses for extras, and that he never did give his consent to the appropriation for such purpose. He further testified that he had not made any effort to collect the \$450 from Roundtree, and had not notified Higby that he was claiming the same. He later testified that he would not say positively that on a certain night, the day before the alleged meeting at Eight and Main streets, he had not met with Dr. Roundtree, Mr. James, and Miss Macloud at the doctor's office and figured up their accounts, as Roundtree and James had testified, and that at said meeting he agreed that he owed Dr. Roundtree more than \$450, and that the latter might go to Barbuza and get that amount. He further testified that he would not say that he did or did not meet Barbuza, Roundtree, and James at the time and place mentioned.

[1] But while we are probably not justified in concluding that the trial court was warranted in holding that, as a matter of law, the evidence showed that Hudgins authorized the payment by Barbuza to Roundtree of the \$450, yet we think the uncontradicted evidence does show that the money thus received by Roundtree was used and applied to the payment of labor and material bills necessary to the completion of the contract which Hudgins had undertaken. Though the money might have been paid to Roundtree without the order or authority of Hudgins, yet if, in fact, it was used in the completion of the contract which Hudgins had obligated himself to perform, and which he must have performed in order to show himself entitled to this balance due, he is in no position to demand further payments from Higby, Roundtree, or Barbuza. Hence we conclude that no injury is shown by appellant by reason of the peremptory instruc-

tion so far as it affected Hudgins' right to recover the \$450 claimed to be due under the original contract. In order to sustain his right to recover this amount, he would be required to show that he had performed his contract, which contract included the payment of all bills for labor and material, and this quantum of proof would not be satisfied if the evidence disclosed that more than the amount of funds appellant claimed to be still owing him had been furnished and expended by Roundtree in the completion of the contract.

[2] As to Hudgins' claim for extras in the sum of \$597.45, it was incumbent upon him to show, not only that he had performed services, furnished material, and done work outside of and in addition to the specifications agreed upon, but that such additions and alterations necessitated an expense in excess of the contract price. This, we think, appellant Hudgins failed to show. He testified at some length about the extras furnished and additional work done, his testimony upon this feature covering some 20 pages of the statement of facts, but after reading his entire testimony with care, and portions of it several times, we have reached the conclusion that said testimony fails to disclose facts upon which the jury could have properly based a verdict in Hudgins' favor. For instance, he testified in one place that there was owing to him for extras \$300, and in another place that the amount was \$212.45. He further testified that from this amount there should be deducted certain items that Roundtree had paid for, and that he did not think these items paid for by Roundtree would amount to more than \$125 to \$150. That he would also have to give Roundtree credit for \$50 paid on witness' note. He further testified that he did not know whether the work as done would cost more or be of a greater value than the work provided for under the contract; that is to say, whether the changes and alterations made resulted in an increased or decreased cost. He testified:

"There is no man living can get at what counsel wants, the difference between the cost of the building as originally designed and the cost of the building as constructed in the item of the change of the roof. In order to get what it would have cost to build that part of it according to the original agreement I would have had to go back and make another bill, showing the difference between the cost of the extras in the balance of the building and the original."

It would be impracticable to quote appellant's testimony at length, but we have concluded that the trial court did not err in holding that Hudgins had not discharged the burden of proof resting upon him to establish his right to recover for extras. Hence all assignments in appellant Hudgins' brief are overruled, and the judgment as to him is affirmed.

[3] The claim of appellant Leeper-Curd

Lumber Company is that an order from a contractor to an owner in favor of the materialman for the price of material used in the construction of a building for the owner operates as an assignment, whether the same is accepted by the owner or not, and takes precedence over other claims and liens accruing after the date of the assignment. It is contended that the evidence shows, or at least presents the issue, that Barbuza was the duly authorized agent of Higby to pay out the money due and becoming due under the contract, and that the presentation of the order from the contractor and in favor of the Lumber Company to Barbuza was, in effect, a presentation to Higby. In support of its proposition, appellant cites: *Belharz v. Illingsworth*, 62 Tex. Civ. App. 647, 132 S. W. 106; *Fielder Lumber Co. v. Smith*, 151 S. W. 605; *King v. Hardin Lumber Co.*, 187 S. W. 401; *School District v. Oil City Iron Works*, 180 S. W. 1121, and other cases.

In the well-known *Belharz Case*, the contractor drew written orders on the owner in favor of a materialman in payment of material, and such orders were accepted by the owner, and the court held that an equitable assignment of so much of the fund due the contractor was affected in favor of the materialman, and the said assignment was superior to any claim or lien of other materialmen of which subsequent notice was given to the owner. *King v. Hardin Lumber Co.*, supra, holds that an equitable assignment of funds in the hands of the owner and due the contractor will be made by the issuance of an order by the contractor on the owner, even though the order is not accepted. But the holdings in these and similar cases recognize the statutory rule laid down in article 5623, V. S. Civ. Stats., to the effect "that in no case shall the owner be compelled to pay a greater sum for or on account of labor performed or material, machinery, \* \* \* than the price or sum stipulated in the original contract between such owner and the original contractor or builder," etc. While it has been held that where under the building contract a specified sum was due the contractor at any certain stage in the construction work, and the statute governing the fixing of the materialman's or laborer's lien has been duly complied with prior to the payment of such installment, the materialman or laborer will have a lien against the building or other construction for which material was furnished, or upon which labor was expended to the amount established to be due (*First National Bank v. Lyon-Gray Lumber Co.*, 194 S. W. 1146, and cases there cited), yet we fail to find evidence that, at the time either of the appellants Leeper-Curd Lumber Company or Gurley gave notice to Barbuza or Roundtree, claimed by appellants to be acting as Higby's agents for the purpose of receiving such notice, any installment was due Hudgins, the contractor, for work done. Neither the con-

tract of May 16th, to which Higby and wife and Hudgins were parties, nor the one of May 5th, to which Higby, Hudgins, and Dr. Roundtree were parties, provided for installment payments upon the partial completion of the building, and the testimony of the witnesses fails to show that any installment was due at any time upon which either of appellants' liens would attach.

[4] We have given the consideration of this case much time and labor. Since the verdict for appellees was rendered upon peremptory instruction, we have most carefully examined the record, in order to determine if there was any evidence of a probative nature requiring the submission to the jury of the claims of appellants. That the lumber company furnished the material, and that Gurley furnished material and labor for which they were not paid in full, is evident. If they complied with the statutory requirements to fix their respective liens, they should not only have judgment against Hudgins for said amount, which was given them, but should have a lien against the premises to secure the payments thereof. But irrespective of whether Leeper-Curd Lumber Company or Gurley complied with said statutory requirements, and irrespective of the question as to whether they would have a constitutional lien in the absence of a strict compliance with the provisions of the statutes, upon which questions the parties hereto differ, and which questions we do not find it necessary to decide, yet we are constrained to hold that the evidence is insufficient to raise an issuable controversy as to whether at any time there were any funds in the hands of Higby or Barbuzza to which any liens held by appellants would attach. The burden was upon these two claimants to establish, not only the verity of their claims, but the existence of the liens. The latter they failed to do.

The judgment of the trial court is in all respects affirmed.

TEXAS CO-OPERATIVE INV. CO. et al. v. CLARK et al. (No. 9121.)

(Court of Civil Appeals of Texas. Ft. Worth. June 14, 1919. Rehearing Denied Oct. 18, 1919.)

1. APPEAL AND ERROR  $\S$ 216(2)—OBJECTIONS TO INSTRUCTIONS; NECESSITY OF REQUESTS.

In an action for price paid for stock on ground of fraud, objection to an instruction on false representations, because it gave jury no criterion for determining what was a misrepresentation of fact and what was a statement of opinion and what were mere promissory representations, will not be noticed on appeal; no request for explanatory charge having been made in trial court.

2. HUSBAND AND WIFE  $\S$ 86—FORFEITURE OF CONTRACTS BY MARRIED WOMEN.

A married woman cannot be bound by provisions in a contract for the subscription to corporate stock which would warrant forfeiture of payments for nonpayment of subsequent installments.

3. CORPORATIONS  $\S$ 83 — STOCK SUBSCRIPTIONS; FORFEITURE FOR NONPAYMENT.

Where plaintiff, after having subscribed for corporate stock on installments, gave a further subscription to defendant's agent, paying the price of the stock, but defendant refused to issue the stock, such failure of defendant warranted plaintiff in refusing to pay installments on her earlier subscriptions, and excused her from provisions of the contract that payments made should be forfeited in case of default.

4. FRAUD  $\S$ 11(1)—MISREPRESENTATION AS TO RETURNS FROM STOCK AS OPINION.

Where an agent selling corporate stock made misrepresentations to prospective purchaser as to the returns from the stock, such representations, though partaking of the nature of opinion and of promissory character, are actionable, and hence admissible in an action by purchaser to recover not only payments on the ground that subscription was induced by false representations but also exemplary damages.

Appeal from District Court, Tarrant County; R. E. L. Roy, Judge.

Action by Mrs. M. A. Clark and others against the Texas Co-operative Investment Company and others. From a judgment for plaintiffs, defendants appeal. Affirmed.

See, also, 212 S. W. 245.

Capps, Cantey, Hanger & Short, of Ft. Worth, for appellants.

I. W. Stephens and D. W. Odell, both of Ft. Worth, for appellees.

CONNER, C. J. Mrs. M. A. Clark, joined by her husband, James Clark, instituted this suit against the Texas Organization Company, a Texas corporation, and against the Texas Co-operative Investment Company, an Arizona corporation, to recover \$4,500 by her paid for stock in the investment company. It was alleged that the two companies were acting together for a common purpose, and that said money had been secured by reason of certain false and fraudulent representations made to Mrs. Clark by one Peoples, acting under the authority of the companies named. The trial resulted in a judgment in favor of Mrs. Clark, and the companies mentioned have appealed.

[1] Error is assigned to the following portion of paragraph 2 of the court's charge, viz.:

"If you find from the evidence that on or about the dates alleged by plaintiff that he (Peoples) made the representations of fact to



plaintiff, Mrs. M. A. Clark, substantially as alleged in her amended petition, and that these representations of fact were substantially false as alleged by her," etc.

It is insisted in substance that the clause quoted is objectionable, in that it gave the jury no criterion whatsoever for determining what was a representation of fact, the falsity of which was misleading and confusing, and what was a statement of opinion, the incorrectness of which would invalidate the contract, and what were mere promissory representations giving rise only to an action for damages if not performed. It is true that the petition contained allegations of false representations partaking of the nature of promises of performance of future acts, and of opinions of the character of puffing inducements; but the petition undoubtedly also contained averments of false representations of fact which were alleged to be and which appear to be material inducements to the subscriptions for stock made by the plaintiff, and the charge objected to required a finding of all of the representations of fact as substantially alleged. A finding of such character necessarily established the existence of the material misrepresentations of fact and authorized a verdict in plaintiff's favor, regardless of the question of whether there might not have been also misrepresentations of themselves insufficient to authorize a recovery. Moreover, the objections made amount to no more than complaints of mere omissions calling for special charges on the part of appellant to correct the supposed deficiency in the court's charge. Indeed, the court upon the request of the defendants did instruct the jury to the effect that, if they found that Mrs. M. A. Clark was caused to subscribe for the stock in question "solely because of the representations of Homer Peoples, testified to by her, that he would guarantee that the stock would pay 10 per cent. dividends, then and in such event you will find and return a verdict for the defendant Texas Co-operative Investment Company." We think that, if the defendants desired to have the jury instructed further than was done by this special charge as to what representations they should treat as representations of fact within the scope or general meaning of the charge, they should have requested special instructions to supply the omissions and assigned error to the refusal of such charges. But this was not done. Appellant's first and second assignments of error are, accordingly, overruled.

[2, 3] Defendant also assigns error to the following special charge, given by the court upon the request of the plaintiff Mrs. M. A. Clark, viz.:

"If you fail to find for the plaintiff M. A. Clark on the issue of fraud submitted to you in the charge of the court, but find from the evidence that Homer Peoples was the agent of

defendants or was held out as such by said Claude C. Hays, as general manager of said companies, and that as such agent he induced her to purchase and pay for stock in said investment company at or about the dates alleged in June, July, and August, 1911, and that she dealt with him in each of said transactions as the agent and representative of defendants, believing that he was such agent, and that defendants refused to give her credit for the sum of money, if any, paid on said August subscription and declared a forfeiture of the moneys paid on said June and July subscriptions, and that on this account said plaintiff refused to make any further payments, you will find for her the sums paid, if any, on said June, July, and August subscriptions, with interest at 6 per cent. per annum from October 1, 1911."

The evidence shows that Mrs. M. A. Clark advanced the moneys for which she sues upon three several occasions; the first was on June 29, 1911, the next July 1, 1911, and the last on August 1 of that year. At the time of the first two subscriptions, Mrs. Clark signed an application order which, in terms, authorized a cancellation of her subscription and a forfeiture of all moneys advanced by her in the event she should fail to pay any remaining installment for stock for which she had given her notes. At the time of the last or August purchase, however, she signed no application but then subscribed and paid for \$2,000 worth of stock. The proof further shows that no stock at any time has ever been issued and delivered to Mrs. Clark. On the contrary, the defendant investment company refused to so do, and undertook to cancel the notes given by Mrs. Clark and to forfeit the sums of money paid by her on the June and July subscriptions, and defended against the August subscription on the ground that Peoples had not been authorized to solicit and take this subscription. It further appears that, at all times herein involved, Mrs. Clark was a married woman. In view of these facts, we fail to find any prejudicial error in the charge quoted. If it be assumed that the provision for forfeiture of money in the June and July subscriptions amounted to something more than a mere penalty and authorized under other circumstances the forfeiture specified, yet Mrs. Clark, then being a feme covert, could not be bound thereon. By virtue thereof, we do not think it can be said that the investment company was authorized to cancel Mrs. Clark's notes, given for the June and July subscriptions, forfeit all moneys paid by her thereon, and refuse to issue her any stock. But even if mistaken in this view, it is clear that the investment company had no right to refuse, as it did do, to issue stock actually paid for in August. At all events, plaintiff was entitled to this stock, and the refusal of the company to issue it to her amounted to a sufficient cause, we think, for her refusal, if

any, to make further payments on her June and July subscriptions. The third assignment will, accordingly, be overruled.

[4] The remaining assignments, 4 to 12, inclusive, relate to objections to the testimony. Mrs. Clark was permitted to testify over the defendants' objections that Peeples represented that the stock of the investment company would pay enormous dividends; that she (Mrs. Clark) would be able to borrow from the investment company all the money she might request at a rate not to exceed 6 per cent. with the stock of the investment company as collateral security; that he (Homer Peeples) would guarantee 10 per cent. on this stock on the start; that as soon as the investment company began business its stock would pay 100 per cent. dividends; that he (Homer Peeples) would guarantee that the stock of the investment company would be paying 100 to 150 per cent. dividends or better, etc. It is objected that this testimony consisted of mere opinions, puffing declarations, and promissory representations, which afforded no grounds for the relief which plaintiff sought. Without stopping to discuss the nature and effect of this testimony, we think it sufficient to say that, among other things, these promises and representations were alleged to have been false in fact and known to be false at the time such representations were made and for all of which, in addition to actual damages, exemplary damages were sought. Under the allegations, therefore, as it seems to us, the evidence was clearly admissible, for we think it can be no longer doubted that if the representations and promises referred to were known by the agent of appellant to be false at the time he made them, and that the same were made for the purpose of inducing the plaintiff to make the subscriptions that she did, and part with her money as she did, being induced by said representations to do so, then the representations were actionable, even though partaking of the nature of opinion and of a promissory character. See *Henderson v. Ry. Co.*, 17 Tex. 560, 67 Am. Dec. 675; *Ry. Co. v. Shuford*, 36 Tex. Civ. App. 251, 81 S. W. 1189; *Riggins v. Trickey*, 46 Tex. Civ. App. 569, 102 S. W. 918; *Newton v. Ganss*, 7 Tex. Civ. App. 90, 26 S. W. 81; *Cole v. Carter*, 22 Tex. Civ. App. 457, 54 S. W. 914; *Connally & Shaw v. Saunders*, 142 S. W. 975; 20 Cyc. p. 18; and other authorities that might be cited. The requested charge, to the refusal of which complaint is made in the thirteenth and last assignment, was properly refused, we think, for the reason that it ignored the issues of identity, of agency, and of fraud submitted by the court, and authorized a finding for the defendant investment company, even though all of these issues were determined adversely to that company.

We conclude that all assignments of error should be overruled, and the judgment is affirmed.

CITY OF DALLAS et al. v. ARMOUR & CO.  
et al. (No. 8283.)

(Court of Civil Appeals of Texas. Dallas. Oct. 25, 1919.)

1. EQUITY ⇨97—JURISDICTION OF "CLASS SUITS."

Class suits may be maintained in equity; class suits being those in which one or more in a numerous class, having a common interest in the subject-matter, sue in behalf of themselves and all others of the class.

[Ed. Note.—For other definitions, see Words and Phrases, Second Series, Class Suit.]

2. EQUITY ⇨97—PARTIES IN CLASS SUITS.

Persons named in the record in a class suit are parties; but others of the class, although persons interested, are not parties.

3. JUDGMENT ⇨702—RES JUDICATA; PARTIES NOT NAMED IN CLASS SUITS.

Where an action is brought by a particular class of persons, as citizens and taxpayers, all members of such class are bound by the judgment rendered, although not named in the record as parties.

4. JUDGES ⇨44—DISQUALIFICATION; "PARTY" TO SUIT.

A judge, who is a resident of a city and a taxpayer, although interested in a suit brought by certain persons in behalf of the taxpayers of the city as a class is not a "party" to the suit, so as to be disqualified to hear it.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Party.]

5. JUDGES ⇨44 — DISQUALIFICATION; "INTERESTED" IN SUIT.

Judges, who are taxpayers of a city, although interested in a suit brought in behalf of the taxpayers of such city as a class to enjoin a purposed expenditure of the public funds and donation of land, they are not so immediately and directly "interested" as to be disqualified to try and hear the suit, under Const. art. 5, § 11, and *Vernon's Sayles' Ann. Civ. St. 1914*, art. 1584.

[Ed. Note.—For other definitions, see Words and Phrases, Interested.]

6. INJUNCTION ⇨110—AUTHORITY OF NON-RESIDENT JUDGE.

In view of *Vernon's Sayles' Ann. Civ. St. 1914*, art. 4643, an injunction issued by a nonresident district judge was void, where it was erroneously thought that the resident judges were disqualified by interest.

Appeal from District Court, Dallas County.

Action by Armour & Co. and others against the City of Dallas and others. Judgment for plaintiffs, and defendants appeal. Reversed and remanded.

Jas. J. Collins, Edward Dougherty, T. B. McCormick, and Thompson, Knight, Baker & Harris, all of Dallas, for appellants.

Etheridge, McCormick & Bromborg, of Dallas, for appellees.

RASBURY, J. Upon the petition of Armour & Co. of New Jersey, Armour & Co. of Texas, a foreign and domestic corporation, respectively, and F. M. Etheridge and J. M. McCormick, of Dallas, Tex., having for its purpose the cancellation of a contract between the city of Dallas, the Texas & Pacific Railway Company, and the Wholesale District Trackage Company, on the ground that it was void, because illegal, and for temporary injunction restraining all parties thereto from performing said contract or any portion thereof pendente lite, and alleging that the petitioners were taxpayers of the city of Dallas, and sued for themselves and all other taxpayers in said city of Dallas, Hon. Horton B. Porter, judge of the Sixty-Sixth district court in Hill county, upon the sworn allegation that the proceeding was a class suit, by fiat indorsed upon the petition in Hillsboro, directed the clerk of the district court of Dallas county to file the petition and docket the cause in the Fourteenth district court in Dallas county, and upon the petitioners entering into a bond in the sum of \$10,000, conditioned as required by law, to forthwith issue the temporary injunction. Bond was filed and the writ issued. The city, the railway company, and the trackage company, without further proceedings in the court below, appealed from the order of the district judge in the time and manner prescribed by law.

Omitting formalities, the petition alleged that appellants entered into a contract in writing (certain details and provisions of which we omit, for the reason that they are not of importance to the issues presented), which, after reciting that the railway company operates double railway tracks upon Pacific avenue in the city of Dallas, under grant from said city for a period of 50 years from April, 1890, and that located on said street, between Griffin and Preston streets, are various industrial plants served by the tracks of the railway company, and that the city and the trackage company desire same removed between the points indicated, and that the railway company is willing to remove same, the parties agree (1) that the trackage company will procure and convey to a trustee for the railway company certain designated lands to be used by the railway company as an industrial district for the various uses required for that purpose, conveyance to the railway company to be made when it shall have removed its tracks from Pacific avenue as indicated, and convey to the city of Dallas by special warranty deed,

in consideration of \$100,000, certain lands which it proposes to acquire from the railway company; (2) that the railway company will arrange with the Houston & Texas Central Railroad Company to use the latter's tracks for entry into the city, abandon, with certain exceptions, its tracks upon Pacific avenue between the points indicated, abandon, after being put in peaceful possession of the lands agreed to be conveyed by the trackage company, all property on Pacific avenue, between Griffin and Lamar streets, other than that abandoned to it by the city, conveying to the trackage company by special warranty deed such thereof as it has title to, and, after the grant by the city of the rights above enumerated, and being vested with title in the lands by the trackage company, it will commence the construction of the tracks, etc., for the industrial district indicated, and complete same with due diligence; (3) that the city will by ordinance grant the railway company the use of the lands to be conveyed to it by the trackage company for the purposes indicated, as well as the right to operate its trains, etc., over a certain line of railway proposed to be constructed by the Houston & Texas Central Railroad Company in said city, to abandon by ordinance to the railway company a portion of the north side of Pacific avenue, between Griffin and Lamar streets, and to purchase from the trackage company, for \$100,000, the land of the railway company lying contiguous to that abandoned to the railway company by the city, for the purpose of opening and extending Pacific avenue, between Griffin and Lamar streets.

As grounds for canceling said contract appellees allege, among other matters, that the proposed purchase by the city from trackage company of the property to be abandoned to it by the railway company is but a pretense, and is intended in fact as a gift or donation for making up a shortage for the trackage company in its purchase of the industrial district, and forbidden by the Constitution of the state, in addition to which said property is incumbered by sundry liens, aggregating more than \$25,000,000, and further, if said agreement to pay \$100,000 is not a gift or donation, it is yet in violation of the Constitution and the city's charter, in that the city did not, before entering into such agreement, appropriate said sum of money, and that the agreement by the city to abandon to the railway company 40 feet off the north side of Pacific avenue, between Griffin and Lamar streets, is likewise a gift or donation and forbidden by the Constitution, and further that said portion of the contract that obligates the city to enact in the future certain ordinances is against public policy, and consequently void, because it pledges and hypothecates the city's legislative power, and, if not against public policy, is illegal, because

it does not exact any compensation for the grant, as is required by the city's charter.

In limine appellees suggest that, it appearing from the petition that the members of this court are taxpayers of the city of Dallas and that the suit is appropriately brought in our behalf as members of that class, we are disqualified to hear and determine the issues in the case, both because we are parties plaintiff and interested in the cause and the question to be determined.

[1, 2] We apprehend that it is unnecessary at this time to cite authority in support of the right in equity to maintain class suits; that is, suits in which one or more of a numerous class, having a common interest in the subject-matter, sue in behalf of themselves and all others of the class. 30 Cyc. 132. So, assuming and conceding, as we must, in view of the pleading, that the case presents a class suit, are the members of this court parties thereto in the sense that plaintiffs and defendants ordinarily are? In determining whether an attorney, who had a contingent fee in the cause of action, was a party to the suit, and the presiding judge disqualified because related to the attorney within the prescribed degree of consanguinity, our Supreme Court held that the terms "party" and "parties," when used in connection with suits or actions, were technical words and to be given that signification. *Winston v. Masterson*, 87 Tex. 200, 27 S. W. 768. The court in the case cited adopts the holding of another that a "party" is the one by or against whom a suit is brought, the parties named in the writ on the record; all others who may be affected indirectly or consequentially being persons interested, but not parties. Such, in our opinion, is the status of all members of the given class in class suits, who have not intervened or in some authorized manner been made parties on the record.

[3, 4] The fact that those in the particular class are bound by the judgment rendered therein as they are (*Hovey v. Shepherd*, 105 Tex. 237, 147 S. W. 224) is of no importance. The attorney in *Winston's Case* was held not to be a party to the suit, yet it is obvious that an adverse judgment against his client would preclude a suit by him for his interest in the cause of action in the same manner that any judgment rendered in the present case will affect all those "indirectly or consequentially" interested therein. We therefore conclude that we are not "parties" to the suit, and hence not disqualified for that reason.

[5] Coming, then, to the next contention, are we disqualified because the case is one wherein we are "interested" (Const. art. 5, § 11), or one wherein we are interested "in the question to be determined" (article 1584, *Vernon's Sayles' Civ. Stats.*)? (We note, in passing, without expressing any view on the

issues that might arise thereon, the fact that the Legislature has by article 1584 attempted to broaden the disqualifying provisions of the Constitution). "The interest which will disqualify a judge must be direct and immediate, and not contingent and remote." "Where a judicial officer has not so direct an interest in the cause or matter as that the result must necessarily affect him, to his personal or pecuniary loss or gain, \* \* \* then he may sit." The quotations are the rule announced in other jurisdictions, and adopted by our Supreme Court, as the test to be applied to the constitutional inhibition. *City of Oak Cliff v. State ex rel. Gill*, 97 Tex. 391, 79 S. W. 1069. The purpose of the suit in the case cited was to declare void an act of the Legislature annexing Oak Cliff to the city of Dallas. The act authorized the city of Dallas, upon its taking effect, to issue \$50,000 of bonds and to levy a tax sufficient to provide a sinking fund and interest therefor. Judge Gaines, then a member of the Supreme Court, was a taxpayer in the city of Dallas, and when the case reached the Supreme Court the suggestion was made that Judge Gaines was disqualified to sit in the case, for the reason that he was interested therein. The court declared, for the reasons stated in the opinion, that Judge Gaines was neither directly nor immediately interested as a taxpayer in the suit, and hence not disqualified.

In the present case our interest, it occurs to us, is less direct and immediate, or, otherwise stated, more remote and contingent, than the interest of Judge Gaines. The substance of the acts of the city officials challenged in the present case is an attempt, under the guise of a purchase, to donate \$100,000 of public funds to a private corporation, to enable it to carry out its contract to furnish the railway company certain lands for an industrial railway center, charged to be in violation of the Constitution, the donation of a portion of a public street to the railway company, likewise in violation of the Constitution, the pledging of its legislative authority in advance, etc. Such acts, if true, upon which we may and do not pass pro or con, present questions in which the members of this court as citizens are interested. Such interest does not, however, disqualify us from passing upon their legality. 15 R. C. L. 536. The interest to disqualify must be legal or beneficial, or, as said in the case cited, personal or pecuniary. Eliminating those acts which tend to show misconduct on the part of the city officials, there remains only the proposed expenditure of the public funds, in which we might be said to be personally and pecuniarily interested. If we are interested, then is the interest so remote and contingent as not to affect our qualifications under the rule stated? We conclude it is. While it may be conceded that the ex-

penditure of the \$100,000 might tend to increase the tax rate, though such possibility is obviously remote, yet any judgment rendered in this case will neither free any property we possess from any threatened tax or impose another tax thereon. It will give the city no right to levy a tax, nor the members of this court any relief against any tax hereafter to be levied. As a consequence, we are neither directly nor immediately interested in the matters that may be adjudged in the proceeding, and hence not disqualified to hear and determine the issues.

[6] Having determined that we are qualified to hear the proceeding, it follows that the district judges of Dallas county were qualified, since the same inhibitions apply to district judges that apply to members of this court, and, being so qualified, it further follows, as contended by appellants, that Hon. Horton B. Porter, the nonresident judge who issued the writ, was without authority to do so, since he acted and assumed to act only on the basis that the Dallas county judges were disqualified, and, being without authority, his act is void. Article 4643, Vernon's Sayles' Civ. Stats.

The interlocutory writ of injunction is dissolved, and the case is remanded to the district court, for further proceedings in consonance with the views herein expressed.

**MAYHEW & ISBELL LUMBER CO. v. VALLEY WELLS TRUCK GROWERS' ASS'N et al. (No. 6226.)**

(Court of Civil Appeals of Texas. San Antonio. Nov. 12, 1919.)

**1. ASSOCIATIONS §20(1) — STATUTORY PERMISSION TO SUE IN ASSOCIATION NAME.**

The statute which permits an unincorporated association to sue or be sued in its association name does not undertake to change the legal status of the association, or in any way affect the law in so far as it relates to contract, but is intended merely to furnish a convenient method of conducting suits.

**2. APPEAL AND ERROR §1039(3)—HARMLESS ERROR IN MISJOINDER OF ACTIONS.**

In an action by individual members of a truck growers' association, error, if any, in permitting members who suffer damages, because of the failure of defendant to furnish onion crates, to join their several causes of action, and to permit all members to join in with a joint cause of action, *held* harmless.

**3. ACTION §50(3) — JOINDER OF SEPARATE AND JOINT CAUSES OF ACTION FOR BREACH OF CONTRACT.**

Where the members of a truck growers' association had contracted in the name of the association with defendant for a certain number of onion crates, without specifying how many crates each member was to receive, the members who suffered damages because of de-

fendant's failure to furnish a sufficient number of crates could properly join their several causes of action, and also join in a joint cause of action in the name of the association.

**4. JUDGMENT §240 — JOINT JUDGMENT ON SEPARATE CAUSES OF ACTION ERRONEOUS.**

Where members of a truck growers' association brought action joining the association for defendant's breach of contract to furnish onion crates, each member having a separate cause of action, a joint judgment was improper; since each member separately should have been awarded such damages as he proved.

**5. SALES §23(3)—COMPLETION OF CONTRACT.**

A contract for the delivery of onion crates to the members of a truck growers' association, prepared by a representative of the association, accepted by the manufacturer, and delivered to the association's representative, who thereupon made a partial cash payment, *held* to constitute a complete contract.

**6. EVIDENCE §158(27)—ORIGINAL CONTRACT WITHIN BEST EVIDENCE.**

In an action by members of a truck growers' association for breach of a contract to furnish onion crates, the written, signed, and accepted contract itself was the best evidence as to the number of crates to be delivered and as to the time of delivery.

**7. CONTRACTS §10(4)—MUTUALITY OF CONTRACT FOR SALE OF ONION CRATES OPTIONAL IN PART.**

Where members of a truck growers' association entered into a contract for the purchase of onion crates, whereby the first consignment of crates was paid for in cash, additional crates to be paid for at a named figure, the contract, not being separable, and the cash payment being not merely the payment of a pre-existing obligation but a consideration supporting the entire order, was not void for want of consideration and lack of mutuality regardless of whether it was optional with the truck growers to take additional crates.

**8. SALES §1(4)—CONTRACT FOR PURCHASE OF ONION CRATES NOT UNCERTAIN AS TO NUMBER.**

Where members of a truck growers' association ordered onion crates under a contract providing for a cash payment of the first consignment, additional crates to be furnished "as needed to pack their 1917 onion crop in," the contract was not void, because of uncertainty as to the number of crates to be furnished; the maximum being fixed, as the amount needed for the crop.

**9. EVIDENCE §420(3)—PAROL EVIDENCE TO INGRAFT CONDITION UPON WRITTEN CONTRACT.**

Parol testimony is not admissible to ingraft a condition upon a plain contract.

**10. SALES §81(1)—TIME OF DELIVERY AS ESSENCE OF CONTRACT.**

Time is of the essence of a contract between truck growers and a manufacturer to furnish a sufficient number of onion crates to market a designated crop of onions.

**11. SALES  $\Rightarrow$ 179(3)—WAIVER OF DELAY IN DELIVERY BY ACCEPTANCE OF GOODS ORDERED.**

In an action for breach of contract to furnish onion crates to the members of a truck growers' association to harvest a designated crop of onions, acceptance of crates after the time when damages were suffered by plaintiff because of defendant's failure to furnish crates *held* not a waiver of the breach of contract, where such crates had been continually demanded.

**12. SALES  $\Rightarrow$ 176(1) — INFERENCE OF INTENTION TO WAIVE BREACH OF CONTRACT.**

The question of waiver of breach of sale contract is mainly one of intention, and such intention cannot be inferred from acts performed under circumstances such as renders the acts involuntary or compulsory.

**13. SALES  $\Rightarrow$ 174—DEFAULT OF BUYER AS EXCUSE FOR SELLER'S BREACH.**

In an action by truck growers for breach of contract to furnish onion crates, failure to make a partial payment for crates received after breach by defendant *held* not to excuse such breach on defendant's part.

**14. SALES  $\Rightarrow$ 172—RESALE OF SOME OF ARTICLES FURNISHED AS EXCUSING FAILURE TO DELIVER BALANCE.**

Where a contract to furnish onion crates to the members of a truck growers' association merely obligated defendant to deliver such crates as were needed for the crops of the members of the association, and did not prohibit resale, that some of the crates were disposed of to a nonmember for the use of his tenants who were members did not constitute a breach excusing seller's failure to deliver remainder of crates contracted for.

**15. SALES  $\Rightarrow$ 417—EVIDENCE AS TO DAMAGE IN BUYER'S ACTION FOR BREACH.**

In an action by members of a truck growers association for breach of defendant's contract to furnish crates in which to market their 1917 crop of onions, the crates to be furnished as needed, where defendant contended that, by a more judicious distribution of crates received among the members, damages arising from failure to deliver balance of crates could have been lessened, evidence *held* not to show an improper distribution of the crates.

Appeal from District Court, La Salle County; Covey C. Thomas, Judge.

Action by the Valley Wells Truck Growers' Association and others against the Mayhew & Isbell Lumber Company. Judgment for plaintiffs, and defendant appeals. Reversed and remanded.

Martin & Martin, of Uvalde, Templeton, Brooks, Napier & Ogden, of San Antonio, Vandervoort & Johnson, of Carrizo Springs, and John W. Willson, of Cotulla, for appellant.

W. H. Davis, of Crystal City, and Arnold & Cozby, of San Antonio, for appellees.

MOURSUND, J. In stating the case we avail ourselves, to a large extent, of the statement in appellant's brief:

"This suit was brought in the district court of Dimmit county, Tex., by the Valley Wells Truck Growers' Association and J. T. Baber, G. B. Penn, Alfonse Dauwe, O. A. Hiatt, Peter Hooce, C. P. Hooce, L. W. McCarley, Pol Michiels, H. D. Martin, W. B. McCarley, F. M. McCarley, B. F. McCarley, Leon McCarley, William O'Brien, S. J. Potter, J. F. Storoszyoszyn, Peter Storoszyoszyn, O. Vande Walle, Peter Vande Neut, Hector Williams, W. S. Wilburn, A. A. Hussey, I. H. Warren, C. H. Moore, Louie Kurlanski, W. A. Jones, Frank Wolverton, W. A. Shumate, P. D. Woolwine, and A. H. Rife, as plaintiffs, against the Mayhew & Isbell Lumber Company, a corporation, as defendant. It was alleged that the association was organized and conducted for the mutual profit of its members, consisting of the aforesaid 80 individual plaintiffs; and it was also alleged that the association constituted a partnership composed of its said members. The association sued in its own behalf and also in behalf of its members. The suit was to recover damages in the sum of \$29,710.00, alleged to have been sustained by reason of the breach by defendant of its contract to furnish plaintiffs with crates in which to pack their onion crops for 1917. The cause of action alleged by plaintiffs in their second amended original petition, on which the case was tried, is this:

"That plaintiffs are engaged in the business of growing onions for the market, and that in the spring of 1917 they had about 200 acres planted in onions, which they estimated would produce 300 bushels to the acre. That the onion is a perishable vegetable, which must be harvested as soon as same is matured in the field, and then packed in bushel crates and marketed at once, or same will deteriorate, rot, etc. That onions mature in that section from April 15th to May 15th. That, in order to be assured of crates in which to pack and market their said crop, plaintiff approached defendant on or about March 16, 1917, and told defendant that they would need 60,000 crates or more in which to hold, harvest, and sell their said crop, and that they would begin digging and crating about April 20th, and that they desired to buy crates, not as merchants or dealers to sell upon the market, but for the purpose of packing, harvesting, and selling therein their said crops. That 'the defendant on or about March 16, 1917, and on or about March 22, 1917, accepted an order from the plaintiffs for 60,000 bushel onion crates to be used by plaintiffs to pack, harvest, and market their 1917 crop in, and contracted and agreed to deliver to the plaintiffs immediately, f. o. b. Las Vegas, Tex., 80,000 Cummer pine onion crates, and further agreed to furnish the plaintiffs such additional Cummer pine onion crates, delivered f. o. b. Las Vegas, Tex., as needed by the plaintiffs to pack their 1917 onion crops, and the defendant agreed to sell these crates to the plaintiffs for the purpose of being used to pack their 1917 crop therein, at a price of 15 cents each, cash, or 15½ cents payable as the

onions were sold, and as a further consideration for said contract the defendant required of the plaintiffs that they pay on the purchase price of said onion crates \$4,500.00 in cash, which cash payment the plaintiffs made in accordance with said contract, and the said contract was, on March 22, 1917, reduced to writing, and said contract was the joint contract of the plaintiffs with defendant." The contract then set out is copied in the findings of fact.

"The plaintiffs further alleged that by said agreement and in consideration of said cash payment, as hereinabove set forth, the defendant contracted and agreed to immediately deliver to the plaintiffs 30,000 Cummer pine onion crates, and agreed to furnish the plaintiffs such additional Cummer pine onion crates as they may require as needed to pack their 1917 onion crop, for the consideration of 15 cents per crate cash, or 15½ cents per crate when the onions are sold. That defendant knew all said facts, and knew that an unusually large onion crop was being raised in Texas in 1917, and that there was a scarcity of onion crates, and that the early onions to reach the market would command a higher price than those reaching the market later, and that plaintiffs would be unable to procure crates anywhere else in the event defendant failed to furnish same in accordance with said contract. That plaintiffs' said crop consisted of 60,446 bushels, and was matured in the field and ready to harvest on or before May 10th. That, had defendant complied with its contract and furnished said number of crates (60,446) to plaintiffs on or before said date, they could and would have marketed their entire crop on or before May 20th at \$1.50 per bushel. That defendant furnished plaintiffs the first 30,000 crates in time, and plaintiffs marketed 30,609 bushels of their crop without loss. That defendant furnished plaintiffs 4,000 crates about May 20th and 4,000 more about May 27th, which were used by them; but that same were not furnished in time, and were furnished so late that the onions packed therein were damaged so that same had to be sold at a loss. That defendant thereafter furnished plaintiff 4,000 more crates, but same were delivered so late that they could not be used on account of plaintiffs' crop being entirely ruined when same were received. That defendant never furnished plaintiffs any more crates. That plaintiffs sold 17,322 bushels of damaged onions at a loss, and that the remainder of their crop (12,515 bushels) was a total loss. That plaintiffs 'frequently and constantly, to wit, every day from the time of entering into said contract until said onion crop was completely destroyed, \* \* \* demanded crates of the defendant.' That they made every effort to get crates from other sources, but were unable to do so. That, by reason of the deterioration and destruction of their onions and the decline in the market price, due to defendant's failure to furnish crates in time and in accordance with said contract, plaintiffs were damaged in the net sum of \$29,710.00, which damages were reasonably in contemplation of both plaintiffs and defendant at the time said contract was entered into as a probable result of the breach of said contract by defendant. That said onion crops of plaintiffs were owned, raised, and harvested by

the individual plaintiffs separately, but that the seed were obtained for them by the association, and the association looked after the marketing of the crops of its said members and purchased the crates in which to market same. That all the members were interested in the crop of each member, in that by the arrangements for seed, crates, packing, marketing, etc., a uniform pack and grade were secured and better prices obtained. That the contract to purchase crates from defendant was a joint contract and joint enterprise of all the plaintiffs. The petition and exhibits attached thereto show that there was no loss or damage to the crops of 10 of the individual plaintiffs. The exhibits show the acres planted in onions by each of the 20 individual plaintiffs who suffered damage to their crops, the number of bushels raised by each, the number of crates received by each in time and on which no loss was suffered, the number of bushels raised by each on which a loss was sustained, and the amount of loss sustained on the crop of each."

The defendant interposed pleas of misjoinder, a general denial, and a special denial under oath of the partnership. In addition, it pleaded various matters of defense which will be sufficiently disclosed in the discussion of the assignments of error.

"The plaintiffs, by supplemental petition, pleaded that defendant dealt with them as an association in the making of the alleged contract, and was estopped from denying their right to sue jointly as an association and as joint participants in a joint venture; to which plea defendant interposed a general denial. The plaintiffs, by trial amendment, pleaded that the alleged written contract sued on was accepted by them, and they became bound to purchase from defendant the crates needed by them to pack their 1917 crop in and pay therefor the stipulated purchase price, and became bound to accept from defendant and pay for the said 60,000 crates ordered by them from defendant as set forth in their petition, all of which defendant agreed to do. The defendant, by trial amendment, pleaded that all the crates furnished by it were not used for the purposes for which same were furnished, but that some of them were diverted from that use, to wit, about 2,000 of the said crates so furnished by defendant were sold to one Hendrickson, or were turned over to and used by him on terms unknown to defendant, and that this constituted a breach of the alleged contract, and that a part of the alleged damages was caused by reason of said crates not being used for the purposes for which same were furnished, to which plea plaintiffs interposed a general denial."

The venue was changed to La Salle county. The pleas of misjoinder were tried with the case on the merits and overruled. Judgment was entered for plaintiff association for and in its own behalf and in behalf of 20 individual plaintiffs for \$6,870.15; also, for said 20 individual plaintiffs jointly for said sum of \$6,870.15; and against 10 of the individuals who were plaintiffs.

The findings of fact and conclusions of law are as follows:

### "Findings of Fact.

"(1) The Valley Truck Growers' Association on March 22, 1917, entered into a written contract with the Mayhew & Isbell Lumber Company, which contract was as follows:

"Big Wells, Tex., March 22, 1917.

"This is to certify that we have received of the Valley Wells Truck Growers' Ass'n, through their agent, A. H. Rife, four thousand five hundred (\$4,500) dollars as payment in full for 30,000 Cummer pine onion crates now in transit for immediate delivery f. o. b. Las Vegas, Texas.

"In consideration of the above payment in cash, we agree to furnish the Valley Wells Truck Growers' Ass'n. of Valley Wells, Texas, such additional Cummer onion crates as they may require delivered f. o. b. Las Vegas, Texas, as needed to pack their 1917 onion crop in at 15 cents each cash or 15½ cents payable as onions are sold.

"Mayhew & Isbell Lumber Co.,

"By [Signed] R. C. Nipper."

"(2) At the time of and before entering into this contract, the Mayhew & Isbell Lumber Company knew that the crates called for in the contract were being purchased for a special purpose, namely to enable the members of the Valley Wells Truck Growers' Association, whose names are set forth in the petition, to harvest and market their 1917 onion crop, that as many as 60,000 crates in all might be required for such purpose, and that a crate contains one bushel.

"(3) At the time of and prior to entering into said contract, the 1917 onion crop referred to was planted on approximately 200 acres of ground and, when matured, partly in April and partly in May 1917, consisted of approximately 58,000 bushels of marketable onions.

"(4) The defendant breached its contract in that it failed to deliver 24,000 crates in time, to wit: On or before May 24, 1917, which is the date the court finds was the date for such delivery in the reasonable contemplation of the parties at the time said contract was made on March 22, 1917. Had the 24,000 crates been delivered on May 24th, the onions could have been packed therein and put on the market and sold May 30-June 4, 1917.

"(5) As a result of such breach of contract, a loss was suffered by plaintiffs, in that 11,000 bushels of onions were not harvested and marketed at all and 13,000 bushels were marketed at a loss.

"(6) The amount of the damages suffered by plaintiffs as a result of the defendant's breach of said contract was \$8,070.15.

"(7) Defendant is entitled to a credit of \$1,200.00 to be deducted from amount of said damages as plaintiffs admit they owe defendant that much money for 8,000 crates delivered and not paid for.

"(8) The defendant on or before March 22, 1917, knew that an onion is a perishable vegetable, that plaintiffs had a healthy growing crop which would mature and be ready for market in the latter part of April and during May, 1917, and that the crop might aggregate as much as 60,000 bushels of onions, and knew from the government reports that an unusually large onion crop was in prospect, and that there probably would be a shortage of

crates, and defendant knew all set out in this paragraph at and before the time of entering into the said contract.

### "Conclusions of Law.

"1. I conclude that the pleas of misjoinder are without merit and that same should be overruled.

"2. I further conclude that the contract upon which the suit was based is a valid existing contract and that defendant is liable to plaintiffs as set forth in the decree."

The contention that there was a misjoinder of parties plaintiff and causes of action was properly presented, and overruled, and by appropriate assignments of error complaint is made of such ruling. The allegations with respect to the matter, as contained in appellant's second or supplemental plea, are as follows:

"The damages alleged to have been sustained by reason of the alleged breach of contract did not accrue to the alleged association as such, or to the alleged partnership as such, or to the individual plaintiffs as members of said association or partnership, jointly or in common, but to some of the individual plaintiffs in their individual capacity, and there is no common or joint interest in plaintiffs in the alleged damages (especially in the loss and damage to crops) and no community of interest in the plaintiffs in the relief sought, and the only parties interested in the recovery and in the particular loss and damage to crops specially shown by the exhibits to plaintiffs' second amended original petition are the individual plaintiffs, who are alleged and shown by said exhibits to have separately sustained the particular damages shown by the separate exhibits, and such claims for damages do not constitute a single cause of action, but each of them constitutes a separate and distinct cause of action in favor of several persons separately; that several of the individual plaintiffs, to wit, eight of them, have no interest in this suit, and especially that they have no interest in the damages sought to be recovered for the individual plaintiffs as are alleged to have been damaged as particularly shown by the exhibits to said petition; that no such partnership existed as that alleged in said petition, the damages alleged (especially the loss and damages to crops) did not accrue to such partnership or to the members thereof as such, and that the alleged loss and damage to crops did not accrue to said association as such or to the members thereof as such; that no such joint contract or joint enterprise existed as is alleged by plaintiffs in said petition. Wherefore, defendant says that there is a misjoinder of parties plaintiff and of causes of action herein, because of the facts aforesaid, in that the said parties plaintiff cannot be properly joined in this suit on the causes of action herein sued on, and of these things it prays judgment."

[1] The Valley Wells Truck Growers' Association was not engaged in the business of buying and selling crates or raising onions for the joint profit of its members. It owned



no land, and was merely the agency adopted by its members for purchasing seed and crates to be used by the members for the purpose of growing and marketing crops of onions owned by them in severalty. The contract is a peculiar one. It is referred to in appellee's brief as having been made in the name of the association, but the association did not constitute an artificial person, capable of contracting as a legal entity. The statute which permits an unincorporated association to sue or be sued in its association name merely furnishes a convenient method of conducting suits, without undertaking to change the legal status of the association or in any way affect the law in so far as it relates to contracts. The use of the name of the association, therefore, was merely for the purpose of describing, instead of naming, the men whose agent Rife purported to be. The contract is that of the members of the association just as if, instead of the association name, it had contained the names of all of the members. The contract was made for the purpose of procuring crates in which to pack "their 1917 onion crop," and such crates, in addition to the 30,000 recited to be in transit, were to be furnished "as they may require." The words, "their 1917 onion crop," might relate to a crop owned jointly by the members, or might relate to crops owned by them in severalty. Viewed in the light of the fact that the members of the association did not own jointly any land or crops, the words must be construed to relate to the crops held in severalty by the members of the association. The contract, then, may be described as one in which the members of the association bind themselves jointly to pay for such crates as are delivered; but the benefits to be derived from the delivery of the crates are to inure to the members, not jointly, but severally. The damages sought to be recovered are shown by the petition to have been suffered by the members severally, except that it was perhaps intended by Exhibit 21 to show a small item of joint damages. The damages found by the court to have been suffered must have been several in character, for it is provided that only twenty of the members are entitled to recover.

In passing upon the questions relating to misjoinder and the form of the judgment, we take it that the inclusion in the pleadings and the judgment of the name of the association adds nothing, for to say that the association sued and recovered a judgment is equivalent, so far as the questions involved are concerned, to saying that the members of the association have sued and recovered judgment.

[2] If there was a misjoinder in permitting the members who suffered damages to join their several causes of action, and to permit all the members to join in with a joint

cause of action, if that be the effect of the allegations and Exhibit 21, the error in permitting the joinder was of such a character as not to require a reversal of the judgment. The trial was before the court, and we are unable to see how the appellant could have been injured by the ruling. *Western Union Co. v. Morrow*, 208 S. W. 680.

[3] However, we are of the opinion that the actions were properly joined, especially under our liberal practice. If the contract had provided how many crates each member was to receive, there would be good ground for appellant's contention; but the contract leaves the matter of the division of the crates to the members. It follows that if separate suits were brought, and the appellant was unable to procure the consolidation thereof, it might be subjected to recoveries for damages caused by failure to deliver more crates than it was bound to deliver. Each plaintiff would view the matter from his particular standpoint and allege his damages in accordance with his views. Each might sustain his contention, and the result would be binding on appellant, but not on the members not parties to the suit. We think it is obvious that appellant was entitled to demand that all parties claiming damages under the contract should join therein, and, this being the case, it follows that it was proper to permit the joinder. *Moore's Adm'r v. Minerva*, 17 Tex. 20; *Robbins v. Ayres*, 10 Mo. 538, 47 Am. Dec. 125.

[4] In this connection, we will take up the objections urged to the judgment, which present a much more serious question. There is a palpable inconsistency in the judgment, in that it awards the sum of \$8,870.15 to the association in its own behalf, which means to the 30 members, and also such sum to the association, for the benefit of 20 of the members. This is a matter which could be corrected by this court, but appellant submits the further objection that the causes of action upon which the recovery was awarded are several, and that it was error to award a joint judgment. The court failed to include in his findings of fact the separate items which go to make up the sum awarded. The judgment discloses, however, that the sum awarded is the aggregate of the amounts found to be due 20 plaintiffs on their demands of a several nature. The proper judgment on the pleadings and proof would have been one awarding each member separately such damages as he proved that he sustained, and it was error to add such several damages together and award the 20 plaintiffs a joint judgment for the same. *Lancaster v. Riley*, 34 S. W. 320; *I. & G. N. Ry. v. Reed*, 189 S. W. 907.

Appellees do not concede that it was improper to award the 20 members a joint recovery, and call attention to the case of *Dunn v. Smith*, 74 S. W. 577, in which sev-

eral plaintiffs were permitted to recover jointly for mental anguish. A writ of error was denied (96 Tex. 478, 73 S. W. 945); but the Supreme Court called attention to the fact that only certain specifications of error were contained in the application, and that questions were raised in the Court of Civil Appeals, concerning which the Supreme Court would have had more difficulty had they been presented to that court. A comparison of the opinions leads to the conclusion that the Supreme Court expressed no opinion on the question whether damages suffered by various persons on account of mental anguish could be treated as joint damages in the pleadings and judgment. The decision of the Court of Civil Appeals was referred to in the case of *Western Union Tel. Co. v. Morrow*, 208 S. W. 689, but for the purpose of sustaining the theory that persons who have suffered mental anguish from the breach of a contract should be permitted to litigate in one suit their causes of action for the damages severally sustained.

We find no objection to the holding that it is not reversible error to permit the several causes of action to be litigated in the same case, but cannot subscribe to any contention that damages which in their very nature are several in character can be described as joint in the pleadings and permitted to sustain a joint judgment.

In support of the contention that the judgment is proper, or at least the error is harmless, appellees also cite the cases of *Murphy v. Gage*, 21 S. W. 396; *Ry. v. Alexander*, 121 S. W. 602; *Wheeler v. Hawkins*, 116 Ind. 515, 19 N. E. 470; *School District v. Edwards*, 46 Wis. 150, 49 N. W. 968.

The first-cited case was decided prior to the case of *Faires v. Cockerell*, 88 Tex. 428, 31 S. W. 190, 639, 28 L. R. A. 528, from which it will be seen that the court erred in the cited case with respect to the nature of the cause of action. However, the court did not hold that a joint judgment would have been proper, but merely that, if it was error to render separate judgments, one of the persons against whom a judgment was rendered could not complain because judgment for the entire amount was not rendered against him and the other surety. It is difficult to conceive of a person being injured by rendering a judgment against him for \$100, instead of one under which \$200 could be collected from him.

The case of *Ry. v. Alexander* was an action for damages under the death statutes, and the construction of such statutes furnishes no precedent in this case. The statute treats the sum to be recovered as a fund to be recovered by those who have suffered pecuniary loss.

The case of *Wheeler v. Hawkins* is one in which a trust fund had been diverted, and the trustee, and those who had acquired an

interest therein by subrogation, sued to recover such fund. That the court considered the case as one involving one cause of action for a certain fund is shown by the case cited by it which was one in which the beneficiary and mortgagee sued on an insurance policy. The case of *School District v. Edwards* was also one to recover a certain fund, the debt being evidence by a duebill directed to be delivered to one of the districts for the benefit of all, the proceeds to be divided in proportion to number of scholastica.

The holdings with respect to the recovery of a fund find their basis in the fact that there is only one cause of action. We find no cases holding that when the causes of action are separate and distinct, being dependent upon different sets of fact, it is permissible to render a joint judgment in favor of the plaintiffs for the aggregate sum of the damages severally suffered upon distinct and separate causes of action.

Appellees make the further contention that the association, because of the fact that the contract recites that it is made by it, is authorized to sue thereon for all damages sustained by reason of its breach, and that therefore the judgment in its favor for the aggregate of the damages is proper. This contention is in effect that all the members may sue to recover the damages suffered severally by some of them, and recover a judgment for the aggregate of the amounts of damages thus severally sustained. One of the principal cases relied upon by appellees is that of *Cleveland v. Heidenheimer*, 92 Tex. 108, 46 S. W. 30. In that case it was held that if Heidenheimer made the contract on his individual account and transferred a half to Hawley, he could have sued alone, because an assignment of a part interest in a chose in action is not good at common law, and is only good in equity, and therefore Heidenheimer remained the owner of the legal title. It was further held that, if Heidenheimer made the contract for the partnership in the first instance, he could have maintained suit alone, or the partnership might have sued; that the rule of undisclosed principal applied. There being no assignment of any interest in the contract involved in this case, the first rule referred to in the case of *Cleveland v. Heidenheimer* can have no application. The second rule applies when there is an agent who contracts for an undisclosed principal. This is not such a case, and, if it were, the further rule would apply that when the principal himself sues the agent's right to recover becomes extinguished, for the right of the agent and principal to sue is alternative and not joint. *Mechem on Agency* (2d Ed.) § 2024; *Corpus Juris*, vol. 2, § 899.

We are also at a loss to see how the bringing of the suit by an agent could change the nature of the causes of action upon which he might sue and make joint those which are

several. Appellees also rely upon the cases relating to suits by consignors of live stock upon contracts of shipment. These cases are to a large extent based on the rule permitting the agent to sue in his own name when the principal is undisclosed. *Railway v. Stanley*, 89 Tex. 42, 33 S. W. 100. However, our courts have adopted a rule with reference to shipment contracts, to the effect that the possessory title of the shipper legally in possession of property is sufficient to authorize the collection by him of the damages growing out of the negligent performance of the contract of shipment. *Railway v. Morris*, 100 Tex. 611, 102 S. W. 396, 123 Am. St. Rep. 884; *Railway v. Dinwiddie*, 146 S. W. 281; *Railway v. Littlefield* (Sup.) 154 S. W. 543. We do not regard those cases as of any assistance in deciding the question whether in this case a judgment could properly be rendered in favor of the 30 members jointly for a lump sum to be held by them for the joint benefit of 20 out of the 30. The owners of the distinct and separate causes of action were parties to the suit, and the proper judgment under the statute and the rules of the common law was one awarding each a judgment upon his cause of action for such sum as he proved himself entitled to.

The suggestion that the rendition of a joint judgment for a lump sum in favor of the plaintiffs who proved up to some extent the several and distinct causes of action alleged by them, if error, constituted harmless error, is without merit. The only argument offered in its support is that it is immaterial to whom appellant pays the money if the judgment bars a subsequent suit. It may become a matter of importance to a litigant to have separate judgments against him, for conditions may arise calling for application of the rule permitting the offsetting of judgments against each other. Regardless of whether any actual injury is shown or probable, the statute requires that a judgment shall conform to the pleadings and the nature of the case proved. This statute confers rights upon both litigants, and when it is violated, as it was in this case, the judgment should be reversed.

As the trial court did not embrace in his findings the items of damages found by him to have been suffered by the 20 plaintiffs, there is no basis for a judgment by this court, and the cause must be remanded. The foregoing conclusions lead us to overrule the first four assignments and also No. 34, and to sustain assignments 31, 32, and 33.

[5] Appellant contends there was no such contract as is relied upon by plaintiffs, the contention being based upon the theory that the instrument copied in the findings of fact and signed by appellant was never accepted by the association. There is no merit in the contention. The instrument was prepared by Rife, who represented the asso-

ciation. It was signed by appellant and delivered to Rife, who thereupon made the cash payment of \$4,500. The contract was completed, and the minds of the parties met upon the terms expressed in the writing, which took the place of all previous verbal negotiations. The fifth and sixth assignments are overruled.

[6] It is contended that the undisputed evidence shows that the minds of the parties did not meet with respect to the number of crates defendant was to sell and deliver and the association was to buy and receive, or as to the time when same were to be delivered, and that therefore the court erred in finding that the alleged written contract was a valid existing contract. The contract being in writing and having been signed and accepted, it would seem that it must be accepted as the best evidence concerning the result of the negotiations, and the questions should be directed to its legal sufficiency, and whether, in view of the evidence of what the parties did with respect to the same, the defendant is liable under the terms thereof. We will therefore overrule the seventh and eighth assignments which present the contention above stated.

[7] The appellant by its ninth assignment contends that the contract is void for want of consideration and for lack of mutuality. The theory is that the payment of the \$4,500 for the first 3,000 crates which is recited in the instrument sued on as the consideration for the agreement respecting additional crates was simply the payment of a pre-existing obligation, which the association was legally bound to satisfy at and prior to the time of the execution of said instrument, and therefore such payment was not a valid consideration for the agreement respecting additional crates, and that the instrument leaves it optional with the members of the association whether or not they will take additional crates, and therefore the part of the instrument relating to additional crates is unilateral.

The negotiations related to 60,000 crates from the start, and the proposition made by Rife was that he would take 30,000 crates for immediate delivery and pay cash for same at 15 cents per crate and 30,000 crates for future delivery at the same price. The appellant wired and wrote Cummer Manufacturing Company of this offer, and upon hearing from said company notified Rife that his proposition would be accepted. Rife, on March 22, 1917, went to appellant's agent and wrote out the instrument relied on as the basis for this suit, and paid \$4,500. It is true that at that time the first 30,000 crates were en route, having been diverted from other customers; but the court was authorized to find that there was no separate contract for said 30,000 crates, and that, if appellant had at any time prior to accepting

the written instrument declined to consider the proposition except as to the 30,000 crates for which cash was to be paid, Rife could have declined to accept and pay for said 30,000 crates; that the written instrument was the final agreement in which all negotiations were merged; and that it spoke the truth in stating that the payment of \$4,500 cash was a part of the consideration for the agreement to sell crates additional to the 30,000. There being a valid consideration for the agreement with reference to additional crates, it appears to us that it is immaterial in so far as the ninth assignment is concerned that the agreement failed to bind the association to purchase any additional crates, but gave them the privilege of doing so. *Roberts v. Anthony*, 185 S. W. 423; *Staples v. O'Neal*, 64 Minn. 27, 65 N. W. 1083; *R. C. L.* p. 686, *Contracts*, § 93; *Corpus Juris*, vol. 13, § 183.

The tenth assignment appears to present two theories: First, that the contract is void for uncertainty as to the number of crates to be delivered; and, second, that if not void on its face, it required notice to fix the number of crates, and that the evidence failed to show that the number had ever been fixed by notice.

[8] The language of the contract is not plain. Appellant contends that the word "require" should be given the meaning "demand," and that the contract should be construed to mean that appellant bound itself to deliver such number of crates as plaintiffs might demand, and that this renders the contract void for uncertainty. No contention can be sustained that the association could require the delivery of more crates than necessary for the 1917 crop, but appellant contends that it was left optional with the association to take such number as it might desire not to exceed the number needed for the crop. If this were true, it would not render the contract void, but would leave the number to be fixed by subsequent notice given a reasonable time before the time when the crates would be needed. What we have heretofore said concerning the consideration need not be here repeated. It appears to us to be immaterial whether the contract bound the association to take all the crates needed or only such as they demanded, in view of the fact that the agreement was supported by a valid consideration.

The contention of appellant with respect to the matter of notice of the number of crates needed may be considered in connection with the assignments which deal more specifically with the question. The eleventh and twelfth assignments question the court's finding that defendant breached the contract in that it failed to deliver 24,000 crates in time, to wit, by May 24th; the contentions being, first, that it did not receive any notice at all that such number of crates would be

required, and, second, that notice was not given in time to enable defendant to deliver the crates by May 24th. The court was warranted in finding that in addition to demands for crates, apparently indefinite as to number, made prior to April 28th, on that date appellant's agent received definite notice that 30,000 crates were desired in addition to the first 30,000 mentioned in the contract; also, that this notice gave appellant a reasonable time in which to have effected delivery by May 24th.

[9] The contract contains no provision from which any intention can be inferred to make the sale and delivery of crates dependent upon the ability of appellant to procure the crates from the Cummer Manufacturing Company or any one else. Parol testimony would not be admissible to ingraft a condition upon a plain contract. If there had been any ambiguity in the language with respect to the point under discussion, the evidence would certainly support a finding that the contract was made after due inquiry by appellant to satisfy itself of its ability to procure the crates, and that it was intended to be absolute and unconditional. Assignments 13 and 14 are overruled.

[10] We are unable to see any merit in the contention that time was not of the essence of the contract. All of the facts and circumstances show that it was fully understood that the crates were for the purpose of marketing the onions, and that it was desired to market the onions promptly after taking them out of the ground. The fifteenth assignment is overruled.

The sixteenth assignment only embraces contentions already disposed of, and will be overruled.

[11] Appellant contends that, by accepting and using a car of crates received June 5th and accepting a car received June 10th, the association waived the breach of contract by defendant, and also contends by separate assignments that by accepting such crates there was a waiver of the damages suffered by failure to deliver in time the said 4,000 crates delivered June 5th and the 4,000 delivered June 10th. The statement in support of these assignments shows that, after the date found by the trial judge to be the one by which delivery should have been made, Rife received, accepted and used one car of crates, and received and accepted another car; also, that on the following day he telegraphed appellant, "Give us Las Vegas one car crates quick," and on the next day, June 12th, telegraphed appellant that the association could not use any more crates because it was too late to save the balance of the crop.

[12] The evidence discloses that Rife continually demanded crates; that he would not have been justified in waiving the time, as the crops had to be marketed at once; that

it was impossible to get a sufficient number of crates from other sources; that such crates as could be procured were purchased and used; that other containers were purchased and used; that if the crates had not been accepted and used appellees would have been subject to the charge failing to minimize damages. The question of waiver is mainly a question of intention. Intention to waive cannot be inferred from acts performed under circumstances such as render said acts involuntary or compulsory. 40 Cyc. p. 259, 261; Van Winkle v. Wilkins, 81 Ga. 93, 7 S. E. 644, 12 Am. St. Rep. 299. The court was fully warranted in finding that the evidence failed to show a waiver.

The assignments are overruled.

[13, 14] There is no merit in the twentieth assignment, wherein it is contended that the failure to pay for part of the crates, such default occurring after the breach of the contract by appellant, would excuse the breach by appellant, and relieve it from damages suffered by reason of its breach. The further contention is made in the twenty-first assignment that the contract was breached by the association in that it disposed of 2,000 crates out of the first 30,000 to Hendrickson. We are unable to see how there could be a breach of the contract by disposing of these crates. The contract did not obligate appellant to deliver any more crates than were needed for the crops of the members, and, if such a number of crates had been delivered and all had been sold by Rife and none used by the members, appellant would not have been liable for any damages. The contract contains no provision prohibiting resale. In fact, the only contention that could be urged is that certain damages were caused by this resale, and that the same should not be charged to appellant. However, the evidence shows that all of these 2,000 crates were used by members of the association; that Hendrickson bought them for the use of his tenants who were members of the association, and distributed them as they needed them.

[15] The appellant makes the further contention that there was an improper distribution of crates; that is, that by a more judicious distribution as needed the damages could have been lessened. It appears from the statement that the 20 plaintiffs who are alleged to have sustained damages raised 51,081 bushels and only received 21,244 crates of the 30,609 in which shipments were made without loss, while the 10 who suffered no damages raised 9,365 bushels and received 9,365 crates. This alone is not sufficient to show improper distribution. The association could not presume in advance that the contract would be breached, and, so far as is disclosed by the evidence, when it divided out the 30,609 crates, was guilty of no negligence in permitting those who wanted crates

for their entire crops to take them at that time. The contract did not impose the obligation to distribute the crates as received in proportion to crop estimates. So far as the issue of minimizing damages is concerned, no evidence is pointed out showing that any distribution made after the contract was breached was negligent in that if it had been differently made the damages would have been lessened.

By assignment No. 23 it is contended that defendant was not bound by the contract to furnish crates in which to pack the separately owned crops of the individual plaintiffs. This assignment is overruled. Our views with respect to this point are disclosed in the discussion of the assignments relating to misjoinder, and the form of the judgment.

The twenty-fourth, twenty-ninth, and thirtieth assignments will be considered together. The contentions are: (1) That no judgment should have been rendered against appellant because the undisputed evidence shows that the damages recovered were sustained before May 24th; (2) that the court's fifth finding of fact is not supported by evidence, in that the evidence establishes that the loss and damage accrued in large part (if not entirely) before May 24th, and the balance, if any, would have been sustained in spite of the alleged breach, and could have been avoided by ordinary care and diligence; (3) that the sixth finding is unsupported by evidence.

The statements submitted in support of these assignments merely show that considerable damages accrued before May 24th, and do not point out any evidence showing that the court was not warranted in finding that if delivery of sufficient crates had been made the damages adjudged by him against appellant could have been prevented. The damages were alleged to be \$32,002.77, and the court found the amount to be \$8,070.15. This may be explained on the theory that an excessive sum was claimed, or on the theory that the court differed with plaintiffs with respect to the date of the breach. The court found that 11,000 bushels had not been harvested and marketed on account of the breach of contract, and that 13,000 bushels were marketed at a loss. No request appears to have been made for findings showing how much was allowed by the court for the onions not marketed, and how much for those marketed at a loss. Perhaps the 11,000 bushels were damaged to some extent by the time they could have been shipped had crates been furnished on May 24th, but we are unable to say that the court did not take such damaged condition into consideration. The court found they could have been sold "May 30-June 4, 1917." No evidence is pointed out in the statements showing what said onions, in their damaged condition, conceding they were damaged, would have brought at

the time when they could have been sold had the crates been delivered on May 24th. As onions were shipped in the crates received June 5th, it may be inferred that some at least were not worthless at that time. There is no contention that the evidence discloses that all onions not shipped by May 24th were worthless, nor does appellant contend that the statement contains all the evidence from which the court might determine whether loss was incurred by the failure to deliver crates on May 24th, and, if so, the extent thereof. Under the circumstances, the assignments must be overruled.

We deem it unnecessary to discuss at length assignments 25, 26, 27, and 28, relating to the issue whether appellant had such knowledge as would make it liable for special damages suffered by the owners of the crops. The evidence was ample to support the findings of the court in so far as they bore materially on the right to recover such special damages as were shown to have been suffered.

The judgment is reversed, and the cause remanded.

#### VARN v. MOELLER. (No. 1005.)

(Court of Civil Appeals of Texas. El Paso. Nov. 6, 1919. Rehearing Denied Nov. 28, 1919.)

#### 1. BROKERS $\S$ 57(2)—COMMISSION EARNED BY SECURING PURCHASER READY, ABLE, AND WILLING TO BUY.

A real estate broker having furnished the purchaser, ready, able, and willing to buy and on the proposed terms, and who was accepted by the seller, was entitled to recover his commission, although the sale was finally made by the seller on terms satisfactory to himself and different from those originally agreed upon between purchaser and broker, and particularly where the purchaser insisted that he bought through the broker, and must close the deal through him.

#### 2. TRIAL $\S$ 351(5)—REQUESTED SPECIAL ISSUE PROPERLY REFUSED IN VIEW OF OTHERS SUBMITTED.

In a broker's action for commission, where the court had submitted to the jury in the first two issues in his general charge, the ultimate and controlling issues of the case held not error to refuse to submit any one of the requested special issues.

#### 3. TRIAL $\S$ 350(4)—REFUSAL OF REQUESTED SPECIAL ISSUES CONTAINING NONGERMANE QUESTIONS.

In action for commissions on sale of property by broker, requested special issue, embracing making of agreement not germane to real issue in the case, held properly refused.

#### 4. TRIAL $\S$ 273, 352(2)—TIME FOR PREPARING OBJECTIONS AND FOR FILING OF SPECIAL ISSUES.

In a broker's action for commission, where the court's charge submitted only three issues and the controlling issues were exceedingly few and simple, and the court adjourned from 11:45 a. m. until 2:30 p. m., requiring that all special issues be prepared in the interval, and appellant prepared and filed objections to the court's charge, and it does not appear what further objections appellant wanted to prepare, the assignment that the court erred in not granting more time must be overruled.

#### 5. APPEAL AND ERROR $\S$ 1050(1)—HARMLESS ERROR IN ADMISSION OF EVIDENCE.

In a broker's action for commission on the sale of real estate, that appellant owner admitted or denied in a letter his liability for commission would be so remote to the real issues that the introduction of the letter would not be reversible error.

Appeal from District Court, El Paso County; P. R. Price, Judge.

Suit by William Moeller against George W. Varn. Judgment for plaintiff, and defendant appeals. Affirmed.

M. W. Stanton, of El Paso, for appellant.  
Jones, Jones, Hardie & Grambling, of El Paso, for appellee.

WALTHALL, J. Appellee, William Moeller, brought this suit to recover of appellant, George W. Varn, \$687.50 as commissions alleged to be due appellee for the sale of certain real estate effected through him as a broker. Appellee was a real estate broker in the city of El Paso, Tex.

Appellant, the owner, listed certain real estate with appellee for sale. Appellee alleged that he, on terms satisfactory to appellant, sold the real estate to A. Stolaroff for \$13,750, and in separate counts alleged that a commission of 5 per cent. on the gross selling price of the property sold was agreed upon for effecting said sale, the first count declaring upon an express contract for said commission, and the second count declaring upon an implied contract.

Appellant answered by general demurrer, general denial, and a special denial of certain allegations in the petition, and alleged that the property claimed to have been sold was under a mortgage, and that under the agreed terms upon which the property was to be sold the property was to be released from the mortgage and cash paid for the property; that appellee was to consummate said agreement before he was entitled to a commission, and that said agreement was never consummated; that a sale was made to A. Stolaroff, but by agents other than appellee.

Upon special issues submitted the jury found: First, William Moeller was the procuring and efficient cause which induced A.

Stolaroff to purchase the property, and which enabled appellant to sell the same to A. Stolaroff; second, it was mutually understood or contemplated by appellant and appellee that appellant should pay appellee a commission of 5 per cent. upon the purchase price of said property, if said property should be sold by appellee for a sum satisfactory to appellant and on terms satisfactory to appellant; third, the reasonable value of appellee's services in procuring the sale of said property was \$687.50. Judgment was rendered on the verdict for appellee for the amount found by the jury.

Appellant presents 23 assignments of error, and further insists that it was fundamental error to overrule appellant's general demurrer. We think the court was not in error in overruling appellant's general demurrer. Appellant's first assignment is a copy of a large portion of his lengthy motion for a new trial, embracing appellant's deductions of fact from the evidence, propositions both of law and fact, and neither the assignments nor propositions thereunder distinctly specify or point out that part of the proceeding contained in the record in which error is complained of so as to identify it. We gather, however, that appellant's insistence under this assignment is: First, that the original contract of sale made by appellee to Stolaroff was made subject to approval by appellant, and that the evidence shows that appellant never approved the sale as originally made by appellee with Stolaroff; second, that it appears from the evidence that appellee never carried out any agreement by which he was to receive a commission, as same was not consummated; that appellee was not the efficient procuring cause of the sale; that the alleged agreement under which appellee claims a commission was without consideration; that appellee made no agreement with Stolaroff satisfactory in its terms to appellant; and that the verdict and judgment are wholly unsupported by the evidence. The assignment is not sustained by the record. The evidence is undisputed that appellant listed the property for sale with appellee. The evidence shows, and the jury found, that appellee found the purchaser, and was the procuring and efficient cause which induced the purchaser, Stolaroff, to finally purchase the property. The evidence shows that, while the terms of the sale as first outlined and agreed upon between appellee and Stolaroff were somewhat changed in the final consummation of it, the property was sold by appellant to Stolaroff, and for the amount of money originally agreed upon. As soon as appellee agreed with Stolaroff on the amount at which the property could be purchased, he so advised appellant, and insisted on appellant coming to El Paso at once. Appellant by telegram or letter accepted the terms of the sale with some few minor provisions, came on to El Paso, and made the sale.

[1] Appellee, having furnished the purchaser ready, able, and willing to buy, and on the proposed terms, and who was accepted by the seller, was entitled to recover, although the sale was finally made by the seller, on terms satisfactory to himself, and on terms different from those originally agreed upon between the purchaser and appellee. Stolaroff was ready, able, and testified that he was willing, to pay all cash, or to assume the indebtedness on the property and pay the difference in cash. Stolaroff further testified that no real estate dealer other than appellee negotiated with him about the property, and in effecting the purchase insisted that he bought the property through appellee and must close the deal through appellee. *Webb v. Harding* (Com. App.) 211 S. W. 927; *Goodwin v. Gunter*, 185 S. W. 295, and same case on rehearing, 195 S. W. 848.

[2] The court was not in error in refusing to submit any of the special charges requested by appellant. In our opinion the court had submitted to the jury in the first two issues the ultimate and controlling issues in the case in his general charge, and it was not error to refuse to submit any one of the special issues.

[3] As to special issue 5, as submitted by appellant, as we understand it, it did not include the entire contract appellee had undertaken, to find a purchaser for the property and for which service, if successful, he was to receive the commission as stated in appellee's petition, and upon which he had offered his evidence, but the question to the jury in the special issue was whether at a much later date, and after appellee's original contract with Stolaroff had been made, appellant and appellee then entered into the contract by which appellee would find a purchaser on terms stated, and whether under the agreement then made appellee was to receive a commission of 5 per cent. on the purchase of the property, and whether under that agreement the sale was to be closed before the day stated. To which special issue the court added the words: "And this was the entire agreement relating to the property at the time inquired about."

The special issue 5, as submitted by appellant, was misleading. It seems to us immaterial whether appellant and appellee entered into any such contract or not. It had reference only to some of the conditions of sale appellant was insisting upon while the sale was pending and did not embrace the contract sued on, nor the facts shown in evidence by appellee in effecting the sale to Stolaroff. As submitted by the court, and having the contract referred to to relate back and cover the entire transaction as a whole, the jury answered No. It is difficult to tell just what was the issue meant to be submitted to the jury. Omitting from the issue the

words the court added, had the jury answered No, to the question, it would have meant only that at that time, and under the group of facts there stated, a contract was not made agreeing to a commission. But such finding would not have determined the issues tendered in the pleadings by either party. As submitted and found by the jury no real issue upon which the case depended was determined. In other words, the jury might have answered the question by Yes or No either as tendered by appellant or as submitted by the court, and the answer would not have determined any issue in the case, for the reason that the group of facts stated in the question constituted neither the cause of action as pleaded nor the defense.

What we have said in discussing other assignments applies to assignments 12, 13, 14, 15, and 16.

[4] The next three assignments complain that the court refused to allow a reasonable length of time within which to make written objections to the court's charge and to prepare and submit special issues. The court adjourned at 11:45 o'clock a. m. until 2:30 o'clock p. m., and required that all special issues be ready to submit at the time to which the court adjourned. Appellant prepared and filed objections to the court's charge. It does not appear what further objections, if any, or what was the nature of the further objections appellant's attorneys wanted to prepare. We are not prepared to say the court abused its discretion in not granting more time. The court's charge was brief, submitting only three issues. The real controlling issues in the case are exceedingly simple and few. The assignments are overruled. *Fred Mercer Dry Goods Co. v. Fikes*, 181 S. W. 1178. As we view the record, the court was not in error in refusing to allow appellant to withdraw his announcement and continue the case.

[5] Admitting that the portion of the letter referred to in the twenty-third assignment should not have been introduced in evidence, a question we need not pass upon, it being self-serving on the facts stated in the letter, we fail to see how its admission in evidence in any way affected the result. It had no bearing upon any of the issues submitted. The fact that appellant admitted or denied his liability for a commission would be so remote to the real issues tendered in the pleadings of either party and the issues submitted by the court that the introduction of the letter could have but little, if any, probative force. It could not be reversible error. While we have not discussed severally each of the assignments, we have carefully considered them, and they are each overruled.

Finding no reversible error the case is affirmed.

ALLEN v. CRUTCHER et al. (No. 9141.)

(Court of Civil Appeals of Texas. Ft. Worth.  
June 28, 1919. Rehearing Denied  
Oct. 18, 1919.)

1. APPEAL AND ERROR §722(1)—ASSIGNMENTS OF ERROR; NUMBERING.

It is a violation of Rule 29 for Courts of Civil Appeals (142 S. W. xiii) for an appellant to number assignments from 1 to 16, and then from 7 to 24, because that causes a duplication of assignments of the same number.

2. APPEAL AND ERROR §305—NECESSITY OF EXCEPTION TO OVERRULING MOTION FOR NEW TRIAL.

Though plaintiff, who was cast below, and whose motion for new trial was denied, did not formally except to overruling of her motion for new trial, *held* that, where it appeared that after such motion was overruled she gave notice of appeal in open court, the appeal may be considered.

3. FRAUDULENT CONVEYANCES §57(5), 206(1)—INDEBTEDNESS AT TIME OF CONVEYANCE AND INSOLVENCY NECESSARY TO RECOVERY.

Where plaintiff, who attacked a conveyance, under Rev. St. 1911, arts. 3966 and 3967, by husband to his wife as in fraud of creditors, failed to show that the demand on which she recovered judgment against the husband two years after the conveyance was in existence at the time of the conveyance, or that the husband was insolvent at the time of the conveyance, there can be no recovery.

Appeal from District Court, Nolan County; W. W. Beall, Judge.

Trespass to try title by J. C. Gray against S. W. Crutcher and wife, in which E. W. Pierce and others intervened as defendants, and in which Mrs. A. A. Allen was allowed to intervene, being substituted as plaintiff. From a judgment for defendants, plaintiff appeals. Affirmed.

Grisham Bros., of Eastland, for appellant. J. H. Beall & Son and Ellis Douthit, all of Sweetwater, and Royall G. Smith, of Colorado, Tex., for appellees.

BUCK, J. J. C. Gray filed suit August 18, 1917, in the form of trespass to try title, against S. W. Crutcher and wife, Mattie Della Crutcher, alleging that theretofore, on July 2, 1917, plaintiff was lawfully seized and possessed of section No. 63, block 22, original survey Texas & Pacific Railway Company, containing 636 acres, in Nolan county, Tex.; that on said date defendants unlawfully entered in and upon said premises, and ejected the plaintiff therefrom, etc.

Defendants, S. W. Crutcher and wife, filed their answer March 30, 1918, in which S. W. Crutcher disclaimed any claim to title in and to said land for himself, and alleged that Mrs. Mattie D. Crutcher owned and held



said land in fee simple as her own individual property. Mrs. Crutcher pleaded not guilty. In another count she pleaded in the way of cross-action for relief, alleging that plaintiff was claiming title under a sheriff's deed to one Mrs. A. A. Allen, purporting to convey said section of land for a recited consideration of \$250, and claiming that said land was owned and held by S. W. Crutcher under a recorded deed. Mrs. Crutcher further pleaded that her husband had no title to said land, and that the purported sheriff's deed to the plaintiff conveyed no title, yet it cast a cloud on defendant's title to the land. Wherefore she prayed that she have a judgment canceling the sheriff's deed to Mrs. Allen, and the deed from Mrs. Allen to the plaintiff Gray, and to remove cloud.

The children of Mrs. Crutcher by a former marriage, to wit, E. W. Pierce, Mrs. Mattie M. Trammell, joined pro forma by her husband, Thomas Trammell, and Annie B. Rogers, joined pro forma by her husband, M. N. Rogers, intervened, alleging that they and the defendant Mrs. Mattie D. Crutcher were the owners in fee simple of said land; that the land was purchased with funds derived from the estate of the father of interveners and their mother; that, after the mother's marriage with S. W. Crutcher, Mrs. Crutcher was appointed guardian of the estate, consisting of a tract of land in Robertson county, Tex., and that she sold said land in Robertson county, and collected other sums of money belonging to said estate, and purchased the section of land in question, taking the title thereto in the name of S. W. Crutcher; that since said purchase the defendants, S. W. Crutcher and Mattie D. Crutcher, at all times recognized the right of the interveners in and to said land, and that the interveners are the owners of an undivided two-thirds interest in said section, and have the right to an immediate partition of said land. Wherefore interveners prayed for a cancellation of the deed under which plaintiff asserted title, and for a judgment in their favor granting the relief prayed for, and for writ of partition.

Other pleadings were filed by the defendants Crutcher and by plaintiff and by the interveners, but it will not be necessary to mention them further at this time, except to state that Mrs. Allen filed her petition of intervention, alleging that she had purchased the land in question from plaintiff, J. C. Gray, and asking that she be permitted to intervene in this suit as party plaintiff, which was permitted by the court.

The cause was submitted to a jury upon special issues, and a judgment was rendered against plaintiff, Mrs. A. A. Allen, from which she has appealed.

The evidence shows that on September 28, 1891, the land in controversy was conveyed to S. W. Crutcher by J. A. Fuller for a re-

cited consideration of \$500 in cash, and the assumption of three vendor's lien notes of \$640 each; that on April 1, 1914, S. W. Crutcher executed a deed to the land to his wife, Mrs. Mattie D. Crutcher, for a recited consideration of \$5,000 paid by grantee, and in consideration of the love and affection of the grantor for the grantee. It is further recited in said deed that said \$5,000 was in full payment of the sum of \$2,000, with accrued interest, loaned by grantee to grantor out of her own separate estate, "about 25 years ago, and this being the first and only payment of said indebtedness by me, the said S. W. Crutcher, and she, the said Mattie D. Crutcher, hereby agreed to accept this deed of conveyance and of the land herein described in full and final payment and liquidation of the above-mentioned debt."

It is in evidence, further, that on March 27, 1916, Mrs. A. A. Allen recovered in the district court of Nolan county a judgment against S. W. Crutcher and others, the judgment being upon a note in favor of Mrs. Allen, with interest and attorney's fees, and being in the sum of \$2,254.90; that on June 8, 1916, the land in question was levied upon, under execution, to satisfy this judgment, and was on July 4, 1916, sold to Mrs. A. A. Allen for the sum of \$250. A deed by the sheriff to Mrs. Allen was executed and delivered the same day. On June 21, 1917, Mrs. Allen conveyed the land to J. C. Gray, for the recited consideration of \$1,500 paid, and on February 1, 1918, Gray reconveyed the land to Mrs. Allen for the same recited consideration, plaintiff claiming title to be in her under the sheriff's deed aforesaid.

It is further in evidence that Mrs. Crutcher qualified as the guardian of the estate of her minor children by her first marriage, and later sold the land in Robertson county belonging to the estate of said minors, and also certain property in McLennan county belonging to Mrs. Crutcher's separate estate; that the money derived therefrom was turned over to S. W. Crutcher, and that he paid some, if not all, of the notes due on the land out of the money derived from the sale of the Robertson county land, and used the funds from the sale of the McLennan county land to make the first payment on the section in controversy, as well as to apply on subsequent payments. Defendant Mrs. Mattie D. Crutcher and the interveners mentioned claimed title by reason of an alleged resulting trust arising out of the use of funds derived from the separate estate of Mrs. Crutcher and the estate of the children in the payment of the purchase price of the section of land in controversy.

[1] Appellant has 31 assignments of error, numbering them from 1 to 16, inclusive, and then beginning with the seventh and ending with the twenty-fourth. Thus the brief contains two assignments numbered 7 and two

numbered 8, etc. This practice is in violation of rule 29 prepared by the Supreme Court (142 S. W. xiii) for the guidance of Courts of Civil Appeals and attorneys practicing therein, which rule, in part, provides "that the assignments as presented in the brief shall be numbered from the first to the last in their consecutive order."

[2] Appellee has filed a motion to dismiss the appeal for the averred reason that the appellant failed to except to the order of the court overruling her motion for a new trial, and that, as the trial below was before a jury, a motion for a new trial was and is requisite to an appeal. An examination of the transcript discloses that no exception was taken by plaintiff below to the overruling of plaintiff's motion for judgment or to the granting of defendant's motion for judgment. The record further discloses that upon the overruling of the plaintiff's motion for a new trial "the plaintiff then and there in open court gave notice of appeal to the Court of Civil Appeals for the Second Supreme Judicial District at Ft. Worth, Tex." It will be noted that the record fails to show that plaintiff formerly excepted to the action of the court in overruling her motion for new trial, but perhaps we are justified in treating her notice of appeal as including an exception to the judgment from which she appeals. At any rate, without approving the omission of a formal exception to the action of the court in overruling the motion for a new trial, and with no purpose to set a precedent justifying such omission, we have concluded to overrule appellee's motion to dismiss, and to entertain jurisdiction.

[3] Appellant's right, if any, to subject the land in question to the payment of a judgment rendered in her favor against S. W. Crutcher and others, must rest upon a showing that at the time the deed was executed by S. W. Crutcher to Mattie D. Crutcher the plaintiff was a creditor of S. W. Crutcher, and S. W. Crutcher was insolvent at the time of said deed from him to his wife, and therefore said conveyance was in fraud of plaintiff's rights as such creditor. The articles of the statute on fraudulent conveyance pertinent to this question are:

"Art. 3966. Every gift, conveyance, assignment, or transfer of, or charge upon, any estate, real or personal, every suit commenced, or decree, judgment or execution suffered or obtained, and every bond or other writing given with intent to delay, hinder or defraud creditors, purchasers, or other persons of or from what they are, or may be, lawfully entitled to, shall, as to such creditors, purchasers or other persons, their representatives or assigns, be void. This article shall not affect the title of a purchaser, for valuable consideration, unless it appear that he had notice of the fraudulent intent of his immediate grantor, or of the fraud rendering void the title of such grantor.

"Art. 3967. Every gift, conveyance, assignment, transfer or charge made by a debtor, which is not upon consideration deemed valuable in law, shall be void as to prior creditors, unless it appears that such debtor was then possessed of property within this state subject to execution sufficient to pay his existing debts; but such gift, conveyance, assignment, transfer or charge shall not on that account merely be void as to subsequent creditors, and though it be decreed to be void as to a prior creditor, because voluntary, it shall not for that cause be decreed to be void as to subsequent creditors or purchasers."

If S. W. Crutcher was solvent at the time he conveyed this land to his wife, April 1, 1914, and able to respond to all just claims against him, or if plaintiff was not at that time a creditor of S. W. Crutcher, she is in no position to complain that such conveyance was made to Mrs. Crutcher in fraud of plaintiff's rights. Ordinarily a subsequent creditor cannot successfully attack the conveyance made by one who afterwards becomes his debtor. *De Garca v. Galvan*, 55 Tex. 53; *Hodges v. Taylor*, 57 Tex. 196; *Riggs v. Hanrick*, 59 Tex. 570; *Cason v. Chambers*, 62 Tex. 305. The record discloses that a judgment was rendered in favor of Mrs. A. A. Allen against S. W. Crutcher and others on March 27, 1916, nearly two years subsequent to the date of the deed from S. W. Crutcher to his wife. There is nothing in the judgment, so far as copied in the record, which discloses the date of the notes upon which the judgment was predicated, nor do we find anything in any other part of the statement of facts giving such information. Hence, so far as the record discloses, at the time S. W. Crutcher made the deed to his wife he did not owe Mrs. Allen, and so far as she is concerned Crutcher's conveyance of the land is not shown to be in fraud of creditors. Also, the evidence is very meager upon the question of Crutcher's insolvency at the time of said conveyance. He testified that he was not insolvent at that time, and we are of the opinion that the evidence upon that issue is probably sufficient to support the conclusion of the jury that he was solvent. But whether he was solvent or insolvent on April 1, 1914, if Mrs. Allen was not a creditor at that time she shows no right to set aside the deed because in fraud of creditors.

Hence we conclude, irrespective of any question as to the tenability of the claims of the Pierce heirs or of Mrs. Crutcher to the title to the land in question, that plaintiff failed to establish by requisite proof one of the essentials necessary to sustain her claim. It therefore becomes our duty to affirm the judgment of the trial court, and it is so ordered.

GALLOWAY et al. v. HODNETT. (No. 492.)

(Court of Civil Appeals of Texas. Beaumont.  
Nov. 12, 1913.)JUDGMENT  $\Leftrightarrow$  256(2)—MUST CONFORM TO SPECIAL ISSUES NOT QUESTIONED.

In suit by husband and children for title and possession of land, where jury found in response to special issue that deed, executed by plaintiff husband and his wife to defendant's grantor to correct mistake was intended to operate as a deed, the court could not enter judgment for plaintiffs, who neither objected to the submission of the issue nor filed motion to set aside answer of jury to the issue.

Appeal from District Court, Newton County; W. T. Davis, Judge.

Suit by Robert Galloway and others against T. E. Hodnett. Judgment for defendant, and plaintiffs appeal. Affirmed.

A. L. Shaw, of Stephenville, and A. M. Huffman, of Jasper, for appellants.

Wightman & Hancock, of Newton, for appellee.

WALKER, J. On the 2d day of April, A. D. 1908, Robert Galloway purchased, for a consideration of \$200, 50 acres of land on the William Prissick survey in Newton county, Tex.; this being the land in controversy in this suit. He built his home on this land, cleared up a farm, and continued to live on and cultivate this land from that time up to and including the year 1910, and had it worked by tenants during the years 1911, 1912, and 1913. On December 14, 1907, Robert Galloway and his wife, Sarah Galloway, borrowed \$50 from James Erwin, executing to Mr. Erwin a deed to said 50 acres of land, properly describing it, except stating that it was on the Richard Simmons league, instead of on the William Prissick survey; this deed being executed as security for the \$50. The deed recited a consideration of \$80, \$50 principal and \$10 interest. On August 23, 1909, James Erwin executed a deed to F. M. Mattox to said 50 acres of land for a consideration of \$68, properly describing it as on the William Prissick survey. F. M. Mattox knew, at the time he took this deed from Erwin, that Erwin held a deed to the land only as security for \$50. The \$68 paid by Mattox represented the principal and accrued interest on the original loan of \$50.

On March 6, 1911, Robert Galloway and Sarah Galloway executed a deed to F. M. Mattox for said 50 acres of land, properly describing it as on the William Prissick survey; said deed reciting a consideration of \$60, and further reciting that it was executed for the purpose of correcting the description in the deed executed by them to Erwin on December

14, 1907, wherein the land was described as a part of the Richard Simmons league, the deed stating that they were making the correction in the deed to Mattox, because he had purchased from J. A. Erwin. On October 30, 1911, F. M. Mattox sold said 50 acres of land to T. E. Hodnett, appellee here, for a consideration of \$320 cash. At the time of the purchase by T. E. Hodnett, appellee George Snell and Sam Galloway were in possession of and cultivating the land for Robert Galloway as tenants, and continued to cultivate it as such for two years thereafter. After the execution of the deed from Mattox to Hodnett, Sarah Galloway died.

This suit was brought by Robert Galloway and his children to recover the title and possession of this 50 acres from T. E. Hodnett. This case was submitted to the jury on three special issues, and in answer thereto the jury found as follows:

(1) The instrument executed by Robert Galloway and his wife, Sarah Galloway, to F. M. Mattox, dated March 6, 1911, and describing the land in controversy, was intended to operate as a deed.

(2) Robert Galloway was in possession of 50 acres of land in controversy by tenants on October 30, 1911.

(3) F. M. Mattox, prior to and on the 23d day of August, 1909, same being the date of the deed executed by James Erwin to F. M. Mattox, knew that the deed made to said Erwin by Robert Galloway and wife was intended as a mortgage.

No objections were made by appellants to the submission of the first issue, no motion was filed by them to set aside the answer of the jury to this issue, and no assignment is made by them that the testimony is not sufficient to sustain the jury's answer to the first issue. On this verdict of the jury, appellants filed a motion asking the court to enter judgment in their behalf. This motion was denied by the court, and judgment was entered in favor of appellee. Appellants present to us only one assignment of error, as follows:

"The court erred to the prejudice of plaintiffs in overruling plaintiffs' motion to enter judgment in their favor upon the answers of the jury to the questions submitted to them in the court's charge and in entering judgment for defendant on his motion."

This assignment cannot be sustained. The jury having found that the instrument dated March 6, 1911, executed by Robert Galloway and his wife, Sarah Galloway, to F. M. Mattox, was intended to operate as a deed, the court could not enter judgment in favor of appellants in the face of this finding. First Texas State Insurance Co. v. Burwick, 193 S. W. 165.

Finding no error in this record, this case is in all things affirmed.

**ROYAL NEIGHBORS OF AMERICA v. SIMS  
et al. (No. 8271.)**

(Court of Civil Appeals of Texas. Dallas.  
Nov. 1, 1919.)

**1. INSURANCE ⇐665(3)—EVIDENCE AS TO MIS-  
REPRESENTATIONS IN APPLICATION.**

In an action on an insurance policy, wherein insurer pleaded that insured had misrepresented the date of her birth, evidence held to support a finding that the year of birth on the application had been left blank by insured, and subsequently erroneously filled in by some one else.

**2. INSURANCE ⇐389(7)—WAIVER OF INFOR-  
MATION REQUIRED OF APPLICANT.**

Where applicant for a life insurance policy makes no statement as to age, or imperfectly and incompletely states it, insurer, by issuing a policy, waives the information and is bound, notwithstanding that the age, if given, would have caused a refusal of insurance.

Appeal from District Court, Hunt County;  
A. P. Dohoney, Judge.

Action by Mrs. Mae Sims and others against the Royal Neighbors of America. Judgment for plaintiffs, and defendant appeals. Affirmed.

Davis, Johnson & Handley, of Dallas, for appellant.

Clark & Sweeton, of Greenville, for appellees.

**RASBURY, J.** This is an appeal from the judgment of the court awarding appellees the sum named in a policy of insurance issued by appellant to Mrs. Lella Youngblood, of which appellees were the designated beneficiaries. In the court below appellant alleged as matter of defense that Mrs. Youngblood, in her application for insurance, stated she was born December 18, 1862, while in truth she was born May 18, 1858, making her age that at which appellant would not have insured her, and which false statement, by the provisions of the policy, rendered it void and unenforceable. Appellees by sworn plea alleged in substance that the application signed by Mrs. Youngblood had been materially altered or changed after she signed same, by adding after the figures "18" the figures "62." The court found as matter of fact that the application signed by Mrs. Youngblood did not contain the statement that she was born on the 18th day of December, 1862, but contained the statement that she "was born \* \* \* on the 18th day of December, 18—."

[1] The single issue presented on appeal is that: the finding of the court is without support in the evidence. The facts deducible from the evidence on that issue are these: The application for insurance offered in evi-

dence by appellant, and which bears the genuine signature of Mrs. Youngblood, contains the statement, "I was born \* \* \* on the 18th day of December, 1862." The figures "18" were part of the printed form. The figures "62," following the printed figures "18," are written in with pen and ink, and the handwriting employed for that purpose is dissimilar or unlike the handwriting employed in filling in the other and various blanks in the application. The application is dated September 22, 1906, and was continuously in possession of appellant from that date to the date of the trial, a period of more than 12 years. Attached to the policy sued on was a copy of the foregoing application, and attached to the application was a printed slip or rider, asserting it to be a copy of the original application. Such copy does not contain the statement that Mrs. Youngblood was born December 18, 1862, but does contain the statement, "I was born \* \* \* on the 18th day of December, 18—"; the figures "18" being printed. The policy or certificate sued on was the third issued to Mrs. Youngblood, due to change of beneficiaries. Both former policies had attached to them purported copies of the application. The policies and the copies of the applications were shown to be in the possession of appellant. The applications were not produced at trial. On the margin of the policy delivered to Mrs. Youngblood was the notation, "Age 44," referring to the assured. Mrs. Youngblood was in truth born May 18, 1858. This made her ineligible for membership in appellant at the time she made her application.

We conclude that the court's conclusion does find support in the evidence. There is an apparent difference between the handwriting employed in placing the figures "62" after the printed figures "18" and that used in filling in the large number of other blanks in the application. The court was authorized to regard and inspect that difference in reaching a conclusion. *Millington v. Millington*, 25 S. W. 320. The fact that appellant had attached to its policy a copy of the application disclosing that Mrs. Youngblood did not make the statement that she was born in 1862 is a circumstance of no mean significance, when it is considered that only from the application signed by Mrs. Youngblood could a copy be made. To the foregoing might be added the further circumstance that no officer, agent, or representative of appellant testified that they had not altered the instrument, or detailed the manner of its keeping, or in whose possession or control it was during the years following its receipt.

[2] Having concluded that the evidence sustains the court's finding that the applicant made no statement concerning her age, or at most an incomplete or imperfect answer to the inquiry, it follows, under the rule stated

in the cases cited below, that appellant, by issuing its policy, waived such information and is bound by the policy. *Phoenix Assur. Co. v. Munger*, 49 S. W. 271; *Thies v. Mutual Life Ins. Co.*, 13 Tex. Civ. App. 280, 35 S. W. 676; 3 Cooley's Briefs on Insurance, 263d.

The judgment is affirmed.

### TEXAS POWER & LIGHT CO. v. HEALER et al. (No. 6169.)

(Court of Civil Appeals of Texas. Austin.  
Oct. 8, 1919. Rehearing Denied  
Nov. 26, 1919.)

#### APPEAL AND ERROR $\S$ 662(2) — TRANSCRIPT SHOWING TIME OF FILING WRIT OF ERROR CONCLUSIVE.

Where the transcript shows that on the day final judgment was rendered for plaintiff the trial court overruled defendants' general demurrer to the petition, but the record contains nothing to show that the order was not entered of record as indicated by the transcript on the date the case was tried and final judgment rendered, plaintiff's motion to dismiss defendants' writ of error cannot be successfully resisted on the ground that time for suing out the writ dates from the time a certain nunc pro tunc order overruling demurrer was subsequently made.

Error from District Court, McLennan County; Geo. N. Denton, Judge.

Action by J. C. Healer and others against the Texas Power & Light Company. To review judgment for plaintiffs, defendant brings error. On motion to dismiss the writ. Motion sustained.

Sanford & Harris, of Waco, for plaintiff in error.

Alva Bryan and W. L. Eason, both of Waco, and John Maxwell, of Austin, for defendants in error.

**KEY, C. J.** The final judgment in this case was rendered on May 16, 1918, and the petition and bond for writ of error were not filed until June 10, 1919. The defendants in error have submitted a motion to dismiss the writ of error, because the same was not applied for within 12 months after the rendition of the judgment, as required by the statute now in force. In reply to that motion, the plaintiff in error states that the original judgment was not correctly recorded in the minutes of the court, in that it failed to show that the trial court had overruled the plaintiff in error's general demurrer to the petition of the defendants in error, and that during the month of August, 1918, upon application of the plaintiff in error, the trial court made a nunc pro tunc order showing that the general demurrer was overruled as stated;

and it is contended on behalf of the plaintiff in error that the time for suing out a writ of error dates from the time the nunc pro tunc order was made, and, as the writ of error was sued out within 12 months from that time, that the motion to dismiss should be overruled.

In the reply of the plaintiff in error to the motion to dismiss it is stated:

"On the — day of August, 1918, on motion of Texas Power & Light Company, the trial court entered an order, nunc pro tunc, overruling plaintiff in error's general demurrer to the petition of defendants in error. (See transcript p. — for the order and affidavit of the clerk of the district court as to the date of the entry of the order.)"

We have carefully examined every page of the transcript, and have failed to find any such order. The transcript does contain an application for such nunc pro tunc order, but it does not show that that application was ever called to the attention of or considered by the trial court. On the contrary, the transcript shows that on the day the final judgment was rendered the court overruled the general demurrer referred to, but there is nothing in the record to show that that order was not entered of record, as the transcript indicates, on the date the case was tried and final judgment rendered.

Therefore, if it be conceded that counsel for the plaintiff in error are correct as to the legal proposition asserted by them, still, as the record does not bring this case within the rule referred to, we must hold that the answer to the motion to dismiss is insufficient; and, as the writ of error was not sued out within the time prescribed by statute, the motion to dismiss is sustained.

Motion granted.

### CHICAGO, R. I. & G. RY. CO. v. WISDOM. (No. 9129.)

(Court of Civil Appeals of Texas. Ft. Worth.  
June 28, 1919. On Motion for Rehearing, Nov. 1, 1919.)

#### 1. CARRIERS $\S$ 303(8)—PERSONAL ASSISTANCE TO ALIGHTING PASSENGER.

Ordinarily a carrier is not burdened with the duty of extending personal assistance to a passenger alighting from a train.

#### 2. CARRIERS $\S$ 303(8) — FAILURE TO ASSIST ALIGHTING PASSENGER.

Employees of a carrier were not negligent in failing to assist a healthy young woman, carrying a small traveling bag, to alight from a train, where she did not request assistance and the step was in good order, except that rubber covering was worn smooth.

#### 3. EVIDENCE $\S$ 20(2)—JUDICIAL NOTICE.

Relative to duty of carrier to assist female passenger, it is a matter of common knowledge

that often women resent the laying of hands on their person under any pretense.

**4. APPEAL AND ERROR ¶1062(1)—HARMLESS ERROR; SUBMISSION OF ISSUES.**

Where two issues of negligence were submitted to the jury, one of which was improperly submitted, and the appellate court is unable to tell upon which issue a verdict rested, judgment for plaintiff must be reversed.

**5. CARRIERS ¶318(9)—INJURIES TO PASSENGER; EVIDENCE OF PROXIMATE CAUSE.**

In an action by a passenger who fell while alighting from a train, evidence *held* insufficient to sustain a finding that slippery condition of steps was proximate cause of fall.

**6. CARRIERS ¶318(9) — INJURY TO PASSENGER; CERTAINTY AS TO CAUSE.**

Where it was as reasonable to conclude from the evidence that a passenger fell while alighting by reason of her three-inch heel catching on the edge of the steps as that she slipped because of smooth condition of the steps, verdict in her favor cannot be sustained.

**On Motion for Rehearing.**

**7. EVIDENCE ¶6—JUDICIAL NOTICE; SHADOW CAST BY SUN.**

The court must judicially know that in August at 6 o'clock in the evening at Paradise, Tex., the sun cast a shadow on the east side of a train facing north, and on the steps on the east side of a coach.

**8. EVIDENCE ¶383(10)—PHOTOGRAPHS OUTWEIGHING TESTIMONY OF CONDITION OF CAR STEPS.**

In an action by a passenger for personal injuries from a fall while alighting from a train, testimony of a 17 year old boy, who stood some distance away, that the rubber on the steps of the coach from which plaintiff was alighting was entirely worn through, *held* not sufficient to raise a conflict or to warrant the jury in finding that the rubber was worn entirely through, where photographs were immediately taken which showed that, although the rubber was worn, it was not worn through.

**9. EVIDENCE ¶20(2)—JUDICIAL NOTICE.**

The court may judicially know that rubber on a car step merely worn smooth will not become "slick" from this cause alone, so as to invite a slipping of the foot.

**10. APPEAL AND ERROR ¶1001(1) — REVIEW OF QUESTION OF FACT.**

To sustain the verdict on appeal, the evidence must amount to something more than inferences, and must be legally of a probative force, mere detached statements of witnesses which may positively furnish an argumentative basis not being controlling, and a jury is not authorized to arbitrarily reject testimony that is unimpeachable and without suspicion.

Buck, J., dissenting.

Appeal from District Court, Wise County;  
F. O. McKinsey, Judge.

Suit by Geneva Wisdom against the Chicago, Rock Island & Gulf Railway Company. Judgment for plaintiff, and defendant appeals. Reversed and rendered.

McMurray & Gettys and Lassiter & Harrison, of Ft. Worth, for appellant.

Carden, Starling, Carden, Hemphill & Wallace, of Dallas, for appellee.

CONNER, C. J. Appellee, Miss Geneva Wisdom, instituted this suit on the 29th day of November, 1916, to recover damages on account of an injury alleged to have occurred to her on August 2, 1916, while alighting from the defendant's train at Paradise, Tex. It was alleged that she was a passenger from Ft. Worth to Paradise, and that she slipped and fell while descending the car steps at Paradise, and that she was caused to fall by reason of the failure of the defendant's employees to take her traveling bag and carry it down the steps for her, and to take hold of her arm and assist her down the steps, and by reason of the fact that the steps on the car were old, worn out, and rickety, and slick and slippery, and not properly pitched.

The defendant pleaded a general denial, and averred that the plaintiff was guilty of contributory negligence, in that she was wearing slippers with extremely high heels, that were likely to turn under her feet and cause her to stumble and fall, and that in starting down the steps she so carelessly stepped as to bring about her fall; that if her handbag was so heavy that it endangered or interfered with her equilibrium as she walked out of the car that fact was known only to her, and that she was negligent in failing to set it down on the platform or to offer it to one of the three attendants present at the time, any one of whom would have received and carried it for her on the least indication that she desired assistance.

The trial resulted in a judgment in favor of the plaintiff for the sum of \$1,400, and the defendant has duly appealed.

The assignments of error call for a determination of the sufficiency of the evidence to sustain the charge, verdict, and judgment, in appellee's favor. We have very carefully considered the evidence. It is too voluminous to justify our setting it out in full, and therefore we will undertake to state briefly its substance. The evidence is that on August 2, 1916, the appellee, together with her mother and sister, was a passenger on one of appellant's trains from Ft. Worth to Paradise, Tex.; that upon arrival of the train at Paradise appellee's mother and sister preceded her in alighting; that appellee emerged from the coach with a grip in her hand, which upon her turning upon the platform to descend the steps she took in both hands and held it out in front of her, and in this manner

she started to descend. As she passed out of the car door and onto the platform the auditor of the train was standing near by. She made no request of the auditor to take her grip or to assist her in descending, nor did the auditor speak to or in any way attempt to assist her. At the foot of the steps on either side stood the conductor and brakeman for the purpose of assisting passengers to alight. The plaintiff made no request of these employes of appellant for assistance, nor did they, until after her fall, as herein-after stated, offer to assist her. As appellee stepped from the platform onto the first step of the car her foot in some manner slipped or was caught, and she fell and was projected with her feet forward down the steps, and thus received the injuries for which she sued. Appellee at the time was wearing shoes or pumps of a fashionable make with heels about three inches high. The heel from one of these shoes was wrenched off, and found immediately after appellee's fall.

The evidence principally relied upon, and the only evidence cited in behalf of appellee in support of her allegations of negligence relating to the steps, is that of the witness Barnett and of S. R. Johnson, one of the brakemen on the train in question. Barnett testified in relation to the steps as follows:

"They were old steps, and the rubber on the steps was—there had in time been rubber on the steps, but they were all worn off, but around the edge or outside of the steps. The place you walk down, the center of the steps, was no rubber on. The surface of the step was worn until it was slick."

S. R. Johnson testified:

"This step in court resembles the step from which the plaintiff fell. On this step the rubber is worn off in places; worn some in the center; worn smooth; not none of them entirely smooth; there is a place right there that is smooth, in the center, where they step off."

This testimony is all that is quoted by appellee in support of the allegations of negligence referred to.

It was further proved that appellee at the time of her injury was 27 years of age; had been a teacher in public schools in various parts of the state for a number of years, and was an experienced traveler on trains. She testified that at the time her health was good, and in describing the immediate circumstances, among other things, said:

"My mother and sister were with me at the time. Mother got off first, my sister next, and I last. \* \* \* In getting off I was walking in my ordinary manner, taking my time. I had a traveling bag with me. It was a medium size traveling bag. I had it up in both hands as I came down the aisle, and also had it in my hands when I came to the entrance. \* \* \* When I started down I fell, fell down on the ground. I fell kind of sideways on this side,

striking the steps, and I fell onto the step box, and then to the cement, or whatever you call it, the platform or ground. I fell awfully hard. No one caught me."

Cross-examined she said:

"When I came out of the car I had my grip in front of me; had both hands in the handhold of my grip, carrying it right in front of me. \* \* \* Somebody was on the platform to my left as I started out. He did not touch me. I did not say a word to him, nor he to me. I have stated I was not positive whether I had stepped down on the first step when I fell or not. I do not know when the heel came off my slipper. It was off when I got to the ground. I do not know that my foot turned over. I do not know what caused me to fall. \* \* \* I do not remember whether I saw a man at the bottom of the steps. I think there was one on either side. I have lots of times got on trains. I think I knew as well as anybody how to get on and off of a train."

The conductor of the train, among other things testified that he reported the accident to the claim agent at Ft. Worth, and on his return to that place was there met by the claim agent, who testified that he immediately took a photograph of the steps and ordered them detached, to the end that they might be exhibited as a demonstration of their condition. The photographs accompany the records in this case, and therefrom the rubber on the steps appear to be about in the condition described by the brakeman Johnson, whose testimony relating to this matter, as set out by appellee, we quoted, that is to say, the steps of the car appear to have been surfaced with rubber mats which originally were in a corrugated form, but which from use had been so worn as to reduce the corrugation in places to a smooth surface. The photographs, however, do not show that the rubber had been worn through at any place, and all of the testimony, except that of the witness Barnett, describes the steps about as we have attempted to describe the photograph.

[1] Viewing the testimony, as a whole, and in its most favorable aspect for appellee, we are unable to say that the evidence authorized the submission of the issue of negligence in a failure on the part of the servants and employes of the appellant to aid and assist plaintiff at the time in question. Ordinarily the carrier is not burdened with the duty of extending personal assistance to a passenger in alighting from a train. See *Flory v. San Antonio Traction Co.*, 89 S. W. 278, in which is cited *Railway Co. v. Buchanan*, 31 Tex. Civ. App. 209, 72 S. W. 96. See, also, 2 Moore on Carriers, p. 1245, § 52. But appellee cites the cases of *N. Tex. Traction Co. v. Danforth*, 53 Tex. Civ. App. 419, 116 S. W. 147; *T. & P. Ry. Co. v. Miller*, 79 Tex. 78, 15 S. W. 264, 11 L. R. A. 395, 23 Am. St. Rep. 308; *Flory v. San Antonio Traction Co.*, 89 S. W. 278; *M., K. & T. Ry. Co. v. Buchanan*, 31 Tex. Civ.

App. 209, 72 S. W. 96; Campbell v. Alston, 23 S. W. 33. These cases, however, we think, are plainly distinguishable from the one before us. In the case of N. Tex. Traction Co. v. Danforth, supra, which we will notice as illustrative of the others, the court held that the evidence supported the following allegations of the plaintiff's petition:

"That on the 20th day of May, 1906, about 9 o'clock a. m., plaintiff's wife, Lula O. Danforth, with her baby in arms, became a passenger on the defendant's interurban car No. 11, at its Tenth street station in Oak Cliff, and paid her fare to the conductor of the car, to be carried to Ft. Worth to visit her friend, Mrs. Elizabeth Derozier. When said car stopped in response to her signal at the intersection of Main and Weatherford streets in Ft. Worth for her to alight, and while she, with her 17 months old baby in her arms, and in the exercise of the greatest care and prudence to safely alight, was stepping from the rear platform to the step, from which she would alight to the street, her feet slipped from the step of the car, and threw her with great violence and force down upon the street and backward against said step. That her feet slipped from the step of the car because of the step being worn, making the board thinner and slanting and slippery, and because of slippery mud having accumulated and being on said step, and because said step was defectively constructed, in that it was too steep, and without sufficient projection, and was all the more dangerous, being thus defectively constructed, and the more liable to cause a passenger to slip and fall in stepping from the platform to this worn, muddy, and slippery step. That at the time plaintiff's wife, with her baby in her arms, was leaving the car, and while she was attempting to step from its rear platform to the street, the defendant's conductor, who knew of the condition of said step, and which was not known to plaintiff's wife, was standing idle and unoccupied on the rear platform of the car, leaning against the platform rail, and said plaintiff's wife, with her infant baby in her arms, attempting to get off the car, and said conductor well knowing that plaintiff's wife needed assistance and warning on account of said condition of said step of the car, yet he remained in his position aforesaid on the rear platform of the car, and failed and refused to assist her to alight therefrom, or even to warn her of the dangerous condition of said step, but remained idle and silent, and made no effort to assist her, or to inform her of the dangerous and perilous position she would be subjected to in using said step in alighting from the car."

[2] It is evident, we think, that the circumstances shown in the Danforth Case were very different from those shown in the case before us. In the Danforth Case, Mrs. Danforth had in her arms a 17 months old baby, and exercised the greatest care and prudence to safely alight. The step was worn, making it both thinner and slanting, and slippery because of slippery mud having accumulated on the step, and because the step was defectively constructed, in that it was too steep

and without sufficient projection. The conductor knew of the condition of the step, which was not known to the plaintiff's wife, and stood by, idly and unoccupied, without making any effort to assist Mrs. Danforth in alighting. But here the appellee is a young woman, experienced in traveling, and carrying only an ordinary grip, which she herself testified was not very heavy, and without request undertook on a pair of high heel slippers to descend the steps. The necessity for assistance certainly did not occur to the appellee at the time with any great force, otherwise it seems but natural that she would have requested assistance. What was there in the appearance of things or within the knowledge of the employees of appellant that amounts to a failure to exercise due care to assist the appellee? The time was in August; there is no pretense that the steps were muddy, or that the boards were worn thin, or that they did not sufficiently project, or that they were not wide enough, or improperly slanted. All other passengers, both ladies and gentlemen, had just descended safely and without complaint. Admitting the steps to have been in the condition described by the witness Barnett, which undoubtedly is in opposition to the great weight of the evidence, and that the servants of the appellant knew of such condition, we think it can hardly be said that the condition of the steps alone called upon said servants, under all of the other circumstances, to go beyond what they did do at the time. The conductor and brakeman were at the foot of the steps for the purpose of assisting; they attempted to do so immediately upon appellee's fall; the auditor on the platform was not called upon; appellee, by the exercise of any care, would certainly have seen the steps and have availed herself of the supporting rods on the side.

[3] It is a matter of common knowledge that often ladies resent the laying of hands on their person under any pretense, so that on the whole we cannot think that the evidence supported or authorized the submission of the issue of negligence just discussed, nor does it authorize, in our judgment, a recovery upon this ground.

[4-6] The conclusion just noted would, of course, and at all events, require a reversal of the judgment, inasmuch as we have no way to determine upon which of the two issues of negligence submitted in the case the jury based their verdict, but we have been unable to avoid the conclusion that neither the charge, verdict nor judgment can be supported upon the issue of negligence relating to the condition of the steps, for if it be admitted that the steps were in the condition described by the witness Barnett, it cannot be said from the evidence that this condition was the proximate cause of plaintiff's fall. While several of the witnesses testified that



the plaintiff "slipped and fell," yet we think the evidence makes it apparent that this expression is as reasonably referable to the fact that her heel caught on the edge of the step, as she was attempting to descend from the first to the second step as to the fact that she slipped because of the condition of the step. Witnesses who testified that plaintiff slipped were at varying distances from the platform. None of them, as we interpret the evidence, testified that the appellee slipped before her heel caught on the step. It seems that no one knew just how that happened, and she said, as already quoted, that she did not know when the heel of her slipper came off, or whether her foot turned, or what caused her fall. One witness Gifford Steele, called as a witness on behalf of the plaintiff, testified on this point as follows:

"As she (appellee) stepped on the platform he (the auditor) did not assist her in any way. She just slipped and fell; she just started down the steps, and as she started to pass her foot to the second step, I believe it was, just slipped, she just fell backward, just slipped on down, fell backward to the step."

This testimony, and we find no other as closely pertinent, tends to show that she had safely descended to the first step, and that probably as she attempted to pass the foot from which the heel of her shoe had been wrenched to the second step she failed to project her foot sufficiently far, and hence the heel of her shoe caught on the edge of the step, and caused her to slip and fall backward. It is not necessary that we conclude that this is the way the accident actually happened, it is only necessary to state that this theory is as reasonably supported by the evidence as any other, and we certainly think that the evidence shows that it is. For, as we had occasion to say in the case of *Railway Co. v. Davis*, 161 S. W. 932, writ of error refused:

"The rule undoubtedly is that, where the testimony shows that an accident is as reasonably attributable to a nonactionable cause as to one that is, the law will not uphold a conclusion in the nature of a mere guess in favor of the latter."

It cannot be said, therefore, that the condition of the steps, even if not in proper condition, was the proximate cause of plaintiff's fall, and this fact is as essential to the appellee's right of recovery as is the establishment of negligence on appellant's part in respect to the steps.

We cannot therefore but conclude, as before stated, that the evidence in this case wholly fails to support either the charge, verdict, or judgment in appellee's favor, and the judgment must therefore be reversed and here rendered for appellant.

Reversed and rendered.

### On Motion for Rehearing.

Appellee has presented a forceful motion for a rehearing herein, and has convinced our Associate Mr. Justice Buck that the evidence does not support the conclusion reached by the full court, as expressed in our original opinion, his view being fully and ably presented in his dissenting opinion herewith filed. The majority, however, after again carefully reviewing the record, feel unable to reverse the views of the evidence originally stated.

To what was originally stated we add that the appellee, her sister and mother were accompanied by two grips and in the description of the grips there are detached portions of the evidence from which it is possible to infer that the appellee at the time of her fall had a large and heavy grip, but when the whole evidence on the subject is carefully considered, it is perfectly plain, we think, that the particular grip that appellee was carrying in her hand at the time was the smaller and lighter one. S. R. Johnson, one of the train operatives, who was at the foot of the steps, testified that "she (the plaintiff) had a small, ordinary hand bag in her hand." The plaintiff herself testified, as set out in the original opinion:

"I had a traveling bag with me, it was a medium size traveling bag. I had it up in both hands as I came down the aisle, and also had it up in my hands when I came to the entrance."

There was nothing, therefore, in the size of the grip to call for assistance.

Some stress is laid upon the testimony that the brakeman assisted other lady passengers to alight. Johnson, the brakeman, testified that, as the appellee began to descend the steps "just immediately before she fell," he was "trying to take her baggage, \* \* \* was reaching with my hand, and just as I touched the bottom of the baggage her shoe heel gave away, and I caught her in both arms as she came down," etc.

[7-9] It will be recalled that the plaintiff herself testified that she made no request for assistance, nor does it appear that the assistance rendered by the train employees to other ladies was other or different than that offered to appellee. It is not reasonable to expect or require, in the absence of some circumstance showing a necessity therefor, that the train employees should take the arm of a passenger and with her descend the steps in order to guard against an accident such as happened in this instance. Much stress is laid upon the testimony of O. G. Barnett. He testified that he would be 20 years old in July following the date of the trial, which was on the 24th day of June, 1918; that he was engaged in running a service car, and was at the depot on the occasion in question; that "there was a pretty good bunch of people down there; \* \* \*

that the train came from Ft. Worth and was going north, getting there in the evening 6:30, I believe; \* \* \* that the passengers get off the train on the east side—the right-hand side from Ft. Worth. I saw her as she was coming out of the car on to the platform. She had a kind of suit case—I was not certain; it was a suit case of some kind. \* \* \* I did not measure the distance Miss Wisdom moved in falling, I do not know, just have to kind of guess it at about 4 or 4½ feet, I judge. Q. Did she complain any at the time? A. Well I never did—there was a big crowd there, I never did hear any one say.” On cross-examination he said that when the accident happened he was standing somewhat near a semaphore. “Q. What direction is that from where Miss Wisdom came out of the car? A. Well, she was about—I judge the car stopped something like 4 or 5 feet from the semaphore, two or three feet. I was looking kind of sideways when I saw her kind of south. \* \* \* I am not positive which heel it was that caught.” It therefore appears that at the time of the accident the witness Barnett was a boy about 17 years old; that he was not standing immediately in front of the car steps, and evidently not a member of the crowd standing just before them; that on the contrary he was standing and facing in an oblique direction from the steps, and we must judicially know that in August at 6 o'clock in the evening the sun cast a shadow on the east side of the train and on the east side of the steps, and when this witness testified that the rubber was all worn off of the steps save around the edges, and that the steps were slick in the middle, and that the appellee first slipped and then her heel caught on the edge of the step was but stating conclusions rather than definite facts certainly known to him; for of all the persons who were present, including the appellee's mother and sister and appellee herself, none save Barnett testified that the rubber was all worn off of the steps. The evidence as a whole conclusively establishes, in the opinion of the majority, that while the rubber on the steps had been worn smooth in places it had not been worn through in any place, and this conclusion is verified by the photographs which accompanied the transcript. It has been suggested that the jury were not bound to believe this testimony, but the testimony was uncontradicted to the effect that immediately upon the train reaching Ft. Worth the steps in question were detached, photographs taken thereof, and photographs exhibited to the jury and here as stated. No attempt was made whatever to contradict these witnesses, and we know of no just theory upon which we can reject the conclusion to which all this testimony leads. We think we may also judicially know that rubber merely worn smooth will not become “slick” from this cause alone so as to invite a slipping

of the foot, and, interpreting the evidence as a whole, we cannot avoid the conclusion that the expression of those witnesses who stated that the steps were “slick” was merely, by that form of expression, intended to convey the idea that the rubber had been worn “smooth.”

[10] We well understand the rule that the jury are the exclusive judges of the credibility of the witnesses and the weight to be given to their testimony, and that it is our duty to affirm a verdict and judgment if there is any evidence of probative force to sustain the verdict, but to sustain the verdict the evidence must amount to something more than inferences; it must be legally of a probative force; mere detached statements of witnesses which may positively furnish an argumentative basis are not controlling, nor do we understand that a jury is authorized to arbitrarily reject testimony that is unimpeached and without suspicion. See *Grand Fraternity v. Melton*, 102 Tex. 399, 117 S. W. 788.

We will not undertake to here analyze the numerous decisions on the subject, but we will cite a few of them which very certainly illustrate the fact that it is not every state of evidence which has satisfied a trial jury and court that will, on appeal, authorize an affirmance of the verdict and judgment. *Joske v. Irvine*, 91 Tex. 582, 44 S. W. 1059; *Texas Loan Agency v. Fleming*, 92 Tex. 458, 49 S. W. 1039, 44 L. R. A. 279; *M. K. & T. Ry. Co. v. Malone*, 102 Tex. 269, 115 S. W. 1158; *Snipes v. Bomar Cotton Oil Co.*, 106 Tex. 181, 161 S. W. 1; *Ft. Worth B. Ry. Co. v. Jones*, 106 Tex. 345, 166 S. W. 1130; *T. & P. Ry. Co. v. Shoemaker*, 98 Tex. 456, 84 S. W. 1049; *G., C. & S. F. Ry. Co. v. Davis*, 161 S. W. 932, writ denied; *S. L. & S. F. Ry. Co. v. West*, 174 S. W. 287, writ denied; *Ft. Worth & R. G. Ry. Co. v. McMurray*, 173 S. W. 929, writ denied; *Medlin Milling Co. v. Mims*, 173 S. W. 968, writ denied; *H. & T. C. Ry. Co. v. Schmidt*, 61 Tex. 282.

We conclude that it is not only our duty, but in the real interest of the appellee herself, that we adhere to the conclusions originally expressed. If in fact the evidence is insufficient to sustain the verdict, as the majority think, it is better for all that the fact be now accepted rather than to wait for acceptance through continued and costly litigation. It is ordered that the motion for rehearing be overruled.

BUCK, J. (dissenting). It is with some reluctance that the writer dissents from the conclusion reached by his Associates that the motion for rehearing presented by appellees should be overruled. On the original consideration, he was in doubt as to the correctness of the conclusion of the majority that the judgment below should be reversed, and judgment here rendered for appellant. This

doubt has ripened into a conviction that we were in error in so deciding.

Plaintiff alleged two grounds of negligence on the part of defendant which have some support in the evidence, to wit:

(1) That three of defendant's employes were present, one at the top of the steps and two at the bottom, as she was leaving the coach, carrying a traveling bag "which was heavy and cumbersome," and that it was, under the circumstances, the duty of said employes of defendant to relieve plaintiff of said baggage and to take hold of her arm and to assist her to safely alight. That plaintiff had traveled on defendant's train many times theretofore, and that it had been the custom and practice of such employes to assist ladies, especially those with baggage, to alight, by taking the baggage and by taking hold of the lady passenger's arm. That she fully expected them to do so in the instant case, and thought they acted as if they were going to do so, they did nothing to assist plaintiff to alight.

(2) That the steps leading from the car were old and rickety, "slick and slippery," not level or properly pitched, etc., and that said agents and employes of defendant knew or were charged with knowledge of said defective condition of the steps, and that under the circumstances they should have assisted plaintiff to alight.

The evidence does show that when the plaintiff emerged from the coach in which she had been riding that one of the trainmen was at the entrance of the door out on the platform. Plaintiff testified:

"In getting off I was walking in my usual manner, taking my time. \* \* \* One of the trainmen was standing there—I do not know whether the auditor or conductor. He was standing just to the left of me. He was standing on the platform of the train. \* \* \* I did not say anything to him when I passed, nor did he to me. He did not take hold of me nor my baggage, nor did he touch me. When I started down I fell, fell down on the ground."

S. R. Johnson, witness for defendant, testified that he was a brakeman on the train, and that when the train stopped he was standing just south of the steps, possibly a little in front. He further testified:

"I saw the other ladies that came out just ahead of Miss Wisdom. I assisted them all off. When Miss Wisdom came down the car (steps?), just immediately before she fell, I was trying to take her (baggage?). She had a small, ordinary hand bag in her hand, and I was reaching with this hand, and just as I touched the bottom of the bag her shoe heel gave away, just let the bag go, and I caught her in both arms as she came down, and broke the fall as best I could. \* \* \* This step in court resembles the step from which the plaintiff fell. On this step the rubber is worn in places, worn some in the center, worn smooth, not none of them entirely smooth. There is a place right there that is smooth, in the center, where they step off."

O. G. Barnett testified that he lived at Paradise and was running a service car; that he was at the depot when the train stopped. He testified:

"I first saw this young lady as she was coming out of the coach off onto the platform. \* \* \* I saw only the 'brakie' and the conductor. The conductor was upon the platform. \* \* \* The man on the platform was standing there; was not doing anything; kind of waiting for the passengers to get out. When Miss Wisdom got to the platform she started down the first step. Her foot slipped forward, and her heel pulled off, and she slid down the steps. \* \* \* She slipped from the first step, the top step, the next step from the platform. The platform is level with the floor of the car, and when she stepped on the first step her foot kind of slipped forward. I saw the condition for those steps. They were old steps, and the rubber on the steps was—there had been in time rubber on the steps, but they were all worn off, but around the edge or outside of the steps, the place you walk down, the center of the steps, was no rubber on. The surface of the step was worn until it was slick. \* \* \* I am not positive which heel it was that caught. It was caught on the edge of the step, the first step. Her heel caught that way (pantomime). It pulled the heel off; tolerably high heel shoe, and it slipped. Q. Wasn't it a very high heel shoe? A. Nothing more than girls around home wear. Her foot slipped off that way, and the heel came off. Q. That is what made her fall, that heel coming off? A. No, sir. If the heel hadn't come off she would have been out on her head. Q. You know that? A. Sure. Q. You were watching, you knew she was going to do that? A. No; I didn't know she would do that. That heel came off; her foot slipped out from under her. She was standing in a position if the heel hadn't come off she would have went over. \* \* \* There was no rubber on that step she slipped off on; was no rubber on the edge, on the outer side, next to the wall, where it had been worn off through the center. \* \* \* On each side there was a little rubber next to the wall, but in the middle there was no rubber at all."

He further testified that W. N. Harris (not one of the trainmen) grabbed the plaintiff when she fell, ran and grabbed her, and that he never saw the brakeman grab her. He testified that plaintiff's suit case was about 2 feet long.

The plaintiff testified that she thought there were two trainmen on the depot platform at the bottom of the steps, one at each side.

Gifford Steele, witness for plaintiff, testified that he had lived near Paradise all his life; that he was down at the depot that day. His testimony, in part, is as follows:

"When I first saw Miss Wisdom that day she had just started down the steps, started to get off the train and her foot slipped, and she fell. \* \* \* She had a traveling bag, had it in front of her. \* \* \* The auditor did not take hold of this lady's traveling baggage. As she stepped on the platform he did not assist her in any way. She slipped and fell. She just fell backward to the steps. Her back hit the

step, and her feet went down in front of her. I could not tell how hard she fell. Looked like a pretty hard fall. They caught her before she fell lengthways on the platform. The parties that caught her were on the platform of the depot. \* \* \* The first thing I saw; her feet slipped from under her, and she fell in a sitting position on the steps and bumped on down. \* \* \* She had some kind of traveling bag. \* \* \* She had it in front of her."

H. C. Richberg, who lived at Paradise, testified that he was just ahead of Miss Wisdom in getting off the train. He testified:

"My recollection is that the conductor was standing to my left on the platform as I came out. I saw her start down the steps of the car. I suppose her feet slipped from under her. \* \* \* I came down those same steps. \* \* \* I noticed they were old steps. They were worn some. I think there was rubber on them. \* \* \* They were worn sort of smooth across by constant use. \* \* \* There was rubber on that step but it was worn and old, worn slick."

R. J. Stewart, witness for defendant, testified that he was the conductor in charge of the train that day in place of Tobe Goodman, the regular conductor; that the auditor, D. E. Scofield, was up on the platform of the car, and the brakeman Johnson was standing on the depot platform, Johnson on the south side of the steps and the witness on the north side; that when plaintiff fell witness was standing at the bottom of the steps; that "her feet slid out from under; fell with her feet towards me; right between me and the brakeman." Scofield testified that he saw plaintiff when she fell; that "just before she fell her feet slipped. When she stepped out of the car I put my hand right on her arm to assist her as she passed by. When she fell I grabbed at her, and could not reach her body but put my hand on her head as she slipped down. \* \* \* I examined the steps just after she fell, before we moved. I did not see any defect in them. There was no defect in the rubber that I could see."

Enough of the evidence has been noted, in the writer's opinion, to show that there was at least some evidence tending to establish:

(1) That three trainmen were present at the time and place of the accident in position to have relieved the plaintiff of her baggage and to have otherwise assisted her in alighting from the car. That not one of them did render any assistance.

(2) That the trainmen were accustomed to render such assistance, and in fact did so this day and as to this coach assist the other ladies in alighting.

(3) That the steps were old and defective, with the rubber thereon worn slick, at least as to the top step from which plaintiff fell.

(4) That plaintiff's foot slipped from under her because of the worn surface of the top step, and that her heel caught, after she

slipped on the edge of the step. That one of the inducing causes of the injury was the worn condition of the rubber covering to the steps.

The jury were not bound to believe that the steps exhibited in court were the same steps that were attached to the car at the time of the accident, and down which the plaintiff fell. The jury were authorized in finding that in the exercise of that high degree of care due a passenger, defendant's employes were negligent in using steps in the worn and defective condition, as above noted.

(5) The evidence further justifies a finding that the trainmen were negligent, taking into consideration the worn condition of the steps, which condition was open and patent to them, and the fact that plaintiff was incumbered with a traveling bag, or grip, which on account of its size and cumbersomeness she was having to carry in front of her, in not relieving the plaintiff of the baggage and in not otherwise assisting her to alight.

It is true that the failure to assist a female passenger to alight from a train is not per se negligence, but the circumstances, surrounding the transaction may tend to show the propriety of such assistance and the duty upon the employes of the carrier to render it. *Railway Co. v. McCullough*, 18 Tex. Civ. App. 534, 45 S. W. 324; *Traction Co. v. Flory*, 45 Tex. Civ. App. 233, 100 S. W. 200; *Railway Co. v. Buchanan*, 31 Tex. Civ. App. 209, 72 S. W. 96; *Walker v. Quincy, O. & K. C. Ry. Co. (Mo.)* 178 S. W. 108, 10 N. C. C. A. 516; *Ga. & Fla. Ry. Co. v. Thigpen*, 141 Ga. 90, 80 S. E. 628, 4 N. C. C. A. 457.

The question as to whether it is negligence on the part of the employes of the railway company to fail to assist a passenger to alight from a train is largely one for the jury. *Traction Co. v. Flory*, supra; *T. & P. Ry. Co. v. Miller*, 79 Tex. 78-84, 15 S. W. 264, 11 L. R. A. 395, 23 Am. St. Rep. 308. If there are any conditions such as old age or physical infirmities on the part of the passenger, or being incumbered with heavy baggage, or the defective condition of the place and means of disembarkation, including the condition of the landing place, neither would the trial court nor an appellate court be justified in depriving the litigant of the right to have a jury pass upon the question as to whether the carrier was negligent in failing to render assistance to the passenger under such circumstances. *Railway Co. v. Finley* 79 Tex. 85, 15 S. W. 266; *I. & G. N. Ry. Co. v. Williams*, 183 S. W. 1185.

As was said in *Ft. Worth & D. C. Ry. Co. v. Spear*, 107 S. W. 618, 615:

"We do not think it can be said as a matter of law that the failure of a carrier to assist a female passenger to alight from a train is negligence. Whether it would be negligence or not in a given case would depend upon whether fur-

nishing such assistance was or was not within the bounds of its duty to exercise the high degree of care imposed upon it to secure the safety of its passengers."

In speaking of this duty, Hutchinson on Carriers, § 617a, p. 73, says:

"But the duty may be imposed where the passenger is known to be so sick, aged, or infirm as to need assistance in alighting safely, and certainly where the passenger is called upon to alight away from the station or at a dangerous and unusual place. Where conveniences for that purpose have not been provided, the carrier owes to the passenger the duty to see that he has such assistance as is reasonably necessary to enable him to alight in safety. As is said in a late case, 'the contract of a railroad company with its passenger does not terminate until he has alighted from the cars.'"

The fact that evidence was introduced by defendant to show that the steps used were not worn smooth or slick, and that the baggage carried by plaintiff was not large or heavy, and that her fall was caused, not by the defective condition of the steps, but through the plaintiff's contributory negligence in wearing high heel shoes or in not noticing how and where she was placing her foot, does not, in the opinion of the writer, justify this court in reversing and rendering the judgment. All these matters were before the jury and the trial court, and they were in better position to pass upon the weight of the conflicting testimony than this court. Even if it could be truthfully said that the great preponderance of the evidence exculpates defendant from any negligence in the respects charged, yet in the face of some evidence of a probative force tending to establish the existence of facts rendering it the duty of defendant's employees to assist plaintiff to alight, this court's duty would be to reverse and remand rather than to reverse and render. Hence the writer dissents from the conclusion reached by the majority on appellee's motion for rehearing.

### ELLIS v. HAYNES. (No. 8221.)

(Court of Civil Appeals of Texas. Dallas.  
Oct. 25, 1919.)

#### 1. EVIDENCE $\S$ 354(11)—BOOK ENTRY ADMISSIBLE ALTHOUGH WITNESS DID NOT MAKE ENTRIES.

In suit submitted upon sole issue whether deed from defendant and wife to plaintiff was intended as a mortgage or for security, where plaintiff claimed that at time of conveyance he paid to defendant \$500 in cash for the land, the court erred in excluding evidence of the cashier of the bank as to whether plaintiff's account showed a charge of \$500 on said date, though the cashier had not made the entry.

#### 2. EVIDENCE $\S$ 273(3)—SELF-SERVING DECLARATIONS OF GRANTOR.

In suit upon issue whether deed from defendant and wife to plaintiff was intended as a mortgage or for security, testimony as to declarations of defendant grantor to the effect that he was the owner, made when plaintiff was not present, claimed to be self-serving, was inadmissible.

#### 3. TRIAL $\S$ 849(3)—SUBMISSION OF SPECIAL ISSUE WITHOUT REQUEST.

Vernon's Sayles' Ann. Civ. St. 1914, art. 1984a, leaves with the court discretion to submit special issue without request.

#### 4. TRIAL $\S$ 232(2)—NECESSITY OF ACCOMPANYING SPECIFIC ISSUE WITH INSTRUCTION.

Where court submitted cause on sole issue whether deed from defendant and wife to plaintiff was intended as a mortgage or security, a charge on burden of proof, and question whether defendant after conveying the land remained in possession and attorned to plaintiff as his landlord for such time as would be a bar under statute of limitations, *held* necessary.

Error from District Court, Kaufman County; Joel R. Bond, Judge.

Suit by A. T. Ellis against John Haynes. Judgment for defendant, and plaintiff brings error. Reversed and remanded.

Wynne & Wynne, of Kaufman, and Adams & Stennis, of Dallas, for plaintiff in error.

Huffmaster & Huffmaster, of Kaufman, for defendant in error.

RAINEY, C. J. Plaintiff in error brought this suit to recover of defendant in error a certain tract of land conveyed to him in 1903, some 14 years before suit, by plaintiff and wife by an absolute conveyance. Plaintiff in error claims to be the owner under said conveyance.

Defendant in error by answer claimed said land, and that said conveyance was made by him and wife to secure plaintiff in error in the payment of an indebtedness and was given solely as a mortgage to secure said indebtedness, and therefor the plaintiff in error had no right to recover said land.

The case was submitted to the jury on the sole issue, viz.:

"Does the evidence show that the deed from John Haynes and wife, Jane Haynes, to the plaintiff, A. T. Ellis, dated October 28, 1903, was intended by the parties as a mortgage or security for a debt or other like purpose?"

The jury answered in the affirmative. Upon this answer being returned by the jury, the court rendered a judgment for defendant in error, and from this judgment a writ of error was sued out by plaintiff in error, who presents various assignments of error.

[1] The first assignment of error complains of the court in not admitting the testimony of Sam Krause, assistant cashier of the

First National Bank of Kaufman, as shown by the following bill of exception, viz.:

"Be it remembered, that on the trial of the above entitled and numbered cause, the plaintiff, A. T. Ellis, to prove the issues on his part, placed the witness, Sam Krause, upon the witness stand and the said witness testified that he is the assistant cashier of the First National Bank of Kaufman, Texas, and as such is in charge of the books of said bank, and that said books were correctly kept and were correct, and that the account of A. T. Ellis, shown by said books for the year 1904 were part of the records kept by him as assistant cashier of said bank, though he personally had not made the entries made in said books, and then plaintiff propounded to said witness through his counsel, the following question: 'Turn to the account of A. T. Ellis and see the state of the account of A. T. Ellis on October 28, 1903, and see if there is a charge there of \$500.00 on said date.' To which question and the answer sought to be elicited, the defendant objected for the reason that the books had not been kept by the said Sam Krause, and he had not personally made the said entries, which objections of the defendant were by the court sustained and the said witness not permitted to answer and all of his testimony excluded. To which action of the court the plaintiff then and there objected and excepted because said witness would have testified, if he had been permitted to testify, that the said books showed that on that date A. T. Ellis was charged with \$500.00 the amount paid to John Haynes, but the court refused to permit said witness to testify. To which action of the court plaintiff then and there objected and excepted, and here and now objects and excepts, and tenders this his bill of exceptions No. 4 and asks that it be approved by the court. Wynne & Wynne, Attorneys for the plaintiff, A. T. Ellis.

"Sam Krause testified that the books of the bank were correctly kept since he had been in control, but could not state their condition when kept at the time inquired about, as he was not in charge and did not make them. He knew nothing about their correctness. Approved this 30th day of September, 1918. Joel R. Bond, Judge Presiding."

The second assignment of error and proposition submitted are virtually the same as the first, and we submit only appellant's proposition under the first assignment, as follows:

"The keeper of books of accounts of a bank, not a party to the suit, and who has personally examined said books and testified that said books had been correctly kept and are correct, should be permitted to testify whether said books show a certain item charged to one of the parties to the suit on a certain date, notwithstanding the objection by the other party on the ground that the books had not been kept by the witness and the witness had not personally made such entry."

Appellant pleaded that at the time of said conveyance he paid to John Haynes \$500 in

cash for said land, and so testified. Haynes claimed that he never received any money for said land; that, if it was paid, it was paid to another; that he had arranged for a loan of \$500, and if said sum was paid out by plaintiff in error it was paid to another and not to him. The testimony sought, if admitted, would have been a circumstance tending to corroborate plaintiff in error and a denial of defendant in error's testimony as to the payment of \$500 in cash to Haynes. The court erred in refusing to admit this testimony. The question of the admission of such testimony is fully discussed in *Railway Co. v. Startz*, 42 Tex. Civ. App. 85, 94 S. W. 207, and *Barclay v. Deyerle*, 53 Tex. Civ. App. 236, 116 S. W. 123. In the last case cited a writ of error was denied by the Supreme Court. In the case of *Railway Co. v. Startz*, Mr. Chief Justice Fisher says:

"The admissibility of this evidence does not rest upon the 'shopbook rule,' which relates only to the books and entries of parties to the controversy, but depends upon those principles of law that admit entries made by third parties who are not connected with the controversy."

And then states the rule thus:

"(1) But written entries by persons deceased may, under some circumstances, be shown in evidence against third persons. Thus, where a person has peculiar means of knowing a fact, and makes a written memorandum thereof against his interest at the time, such entry is evidence of the fact as against third persons after the death of the person making it. (2) Again, entries by third persons made contemporaneously with the principal fact, forming links in the chain of events, and constituting a part of the res geste, are admissible; and in such case it is immaterial whether the entries were for or against the interest of the person making them. (3) Another class of entries made by third persons, which may be received in evidence is recognized by some authorities, though by others not distinguished from the preceding, and consist of entries made at the time and in the ordinary course of business by a person whose duty it is to make them."

[2] The third, fourth, and fifth assignments complain of the admission of the testimony of witness Massy and John Haynes as to declarations of said John Haynes to the effect that he (John Haynes) was the owner of said land, which declarations were made when A. T. Ellis was not present, and were self-serving and not admissible. Plaintiff in error submits the following proposition under said assignments:

"The declarations of a grantor while in possession of the land, showing or tending to show that a deed absolute on its face was really intended as a mortgage, are not admissible for any purpose bearing on the question of title where made in the absence of the grantee many years after such conveyance, and the court erred in admitting in evidence, over objections

of plaintiff, statements of the defendant and his witness theretofore made in the absence of plaintiff, showing or tending to show that, many years after the execution and delivery by defendant to plaintiff of a deed executed by defendant and his wife absolute in form and conveying to plaintiff the property in controversy, the defendant was claiming that the conveyance to plaintiff was conditional and that defendant was claiming to own said property."

Said declarations were not admissible as evidence in this action. *Wallace v. Perry*, 83 Tex. 328, 18 S. W. 595; *Ratliff v. Gordon*, 149 S. W. 196.

[3, 4] Error is assigned to the action of the court in submitting special issues to the jury without request from either party. The court submitted one issue but gave no general charge, however, instructed the jury in connection therewith to the effect:

"That a deed on its face may be shown by parol or oral evidence to be a mortgage or security for money loaned or advanced for a debt owing," etc.

There was no charge upon the burden of proof as to whom the burden was on, nor was there any charge on statute of limitation. It was not error in the court in submitting special issues to the jury. Article 1984a, Vernon's Sayles' Texas Statutes, treating of the submission of special issues, amendment 1913 Legislature, reads, in part:

"In submitting special issues the court shall submit such explanations and definitions of legal terms as shall be necessary to enable the jury to properly pass upon and render a verdict on such issues, and the court may submit said cause upon special issues without request of either party, provided that if the nature of the suit is such that it cannot be determined on the submission of special issues, the court may refuse the request to do so, but the action of the court in refusing may be reviewed on proper exception in the appellate court, and this article shall be construed in connection with article 1985 of chapter 14, title 37, Revised Statutes."

This provision leaves with the court the discretion to submit special issues without request, which discretion is subject to review by the appellate courts.

While in the submission of the one special issue in this court we think the court ought to have charged on the burden of proof and in the question of whether Haynes, after conveying the land, remained in possession of it and attorned to Ellis as his landlord for such time as the statute of limitation would have barred him from a recovery.

The judgment for the reason of the wrongful exclusion and admission of testimony pointed out will be reversed, and cause remanded.

# Ex parte GRIMES.

CRAVEN v. WHITTENBERG.  
(No. 6143.)

(Court of Civil Appeals of Texas. Austin.  
Oct. 24, 1919. Rehearing Denied  
Nov. 26, 1919.)

## 1. COURTS ⇨475(1) — OUSTER OF JURISDICTION BY COURT OF CONCURRENT JURISDICTION.

When a court of competent jurisdiction has obtained jurisdiction of a cause, such jurisdiction cannot be ousted by a proceeding as to the same cause subsequently instituted in a court of concurrent jurisdiction.

## 2. COURTS ⇨42(3) — VALIDITY OF STATUTE CONFERRING JURISDICTION ON JUVENILE COURT.

Rev. St. 1911, arts. 2184-2190, defining the jurisdiction of juvenile courts and prescribing the procedure as to dependent or neglected children, are not in violation of Const. art. 5, § 8, conferring on the district court original jurisdiction over guardians and minors and general jurisdiction over all causes of action for which a remedy or jurisdiction is not provided by law or Constitution, when considered in connection with section 16, giving the county court a power to appoint guardians of minors.

## 3. GUARDIAN AND WARD ⇨29 — DUTIES OF GUARDIAN OF PERSON.

Guardians of minors may be either of the person or of the estate, the guardian of the person being entitled to the charge and control of the ward and the care of his support and education, in view of Rev. St. 1911, art. 4122.

## 4. GUARDIAN AND WARD ⇨29 — CONSTITUTIONALITY OF STATUTE CONFERRING ON GUARDIAN CONTROL OF WARD'S PERSON.

A statute giving to the legally appointed guardian of a minor control of the person of the ward and the care of his support and education upon such terms and under such restrictions as may be provided by law is constitutional.

## 5. GUARDIAN AND WARD ⇨8 — JURISDICTION OF COUNTY COURT TO APPOINT GUARDIAN.

The county court is a proper tribunal to appoint a guardian for the person of a minor.

## 6. INFANTS ⇨19 — PROCEEDINGS TO APPOINT GUARDIAN IN COUNTY COURT.

Where the county court, sitting as a juvenile court, tried a complaint that a certain person was a dependent child before a jury, and adjudged such person to be a dependent child and the ward of the court subject to its orders until finally discharged or until attaining the age of 21 years, the proceeding was one to appoint a guardian for the dependent child.

## 7. INFANTS ⇨19 — APPOINTMENT OF PROBATE OFFICER AS GUARDIAN OF DEPENDENT.

Where the county court, sitting as a juvenile court, acting upon a petition charging a cer-

tain person with being a dependent child, decreed the child to be dependent and issued an order of commitment to the probate officer of the county until further order of the court, the effect of the order was to make such probate officer the guardian of the dependent, in view of Rev. St. 1911, arts. 2184, 2189, and 2190.

**8. HABEAS CORPUS  $\Leftrightarrow$ 46 — INFANTS  $\Leftrightarrow$ 19 — CONSTRUCTION OF STATUTES AUTHORIZING THE APPOINTMENT OF GUARDIANS.**

Rev. St. 1895, arts. 3502a, 3502b, conferred upon the county courts the power to determine the custody of children and to exercise the power through a writ of habeas corpus in cases where guardianship was not involved, while Rev. St. 1911, arts. 2184, 2189, and 2190, provide for the appointment of guardians and make custody in such cases only an incident of the guardianship.

**9. HABEAS CORPUS  $\Leftrightarrow$ 3, 4—REVIEW OF ERRORS IN APPOINTMENT OF GUARDIAN.**

Where the county court authorized the probate officer to take charge of a dependent child pending a motion for a new trial, such action, if error, could be corrected only upon motion for new trial or upon appeal, but not by means of a writ of habeas corpus.

**10. HABEAS CORPUS  $\Leftrightarrow$ 4, 30(1)—NATURE AND ELEMENTS.**

Habeas corpus is not a method of appeal, and is a collateral attack which cannot be invoked where there have been mere irregularities in proceedings of another court, but only where the judgment of such other court is absolutely void.

Appeal from District Court, McLennan County; Richard I. Munroe, Judge.

Habeas corpus by Mrs. Lillian Whittenberg against F. A. Craven to recover the custody of Grace Lee Grimes, a dependent child. From a judgment granting the application for the writ, respondent appeals. Reversed, with instructions.

Jas. P. Alexander, of Waco, for appellant.  
F. M. Fitzpatrick and E. C. Street, both of Waco, for appellee.

**Findings of Fact.**

JENKINS, J. This suit was a proceeding under an application for writ of habeas corpus, the petition therefor alleging that Grace Lee Grimes was illegally restrained of her liberty by F. A. Craven. On the — day of March, 1919, a complaint was duly filed in the county court of McLennan county, sitting as a juvenile court, charging that Grace Lee Grimes was a dependent child. On March 17, 1919, said cause was tried, and the jury returned a verdict that said Grace Lee Grimes was a dependent child. On the same day the county court entered the following judgment:

"It appearing to the court that said Grace Lee Grimes is under sixteen years of age, to

wit, nine years of age, and that the evidence adduced shows her to be a dependent child, it is therefore ordered, adjudged, and decreed that said child is a dependent child, and a ward of this court, and subject to this and all further orders of this court until finally discharged, or until she reaches the age of twenty-one years."

On the same day the court issued an order of commitment as follows:

"In the above-entitled cause it appearing to the court that it is to the best interest, morally and physically, of the child, Grace Lee Grimes, that she be turned over to the care and custody of F. A. Craven, probate officer of McLennan county, a suitable person residing in Waco, McLennan county, it is therefore ordered, adjudged, and decreed by the court that the said Grace Lee Grimes be turned over to the care and custody of F. A. Craven, subject to the following stipulations: Until further ordered by this court. And it is further ordered that said F. A. Craven, probate officer, have the right to the custody of said child subject to the further orders of this court."

These matters were all alleged in appellant's answer in the habeas corpus proceeding. That court granted the application for habeas corpus, and awarded the custody of Grace Lee Grimes temporarily to her mother Mrs. Lillian Whittenberg; to which action of the court appellant duly excepted, and has perfected his appeal to this court.

**Opinion.**

The issue presented in this case is as to the constitutionality of articles 2184-2190, defining the jurisdiction of juvenile courts. Article 2184 defines a dependent or neglected child. Article 2185 gives both the district and the county court jurisdiction over such child, when sitting as a "juvenile court." Article 2186 declares who may institute proceedings. Articles 2187, 2188, 2189, and 2190 are as to the procedure in such cases.

Jurisdiction is given the county court by the express terms of the act, and the proceedings were in accordance with its terms. Had there been no such proceedings in the county court, the district court would have had jurisdiction under a habeas corpus proceeding to determine the custody of the child.

[1] When a court of competent jurisdiction has obtained jurisdiction of a cause, such jurisdiction cannot be ousted by a proceeding as to the same cause subsequently instituted in a court of concurrent jurisdiction. *Stone v. Byars*, 32 Tex. Civ. App. 151, 73 S. W. 1086; *Ry. Co. v. Lewis*, 81 Tex. 1, 16 S. W. 647, 26 Am. St. Rep. 776; *Clepper v. State*, 4 Tex. 242; *Goggan Bros. v. Morrison*, 163 S. W. 119. Hence it follows, under the facts of this case, that, if articles 2184-2190 are constitutional, the district court erred in assuming jurisdiction in this cause.



It is the contention of appellee that the Articles referred to are in violation of article 5, § 8, of the Constitution of this state, which confers upon the district court "original jurisdiction and general control over executors, administrators, guardians and minors; under such regulations as may be prescribed by law," and "general original jurisdiction over all causes of action whatever for which a remedy or jurisdiction is not provided by law or this Constitution, and such other jurisdiction, original and appellate, as may be provided by law."

It is plain from this provision of the Constitution that, if there was no other provision giving the county court jurisdiction herein, the district court would not only have jurisdiction to determine the custody of the minor, but would have exclusive jurisdiction in such case. Where nothing is involved except the issue of custody, the Constitution does not confer jurisdiction to determine such issue upon any other court. This was the case in *Legate v. Legate*, 87 Tex. 248, 28 S. W. 281; *Rice v. Rice*, 24 Tex. Civ. App. 506, 59 S. W. 941, cited by appellee. In *Estes v. Presswood*, 137 S. W. 146, cited by appellee, the question of jurisdiction was determined by the residence of the parties. For the reason stated, these cases are not in point in the instant case, unless there is no provision of the Constitution which conferred jurisdiction upon the county court under the facts of this case.

[2] We think there is such a provision in our Constitution, viz., article 5, § 16, which reads as follows:

"The county court shall have the general jurisdiction of a probate court; they shall \* \* \* appoint guardians of minors."

For similar provisions in prior Constitutions of this state, see article 4, § 16, Constitution of 1866; article 4, § 15, Constitution of 1861; article 4, § 15, Constitution of 1945.

[3-5] Guardianships of minors are of two kinds, viz., guardianship of the person and guardianship of the estate. "The guardian of the person is entitled to the charge and control of the person of the ward, and the care of his support and education, and his duties shall correspond with his rights." R. S. art. 4122. The right of a guardian of the person of a minor to the custody of such minor was well understood when our present Constitution was adopted. 12 R. C. L. pp. 1103 and 1119; 21 Cyc. 62; Act March 20, 1848, P. D. art. 3904. There can be no question as to the constitutionality of a statute giving such control to the legally appointed guardian of a minor, upon such terms and under such restrictions as may be provided by law. Nor can it be doubted that the county court is a proper tribunal to appoint a guardian for the person of a minor.

[6, 7] Was the proceeding in the county

court in the instant case a proceeding to appoint a guardian for Grace Lee Grimes, and was the effect of the judgment of that court to appoint F. A. Craven as such guardian, either temporary or permanent? We think these questions must be answered in the affirmative.

Article 2184 defines a "dependent child," among other things, as one who has "no proper *guardianship*." Article 2189 provides that one adjudged to be a dependent child "may be turned over to the care and custody of any suitable person or any suitable institution in the county or state organized for the purpose of caring for 'dependent children,' and which is able and willing to care for same. And when such child is so turned over to the custody of such person or institution, such person or institution shall have the right to the custody of said child, and shall be at all times responsible for its education and maintenance, subject at all times to the orders of the court."

These are essential elements of guardianship of the person and of nothing else. Article 2190 is explicit as to this. It declares that, where a dependent child is turned over to any individual or institution, it "shall become a *ward* and be subject to the *guardianship* of the institution or individual to whose care it is committed. \* \* \* The court may change the *guardianship* of such child," etc. (Italics in the foregoing excerpts ours.)

[8] The difference between articles 3502a and 3502b, R. S. 1895, and the articles here under consideration, is that the former articles undertook to confer upon the county courts the power to determine the custody of children, and to exercise such power through a writ of habeas corpus in cases where guardianship was not involved, whereas the latter articles provide for the appointment of guardians, custody in such cases being only an incident of the guardianship, as it is a necessary incident of all guardianship proceedings. In *Rice v. Rice*, 24 Tex. Civ. App. 507, 59 S. W. 942, the court said:

"This is not an application for the appointment of a guardian of a minor. It is a civil proceeding by habeas corpus, in which the sole question to be determined is: Who is entitled to the custody of the infant?"

The delinquent child act was held constitutional in *Ex parte Bartee*, 76 Tex. Cr. R. 285, 174 S. W. 1051.

The Constitution of Idaho confers jurisdiction upon county courts in that state, "in all matters of probate \* \* \* and appointment of guardians," as does the Constitution of this state. The Legislature of Idaho passed a delinquent child act similar to the one here under consideration. In a very able opinion by the Supreme Court of that state, the act was held to be constitutional.

In re Sharpe, 15 Idaho, 120, 96 Pac. 563, 18 L. R. A. (N. S.) 896.

[9, 10] It is the contention of appellee that the county court erred in issuing an order authorizing appellant to take charge of the child, pending a motion for new trial. We do not think that the court abused its discretion in this; but, if it be conceded that the court committed error in so doing, such error could be corrected only upon motion for new trial, or upon appeal. Habeas corpus is not a method of appeal. It is a collateral attack, and cannot be invoked where there have been mere irregularities in the proceedings of another court, but only where the judgment of such other court is absolutely void. *Holman v. Mayor*, 34 Tex. 670; *Ex parte Dickerson*, 30 Tex. App. 448, 17 S. W. 1076; *Ex parte Branch*, 36 Tex. Cr. R. 384, 37 S. W. 421; *Ex parte Japan*, 36 Tex. Cr. R. 482, 38 S. W. 43.

We hold that articles 2184-2190 are constitutional; for which reason the judgment of the trial court is reversed, with instructions to dismiss this cause.

Reversed, with instructions.

#### RUNGE v. FRESHMAN et al. (No. 8175.)

(Court of Civil Appeals of Texas. Dallas.  
Nov. 8, 1919.)

#### 1. HUSBAND AND WIFE §29(7)—DEEDS TO FUTURE WIFE NOT "MATRIMONIAL AGREEMENTS" REQUIRING ATTESTING WITNESSES.

Rev. St. 1911, art. 4618, providing that every "matrimonial agreement" must be acknowledged before some officer and attested by at least two witnesses, *held* not to govern deeds executed before marriage by a husband to his future wife to settle on her a portion of the property of which he was absolutely possessed, in consideration of her marrying, the property to be her separate estate for life, to revert to him if she died without issue, but if she had issue to go to her heirs.

#### 2. HUSBAND AND WIFE §29(8)—VALIDITY OF ANTENUPTIAL SETTLEMENT BY DEEDS.

Deeds executed before marriage by a husband to his future wife, granting her the property for life, to revert to him if she died without issue, but if she had issue to go to her heirs, *held* not prohibited by Rev. St. 1911, art. 4617, as a stipulation between parties about to marry, altering the legal order of descent and distribution as contemplated by the Legislature.

#### 3. DEEDS §128—ALTERNATIVE GRANT ON CONTINGENCY VALID.

Despite the rule in *Shelley's Case*, a deed with the provision that, if the grantee dies first, title shall pass to another, is valid.

#### 4. DESCENT AND DISTRIBUTION §68—LAWS OF DESCENT AFFECT PROPERTY OWNED AT DEATH ONLY.

The laws of descent and distribution govern only what the person owns at his death, and cannot touch what he has disposed of during his life, so that a person has heirs only as to property which he holds at his death, and not as conveyed away during his lifetime.

Appeal from District Court, Dallas County; W. F. Whitehurst, Judge.

Suit by Julius Runge, trustee in bankruptcy, against Sam Freshman and another. From judgment for defendants, plaintiff appeals. Affirmed.

Brooks, Worsham & Graham, and Allen Charlton, all of Dallas, for appellant.

Synnott & Duggan, of Dallas, for appellees.

RAINEY, C. J. Appellant, as trustee in bankruptcy of Samuel Freshman, bankrupt, sued appellees in trespass to try title to recover certain lots of land herein described in the city of Dallas, alleging that Benjamin Moses Freshman, a minor, was claiming some interest in the said property and that Samuel Freshman was the common source of title.

Defendant pleaded a general demurrer and general denial and specially answering in substitute that prior to June 15, 1906, Samuel Freshman was a widower; that he was solvent; that in contemplation of marriage with Miss Minnie Franklin he deeded her before marriage the two pieces of property sued for; that the marriage was consummated a few days after the execution of the deeds; that the minor defendant, Benjamin Moses Freshman, was born of said wedlock, and that in 1910 Mrs. Freshman, the mother of said minor, died; that Samuel Freshman was appointed guardian of the estate of said minor and inventoried the property in controversy here in the probate court as the property of said minor. He further pleaded the three and ten year statutes of limitation.

A trial resulted in a judgment for appellees, from which this appeal is taken.

#### Conclusions of Fact.

The following facts were agreed to by the parties upon the trial of the case:

(1) That in cause No. 1211, in bankruptcy, in the matter of Samuel Freshman, bankrupt, in the District Court of the United States for the Northern District of Texas, at Dallas, Tex., the said Samuel Freshman was adjudged a bankrupt on the 2d day of November, 1915, and that the plaintiff, Julius Runge, after being duly appointed, qualified as trustee of said Freshman's estate, and his bond was approved by the referee in bankruptcy on November 26, 1915, and that on April 16, 1917, the date on which this suit was filed,

and on February 7, 1918, the date on which this case was tried, said bankruptcy proceedings were still pending in said court, and that at all of said times the plaintiff, Julius Runge, was and had been the duly appointed, qualified, and acting trustee in bankruptcy of said estate.

(2) That prior to the 15th day of June, 1906, Samuel Freshman was a widower, having one child, to wit, a daughter, by a former marriage, and that prior to said June 15, 1906, he sought in marriage one Minnie Franklin.

(3) That the said Minnie Franklin was without separate estate, and that the said Samuel Freshman owned, as his own separate estate, property, including that described in plaintiff's petition herein, of the aggregate value of, to wit, \$50,000.

(4) That before the said Minnie Franklin would consent to the marriage, she required that the said Samuel Freshman convey to her certain property, to be hers during her lifetime, among which property was that described in plaintiff's petition herein.

(5) That pursuant to such agreement between the said Samuel Freshman and the said Minnie Franklin the said Samuel Freshman executed to the said Minnie Franklin the two deeds introduced in evidence on the trial of this cause by the defendants, and which are hereinafter set out.

(6) That at the time said deeds were made by said Samuel Freshman to said Minnie Franklin the said Samuel Freshman was then and for many years thereafter a man of ample means, and was worth over and above all debts and exemptions, and had property in his own name, over and above such debts and exemptions, worth an amount in excess of \$40,000 and was indebted to no one which he was unable to pay promptly, and was not then indebted to any one in any amount which was not thereafter paid in full.

(7) That in addition to the consideration recited in said deeds the said Minnie Franklin assumed to pay and did actually pay off as much as \$1,000 indebtedness, which was against the lands at the time Freshman deeded them to her.

(8) That Samuel Freshman and Minnie Franklin were duly and legally married on June 20, 1906, and lived together as husband and wife until on or about December 1, 1910, at which time she died, leaving, surviving her, her husband, Samuel Freshman, and her minor son by Samuel Freshman, whose name was and is Benjamin Moses Freshman, who was born on the 19th day of February, 1908; that at the date of the death of said Mrs. Minnie Freshman she left no other children surviving her; and that she died intestate.

(9) That Samuel Freshman thereafter made application to the county court of Dallas county, Tex., to be appointed guardian of the estate of said Benjamin Moses Freshman,

and such application was granted, and thereafter the said Samuel Freshman duly qualified as such guardian, and is now, and has been at all the times since the filing of this suit, the duly appointed, qualified, and acting guardian of said minor's estate; that he returned into court an inventory, appraisalment, and list of claims as required by law, in which he listed said property of said minor.

(10) That at the time plaintiff was appointed and qualified as trustee of the estate of Samuel Freshman, bankrupt, the said Samuel Freshman did not owe any one whom he owed at the time he conveyed the property described in plaintiff's petition to Minnie Franklin; that up to the latter part of 1914 the said Sam Freshman had been and was amply solvent, and that the beginning of his insolvency dated from the year 1915, and that all the creditors he was indebted to at the time of said bankruptcy, and all the creditors represented by the plaintiff as trustee, are creditors whose claims dated from said year 1915, and the latter part of the year 1914, and that he did not then owe, and did not owe at the time of the filing of his amended answer herein on May 14, 1917, any person, firm, or corporation whose indebtedness dates back to a time antecedent to the year 1914.

Samuel Freshman executed the following deed:

"Know all men by these presents that I, Samuel Freshman, of the county of Dallas, state of Texas, \* \* \* of the sum of one dollar to me in hand paid and of my love and affection for Minnie Franklin, my future wife, of the state and county aforesaid, have granted, sold and conveyed, and by these presents do grant, sell and convey, unto the said Minnie Franklin, my future wife, of the county of Dallas, state of Texas, all that certain lot, tract or parcel of land described as follows: [Description omitted]"—and containing the usual habendum and general warranty clause. "Witness my hand at Dallas, Texas, this 15th day of June, A. D. 1906. Sam Freshman."

On the same date a deed to a different tract was executed, containing the following condition:

"That in the event of the death of the grantee herein before the death of the grantor, title to the property herein conveyed shall revert to the grantor, unless there shall be then living a child or children, offspring of grantor and grantee, in which event it shall descend in fee simple to such offspring."

The execution of neither deed was witnessed, but both were duly signed by Sam Freshman and were acknowledged by him and recorded. "That at the time defendant offered to introduce said deed in evidence plaintiff objected to the introduction of the same, because said deed, having been made in contemplation of marriage, and when the parties thereto were intending to enter into the marriage state, and not having been at-

tested by two witnesses, was incompetent, irrelevant, and immaterial as evidence in this case, and was not admissible to show a divestiture of title out of the said Sam Freshman." Said deeds were admitted in evidence by the court, and the appellant duly excepted.

Appellant's first and second assignments of error will be considered together. Both assignments complain of the admission in evidence of both deeds, and make complaint under propositions:

(1) Proposition under first assignment of error is:

"Where a deed is made in contemplation of marriage, and when the parties thereto were intending to enter into the marriage state, and such deed has not been attested by two witnesses, such deed is incompetent and inadmissible as evidence to show a divestiture of title out of the grantor."

(2) The proposition under the second assignment of error is:

"Where a deed is made in contemplation of marriage, and when the parties thereto were intending to enter into the marriage state, and such deed has not been attested by two witnesses, such deed is incompetent and inadmissible as evidence to show a divestiture of title out of the grantor."

[1] It is further contended that said instruments are "matrimonial agreements," within the meaning of article 4618, R. S., and are incompetent, immaterial, irrelevant, and inadmissible. While as a rule deeds of conveyance are in fact considered to be agreements, we are inclined to the belief that the Legislature, in passing article 4618, never intended deeds made as this was should not be included in the term "matrimonial agreement." Sam Freshman executed these deeds evidently with the intention of settling upon Minnie Franklin a portion of his property of which he was absolutely possessed in consideration of her marrying him, which was a valuable consideration, the property to be her separate estate during her life, and to revert to him in the event of her death without issue, but in the event of issue to go to her heirs. The statute allows settlements of this kind to be made. Minnie Franklin not only accepted the property, but accepted it, possessed it, and lived on it, enjoying it as her separate property until her death, and after she died Sam Freshman was appointed guardian of their child and managed it for him, never claiming any further interest for himself. Nor was any interest in others asserted, except appellant is suing as referee in bankruptcy, and is trying to gain possession for the payment of debts contracted long after said deeds had been made. In *McLeod v. Board*, 30 Tex. 239, 94 Am. Dec. 301, a case where a marriage settlement was made, it was held that when a marriage settlement excludes the husband from participating in

the estate he is forever excluded. Sam Freshman, after his wife's death, ratified by his acts what he did by the deeds, by acting as his son's guardian, and the statute of limitations had run for a sufficient time to bar the claim of creditors.

[2-4] The deeds made by Samuel Freshman were executed before he and Minnie Franklin were married, and at a time when Freshman's daughter by a former marriage had no interest in his property, and when under the law he had the right to dispose of it as he deemed proper, not inconsistent with the law of the land. We are of the opinion that said deeds do not change the order of descent and distribution as contemplated by the Legislature, and the remarks of appellee's counsel are apropos on this question; therefore we adopt them as part of this opinion:

"There has been no rule of forced heirship in Texas since any of the transactions of this case had their inception. Therefore there has been no inhibition against an ancestor disposing of his property during his lifetime by deed or will as he saw fit. Notwithstanding the rule in *Shelley's Case*, a deed with a provision that, if the grantee dies first, the title shall pass to another, is valid. And the deed takes immediate effect, and the legal title passes from the grantor at once, as well as the equitable estate and all other right. Now, the laws of descent and distribution govern only what the party may own at his death, and cannot touch what he has disposed of during his life. The rule and article of the statute insisted upon by appellants refer to marrying parties entering into an agreement whose effect may be to control the disposition of their estate owned by them when they die. The legal order of descent and distribution says that, when parties die, the property then owned by them shall pass in a certain way. Now, under our statute, the marrying parties cannot enter into any agreement general in its terms by which it is agreed that whatever property they die possessed of, or any fraction of it, shall descend a certain way. They would then be legislating. But that does not mean that they cannot convey each to the other, then or any other time during their lives, or divest themselves of every article of property then or at any other time vesting in them. Counsel speak of Freshman having a daughter by a former marriage. That daughter had no more interest in property then owned by Freshman than a stranger had. He could do as he pleased with it. Only when death overtook him while he owned property would any right of hers attach. And since the repeal of the forced heirship statute he could leave a will absolutely taking away any interest she might otherwise have had. So the legal order of descent and distribution could only attach to such property as remained Sam Freshman's at his death and undisposed of by will. Therefore that was the only property that could be affected by the statute referred to by appellants. Then what does the statute mean? Why, that these parties had no right to enter into a contract to the effect that, when either died, undisposed-of property, property then owned by the deceased, should descend in some other way than that outlined by the statutes of descent and distribution. It did not

mean that their free disposition of property during their lives should be hampered, or that it should affect property, the title to which passed by deed away from Freshman. Take every case that counsel cite, and the facts thereof show just what we are contending for. Counsel do not dare tell the facts of those cases, but must content themselves with quoting announcement of principles. But they all deal with contracts that seek to affect property that the deceased died without disposing of."

The case of Groesbeck v. Groesbeck, 78 Tex. 664, 14 S. W. 792, is cited by appellant in support of his right to recover. In that case the parties entered into a marriage contract by which the property of the intended wife was to remain in the hands of a trustee where it was at that time. The parties were married, and afterwards they entered into a postnuptial contract, which was sought to be annulled. By the last contract between them it was provided that—

"In case he died without issue of his marriage his property was to descend and be distributed among his heirs as if no marriage had ever taken place between him and his wife, so depriving her of his personal property and one-half of the real estate to which she would be entitled under the laws of this state; also revoking the antenuptial agreement."

The court held as follows:

"We think the court below, without regard to averments and proof of fraud and undue influence on the part of Mrs. P. H. Groesbeck, should have instructed the jury to find for the plaintiff on the ground that the agreement sought to be set aside was such an agreement as the husband and wife had no power to make. The agreement was intended to change the law of descent, and at the death of the husband deprive the wife of her distributive share of his property under the law. Husband and wife cannot alter the legal order of descent in respect to themselves or their children by contract made in contemplation of marriage, and by a much stronger reason they cannot do so by contract during marriage. Rev. Stats. art. 2847; Cox v. Miller, 54 Tex. 24. Without reference to the fact that there was an antenuptial agreement which the postnuptial agreement illegally pretended to revoke, this contract was such as could not be made between husband and wife and was void. This being the law of the case, no other supposed errors need be considered."

While in said case the court announces that "husband and wife cannot alter the legal order of descent in respect to themselves or their children by contract made in contemplation of marriage, and by a much stronger reason they cannot do so by contract during marriage," which is correct as far as marriage contracts are concerned, yet in said Groesbeck Case the court sustained the lower court's holding that the postnuptial contract was void, and in effect let the antenuptial contract stand. The opinion does not hold contrary to views we have ex-

pressed, and leaves this case without any decision of our courts supporting it directly in point.

"A court of equity," says Kent, "will always carry the intention of these settlements into effect, when that intention is explicit and certain." There can possibly be no contention that it was not the intention of the parties to the deed that the land should be that of Minnie Franklin. Therefore we hold that said judgment should be affirmed. Affirmed.

### CLARK v. MAUND. (No. 495.)

(Court of Civil Appeals of Texas. Beaumont. Nov. 12, 1919.)

#### 1. JUSTICES OF THE PEACE ⇨164(3) — DISMISSAL OF APPEAL FOR FAILURE TO TRANSMIT TRANSCRIPT.

Where justice of the peace did not comply with Rev. St. 1911, arts. 2396, 2397, requiring, in case of appeal to county court, transmission of transcript on or before the first day of the next term, or on or before the first day of the second term of the county court, and defendant appellant did not cause transcript to be filed until the last day of the third term, *held*, county court did not abuse its discretion in dismissing appeal for want of prosecution.

#### 2. JUSTICES OF THE PEACE ⇨164(3)—APPELLANT'S DUTY TO REQUIRE JUSTICE TO TRANSMIT TRANSCRIPT.

While it was the duty of the justice of the peace under Rev. St. 1911, arts. 2396, 2397, to transmit transcript to county court on appeal, it was also the duty of appellant to prosecute his appeal with reasonable diligence, and, if necessary to that end, resort to proper means to compel the justice to make up and transmit transcript to county court.

Appeal from Sabine County Court; F. P. Adams, Judge.

Suit by H. M. Maund against F. I. Clark. There was judgment for plaintiff in the justice court, an appeal to the county court by defendant, where motion to dismiss appeal was granted, and defendant appeals. Affirmed.

Hamilton & Hamilton, of Hemphill, for appellant.

Minton & Lewis, of Hemphill, for appellee.

HIGHTOWER, C. J. On the 6th day of November, 1917, H. M. Maund, who is the appellee here, filed suit in the justice court of precinct No. 1, Sabine county, against F. I. Clark, who is appellant here, upon a verified open account for the sum of \$164.53. On the 25th day of March, 1918, said cause was tried in said justice court, and the plaintiff, Maund, recovered a judgment against the defendant, Clark, for the full amount sued for. Clark

excepted to the judgment so rendered, and gave notice of appeal to the county court of Sabine county, and thereafter, in due time, filed with the justice his appeal bond, conditioned and made payable as by law required, seeking to remove said cause to the county court of Sabine county.

The first term of the county court of Sabine county that convened after the judgment in the justice court was rendered was the May term of the county court, and the second term of the county court that convened after such judgment in the justice court was the August term of the county court, and the third term of the county court to convene after such judgment in the justice court was the November term of the county court.

The record in this case shows, without dispute, that the justice of peace, notwithstanding the filing with him by Clark of his appeal bond, did not transmit or send up to the county court the transcript in said cause, on Clark's appeal bond, as by law required to do, so that such transcript and appeal bond might be filed in the county court at its first term after such appeal was perfected; nor did said justice of the peace send up said transcript and appeal bond to said county court, so that they could be filed in said county court at the second term, which was the August term after the judgment in the justice court. On the 7th day of December, 1918, however, appellant, Clark, did cause said transcript and appeal bond to be filed in said county court; said 7th day of December being the last day of the third term of the county court of Sabine county that convened after the judgment in the justice court was rendered.

Immediately, so far as we are able to gather from the record here, upon filing by appellant of the transcript and appeal bond in the county court, appellee, Maund, filed in the county court a motion in which he prayed the court to dismiss appellant's appeal to that court on the ground, in substance, that appellant, Clark, had negligently failed to prosecute his appeal to that court, without any reason or excuse for such failure; his motion showing that practically three terms of the county court had convened and passed after the judgment in the justice court was rendered, and that no reason existed for such failure on the part of appellant. This motion was resisted by appellant, Clark, and he asked the court to overrule the same, and to postpone the trial of the cause in the county court until the February term, 1919. Upon hearing and consideration of this motion to dismiss, the same was granted by the county court, and the appeal was dismissed, and to this action of the county court in dismissing the appeal appellant, Clark, duly excepted, and gave notice of appeal to this court.

[1] All of appellant's assignments of error raise substantially the same legal question, and what we shall say will dispose of them

all, without taking them up and disposing of them numerically. It is the contention of appellant, substantially, that the county court had no right or authority to dismiss his appeal from the justice court, notwithstanding the fact that practically three terms of the county court had convened and expired before the transcript in the justice court and his appeal bond had been filed in the county court; he contending, in effect, that the law made it the duty of the justice of peace to file such transcript and appeal bond in the county court, and that the failure of the justice of the peace to so file said transcript and appeal bond at the first and second terms of the county court next convening after the judgment in the justice court could not deprive appellant of the right to have the county court try the cause de novo, since the transcript and appeal bond were filed during the third term of the county court, as hereinbefore shown.

Article 2396, R. S., provides:

"Whenever an appeal has been granted from the justice's court to the county court, it shall be the duty of the justice who made the order immediately to make out a true and correct copy of all the entries made on his docket in the cause, and certify thereto officially, and transmit the same, together with a certified copy of the bill of costs taken from his fee book, and the original papers in the cause, to the clerk of the county court of his county."

Article 2397 provides:

"Such transcript and papers shall, if practicable, be transmitted to the clerk of the county court on or before the first day of the next term of such court; but, if there be not time to make out and transmit the same to the first term, they may be so transmitted on or before the first day of the second term of the court."

[2] From these articles it will be observed that it was the duty of the justice of peace, as contended by appellant, to make up and transmit to the clerk of the county court of Sabine county a transcript in said cause by the first day of the May term of the county court of Sabine county, if there was sufficient time elapsing between the perfecting of the appeal and the convening of the county court; but if there was not sufficient time so elapsing, then it was the duty of the justice of peace to make up and transmit said transcript on or before the August term of said county court, all of which the justice of peace, as this record shows, failed to do. While it is true that this duty devolved upon the justice of peace, as contended by appellant, yet it does not follow that no duty or burden rested upon appellant, Clark, to see that this transcript was not timely and properly carried to the county court. Appellant was the actor in this matter, in so far as the appeal to the county court was concerned, and while the statute enjoined upon the justice of the peace the duty of making up and transmitting the transcript, never-

theless it was also the duty of appellant to prosecute his appeal with reasonable diligence, and, if necessary to that end, it was his duty to see and to resort to proper means to compel the justice of peace to make up and transmit to the county court the transcript.

It was so held in *Cariker v. Dill*, 140 S. W. 843. In that case, however, the transcript was not filed in the county court until after the expiration of the third term of that court, after the judgment in the justice court, and appellant contends that the opinion of the Court of Civil Appeals in that case, while not questioning its correctness as to the facts there appearing, is not authority for the action of the county court in this case in dismissing his appeal. While it is true that three terms of the county court had convened and expired in the *Cariker-Dill* Case, nevertheless the principle there announced finds application here, for really and for all practical purposes three terms of the county court had convened and expired, as shown by the record here, since the rendition of the judgment in the justice court, and before the filing of the transcript in the county court. As above stated, the transcript here was not filed in the county court until the very last day of the third term of that court, and we might reasonably infer from the written answer of appellant to appellee's motion to dismiss that there was not sufficient time after filing the transcript on the last day of the term in which to try and dispose of the cause in the county court, because in such written answer appellant moved the county court to continue the case on the docket and let it be heard and disposed of at the February term, 1919.

The county judge filed findings of fact and conclusions of law, and, while we shall not mention them separately, the substance of the fact findings was to the effect that not only the justice of the peace was guilty of negligence in failing to make up and transmit the transcript from his court to the county court, but that appellant himself was also guilty of negligence in failing to cause said transcript to be made up and so transmitted and filed, and the county judge also expressly states in his findings that appellant made no attempt whatever to offer any excuse or reason for his failure to have the transcript filed in the county court any sooner than it was actually filed, which was, as before stated, on the very last day of the third term of the county court. Now, we are asked by appellant to review the action of the county court in this matter, and reverse its judgment in holding that appellant's appeal to that court should be dismissed for the want of prosecution in that court, and after careful consideration we have concluded that we would not be authorized to hold that the county court

was wrong and abused its discretion in concluding that appellant was guilty of such negligence in prosecuting its appeal to that court as justified that court in dismissing the appeal.

We feel sure that, upon the facts as reflected by this record, appellant was not entitled, as a matter of law, to have the county court keep this case upon its docket and hold appellee's judgment in abeyance for another three months after all of the negligence and failure to prosecute the appeal on the part of appellant, as is shown by the record in this case.

All assignments of error are therefore overruled, and the judgment affirmed; and it is so ordered.

### KUEHN v. NEUGEBAUER. (No. 5920.)

(Court of Civil Appeals of Texas. Austin. Oct. 15, 1919. Rehearing Denied Nov. 28, 1919.)

#### 1. ARMY AND NAVY $\S$ 34—VALIDITY OF SOLDIERS' AND SAILORS' CIVIL RELIEF ACT.

In view of Const. U. S. art. 1,  $\S$  8, relating to its war and military power, Congress had the power to pass the Soldiers' and Sailors' Civil Relief Act, title 16a, arts. 1, 2 (U. S. Comp. St. 1918,  $\S\S$  3078 $\frac{1}{4}$ a-3078 $\frac{1}{4}$ e), relating, among other things, to matters of procedure in the state courts.

#### 2. ARMY AND NAVY $\S$ 34—ISSUANCE OF MANDATE ON APPEAL WITHOUT PAYMENT OF COSTS AS AFFECTED BY SOLDIERS' AND SAILORS' RELIEF ACT.

Soldiers' and Sailors' Civil Relief Act (U. S. Comp. St. 1918,  $\S$  3078 $\frac{1}{4}$ d), authorizes the appellate court to grant a motion of an appellee, requesting it to instruct the clerk to issue a mandate, although costs had not been paid within one year from the reversal of a judgment in favor of appellee, it appearing that appellee entered the military service of the United States, before he became aware of reversal of his judgment, and served overseas until within three months of filing his motion, notwithstanding Rev. St. 1911, art. 1539, which leaves the appellate court without discretion to order the issuance of the mandate when costs are not paid within the year.

Appeal from District Court, Hays County; Frank S. Roberts, Judge.

Suit by Joseph Neugebauer against Gus Kuehn. Judgment for plaintiff was reversed and remanded, and plaintiff moves the court to instruct the clerk to issue the mandate; the clerk having refused upon the ground that costs had not been paid within one year. Motion granted.

John P. Pfeiffer, of San Antonio, for the motion.

Will G. Barber, of San Marcos, opposed.

BRADY, J. On April 25, 1918, this cause was reversed and was remanded to the district court of Hays county for a new trial. 204 S. W. 369. No motion for rehearing was ever filed. A few days prior to August 30, 1919, the appellee paid the costs of the appeal, and requested the clerk of this court to issue a mandate to the trial court, in order that he might proceed with the prosecution of the cause, which request was refused by the clerk, upon the ground that the costs had not been paid within one year from the date of the judgment of this court, as required by article 1559, Revised Statutes.

The appellee has filed a motion requesting this court to instruct the clerk to issue the mandate, and has invoked the provisions and benefits of the "Soldiers' and Sailors' Civil Relief Act" (Act March 8, 1918, c. 20, title 16a, Compiled Statutes of the United States, articles 1 and 2, sections 3078 $\frac{1}{4}$ a to 3078 $\frac{1}{4}$ e, inclusive). In his sworn application, appellee shows that on May 13, 1918, he enlisted in the army of the United States to assist in the prosecution of the war against Germany, without having been apprised of the action of this court in this cause; that his military service began May 13, 1918, and ended July 26, 1919, during the greater part of which time he served overseas; that during the entire time of his service he gave his undivided time and attention to the service of his country, aiding and assisting in the prosecution of the war against Germany, and that he had neither time nor opportunity to attend to his personal affairs; that he did not pay the costs of the appeal because of his military service, but that as soon as he reasonably could, and within 30 days after his discharge, he paid the costs and requested the issuance of a mandate. To the application is attached appellee's honorable discharge from the United States army, which verifies his averments as to military service.

Appellant resists the motion and demurs to it, and specially excepts because the federal statutes invoked are inapplicable, and further because article 1559, Revised Statutes of Texas, is mandatory, and leaves this court without discretion to order the issuance of a mandate. There is a general denial of the facts alleged in the motion, and a special reply to the effect that appellee had both actual and constructive notice of the judgment of this court prior to his enlistment in the army, and in ample time for him to have paid the costs and taken out the mandate prior to his military service; further, that before his enlistment appellee had determined to abandon the prosecution of this suit, and that his failure to pay the costs accrued in this court did not result from his enlistment in the army. Appellant has introduced proof and filed an affidavit in support of his defenses to the motion.

The questions presented by this motion are

both novel and important, and it is deemed advisable to, as briefly as may be, indicate our views in writing. No authorities have been cited construing the act of Congress involved, and, as far as we are aware, there are no precedents upon the exact questions arising here. Article 1559, Revised Statutes of Texas, is as follows:

"In cases which are, by the Supreme Court, or Courts of Civil Appeals, reversed and remanded, no mandate shall be taken out of either of said courts and filed in the court wherein said cause originated, unless such mandate shall be so taken out within the period of twelve months after the rendition of final judgment of the Supreme Court, or Court of Civil Appeals, or the overruling of a motion for rehearing. And if any cause is reversed and remanded by the Supreme Court, or Court of Civil Appeals, and if the mandate is not taken out within twelve months as hereinbefore provided, then, upon the filing in the court below of a certificate of the clerk of the Supreme Court, or Court of Civil Appeals, that no mandate has been taken out, the case shall be dismissed from the docket of said lower court."

This statute may be assumed to be mandatory, as has been held in the following cases: *Pevito v. Southern Co.*, 187 S. W. 1009; *Watson v. Boswell*, 73 S. W. 985; *Watson v. Milrike*, 73 S. W. 986; *Scales v. Marshall*, 96 Tex. 140, 70 S. W. 945. Upon this assumption the question then arises whether the federal act is applicable, and, if so, whether it requires or confers upon us the discretion to order the issuance of a mandate under the facts and circumstances of this case. The only portions of the Soldiers' and Sailors' Civil Relief Act which may reasonably be claimed to apply to this case are found in articles 1 and 2. Section 3078 $\frac{1}{4}$ a, article 1, may be said to be merely a preamble, setting forth the purposes and objects of the legislation; but its provisions are important as indicating the intent of Congress and the scope of the enacting clauses which follow. The objects of the act are broadly stated to be the end of enabling the United States to successfully prosecute the war, by extending protection to its citizens in the military service, "in order to prevent prejudice or injury to their civil rights during their term of service and to enable them to devote their entire energy to the military needs of the Nation." To this end it is recited that the subsequent provisions are enacted "for the temporary suspension of legal proceedings and transactions which may prejudice the civil rights of persons in such service," during the war. The provisions of the act are applicable to all state courts, as well as to other courts.

The provisions of article 3078 $\frac{1}{4}$ d, article 2, are as follows:

*"Executions; Stay of Attachments or Garnishments.*—In any action or proceeding commenced in any court against a person in military service, before or during the period of



such service, or within sixty days thereafter, the court may, in its discretion, on its own motion, or on application to it by such person or some person on his behalf shall, unless in the opinion of the court the ability of the defendant to comply with the judgment or order entered or sought is not materially affected by reason of his military service:

"(1) Stay the execution of any judgment or order entered against such person, as provided in this act, and

"(2) Vacate or stay any attachment or garnishment of property, money, or debts in the hands of another, whether before or after judgment, as provided in this act."

Article 3078 $\frac{1}{4}$ dd provides that any stay granted may be ordered for the period of military service and 3 months thereafter, or any part of such period, and subject to such terms as may be just. Article 3078 $\frac{1}{4}$ e reads as follows:

*"Limitations of Actions.*—The period of military service shall not be included in computing any period now or hereafter to be limited by any law for the bringing of any action by or against any person in military service or by or against his heirs, executors, administrators, or assigns, whether such cause of action shall have accrued prior to or during the period of such service."

[1] It has been suggested in argument that it may be questioned whether Congress has power to control matters of procedure in the state courts, but no authority has been cited denying the validity of this or any similar statute. We do not doubt that Congress was invested with full power to pass this statute, or at least the controlling provisions in this case, especially under section 8, article 1, of the Constitution of the United States, relating to its war and military powers.

[2] It is obvious that this is a remedial statute, enacted by Congress for highly important national ends, and that its provisions must be liberally interpreted, to ascertain the intent of Congress, and to give effect to that intention. After a careful consideration of the terms of the statute, construed in the light of the first section or preamble, we have concluded that the first part of article 3078 $\frac{1}{4}$ d is applicable to this case, and that by its provisions this court is at least vested with the discretion to stay the execution of its judgment and order entered against appellee, requiring him to pay the costs of this appeal. The time limited by the act for the

exercise of this authority is for the period of military service and 3 months thereafter, and appellee has made his application during such time. This court might have, and doubtless would have, entered an order staying the execution of its judgment at any time during the year following the rendition of the judgment, upon application of appellee or some one in his behalf, or indeed upon its own motion, had it known of the situation of appellee during practically all that time.

We have given due consideration to the proofs introduced by appellant in resisting the motion urged as equitable reasons against the exercise of our discretion for appellee's benefit, but we do not think they are sufficient to restrain us from granting the relief sought. The application having been formally made by appellee within 3 months after his discharge, we think he is in time, and that the facts of his motion present a meritorious case, justifying this court in exercising its discretion to stay the execution of its judgment a sufficient length of time to enable him to legally procure his mandate. To this end the order of this court made April 25, 1918, adjudging the costs of the appeal against appellee, is stayed until July 26, 1919, and, the appellee having paid the costs of the appeal, the clerk of this court is directed to issue a mandate to the district court, of Hays county, Tex., to proceed further with this cause in accordance with the judgment rendered by this court on said date.

The writer thinks it is proper to add that he is of the opinion that article 3078 $\frac{1}{4}$ e, relating to limitations of actions, is also applicable to this case, and that the time limited by article 1559 for the payment of costs of an appeal and the taking out of a mandate did not run against appellee during the period of his military service. It is appreciated that this case probably does not fall within the strict letter of the last-named section, and that it would be giving it a very liberal construction to hold it applicable here. However, in view of the broad purposes of the act expressed in the first section and the remedial nature of every provision in it, it is believed by the writer that the subject-matter of this motion falls within the spirit of article 3078 $\frac{1}{4}$ e, without further elaboration of the question.

The motion is granted.

Motion granted.

## SHOTWELL v. CRIER. (No. 9133.)

(Court of Civil Appeals of Texas. Ft. Worth.  
June 21, 1919. On Motion for Re-  
hearing Oct. 25, 1919.)

1. JUDGMENT  $\S$ 747(6)—ATTORNEY'S FEES  
AND EXPENSES IN FORCIBLE DETAINER SUIT  
RECOVERABLE IN ACTION FOR BREACH OF  
RENTAL CONTRACT.

In a suit by a landlord for damages for breach of a rental contract, plaintiff was entitled to recover attorney's fees and other expenses in a forcible detainer suit against the tenant appealed from justice to county court so as to avoid multiplicity of suits; recovery for such items not being prohibited by Vernon's Sayles' Ann. Civ. St. 1914, art. 3960, relating to trials of such suits on appeal to the county court.

2. LANDLORD AND TENANT  $\S$ 331(2)—REMOTE  
DAMAGES FOR BREACH OF CONTRACT TO CUL-  
TIVATE LAND.

Damages claimed by landlord for tenant's breach of contract to cultivate land in a good workmanlike manner held not too remote, speculative, and uncertain to sustain an action therefor.

3. LANDLORD AND TENANT  $\S$ 331(2) — DE-  
STRUCTION OF LANDLORD'S SHARE OF CROP  
BY TENANT; MEASURE OF DAMAGES.

The measure of damages for the destruction of the landlord's share of a wheat crop by the tenant's pasturing stock thereon is the market value of plaintiff's share of such crops as would probably have been raised if defendant had complied with his contract and not destroyed the crop.

4. LANDLORD AND TENANT  $\S$ 331(2)—HOLD-  
ING OVER BY TENANT; DAMAGE TO PASTURE.

While, as a general rule, in actions in trespass to try title and in forcible entry and detainer, the measure of damages is the rental value of the property while wrongfully withheld, a landlord may sue a tenant on shares holding over only for use of pasture land withheld after expiration of lease or the value of the grass converted, measuring its value by the number of cattle pastured at a fixed price per head.

5. JUDGMENT  $\S$ 256(6) — NECESSITY OF CON-  
FORMING TO VERDICT FIXING AMOUNT DUE.

Notwithstanding defendant expressly admitted he owed plaintiff a certain sum, so that the court did not submit that issue in his general charge, it was error to enter judgment for such sum, since the judgment must follow and conform to the verdict, and cannot exceed it, in view of our statutes.

On Motion for Rehearing.

6. LANDLORD AND TENANT  $\S$ 331(2)—DAMAG-  
ES FOR BREACH OF AGREEMENT TO CULTIVATE  
LAND PROPERLY.

Where plaintiff landlord was entitled to one-third of a crop free from all expenses of cultivating and harvesting it, his damages can-

not be limited to the value of the crop at the time defendant tenant destroyed it, since that would deprive him of the benefit of his contract with defendant to cultivate the land properly.

7. APPEAL AND ERROR  $\S$ 650—AMENDMENT  
OF RECORD BY CERTIFICATE OF TRIAL JUDGE  
AFTER DECISION ON APPEAL.

After decision on appeal, the record cannot be amended by certificate of the trial judge to show an agreement in open court that the court should allow a recovery for an admitted amount, and for such reason that matter was not submitted to the jury, to justify a judgment in excess of the verdict reduced by the decision.

Appeal from District Court, Taylor County; Joe Burkett, Judge.

Suit by W. T. Crier against E. F. Shotwell. Judgment for plaintiff for the difference between the verdict for plaintiff and the verdict for defendant on the cross-action or counterclaim, and defendant appeals. Judgment reformed and affirmed.

J. W. Moffett, of Abilene, for appellant.

C. H. Fulwiler, of Abilene, for appellee.

DUNKLIN, J. W. T. Crier leased a tract of land to E. F. Shotwell for the period of time beginning November 5, 1915, and ending July 1, 1916. The lease was in writing, and signed by both parties, and it was stipulated therein that the lessee should pay as rent for said land one-third of all the wheat and oats to be grown on the land for the year 1916. The lease contained the further agreement on the part of the lessee to plant the land in wheat or oats, or both, and at the termination of the lease term to deliver possession of the land to the lessor. During the summer of 1916, by oral agreement between the parties, the lease term was extended until July 1, 1917, under the same agreement with reference to the cultivation of the land and rents to be paid therefor as was shown in the written lease. This suit was instituted by Crier against Shotwell for damages for the breach of the defendant's rental contract in failing, as alleged by plaintiff, to cultivate and farm the land in a good and workmanlike manner, as he had bound himself to do, and in failing and refusing to deliver possession of the land to plaintiff after the termination of the lease; also for the value of certain farming implements, which it was alleged belonged to the plaintiff, and were carried away by the defendant and converted to his own use.

In his answer to plaintiff's suit, after specially denying the allegations therein, the defendant filed a cross-action or counterclaim in which he sought a judgment against the plaintiff for pasturing stock, digging a well, and certain other items, all aggregating the sum of \$1,500.

The case was tried before a jury, who re-

turned a verdict in favor of the plaintiff upon the cause of action asserted by him for the sum of \$962.89, also in favor of the defendant on his cross-action against the plaintiff in the sum of \$557.70, leaving a balance in plaintiff's favor of \$405.10. A judgment was rendered in plaintiff's favor for the amount so awarded by the jury, plus \$60.35 found by the court, and the defendant has appealed. But all assignments of error are addressed to the recovery by plaintiff upon his cause of action, no complaint being made that the judgment upon the counterclaim was for an insufficient sum.

[1] The defendant did not deliver possession of the farm to plaintiff at the termination of the lease on July 1, 1917, when his lease terminated, but held the same until about December 15, 1917. In order to get possession of the farm, Crier instituted a suit of forcible detainer against Shotwell in the justice court on August 30, 1917, in which court he recovered a judgment for possession of the farm. But Shotwell appealed the case to the county court, and in that court Crier again recovered a judgment for the possession of the farm. In the prosecution of that suit Crier was forced to employ an attorney, to whom he paid a fee of \$100, and incurred other expenses, such as hotel and traveling expenses incident to attending court for the trial of the case. Those expenses were alleged by him in the present suit, and he sought a recovery therefor as a part of his damages. And upon the trial of this suit that claim was submitted to the jury as one of the items of damages for which plaintiff might recover.

By different assignments of error, appellant has challenged plaintiff's right to recover that item of damages. Article 3060, V. S. T. C. Stats., relating to trials of such suits on appeal to the county court, reads as follows:

"On the trial of said cause in the county court the appellee shall be permitted to prove the damages for withholding the possession of the premises from the appellee during the pendency of the appeal, and for the reasonable expenses of the appellee in prosecuting or defending the cause in the county court; and, if the possession of the premises be not adjudged to the appellant, the said court shall render judgment also in favor of the appellee and against said appellant and the sureties on his bond for the damages proven and all costs."

That statute does not purport to exclude the right to recover for other damages not mentioned therein, resulting from a breach of the rental contract in other respects; neither does it purport to provide that the expenses incurred by the landlord therein mentioned cannot be recovered in any other suit than in a suit such as is therein referred to. It does give to the landlord the right to recover the expenses mentioned, and as those expenses constituted a part only of the dam-

ages sustained by plaintiff in the present suit for defendant's breach of his rental contract to cultivate the land in a proper manner, and to surrender possession at the end of the lease term, we can perceive no reason why plaintiff should be denied the right to claim such damages and all others that are recoverable in a single and separate suit. Indeed, we think such a course was in keeping with the rule that a multiplicity of suits should be avoided when the same is practicable.

[2, 3] We overrule the further contention, likewise presented in different assignments of error, to the effect that damages claimed by plaintiff for the alleged breach of defendant's contract to cultivate the land in a good, workmanlike manner were too remote, speculative, and uncertain to sustain an action therefor. It is insisted that the correct measure of damages for the wheat crop, which plaintiff alleged the defendant destroyed by pasturing stock thereon, was the value of plaintiff's share of the crop when it was so destroyed. Several decisions are cited to support that contention, such as *T. & P. Ry. Co. v. Bayliss*, 62 Tex. 572; *G., C. & S. F. Ry. Co. v. Pool*, 70 Tex. 713, 8 S. W. 535; *Trinity S. Railway Co. v. Schofield*, 72 Tex. 496, 10 S. W. 575. Those were suits for damages, sounding in tort, for the negligent destruction of growing crops, and it was held that the proper measure of damages was the value of the crops when destroyed. Yet it was held in *I. & G. N. Ry. Co. v. Pape*, 73 Tex. 501, 11 S. W. 526, that the value of a growing crop would be the difference between the market value of what it would probably yield and the probable expense of cultivating and marketing it. So, it would seem that even under that rule the amount of damages recoverable would be the same as claimed by plaintiff in this suit for breach of defendant's contract with respect to the manner of cultivation, to wit, the market value of plaintiff's part of such crops as would probably have been raised if defendant had complied with his contract. And that he was entitled to such damages we believe is well settled by the following authorities: *I. & G. N. Ry. Co. v. Pape*, 73 Tex. 501, 11 S. W. 526; *Raywood Rice, Canal & Milling Co. v. Wells*, 33 Tex. Civ. App. 545, 77 S. W. 253; *Rogers v. McGuffey*, 96 Tex. 565, 74 S. W. 753; *Lamar v. Hildreth*, 209 S. W. 167, and cases there cited.

[4] According to testimony introduced by plaintiff, the defendant pastured quite a number of animals on the land between July 1, 1917, the date of the termination of the lease, and December 15, 1917, he finally surrendered possession to plaintiff, and when the reasonable value of such pasturage was \$2 per head per month. And in the court's charge the jury were told that plaintiff would be entitled to recover the value of such pasturage as the measure of his damages for defendant's fail-

ure to turn over the premises at the termination of the lease, as he had contracted to do.

Appropriate assignments of error are presented by appellant to that charge, and to the admission of testimony to prove the facts upon which it was predicated and which are noted above. It is insisted that the proper measure of plaintiff's damages for defendant's wrongful withholding the premises from plaintiff would be the rental value of the land during that period.

In his petition plaintiff alleged, in substance, that defendant pastured on the land an average number of 85 head of stock, and thereby appropriated the use of the land and the grass growing thereon, which was reasonably worth the sum of \$2 per head per month for the stock so pastured, aggregating the sum of \$935.

It is true, as contended by appellant, that the general rule is that in suits to recover possession of real estate, both in trespass to try title and in forcible entry and detainer, the measure of plaintiff's damages for wrongfully withholding the property by the defendant is the reasonable rental value of the property while it was so withheld. *McRae v. White*, 42 S. W. 793; *Wahnschaffe v. Pontoja*, 63 S. W. 663; *Campbell v. Howerton*, 87 S. W. 370; *Ammons v. Dwyer*, 78 Tex. 639, 15 S. W. 1049. The rental value of property is the value of the use of it, and in many of the authorities those expressions are used interchangeably and as having the same meaning, and also in the same sense as "mesne profits." 19 Cyc. 1168 (note); *Bien-court v. Parker*, 27 Tex. 558; 2 *Bouvier's Law Dictionary* (Rawles 3d Revision) 2206.

Plaintiff did not see fit to sue for the rental value of the entire tract, which would include the value of the use of the houses and all the land, but elected to sue only for the value of the grass converted by the defendant by pasturing stock thereon. The grass was the natural product of the soil, and defendant was at no expense in producing it. After the termination of his lease, defendant was a mere trespasser. The grass was a mature crop, as much so as a crop of wheat or corn ready for harvest. Plaintiff's pleadings were sufficient to support a recovery for its value, either upon the theory of the value of the use of the pasture or upon the theory that it was a growing crop, and defendant had wrongfully converted the same to his own use. *Hillman v. Baumbach*, 21 Tex. 203. And plaintiff had the right to recover the value of the use of the pasture or the value of the grass considered as a growing or matured crop, for pasturage purposes or any other purpose to which it was adapted. *St. L. S. W. Ry. Co. v. Anderson*, 173 S. W. 908.

[6] There was evidence sufficient to warrant the submission of plaintiff's claim for the value of certain farming implements which he alleged belonged to him and were carried away or lost by defendant after they

were left with him to be used in making a crop.

In his testimony the defendant expressly admitted that he owed plaintiff \$60.35 on the claim by the latter for oats belonging to him as his part of the crop raised on the land by defendant. Upon this admission the court rendered a judgment in plaintiff's favor for the amount so admitted, and did not submit that issue in his general charge to the jury. In other words, the judgment rendered was in favor of plaintiff for \$60.35 in excess of the amount allowed him by the verdict of the jury. This action by the court was error, since it is well settled by the statutes and by the decisions that the judgment must follow the verdict and must conform thereto. *Armstrong v. Hix*, 107 Tex. 194, 175 S. W. 430; *Jackson v. Walls*, 187 S. W. 676; *McLemore v. Bickerstaff*, 179 S. W. 536, and authorities there cited.

Accordingly, the judgment will be so reformed as to reduce the amount of plaintiff's recovery to the extent of \$60.35. But for the reasons indicated, all other assignments of error are overruled, and, as reformed, the judgment will be affirmed. Costs of this appeal will be taxed against appellee.

#### On Motion for Rehearing.

Appellant insists with much earnestness that the value of one-third of the growing crop of wheat which was destroyed by him at the time it was destroyed by pasturing stock thereon was the correct measure of plaintiff's damages for such destruction.

[6] The allegation made by plaintiff relative to the destruction of the growing crop of wheat was in his complaint that thereby defendant had breached his rental to cultivate the land and care for the crops grown thereon in a workmanlike manner. The claim for damages for such breach was for the value of one-third of the crop of wheat that the land would have yielded but for such breach. Plaintiff would have been entitled to one-third of such a crop free of any expense for cultivating and harvesting it. To limit his recovery to the value of the crop at the time defendant destroyed it would have deprived him of the benefit of his bargain with defendant for the cultivation of the land in a proper manner. Hence the numerous decisions applicable to the mere tortious destruction of a growing crop, cited by appellant, are not applicable.

Testimony showing the amount realized by defendant for pasturing the land after the termination of the lease and while defendant wrongfully withheld possession was admissible to show the value of the grass for pasturage purposes which plaintiff was entitled to recover. *G., H. & S. A. Ry. Co. v. Rheiner*, 25 S. W. 971, and cases there cited.

[7] Appellee has filed a certificate of the trial judge, of a date subsequent to our decision on original hearing, to the effect that the

item of \$60.35, which plaintiff admitted he owed defendant, mentioned in our original opinion, was not submitted to the jury, because appellant agreed in open court that the court should allow a recovery therefor, and that that issue should be withdrawn from the jury. Predicated upon that certificate is a prayer that the judgment of the trial court in favor of appellee be affirmed in its entirety, and that it be not so reformed as to eliminate therefrom the item of \$60.35, which appellant admitted he owed to appellee.

We know of no rule which allows such an amendment of the record in this manner, and at this stage of the proceedings, and hence cannot consider the certificate tendered.

Both motions for rehearing are overruled.

### GALVESTON, H. & S. A. RY. CO. v. WHITE. (No. 1011.)

(Court of Civil Appeals of Texas. El Paso.  
Oct. 30, 1919. Rehearing Denied  
Nov. 20, 1919.)

#### 1. EVIDENCE ⇐474(3) — NONEXPERT TESTIMONY AS TO PHYSICAL CONDITIONS.

Testimony of witnesses, who knew plaintiff and saw him just before and just after his injury, being their personal observations of outward manifestations of condition, open to all who came in contact with him after his injury, held competent, as showing his condition at the time, and not open to objection of being speculative and the opinion of a nonexpert.

#### 2. APPEAL AND ERROR ⇐1060(1)—HARMLESS ERROR; COUNSEL'S ARGUMENT.

Remarks of plaintiff's counsel in argument, being in the verbiage of plaintiff, who as witness, without objection, explained why, after his injury, he sought work of others under an assumed name, even if objectionable, could not alone have influenced the jury.

#### 3. TRIAL ⇐121(1)—ARGUMENT OF COUNSEL COMMENT ON EVIDENCE.

There being evidence that though Dr. M., who testified that he found plaintiff uninjured, was first called in by plaintiff to attend him, continuance of his attendance was at request of R., defendant's surgeon, statement of plaintiff's counsel in argument that R. sent M. to see plaintiff was unobjectionable.

#### 4. TRIAL ⇐133(6)—INSTRUCTION TO DISREGARD ARGUMENT OF COUNSEL.

Reiterated statement in argument by plaintiff's counsel, without support in the evidence, that a doctor, who testified that there was nothing the matter with plaintiff, was a fake, held not prejudicial, the jury having been instructed to disregard it, and counsel having been twice fined for repeating it.

#### 5. DAMAGES ⇐208(2)—QUESTION FOR JURY AS TO INJURY AND RESULT.

Conflicting testimony held to make a question for the jury whether plaintiff's skull had been injured, causing pressure on the brain.

Appeal from District Court, El Paso County; P. R. Price, Judge.

Action by Olan Washington White against the Galveston, Harrisburg & San Antonio Railway Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Baker, Botts, Parker & Garwood, of Houston, and Beall, Kemp & Nagle, of El Paso, for appellant.

M. W. Stanton, McKenzie & Loose, and Hudspeth & Harper, all of El Paso, for appellee.

WALTHALL, J. Appellee, Olan Washington White, brought this suit against appellant, Galveston, Harrisburg & San Antonio Railway Company, to recover damages for personal injuries alleged to have been sustained by him on account of negligence of the appellant, while working for appellant as a switchman in its yards at El Paso, Tex.

Appellee alleged that on July 28, 1917, while he was attempting to descend from one of appellant's box cars, the handhold or grab-iron, one of the appliances placed and used by appellant on the side of its box cars to assist in descending from the car, pulled off, or became detached from the side of the car, and that by reason thereof he was thrown down and received the injury of which he complained.

On the issues submitted the jury found in favor of appellee, and assessed his damages at \$11,000, and judgment was so entered.

[1] Appellant's first and second assignments complain of the admission of the evidence of witnesses Ramsey and Jones. The objection made to the admission of the evidence of each of the witnesses is substantially that it is speculative merely, and the expression of the opinion of one who is not shown to be a physician or surgeon, or an expert on anatomy or physical condition.

Ramsey testified in part:

In 1917 he was working for the Southwestern. He knew White at that time. White went to work on the engine with him. Did not know where White lived when he first knew him. Visited White the following Sunday after White was injured. He then saw that White was bleeding at the left ear. He sat down alongside of the bed. Noticed nothing else about his head; noticed nothing that indicated his mental condition. His appearance was "like a man that was pretty badly hurt." Was acquainted with White before the accident and had occasion to observe his appearance. "Noticed lots of difference" in his appearance before the injury and afterwards. "He wasn't like a man that was at himself. I talked to

him very little. As to his appearance prior to his injuries with reference to strength and activity, his appearance was good; he was a large man, and his appearance as to health good. I have seen Mr. White since that time occasionally, when I came in. As to his appearance now with reference to size and flesh as to what it was prior to his injuries, he is not at all the same man that he was when I first met him when he worked in the Southwestern." Met White once in the summer of 1918 before he had the operation performed. "As to his physical appearance at that time, I thought he was very poor. As to what I meant by that, he had fallen away in weight, and he walked around like a man that was all in, I would judge. As to his appearance prior to his injuries with reference to whether he was an active man, slow or quick, he was active."

Jones testified that—

He became acquainted with White in 1907 in Wichita Falls; knew him there about three years. Did barber work for him during that time. Witness came to El Paso in 1916, and saw White in El Paso in 1917. In Wichita Falls witness had occasion to observe White as to appearance in weight and physical condition; noticed "that he was a big, husky guy." In June, 1917, in El Paso, prior to his injuries, as to his physical condition, "he appeared to be in the same condition that he did when he lived at Wichita Falls. As to what he weighed when I first became acquainted with him, I figure he would weigh somewhere in the neighborhood of 165 pounds. I have seen him a number of times since the time he claimed to have received his injuries. As to his appearance now with reference to his physical condition, he doesn't appear to be the same man that he was before. He doesn't look to be as heavy as he was before. As to his movements and his general condition in regard to health, he doesn't move as brisk as he did before; he doesn't seem to have the energy that he did before."

We think the evidence of the witnesses is not subject to the objections offered. The witnesses each knew White and saw him just before and just after his injuries, and the evidence given is their personal observations of outward manifestations of condition open to all who came in contact with appellee subsequent to his injuries, and we think competent as showing White's physical condition at that time. *Cunningham v. Neal*, 49 Tex. Civ. App. 613, 109 S. W. 455, in which a writ of error was refused; *Railway v. Brown*, 30 Tex. Civ. App. 57, 69 S. W. 1010.

Appellant's third, fourth, fifth, and sixth assignments are directed to remarks of counsel made to and in the presence and hearing of the jury during, and as a part of, the argument to the jury. Appellant assigns the remarks as harmful and prejudicial error.

[2] One of appellee's attorneys in his argument, referring to appellee, said; "He is a man without means and with a family." Again, same counsel, referring to appellee, said:

"It appears from the uncontroverted evidence in this case, gentlemen of the jury, that he was working because he had to. I tell you, necessity knows no law. The man worked because he had to. We all have to work because we have to. We have to earn a living. We have to do it in some way and do it honestly."

It might be observed here that no issue was made in the case as to whether appellee was a man with or without means, nor was it an issue in the case that appellee was working because he had to. It is claimed by appellee that the remarks were rendered proper by reason of certain evidence introduced by appellant. On cross-examination of appellee he stated that he signed a name other than his own to an application for employment, and on redirect examination, in explanation why he did so sign the application, he said:

"When a fellow is having litigation with a railroad company he can't get work. I have to support my wife and baby and that is the only means I had to get employment was to work under an assumed name. \* \* \* I have no means or resource to support my wife, baby, and myself. \* \* \* I had no means of support, and I followed this railroad work practically all my life, and I had no other way of making a living for my family, and that is the reason that I made these false statements in the application, in order to get employment."

The question as to the admissibility of the evidence offered, as to the application or the statements contained therein as primary or original evidence, is not before us; nor is the above-quoted evidence of appellee in explanation thereof. It seems to us, however, conceding, for the purpose of the assignments only, that the application for employment, with its false statements therein, and the evidence of appellee in explanation thereof, were properly before the court (which we do not decide and by no means concede), and raised issues of fact to go before and to be considered by the jury, the remarks of counsel complained of are well within the proof. It seems to us from the record presented here that, if appellant is in a position to complain of the above remarks of counsel, the language used by counsel is in the verbiage of the witness; the jury had heard, without objection, the evidence of the facts referred to in the remarks made, and we cannot think that the remarks alone, if objectionable, could have influenced the verdict.

[3] It is also insisted that harmful and prejudicial error was committed by counsel for appellee in stating in argument to the jury that "Dr. Ramey sent him to see plaintiff," and that "Dr. Moore was a fake doctor." The first remark referring to Dr. Moore, and meaning and referring to the fact that Dr. Moore had called to see appellee immediately after appellee had been injured, and that Dr. Ramey had sent him. The undisputed evidence was that on the night of the accident causing the injuries to appellee Dr. Moore

called to see appellee on telephone call from appellee's wife. In his deposition Dr. Moore testified that he had examined appellee from his head to his toes, both on the next morning after the accident and thereafter, and found absolutely nothing the matter with appellee, and so reported to Dr. Ramey, local surgeon for appellant. Dr. Moore further stated that appellant "paid me \$25.00 for my services to the plaintiff. I didn't want to treat the plaintiff. I saw there was nothing the matter with him, and didn't think he would ever pay me. I wanted to quit, but Dr. Ramey told me to continue to look after him and I would get paid." Dr. Moore made an extended statement as to the several examinations he made of appellee, stating that he found absolutely nothing in the way of injury. The court refused to instruct the jury not to consider the remark of counsel. It seems to us that both parties were more or less responsible for the attendance of Dr. Moore upon appellee. Appellee first called him, and both were responsible for his continued service. We think the trial court was not in error in leaving the matter of Dr. Moore's attendance upon appellee to the jury to determine, if it was an issue of fact to be determined at all. The jury found, contrary to Dr. Moore's evidence, that appellee was injured; but the finding has support in the evidence, on grounds other than influence of the remark of counsel.

[4] It is also insisted that prejudicial and harmful error was committed by appellee's counsel in his closing argument to the jury in which he stated that Dr. Moore was "a fake doctor." The court promptly instructed the jury to disregard the statement of counsel, and said to counsel: "You will not express that opinion any more, sir." To which counsel replied: "That is my opinion; I am going to express my opinion before this jury. That is my judgment; I think I am warranted in stating it." The court replied to counsel: "You will obey the rules of the court. I will fine you \$25, sir." Counsel then, in the hearing of the jury, retorted: "That's all right, sir; I will pay it, but I think the evidence shows that he was a fake doctor." Whereupon the court stated: "All right, sir; I fine you \$50."

It is the insistence here that where the undisputed evidence shows that appellee's wife first called in Dr. Moore, and where the character and reputation of Dr. Moore were not assailed, and no evidence offered in any way reflecting upon his reputation or standing as a physician or surgeon, it was harmful and prejudicial error for counsel to state, and to insist upon stating, to the jury as above, that Dr. Moore is a fake doctor. The question as to whether Dr. Moore was or was not a fake doctor was not an issue in the cases, was not raised by the evidence or argument of opposing counsel, and it seems to us the remark was a clear violation of rule 39, applying to

arguments of counsel on the facts in trial courts. True, while Dr. Moore was not a party to the suit, he was an important witness for appellant, having personally examined appellee and testified to the result of his examination. The question then is presented: Was appellant prejudiced by the remark? The remark did not involve the statement of any fact, nor did the evidence in the case carry even a damaging suspicion of the truth of the opinion expressed, but was only the expression of an opinion of the attorney. The remark does not seem to us calculated to inflame the minds of the jury or create a prejudice against appellant. Had the remark met with the approval of the court, or had not been vigorously excluded, and the attorney reprimanded by the court, it might have appeared to the jury that the court was at least in sympathy with the expression used; but the court promptly excluded the remark from the consideration of the jury, and held counsel in contempt of the court's ruling for its repetition, and punished him by a fine. We have considered this assignment in connection with the seventh, and have concluded that it was error for counsel to make the remarks complained of, but that the remarks made by counsel did not prejudice the appellant.

[5] The seventh assignment complains of the verdict and judgment as being excessive. In order to justify the amount of the verdict, the jury must have believed that the preponderance of the evidence on the issue of the extent of appellee's injuries was on the side of appellee. It would extend the opinion to too great length to even give a synopsis of all the evidence on that issue. Appellee testified to having received the injuries complained of, and to having suffered intense pain in his head before the operation made about a year thereafter, and extreme pain and suffering in other parts of his body, and reduction in size and weight, was in bed some 22 days, unable to walk, subsequently was operated on by trephining on the top of his head for a fracture of the skull. Four physicians assisted in the operation. Three of the physicians testified to a fracture of the skull. Dr. Paul Rigney, a graduate of Tulane Medical College, performed the operation, and testified that "the external evidences were a depression and adhesion of the scalp to the skull, together with what we regard as a cicatrice, which is a thickened area at the point of the injury, thickened area of the scalp where it has adhered. That was very apparent even to look at it from a point almost anywhere in the room, and also by feeling it we could determine the attachment of the scalp and also the depression of the skull—the attachment to the skull. \* \* \* In my opinion this depression that I found there in the skull was producing pressure on the brain." Dr. Rigney further testified that in his opinion appellee, because of impaired endurance, would

never be able to do any class of work involving the operation of trains, or any type of manual labor requiring long hours. Dr. John A. Hardy testified to substantially the same as did Dr. Rigney, as to the abnormal depression and adhesion of the scalp to the skull, and the fracture of the external plate of the skull. We have quoted portions of the evidence of other witnesses as to appellee's general condition and appearance before and after the accident causing the injuries. True, quite an array of surgeons, eminent in surgery, examined the portion of skull removed in the operation, and expressed the opinion that the portion of the skull examined did not disclose a fracture; but that was an issue of fact for the jury, and the jury found generally for appellee, and assessed the damages stated. The verdict has support in the evidence. We cannot say that the verdict and judgment is excessive.

Finding no reversible error, the case is affirmed.

#### SOUTHWESTERN PORTLAND CEMENT CO. v. BUSTILLOS. (No. 305.)

(Court of Civil Appeals of Texas. El Paso.  
Nov. 6, 1919. Rehearing Denied  
Nov. 28, 1919.)

#### 1. APPEAL AND ERROR $\S$ 500(2)—WAIVER OF EXCEPTIONS BY FAILURE OF TRANSCRIPT TO SHOW ACTION THEREON.

Where there is nothing in the transcript to show that the action of the court on special exceptions to the petition was ever invoked, such exceptions are presumed to have been waived.

#### 2. EVIDENCE $\S$ 359(3) — PHOTOGRAPHS OF PLACE OF ACCIDENT ADMISSIBLE.

In an action for damages for death, photographs of the place of the accident were properly admitted in evidence.

#### 3. PLEADING $\S$ 236(1)—ALLOWANCE OF TRIAL AMENDMENTS DISCRETIONARY WITH COURT.

District Court Rule 27 (142 S. W. xix), regulating the filing of trial amendments, does not make the right to file the same dependent upon the contingency that exceptions to a pleading have been sustained; the matter being within the discretion of the court.

#### 4. APPEAL AND ERROR $\S$ 1042(3)—HARMLESS ERROR IN REFUSAL TO STRIKE TRIAL AMENDMENT.

Error of the court in refusing to strike out a trial amendment on the ground that the record fails to disclose that any exception to the petition was sustained, or that any evidence was excluded on account of the insufficiency of the petition, could not be regarded as reversible error, in view of Court Rule 62a (149 S. W. x).

#### 5. CORPORATIONS $\S$ 494 — PRIVATE CORPORATION LIABLE FOR ITS OWN NEGLIGENCE.

Though under Rev. St. 1911, art. 4694, a private corporation engaged in the manufacture and sale of cement is not liable for the death of a person caused by negligence of its agents or employees, it is liable for injuries resulting in the death from its own wrongful acts or omissions, as distinguished from the acts or omissions of servants or agents.

#### 6. CORPORATIONS $\S$ 494—LIABILITY FOR NEGLIGENCE OF VICE PRINCIPAL OF PRIVATE CORPORATIONS.

In action against private corporation for death, the fact that negligent dumping of burning coal and slag into a pit was being done under orders given by a superintendent and vice principal who had been succeeded by another as superintendent and vice principal did not relieve defendant of liability simply by reason of the fact that the superintendent at the time of the accident had not reiterated the orders theretofore given.

#### 7. CORPORATIONS $\S$ 494 — NEGLIGENCE OF PRIVATE CORPORATIONS IN FAILING TO GUARD DANGEROUS INSTRUMENTALITY.

A pit filled with live coals and hot ashes was an intrinsically and affirmatively dangerous agency, and it was the absolute and nondelegable duty of a private corporation to protect and guard against its dangers those rightfully upon the company's premises; failure to guard being negligence of the company itself, as distinguished from negligence of an employé or servant.

#### 8. NEGLIGENCE $\S$ 51—DUTY TO GUARD DANGEROUS INSTRUMENTALITY.

A pit filled with hot ashes and burning coal is a dangerous instrumentality to be properly guarded; although located on private property remote from any public highway, where employes and others rightfully upon the premises habitually used them as a pathway.

#### 9. NEGLIGENCE $\S$ 33(2)—LUNCH CARRIER BECOMING TRESPASSER.

One taking a lunch to an employé of a corporation working on its premises becomes a trespasser if, on his return, he enters on grounds without occasion for doing so.

#### 10. NEGLIGENCE $\S$ 136(15)—WHETHER PERSON ON PREMISES OF DEFENDANT WAS A TRESPASSER, QUESTION FOR JURY.

Whether deceased, who fell into an unguarded pit, was rightly on the premises for the purpose of delivering a lunch to an employé of defendant, or was simply a trespasser, held a question for the jury.

#### 11. NEGLIGENCE $\S$ 33(2)—PERSONS CARRYING LUNCH TO EMPLOYÉS NOT TRESPASSERS.

Where women and children habitually carry lunches to workmen upon the employer's premises, one going on the premises for such purpose is not a trespasser.

#### 12. NEGLIGENCE $\S$ 33(2)—CARRIER OF LUNCH NOT TRESPASSER BY NOT LEAVING IN MOST DIRECT ROUTE.

One rightfully upon an employer's grounds for the purpose of delivering lunch to an em-



ployé does not become a trespasser simply because he does not depart in the most direct and most usually traveled route.

### 13. APPEAL AND ERROR ⇨1001(2)—REVIEW OF VERDICT.

It is a matter of no moment what a judge of an appellate court may think of the sufficiency of evidence to establish a fact, in view of the principle that the sufficiency of the evidence to establish the fact is for the jury to determine.

### 14. APPEAL AND ERROR ⇨216(2)—REVIEW OF INSTRUCTION DEPENDENT ON REQUEST FOR FULLER INSTRUCTION.

A party cannot complain that an instruction was not as full and complete as might be desired, where he did not prepare and request one in proper form.

### 15. NEGLIGENCE ⇨186(29) — CONTRIBUTORY NEGLIGENCE OF CHILD QUESTION FOR JURY.

Whether a 15 year old child was guilty of contributory negligence in using a path along an unguarded pit filled with hot ashes and burning coal held a question for the jury.

### 16. TRIAL ⇨260(1)—REFUSAL OF REQUESTS COVERED BY CHARGE.

A special charge was properly refused, where the matter therein contained was sufficiently covered by the main charge.

### 17. DEATH ⇨95(4)—MEASURE OF DAMAGES FOR DEATH OF CHILD.

The measure of damages recoverable by a mother for death of minor son is the pecuniary loss resulting from his death, including any pecuniary benefit she would probably have received from him during his minority, and the value of any aid she may have had reasonable expectation of receiving from him after reaching majority.

### 18. DEATH ⇨104(5)—INSTRUCTIONS ON DAMAGES FOR DEATH OF CHILD.

An instruction on the measure of damages for the death of child, allowing the jury to assess a fair compensation for the pecuniary loss sustained, held not improper because it did not specifically authorize a deduction for his maintenance during the remainder of his minority.

Appeal from District Court, El Paso County; A. M. Walthall, Judge.

Action by Ynocenta Bustillos against the Southwestern Portland Cement Company. A judgment for plaintiff, reversed by this court (169 S. W. 638), was reversed by the Supreme Court (211 S. W. 929), and the cause remanded. Judgment of trial court affirmed.

Burges & Burges, of El Paso, for appellant. W. M. Peticolas, M. W. Stanton, and Jno. F. Weeks, all of El Paso, for appellee.

HIGGINS, J. This suit was brought by Ynocenta Bustillos to recover damages for the death of her son, Fernando Bustillos, aged 15 years, whose death it is alleged resulted from appellant's negligence. Verdict

was returned and judgment rendered in appellee's favor for \$2,500.

Upon appellant's premises there was a pit or depression in the ground into which it dumped hot ashes, burning coal, and slag. It was alleged that this pit was negligently maintained and unguarded, and on June 2, 1911, the deceased, while passing said pit upon a pathway about 2½ feet distant therefrom, slipped and fell into the same, receiving burns which caused his death; that in using the pathway deceased was performing an errand for one of the employees at defendant's plant, that is, carrying a lunch. The allegations are set out in full in an opinion of the Supreme Court in this case reported in 211 S. W. 929, to which we refer for a complete statement of the allegations of the petition.

The facts in this case, as disclosed by the evidence in so far as they are pertinent to the questions presented by this appeal, will be sufficiently indicated in the course of the opinion.

The first eight assignments complained of the action of the court in overruling general and special exceptions to the petition. The sufficiency of the petition as against general demurrer has been upheld by the Supreme Court in the opinion rendered as aforesaid.

[1-4] In so far as the special exceptions are concerned, there is nothing in the transcript to show that the action of the court upon the same was ever invoked, and in this condition of the record they are presumed to have been waived. It is assigned as error that the court erred in admitting in evidence certain photographs of the pit and its immediate location. Mr. Weeks testified that the photographs were correct and reflected conditions as they existed before the camera. The objections urged relate to the probative force of the photographs, rather than to their admissibility, and they were properly admitted in evidence. During the progress of the trial and before submission to the jury, plaintiff filed a trial amendment. Error is assigned to the refusal of the court to strike it out; the proposition being advanced that the record fails to disclose any exception to the petition to have been sustained or that any evidence was excluded on account of insufficiency of the petition, and there was therefore no authority for the filing of the amendment. Appellant filed a number of special exceptions to the sufficiency of the petition, and, while it is true the record does not disclose any action by the court upon its exceptions, yet appellant in its brief asserts that they were overruled. The trial amendment contains allegations which would meet certain of the special exceptions. The language of rule 27 (142 S. W. xix) for the government of the district court regulating the filing of a trial amendment does not make

the right to file the same dependent upon the contingency that exceptions to the original plea have been sustained. According to the appellant's own theory, the exceptions had been presented, decided, and overruled. It was within the discretion of the court to permit the filing of the trial amendment. *Moore v. Moore*, 73 Tex. 382, 11 S. W. 396; *Railway Co. v. Huffman*, 83 Tex. 286, 18 S. W. 741; *Texas Co. v. Earles*, 164 S. W. 28; *American, etc. v. Ray*, 150 S. W. 763. In any event, the filing of the same is not regarded as reversible error. Rule 62a (149 S. W. x).

[5] Complaint is made of the action of the court in overruling defendant's motion for an instructed verdict in its favor for the reason that there was no evidence showing the defendant company to be such corporation as would be held liable in damages for the death of any person. The defendant was a private corporation engaged in the manufacture and sale of cement. The cases cited by appellant do not support the propositions which it advances. They simply hold that under the second subdivision of article 4694, Rev. Stat., such a corporation is not liable for the death of a person caused by negligence of its agents or employes. But "a private corporation is liable under the statute for injuries resulting in death from what may be deemed its own wrongful acts or omissions, as distinguished from the acts or omissions of its servants or agents." *Fleming v. Texas Loan Agency*, 87 Tex. 238, 27 S. W. 126, 26 L. R. A. 250; *Lipscomb v. Ry. Co.*, 95 Tex. 5, 64 S. W. 923, 55 L. R. A. 869, 93 Am. St. Rep. 804.

In this connection various assignments question the sufficiency of the evidence. It is urged that the maintenance of the pit in its dangerous condition was not shown to have been due to the negligence of a vice principal of the company with authority to represent it in its corporate capacity; that O. J. Binford was the defendant's vice principal, he acting for it with respect thereto and the only representative of the company for whose negligence it could be held responsible; and that Binford was not connected with any negligent act.

[6] Binford succeeded Gilbert as superintendent and vice principal of the company on May 20, 1911. The yard foreman, Duke, testified that the hole was being filled and refuse dumped therein under orders given by Gilbert during his incumbency. In the light of this evidence, there seems to be no basis for the contention that the dangerous agency is not shown to have been produced by the act of a vice principal. The fact that Binford did not reiterate the orders theretofore given does not affect the question. Besides, there is ample evidence of a circumstantial nature to show that the hole was being filled and maintained with the knowledge and ap-

proval of Binford. In fact, it would be difficult to escape such conclusion.

[7] Furthermore, this pit filled with live coals and hot ashes was an intrinsically and affirmatively dangerous agency. As such it was the absolute and nondelegable duty of appellant in some appropriate way to protect and guard against its dangers those rightfully upon the company's premises while passing the same. A failure in this respect is the negligence of the company itself, and it cannot shift responsibility or escape liability therefor. *Jacksonville, etc., v. Moses*, 63 Tex. Civ. App. 496, 134 S. W. 879, 385; *Temple, etc., v. Halliburton*, 136 S. W. 585; *Cameron, etc., v. Anderson*, 98 Tex. 156, 81 S. W. 282, 1 L. R. A. (N. S.) 198; *Cameron, etc., v. Anderson*, 34 Tex. Civ. App. 105, 78 S. W. 8; *Smith v. Humphreyville*, 47 Tex. Civ. App. 140, 104 S. W. 495; *Missouri, etc., v. Ballard*, 53 Tex. Civ. App. 110, 116 S. W. 93; *Kampmann v. Rothwell*, 107 S. W. 120; *Moore v. Kopplin*, 135 S. W. 1033.

The sufficiency of the evidence is further questioned upon the ground that the pit complained of was on the private property of defendant, was remote from any public highway or from any private way through defendant's premises, and no duty devolved upon defendant to maintain its premises free from all dangers, and defendant was not guilty of negligence in using its premises as it did.

[8] This may be disposed of by the observation that there is evidence in the record of employes and others rightfully upon the premises, habitually passing to and fro along and beside the dummy line, adjacent to the pit, using same as a pathway in going to and returning from the plant. It was defendant's duty to such persons to maintain its grounds in safe condition or properly guard and protect against dangerous places therein.

It is further questioned upon the ground that the deceased was a trespasser upon the private premises of defendant, and that it was under no obligation to maintain its grounds free from danger to trespassers, and deceased, being such, accepted the grounds as he found them. In this connection, appellant contends that the undisputed evidence shows deceased had taken a lunch to one Quirino Reyes and was returning; that Reyes upon that date was working at the reservoir  $1\frac{1}{2}$  miles beyond the plant and grounds where the pit was situated; that the county road was the direct route for the return of deceased from reservoir to his house, and he had no occasion whatever in so returning to enter upon the private premises of defendant at its main plant; furthermore, whether he had carried a lunch to the reservoir or the main plant, the accident is shown to have occurred between 4 and 5 o'clock in the afternoon, and under no possible circumstances did he have any right upon the premises at that hour.

[9] It must be conceded he was undoubtedly a trespasser if he was returning from the delivery of a lunch to Quirino Reyes at the reservoir, because he had no occasion whatever in so doing to enter upon the grounds at the main plant. But a careful consideration of the evidence leads to the conclusion that it is debatable whether he was in fact returning from the reservoir or the main plant.

Francisco Maldonado testified that Fernando carried lunch to Quirino Reyes, the day he was burned; but there is nothing to indicate upon what information he based such statement.

Reyes Bustillos, brother of deceased, testified he had carried lunch to Quirino Reyes; that deceased had told him so. It was shown by several witnesses that Quirino Reyes was working at the reservoir on day of accident.

On the other hand, Thomas Negrite, who was with deceased at time of accident, testified they had gone to the cement plant together and Bustillos left a lunch bucket; that a woman named Juana Delfine asked deceased to carry the lunch to a man at the plant, and he did so; that Bustillos took it inside going into the entrance between the clinker bins and plant; witness remained outside and did not see to whom the lunch was delivered; Juana Delfine gave him the lunch about 11:30 a. m.; they remained at plant 2 or 3 hours waiting for the bucket to take it back; during this time they were on the side of a hill adjacent to the plant; when they got the bucket back, they started home, and in passing the pit Bustillos slipped in and was burned. The testimony of Negrite in this connection is as follows:

"We were walking by the hole when young Bustillos fell in. He fell into the hole right here. We had just about reached the hole when he fell in. We were walking by there going home. We had gone over to the cement plant and left a bucket of lunch. I don't know where young Bustillos carried the lunch, because I remained outside when he went in. In going to the cement plant with the lunch we went along here, along the track. We were both together in going back home. Bustillos was on the side of the hole. He was walking on this side of the track. Bustillos was walking between me and the hole. As we walked along by the hole, he fell in the hole. When I saw him, he was hollering for me to pull him out. \* \* \* I went with young Bustillos to carry a lunch to the cement plant. He carried the lunch from the house of the woman called Juana. Yes, Juana Delfine was her name. She called to him, young Bustillos, and brought a bucket, and said it was for a man at the plant. We were passing by and she called to Bustillos. He went inside and I remained outside. He went into the plant by the entrance between the clinker bins and the plant. I did not hear her say anything about who to take it to. That was at half past 11 in the morning. Yes, I went up to the plant with Bustillos, and he took it inside.

I did not see the man he delivered it to, as I remained outside of the plant. We then started back home, and when we got even to the hole he fell in. \* \* \* It was half past 11 or thereabout when we were taking this lunch to the cement plant. We remained at the plant about two hours or three. We were waiting for the bucket, to bring it back, and we did bring it back. We had been to the side of the hill, at the edge of the factory, during that time. We went over there to wait for the man to get through with his lunch. We waited there two or three hours, I don't remember. When the man gave Bustillos the lunch bucket, we started back home. \* \* \*"

[10, 11] It will thus be seen that the testimony of Negrite clearly raises an issue as to whether the lunch was carried to Quirino Reyes at the reservoir or some one else working at the main plant. If it was to the main plant, then deceased could not be regarded as a trespasser, for it is abundantly shown that women and children habitually and constantly carried daily lunches to the men working at the company's plant and delivered same upon the premises. Under the evidence it must be held that such practice was authorized by the company. If so, one upon the premises for such a purpose was rightfully there and could not be regarded as a trespasser. See opinion of Supreme Court in this case cited supra.

[12] There is evidence in the record, too, that there was a pathway passing the pit which was used to some extent by parties in going to and from the plant. It is true, such was not the most direct route for deceased to have traveled from the plant to his home and was not the one most used; but, if he was rightfully upon the premises, he would not lose his status as such and be lowered to that of a naked trespasser, simply because he did not depart in the most direct route for his home and along the one most usually traveled.

As to the fact that the accident is shown to have occurred some time after the noon hour, Negrite explains this circumstance by saying that while waiting for the lunch bucket they went over on a hillside at edge of company's property and spent two or three hours there. They then got the bucket and started back home. While this explanation may not seem entirely satisfactory to this court, yet the jury accepted it, and it was within its province to do so.

[13] So it is seen, the status of deceased as a trespasser or as one rightfully upon the premises resolves itself into the question of whether he took a lunch to Quirino Reyes at the reservoir or to some one else working in the main plant. The evidence falls very far short of satisfactorily establishing the latter fact to the mind of this court, but the issue is clearly raised by Negrite's evidence, and we are not at liberty to disregard the same and set aside the jury's finding thereon.

The remarks of Judge Neill, in *Ry. Co. v. Murray*, 99 S. W. 144, are so apropos in this connection that we quote as follows:

"It is a matter of no moment what a judge of an appellate court may think of the sufficiency of evidence to establish a fact in view of the principle, enacted by the Legislature and enforced by the courts, that the sufficiency of the evidence to establish a fact is for the jury to determine. If the principle is not extended beyond its logical scope, it is no business of his; nor should he suffer any qualms of conscience because a verdict cannot be squared with his own rule of justice."

[14] The thirtieth assignment complains of the definition of a "vice principal" in a special charge given by the court. It is objected that it was calculated to mislead the jury and make them believe that any foreman of any department having control or direction of other employes of the company was a vice principal for whose negligence defendant would be responsible. The charge as criticized gives a correct general definition of a vice principal. *Abilene Cotton Oil Co. v. Anderson*, 41 Tex. Civ. App. 342, 91 S. W. 607, and, while it may not be as full and complete as might be desired, yet it is not subject to the criticism made. If a more complete charge upon the subject was desired, appellant should have prepared and requested one in proper form. Not having done so, it cannot complain. The charge upon the subject which it requested was objectionable and properly refused, for several reasons.

[15] The forty-fifth and forty-sixth assignments must be overruled. It cannot be said as a matter of law that deceased was guilty of contributory negligence in passing the pit.

The twenty-third assignment is overruled. It would have been quite impossible for the court to have stated the pleadings without referring to tracks of certain railway companies, who were originally made parties defendant. Furthermore, such reference could not have had any confusing or misleading influence.

The objection to the court's charge under twenty-fifth assignment is regarded as without merit.

[16] Defendant's special charge, the refusal of which is made the basis of the thirty-sixth assignment, was properly refused, since the matter therein contained was sufficiently covered by the main charge.

[17, 18] The court's charge upon the measure of damage is criticized. The jury was instructed, if they found for plaintiff, that—

She was "entitled to recover such sum as you may believe and find from the evidence to be the pecuniary loss resulting to her from the death of said Ferdinando and not otherwise; the sum so assessed should as a present payment, be a fair compensation for the pecuniary loss, if any, thus sustained. The plaintiff is not restricted by law to the value of the pecuniary benefit she

would probably have received from deceased during his minority, but the term includes besides the value of such aid, if any, as plaintiff may have had a reasonable expectation of receiving from the deceased, after he reached 21 years of age, if any."

It is objected that it does not authorize any deduction to be made for the maintenance of deceased during the remainder of his minority. In estimating the pecuniary loss resulting to plaintiff from the death of her son, the jury would necessarily take into consideration such expense of maintenance, and the charge does not exclude same. It is a correct charge. *Ry. Co. v. Shiflet*, 98 Tex. 103, 81 S. W. 524; *Id.*, 87 Tex. Civ. App. 541, 84 S. W. 248.

The assignments are very numerous, and in passing upon them we have not in all instances specifically referred to same, but it is believed that the views expressed dispose of all questions raised.

Affirmed.

WALTHALL, J., did not participate in the decision of this appeal.

#### HANES v. HANES. (No. 8250.)

(Court of Civil Appeals of Texas. Dallas.  
July 5, 1919. Rehearing Denied  
Nov. 22, 1919.)

#### 1. DEEDS ⇐73—IN CONSIDERATION OF AGREEMENT TO DISMISS CRIMINAL PROCEEDINGS VOID.

A conveyance of realty by defendant to plaintiff in consideration of dismissal of criminal proceedings based upon the seduction of plaintiff by defendant's son, and of the marriage of defendant's son and plaintiff, is void, and will not form the basis of a suit in trespass to try title.

#### 2. DEEDS ⇐17(3) — MARRIAGE SUFFICIENT CONSIDERATION.

A conveyance of land may be supported upon marriage contracted by the grantee and the grantor's son.

#### 3. CONTRACTS ⇐137(1)—EFFECT OF ILLEGALITY OF ONE OF SEVERAL CONSIDERATIONS.

A promise made upon several considerations, one of which is unlawful, no matter whether the illegality be at common law or by statute, is void.

#### 4. DEEDS ⇐73—ILLEGALITY OF CONSIDERATION RENDERS INDIVISIBLE CONTRACTS VOID.

Where a grantor conveyed real property to grantee in consideration of the dismissal of criminal proceedings for seduction of grantee by grantor's son, and of the marriage of the son to grantee, the contract was not divisible, and the conveyance was vitiated by the illegal consideration relative to dismissal of the criminal proceeding.

**5. SPECIFIC PERFORMANCE — CONVEYANCE BASED UPON ILLEGAL CONSIDERATION AS EXECUTORY CONTRACT.**

Where land is conveyed upon several considerations one of which is illegal, as requiring dismissal of criminal proceedings against grantor's son, but the grantee is not put in possession, and the contract remains executory, a suit for specific performance will not lie.

Appeal from District Court, Kaufman county; Joel R. Bond, Judge.

Trespass to try title by Mabel Hanes against C. W. Hanes. Judgment for plaintiff, and defendant appeals. Reversed and rendered.

Huffmaster & Huffmaster, of Kaufman, for appellant.

Woods & Morrow, of Kaufman, for appellee.

**RASBURY, J.** Appellee sued appellant in statutory trespass to try title to recover 50 acres of land in Kaufman county, alleging in addition to the statutory requirements that while she was a married woman her husband refused to join in the suit, and that the land sued for was her separate property. Appellant answered by plea of not guilty, and, among other matters, that the deed was void because against public policy, in that the consideration for the deed was the agreement of appellees to suppress the prosecution of appellant's son, Bryan Hanes, for seducing appellee, Mabel Smith. There was trial by jury, to whom the issues of fact were referred for special verdict in form of the usual interrogatories, upon the answers to which judgment was entered for appellee. From that judgment this appeal is taken.

The facts necessary to be stated are these: Bryan Hanes, son of C. W. Hanes and M. P. Hanes, had been tried and convicted in Dallas county on a charge of seducing Mabel Smith. Pending appeal, the appellant, C. W. Hanes, and his wife M. P. Hanes, conveyed to Mabel Smith 50 acres of land of a 600-acre tract in Kaufman county, reciting the consideration to be "one dollar and other valuable consideration," but did not place her in possession thereof. On the day the deed was executed, Mabel Smith and Bryan Hanes were married; the judge of the court where he had been tried and convicted performing the ceremony, and the county attorney who prosecuted him being present. After the marriage, a new trial was granted, and the conviction was set aside, and Bryan Hanes ultimately released, though what was done with the charge does not appear. Thereafter C. W. Hanes, appellant, and his wife, accompanied by their son, Bryan Hanes, and his wife, went to the home of the former in Kaufman county. Three calendar months after the marriage, Mabel Hanes returned to her parents.

The facts preceding and inducing the execution and delivery of the deed, as related

by J. B. Smith, father of Mabel Hanes, who was acting for her in that respect, is disclosed by the excerpts immediately quoted from his testimony:

"As to how the deed came to be made, will say that the boy, Bryan, was in prison, and Mr. Hanes wanted him out, and that was the only way to get him out was by signing this deed. This deed was made to get Bryan out of prison—for my daughter to marry him to get him out of prison. \* \* \* Yes, the consideration of the deed was that the case was to be dismissed and Bryan was to be turned out of jail after he married Mabel. We were willing to drop the court proceedings against Bryan so long as he acted a gentleman and treated my daughter right. He had a sentence of five years and was talking about appealing the case. \* \* \* I exacted of Mr. Hanes a conveyance to my child of 50 acres of land, and, when he executed the deed, I was willing for my daughter to marry his son; otherwise Bryan Hanes would have gone to the penitentiary. The land was for the support of her and her child. I didn't give my daughter for the deed."

[1] Upon conclusion of the evidence, appellant requested the court, in effect, to peremptorily direct verdict in his favor on the ground that the deed was void and unenforceable because the consideration therefor was illegal. The request was refused, and the court's action in that respect is assigned as error. It is quite clear, we believe, that the consideration moving from appellee to appellant was the promise of appellee's father to suppress or co-operate in the suppression of the criminal charges then pending against Bryan Hanes. Appellee's father, as we have shown, testified that the consideration for the conveyance was that the criminal proceedings were to be dismissed after Bryan Hanes married appellee. It is said that a contract of such character exists where the parties agree expressly or impliedly upon the suppression or abandonment of the prosecution of the criminal charges. *Cohen v. Grimes*, 18 Tex. Civ. App. 827, 45 S. W. 210. By the rule stated, the conveyance was in our opinion void and could not form the basis of a suit in trespass to try title.

[2-4] It is argued, however, that part of the consideration of the conveyance moving to appellant was the agreement of appellee to marry his son, which is a legal consideration and may therefore form the basis of a suit of trespass to try title. While it is our deduction from the evidence that the consideration which actually induced the conveyance was the promise to suppress the criminal prosecution pending against appellant's son, and that the marriage was but a part of the plan to accomplish that purpose, it may be conceded that the marriage was part of the consideration and that such marriage is sufficient to support a conveyance of lands from a third party, as it is (1 *Elliott Contracts*, § 241), yet

that fact will not, in our opinion, lend validity to the deed. It "is well settled upon principle and authority that a promise made upon several considerations, one of which is unlawful, no matter whether the illegality be at common law or by statute, is void." *Edwards County v. Jennings*, 89 Tex. 618, 35 S. W. 1053. It is true that, in consonance with such rule, it is the further rule that if the contract is divisible, that is, the legal consideration can be separated from the illegal, the contract will be enforced. 1 Elliott Contracts, § 249. We are persuaded, however, that the consideration for the conveyance under discussion is not divisible. Conceding, as we have for the time, that Hanes made the conveyance both in consideration that appellee would marry his son and that her father and she would join in the purpose to suppress the criminal prosecution, we are unable to say which was the greater inducement. We believe we could say with greater reason that the controlling inducement was the promise to suppress the prosecution, and that but for the agreement in that respect there would have been no conveyance of lands. In *Edwards County v. Jennings*, supra, the county agreed to pay Jennings \$3,500 and grant him the exclusive privilege of supplying the citizens of Rock Springs with water in consideration of the construction of certain apparatus to furnish a supply of water, etc., for the courthouse. It was held that the contract was void because the exclusive privilege tended to create a monopoly. And while it was also held that part of the consideration, the \$3,500, was legal, the court declared it could not "say which of these considerations most affected the mind of Jennings and induced his promise, nor are there any means of ascertaining how much of his obligation was based upon the illegal consideration." Judged by the standard that ordinarily governs men under facts similar to those disclosed by the record in the case at bar, we think it can be safely asserted that what induced appellant to convey the land was the promise to suppress further prosecution of his son, and what moved appellee's father was the agreement to marry his daughter, which would in some measure repair the injustice done her. Such being the situation, we are unable to escape the conclusion, however reluctant we may be to do so from a moral standpoint, that the consideration is not separable and cannot stand alone upon the legal part.

[5] There is also another well-established rule of law that renders the conveyance unenforceable. As we have noted in our statement of the facts, appellant did not, when the deed was executed and delivered, place appellee in possession of the land, and the contract as a consequence was executory. In such cases when the contract is illegal courts will not decree specific performance. Similarly in cases

where possession is delivered courts will not aid the grantor in recovering possession. *Medearis v. Granberry*, 38 Tex. Civ. App. 187, 84 S. W. 1070.

There are a number of other assignments of error, all of which have been carefully examined, none of which, in our opinion, present reversible error, but which we have not discussed in view of the conclusions we have reached concerning the consideration of the deed.

The judgment of the honorable trial court is reversed, and judgment here rendered for appellant.

Reversed and rendered.

#### WESTCHESTER FIRE INS. CO. v. BIGGS. (No. 490.)

(Court of Civil Appeals of Texas. Beaumont.  
Nov. 11, 1919. Rehearing Denied  
Dec. 3, 1919.)

##### 1. INSURANCE §335(2)—FAILURE TO INCLUDE IN INVENTORY WORTHLESS ITEMS.

That insured in preparing an inventory of stock omitted old, unsaleable stock held not to avoid the fire policy, which required the taking of an inventory.

##### 2. INSURANCE §335(4)—FAILURE TO PRODUCE INVENTORY DID NOT DEFEAT POLICY.

Where insured produced a memorandum of an inventory taken in July before the policies were issued, and a complete inventory taken in the following January, together with record of transactions occurring thereafter, held that the fact that the earlier inventory was burned, and so was not produced, would not defeat recovery, despite the requirements of the policy as to taking an inventory and keeping it in an iron safe.

##### 3. TRIAL §139(1)—DIRECTION OF VERDICT ON CONFLICTING EVIDENCE.

The trial court is never justified in giving a peremptory charge where reasonable minds differ respecting a particular issue under investigation.

##### 4. TRIAL §105(2)—RAISING OBJECTION TO EVIDENCE BY ASSIGNING ERROR TO REFUSAL TO DIRECT VERDICT.

Where defendant insurer did not object to the introduction of evidence establishing facts which would have been shown by the inventory had it not been destroyed, held that objections to such evidence cannot be raised by assigning error to refusal of motion for direction of verdict.

##### 5. INSURANCE §335(4)—DESTRUCTION OF INVENTORY REMOVED FROM SAFE WITHOUT INSURED'S KNOWLEDGE.

Where insured duly prepared an inventory and kept it in an iron safe, the fact that the inventory was removed from the safe shortly before the fire without the insured's knowledge, by one of those from whom he acquired the

business, and, having been left in a desk, was destroyed, *held* not to avoid the policy.

**6. INSURANCE** ¶668(4)—FIRE INSURANCE; BREACH OF RECORD WARRANTY CLAUSE FOR JURY.

In an action on a fire policy covering fixtures as well as a stock of goods, defendant's motion for direction of verdict, on the ground that plaintiff failed to make proof of any loss on fixtures which would preclude him from recovery, since the evidence showed he breached the record warranty clause, *held* properly denied.

**7. INSURANCE** ¶660—SUBMISSION OF INSURED'S BOOKS TO JURY.

In an action on a fire policy where it appeared that the inventory taken before the policy was written was destroyed through no fault of insured, *held* that the submission of books and other data produced by the insured was proper.

**8. APPEAL AND ERROR** ¶1050(1)—HARMLESS ERROR IN ADMISSION OF SECONDARY EVIDENCE.

In an action on a fire policy, the submission in evidence of data presented by insured, it appearing that the original inventory was burned because removed from an iron safe by some one without insured's knowledge or consent, *held* harmless, if erroneous, as it could not have affected the result.

Error from District Court, Panola County; Daniel Walker, Judge.

Action by J. I. Biggs against the Westchester Fire Insurance Company. There was a judgment for plaintiff, and defendant brings error. Affirmed.

Thompson, Knight, Baker & Harris and Will C. Thompson, all of Dallas, for plaintiff in error.

W. G. Banks, of Shreveport, La., for defendant in error.

**BROOKE, J.** By his original petition, the plaintiff alleged: That he was the owner of a stock of merchandise, consisting principally of some drugs and sundries, and of some furniture and fixtures and soda fountain, located in Beckville, Tex., and that on October 17, 1916, defendant issued him its policy of insurance in consideration of a \$94.20 premium, insuring him against loss by fire to the amount of \$1,000 on drugs, \$100 on furniture, and \$400 on fountain; that on November 1, 1916, in consideration of \$68.20, it issued him an additional policy, insuring him against fire to an amount of \$1,000 on stock. Both of these policies were for a year, and are attached to the petition as exhibits. That on May 6, 1917, the property was destroyed by fire, and was at that time of the value of \$4,706.57, as shown by Exhibit C attached to the petition. That after the fire defendant received from plaintiff no-

tice and proof of loss and demand for payment, which was refused. Ownership is sufficiently alleged.

By its amended answer the defendant alleged a general demurrer, special exceptions, general denial, and specially set up the record warranty clause contained in each of the policies sued on, and alleged a breach of each of the provisions of same, and further alleged the pendency of a garnishment suit, and prayed protection against it.

The case was submitted to the jury on special issues, to which they returned their answers, finding, in substance:

That the cash value of the merchandise in the store at the time of the fire was \$3,640.02; that the cash value of the furniture, fountain, and fixtures was \$1,082.65; that the plaintiff did, within 12 calendar months prior to November 1, 1916, take a complete itemized inventory of his stock in his store at Beckville; that the plaintiff did, between July 4, 1916, and the time of the fire, make, prepare, and keep in the regular course of his business a set of books, which clearly and plainly present a complete record of his business, including all purchases and all sales, whether made for cash or credit; that the plaintiff, Biggs, did, between October 17, 1916, and the time of the fire, make and prepare and keep in the regular course of his business a set of books, which clearly and plainly present a complete record of his business, including all purchases and all sales, whether made for cash or on credit; that the plaintiff did, between November 1, 1916, and the time of the fire, make and prepare and keep in the regular course of his business a set of books, which clearly and plainly present a complete record of his business, including all purchases and all sales, whether made for cash or credit; that the plaintiff did, between July 4, 1916, and January 1, 1917, make and prepare in the regular course of his business a record, showing all of the sales made by him during that period for cash.

Judgment was rendered in favor of the plaintiff and against the defendant for \$2,500, with interest from April 30, 1918, provision being made to take care of the garnishment pleaded. Defendant duly made its motion for new trial, which was overruled by the court, and defendant excepted and gave notice of appeal to this court, duly applied for writ of error, and filed its writ of error bond, citation in error, after Mr. Biggs could not be found, being served on his attorney of record, on October 8, 1918.

We make the following additional statement of facts in this case:

The plaintiff below began business about the 4th of July, 1916. At that time he bought out the going business of his father

and uncle. He was to pay them 75 per cent. of the invoice price of their stock, and to ascertain what that sum might be an inventory was taken on that date of a part of the stock. One of the questions involved here is whether that inventory constituted a complete itemized inventory. One of the policies sued on was issued October 17, 1916, and covers \$1,000 on stock of merchandise, \$100 on furniture and fixtures, and \$400 on soda fountain. The other policy was issued November 1, 1916, and described stock. Each of these policies contained the usual record warranty clause. To show a compliance with this clause, the plaintiff produced upon the trial an inventory taken January 1, 1917, his bank book, a book called "cash book" in which appear purchases made during 1917, and a gray book (ledger), in which appear, so the assured testified, a record of purchases for 1916—though this is attacked as failing to show such purchases as is required by the terms of the policy—and also for 1917, a record of cash sales for 1917, and a record of sales for sales on credit for 1916 and 1917. The inventory for 1916 was burned in the fire which occurred May 6, 1917, while in the store and out of the safe, under circumstances hereafter set out.

The Westchester Fire Insurance Company comes to this court complaining of the errors committed by the trial court as evidenced by the following assignments of error.

The first assignment of error is as follows:

"The court erred in refusing and further erred in not giving in charge to the jury defendant's first requested charge, directing a verdict for it, for the reason, among others, that the undisputed evidence showed that the policies sued on, and each of them, was breached and avoided by the plaintiff in the following particulars:

"(a) Failure to take a complete itemized inventory within 12 months prior to the date of each policy or 30 days thereafter.

"(b) Failure to make and prepare within time required a set of books showing a complete record of business transacted, as required by each policy.

"(c) Failure to keep, preserve, and present as required inventory assured says was taken in July, 1917.

"(d) Failure to comply with first section of clause.

"(e) Failure to comply with second section of clause.

"(f) Failure to comply with third section of clause."

[1] The first proposition under this assignment is:

"The undisputed evidence being that the inventory of July, 1916, failed to include some 15 per cent. of the stock, it was not, as a matter of law, any such complete inventory as constitutes any compliance with requirements of the policy as to the taking of inventory, so that peremptory instructions for the defendant in the court below should have been given, since the evidence was also undisputed that no such in-

ventory was taken within 30 days after the issuance of either policy."

On the contrary, it is urged that, it being usual and customary for all merchants to drop from their annual inventories old and discarded stock, failure to include or consider such items in making inventory will not constitute breach of warranty clause in insurance policy requiring that complete inventory be taken.

We are of opinion that on this proposition the court was not in error, and it would, perhaps, be well in this connection to state some of the testimony on this point.

Defendant in error testified:

"The stock of goods that I bought from my father and uncle was the stock of goods that they had in the store for a long time; that is, some of it was; I mean that a small per cent. of it was old stock. I would say that about 15 per cent. of it was old stock, but we did not include that in taking stock, but just left the old stuff here, and that did not go on my inventory. I do not know just how much there was of it, but probably not over 15 per cent."

This testimony was not considered for any purpose except showing that the property had no value, and, if it had any value, it was not purchased by assured, as the only purchase was the goods shown in the inventory.

We do not believe that the cases cited by plaintiff in error have any application here. In the case of Dorroh-Kelly Mercantile Co. v. Orient Insurance Co., 104 Tex. 199, 135 S. W. 1165, the parties had only prepared a partial inventory of the valuable and salable merchandise on hand. This is a case where a complete inventory of all the valuable and salable merchandise was taken. If the old stock omitted in this case was not of sufficient value to be accounted for anything at the time of the sale of the stock in bulk, it would clearly come within the rule announced by plaintiff in error in its brief, that is, that "it is true that the omission of unimportant items of little value and consequence would not be sufficient to defeat the right of recovery."

The policies sued on each provided in part as follows:

#### "Record Warranty Clause.

"The following covenant is hereby made a part of this policy and a warranty upon the part of the assured:

"Section 1. The assured will take a complete itemized inventory of stock on hand at least once in each calendar year and within twelve months of the last preceding inventory, if such has been taken. Unless such an inventory has been taken within twelve calendar months prior to the date of this policy, and together with a set of books showing a complete record of business transacted since the taking of such inventory, is on hand at the date of this policy, one shall be taken within thirty days after the date



of this policy, or in each and either case this entire policy shall be null and void.

"Sec. 2. The assured will make and prepare, in regular course of business, from and after the date of this policy, a set of books, which shall clearly and plainly present a complete record of business transacted, including all purchases, sales and shipments, both for cash and on credit, or this entire policy shall be null and void.

"The term 'complete record of business transacted,' as used above, is meant to include in said set of books a complete record of all the property which shall go into the premises and be added to the stock, and of all property taken from the stock, whether by the assured or by others, even though not technically purchases or technically sales.

"If the business of the assured under this policy be that of manufacturing, this complete record of business transacted must, in addition, show all the raw material received, and all products manufactured therefrom, including the cost of manufacture, and must show waste in process of manufacture, and must show all the raw material and manufactured property which is taken from the building described.

"Sec. 3. The assured will keep and preserve all inventories of stock on hand during the current year and also those taken during the preceding calendar year, which are on hand when this policy is issued, and will keep and preserve all books which are then on hand showing a record of business transacted during the current calendar year, and the preceding calendar year.

"The assured will also keep and preserve all inventories taken after the issuance of this policy, and all books made and prepared for the issuance thereof, showing a record of the business transacted.

"The books and inventories, and each of the same, as called for above, shall be by the assured kept securely locked in a fireproof safe at night, and at all times when the business mentioned in this policy is not actually open for business; or, failing in this, the assured shall keep such books and inventories, and each of them, in some secure place not exposed to a fire which would destroy said building; and, in event of a loss or damage insured against to the personal property mentioned therein, said books and inventories, and each of the same, must be by the assured delivered to this company for examination; or this entire policy shall be null and void and no suit or action shall be maintained thereon for any such loss.

"It is understood and agreed that this clause and the requirements thereof is one of the inducing causes to the acceptance of the risk herein assumed and the issuance of this policy, and that the terms and requirements hereof are material to the risk, and to this insurance, and to any loss or damage happening to the property described in this policy.

"It is further agreed that the receipt of such books and inventories, or the request for them or either of them, and the examination of the same, shall not be an admission of any liability under this policy, nor a waiver of any provision or condition of this policy, or of any defense to the same."

Plaintiff in the court below testified that he took inventory of the stock on January 1, 1917. Policy No. 158794, dated November

1, 1916, covered \$1,000 of the stock, and contains the same provisions as policy No. 158792, which was issued on October 17, 1916. Plaintiff in the court below further testified that he started in business at Beckville, and bought out a business owned by his uncle and his father, who conducted the business in the name of Biggs Bros.; that he did not know exactly how long they had been in the drug business at Beckville, but for some 18 or 20 years; that he bought them out about the 1st of July, 1916; that about the 4th or 5th of July was when he bought them out; that the basis of this purchase and sale was that they were going to take inventory of the stock, and that he (plaintiff) was to give them so much on the dollar for it; that plaintiff took that inventory with either his father or his uncle, who represented Biggs Bros.; that plaintiff was to pay them 75 cents on the dollar on this invoice price; that he started taking invoice about the 1st of July, 1916, and took it for two or three days; that plaintiff and his uncle took the inventory, sometimes plaintiff writing while his uncle called, and then his uncle writing while plaintiff called.

Without going into the matter more completely, we are of opinion that there was no error in the court's action, and this proposition is therefore overruled.

[2] Plaintiff in error's second proposition under this assignment is as follows:

"The policy being avoided by the failure of the assured to preserve and present after the fire the inventory taken in July, 1916, a peremptory instruction should have been given for the defendant as to this breach."

Defendant in error testified:

"The fire occurred on May 5th or 6th, about 10 months after I bought from my father and uncle. The fire occurred somewhere about 4 o'clock in the morning; it was burned up between 4 and 6 o'clock. At the time of the fire the store was closed. It is a fact that on the 17th of October and the 1st of November, 1916, I had this inventory that was taken on the 1st of July, 1916, and it is a further fact that the inventory was burned up in the fire that destroyed my store in May.

"The inventory that was burned up was burned up in the store. It was in there at the time of the fire. I did all the bookkeeping myself. There is nothing in the books that I haven't been asked about; I have been interrogated about everything in every book I have got; and the books I have with me here are all the books I have got of my business from the start until the burn, except the inventory that I took and that got burned up in the fire.

"The invoice of July 1, 1916, was kept in the store, in the safe. I did not take it out of the safe, and it was not taken out with my authority, and I thought it was in the safe at the time of the fire. All of my other papers were preserved, including the invoice of January 1st, and all of my books and the summary as shown in the books; and the only thing that was lost

by the fire was this statement of July 1st, showing what I had purchased. By 'stock' is meant the stock of drugs and fixtures covered by that invoice, the aggregate amount. It was the same stock of goods that I was offering for sale, together with the new goods I had purchased. I placed the inventory of July 1, 1916, in the safe, and I thought it was there in the safe at the time of the fire.

"With reference to the loss of this inventory I put the inventory in the safe some two or three weeks prior to the fire, and never looked at it again. It was in the safe the last time I saw it, and was not taken from the safe with my knowledge or authority."

It seems that defendant in error produced a complete itemized inventory taken January 1, 1917, and a full set of books showing all business transacted down to May 6, 1917, the date of the fire, and plaintiff in error does not object to this part of defendant in error's records. Biggs testified:

"Of course we sold goods out of the store all during 1916; I kept a record of those sales in my bank book. I personally put down in my bank book the amount of sales that I made out of the store during 1916; you have the bank book I refer to—no, I didn't write any of these entries in the bank book, but I was there, and they were written down correctly."

In the case of *Western Assurance Co. v. Kemendo*, 94 Tex. 367, 60 S. W. 661, where it was contended that a policy of insurance had been breached by reason of loss of inventory, Justice Brown said:

"If the assured had furnished anything from which the information contracted for could be with reasonable certainty ascertained, then the question of substantial compliance would be before the court."

In that case, however, the assured had furnished no complete itemized inventory of any character from which the insurance company could reasonably ascertain the nature and amount of loss. In this case we have a complete inventory on hand, and complete system of records and a summary of July 4th inventory, from which it can be ascertained the amount of the loss and nature of the goods destroyed. There is no contention but that the record from January 1, 1917, down to May 6, 1917, is complete in every detail. The usual cases where the assured failed to furnish complete itemized inventory would therefore not apply in this case. The only possible purpose for which plaintiff in error could have desired a statement of the business previous to January 1st was to secure a basis of values from which the profits prior to January 1, 1917, could be figured in order to estimate the profits subsequent to January 1, 1917, and thereby obtain an accurate estimate of the actual stock on hand at the time of the fire. All this data was fully and completely furnished to plaintiff in error, and the jury, in

passing on the facts, determined that defendant in error had from July 4, 1916, down to the time of the fire, prepared and kept a record which clearly and completely presented a complete record of his business. See *Brown v. Ins. Co.*, 89 Tex. 594, 35 S. W. 1060; *Westchester Fire Ins. Co. v. McMinn*, 198 S. W. 638, and authorities there cited; *Bank v. Cleland*, 36 Tex. Civ. App. 478, 82 S. W. 337; *McNutt v. Ins. Co. (Tenn. Ch.)* 45 S. W. 61. We find no merit in this proposition.

[3, 4] The third proposition is:

"Since the undisputed evidence showed that the policies sued on became avoided by the failure of the assured to keep a record of sales for cash during 1916, when they were required to be kept, the jury should have been so instructed."

On the contrary, it is contended that where secondary evidence has been introduced in the trial court to supply the loss of an original preceding inventory called for in the record warranty clause, and same has been considered by the court and jury, without objection or motion to strike out same upon the part of plaintiff in error, a verdict and judgment based upon such evidence should not be disturbed.

See *Underwood v. Parrott*, 2 Tex. 168; *Carter v. Eames*, 44 Tex. 544; *Long v. Garnett*, 59 Tex. 229; *Matlock v. Glover*, 63 Tex. 231; *Brown v. Lessing*, 70 Tex. 544, 7 S. W. 783; *Davis v. Bargas*, 12 Tex. Civ. App. 59, 33 S. W. 548; *McCarty v. Johnson*, 20 Tex. Civ. App. 184, 49 S. W. 1098; *Warren v. Kohr*, 26 Tex. Civ. App. 331, 64 S. W. 62; *Mensing Bros. v. Cardwell*, 33 Tex. Civ. App. 16, 75 S. W. 347.

It seems that if as a matter of law nothing less than a strict compliance with the warranty clause as to the production of the identical previous inventory would suffice, then plaintiff in error would have its remedy by assigning as error the action of the court in admitting the summary for the purpose stated. In the case of *Brown et al. v. Lessing et al.*, supra, the court said:

"The appellants asked charges to the effect that the jury would find in their favor unless the sale had been proved by the introduction of the written instrument by which it was made. This was refused, and correctly so. If the appellant had objected to proof of the sale other than by production of the instrument by which it was made, the objection doubtless would have been sustained, unless some sufficient reason for its nonproduction was shown, but no such objection was made, and, proof other than primary having been introduced without objection, the jury were entitled to consider it."

Failing to do this, there is no issue for the court to consider. As long as the testimony was introduced without objection, it is too late to raise this issue through an assignment of error which merely alleges that the

court erred in refusing to instruct a verdict for the defendant below. The trial court is never justified in giving a peremptory charge, where reasonable minds differ respecting a particular issue under investigation. *Railway Co. v. West*, 149 S. W. 206; *Ward v. Powell*, 127 S. W. 851. This proposition is also overruled.

[8] Plaintiff in error contends by its fourth proposition under its first assignment of error that since the assured failed to make a record of purchases during 1916 when such record was required, the policies became void, and the jury should have been so instructed.

On the contrary, it is contended that where assured produced a complete record of his business from July 4, 1916, down to May 6, 1917, which included a complete inventory taken on January 1, 1917, and a summary taken on July 4, 1916, the original inventory of July 4, 1916, having been destroyed through no fault of assured or his servants, there was no breach of the record warranty clause requiring that such records be preserved.

Plaintiff in the court below testified:

"I had placed the inventory of July 1, 1916, in the safe, and it was not taken out of the safe by me nor with my consent, and I thought it was there in the safe at the time of the fire."

J. W. Biggs testified:

"My name is J. W. Biggs. I was summoned by the defendant as a witness in this case. I remember the burning of J. I. Biggs' store up at Beckville; that is, I remember the night it was burned. I was at one time connected with the store, but had sold out. An inventory was taken in 1916, from July 4th, for 2 or 3 days. I had something to do with the taking of that inventory. Just before the fire I saw that inventory. I got the inventory out of the safe. I don't think Joe told me to get it. I went there to look at it for some personal information. I did not put the inventory back in the safe. I don't see how Joe could have known about that, because he was not back where I was at the time, he was in the front of the store. I was checking over the inventory when some one—I think it was Mr. Pink Barber—called me to the back door for just a minute, and I opened the top drawer of the desk and laid the inventory in there, expecting to come back in a minute and get it. Well, I was out there some little bit, and forgot to go back and put it back. Joe knew nothing at all about it; I did not tell him anything about it. I was not working for Joe, and had nothing whatever to do with the business; the business was in Joe's charge; I had turned it over to him in July, 1917."

In the case of *Western Assurance Co. v. Kemendo*, 94 Tex. 367, 60 S. W. 661, Mr. Justice Brown of the Supreme Court said:

"If the inventory was not produced because it was lost or destroyed by some means not constituting fault, negligence, or design on the part

of the insured or his employees, and if the insured used ordinary care to preserve the inventory in accordance with the terms of the contract, then the failure to produce it would not work a forfeiture of the insurance policy."

It would, indeed, be a harsh ruling that assured, after furnishing such a complete record as he has in this case, including one complete itemized inventory, should forfeit his insurance for the reason that an old inventory was missing, when the information required is furnished by a summary of this inventory which was preserved by assured. It would be hard to figure out a more substantial compliance with the record warranty clause, unless it be exact in every particular. This case, however, goes much further. The only missing paper was lost through no fault of assured or his agents. Assured exercised every care to keep it in the safe, and it remained to be developed upon the trial of the case that just before the fire a former owner of the stock wished some personal information from off the inventory, secured it without knowledge of assured, and forgot to return it to the safe. This brings up a question which no court could reasonably pass on except in favor of assured. If some stranger in passing through a store should abstract from the files or safe of assured some book or paper which would require assured to furnish the information required by an insurance company from other sources, would assured policy be canceled? If that were true, then the taking the goods from assured without his knowledge and without the making of a proper record thereof would invalidate his insurance. The element of good faith should at least enter into the consideration of this matter, and where assured has made every effort to comply with the record warranty clause in preserving his records, and has furnished all of the information that any company could wish for in order to accurately determine the loss, it would seem that no grounds could exist for a forfeiture of the policy. We find no error in the action of the court on this matter, and therefore this proposition is overruled.

[6] The fifth proposition of plaintiff in error is as follows:

"Either the plaintiff has failed to make proof of any loss on fixtures, which could preclude him from any recovery, since the undisputed evidence showed that he breached the record warranty clause, or he has shown a loss of more than the items of insurance on fixtures, in which event a peremptory instruction should have been given for the defendant below, and the court rendered judgment for the plaintiff for the fixtures."

On the contrary, it is urged that where assured furnished in evidence a record of cash sales and record of purchases for the year previous to that in which the fire oc-

curred, and detailed the manner in which an accurate record of his business could be determined from the books presented, there was no breach of record of warranty clause requiring that a complete record be kept.

The court submitted the following issues to the jury:

"Question No. 3: Did the plaintiff, Biggs, within 12 calendar months prior to November 1, 1916, take a complete itemized inventory of his stock in his store at Beckville? Answer this question Yes or No." (To which question the jury answered "Yes.")

"Question No. 4: Did the plaintiff, Biggs, between July 4, 1916, and the time of the fire, make and prepare and keep, in the regular course of his business, a set of books which clearly and plainly present a complete record of his business, including all purchases and all sales, whether made for cash or on credit? Answer this question Yes or No." (To which question the jury answered "Yes.")

"Question No. 5: Did the plaintiff, Biggs, between October 17, 1916, and the time of the fire, make and prepare and keep, in the regular course of his business, a set of books which clearly and plainly present a complete record of his business, including all purchases and all sales, whether made for cash or on credit? Answer this question Yes or No." (To which the jury answered "Yes.")

"Question No. 6: Did the plaintiff, Biggs, between November 1, 1916, and the time of the fire, make and prepare and keep in the regular course of his business a set of books which clearly and plainly present a complete record of his business, including all purchases and all sales, whether made for cash or on credit? Answer this question Yes or No." (To which question the jury answered "Yes.")

"Question No. 7: Did the plaintiff, Biggs, between July 4, 1916, and January 1, 1917, make and prepare, in the regular course of his business, a record showing all of the sales made by him, during that period, for cash? Answer this question Yes or No." (To which question the jury answered "Yes.")

The court also gave two charges which were requested by plaintiff in error, as follows:

"Did the plaintiff have on hand on October 17, 1916, a complete itemized inventory of his stock, together with a set of books showing a complete record of business transacted?" (To which the jury answered "Yes.")

"Did the plaintiff have on hand on November 1, 1916, a complete itemized inventory of his stock, together with a set of books showing a complete record of business transacted?" (To which the jury answered "Yes.")

No other charges were requested by plaintiff in error other than the one to instruct a verdict in its favor.

See *Westchester Fire Ins. Co. v. McMinn*, 198 S. W. 638; *Ins. Co. v. Hardin*, 151 S. W. 1162; *Fire Ass'n v. Masterson*, 83 S. W. 49.

It seems that the books introduced by plaintiff below, together with the testimony of assured, clearly presented an issue which

was properly submitted to the jury, and in this case the findings of fact by the jury upon these points were never objected to in the motion for new trial. Plaintiff in error does not contend that the verdict of the jury was contrary to the evidence, but merely assigns as error the fact that the court refused to instruct a verdict in its favor. In our judgment, the only question here for the court is whether or not there was sufficient evidence before the court to authorize it to submit the issue to the jury. We overrule this proposition.

[7, 8] Plaintiff in error's second assignment of error is that the court erred in submitting any issue to the jury, since the evidence was undisputed that each policy was breached.

The counter proposition to this is that where assured produced books, inventories, and other data to show compliance with the record warranty clause, from which records and data the jury could, by reasonable consideration of same, determine whether or not the record warranty clause had been complied with, it was proper for the trial court to submit such evidence to the jury for consideration.

It would manifestly have been error for the trial court to have refused to submit these books and this testimony to the jury for consideration, and the fact that the trial court did submit them is the only error that the plaintiff in error complains of. It is our position that the error alleged could not have affected the rights of plaintiff in error in any way.

The verdict of the jury exactly coincides with the undisputed testimony as to value, and if a division of the items is desired, it can be accurately determined from the testimony and the findings of the jury just what was meant in this respect. In addition to this, plaintiff in error stood by in the open court and heard the reading of the verdict, and did not complain of same at the time when the error could have been corrected.

If there was ever any serious question in this case, it hinged around the proposition of whether the assured could properly account for the loss of the itemized inventory for the preceding year, and, if not, could he show such substantial compliance as would avoid a breach of the record warranty clause? It is shown conclusively that assured, with all the care of an ordinarily prudent man, carefully preserved the old invoice in his safe, and that just preceding the fire it was removed from the safe without the knowledge or consent of assured, by one who had no connection with the business. Not only is this true, but assured went further, and supplied the loss by introducing in evidence a summary of the inventory for the express purpose of showing a substantial compliance of the record warranty clause which evidence was considered in the trial of

the case without objection upon the part of plaintiff in error.

After a careful consideration of the matter complained of, we are of opinion that the court did not err, and the assignment is overruled.

The third assignment of error is that no judgment can be rendered on furniture and fixtures or fountain since the policy is divisible on these items, and there is no separate finding as to each. Without comment we overrule this assignment. The fourth, fifth and sixth assignments are also overruled, and we might say that in our opinion the matters complained of did not constitute a breach or violation of any of the warranties or conditions or provisions of the policy. *Ins. Co. v. Angier*, 214 S. W. 451.

Finding no reversible error, we are forced to the conclusion that the case should be in all things affirmed; and it is so ordered.

LOUISIANA & TEXAS LUMBER CO. v.  
SOUTHERN PINE LUMBER CO.  
et al. (No. 7774.)

(Court of Civil Appeals of Texas. Galveston.  
June 28, 1919. Rehearing Denied  
Oct. 9, 1919.)

1. NEW TRIAL ⇐8—GRANT AS TO PART OF DEFENDANTS.

In trespass to try title, that portion of a judgment awarding a tract to certain defendants may be set aside, and a new trial granted, without disturbing a portion of the judgment which awarded another tract to another defendant on separate and distinct defenses.

2. TRESPASS TO TRY TITLE ⇐35(2)—DEFENSES AVAILABLE UNDER PLEA OF NOT GUILTY.

In trespass to try title, defendant, filing a plea of not guilty as well as one of limitations, may show that he was a tenant in common with his codefendants, and had an interest in the fee of less than a whole by virtue of a timber deed.

Appeal from District Court, Trinity County; E. A. Berry, Judge.

Trespass to try title by the Louisiana & Texas Lumber Company against the Southern Pine Lumber Company and others. Judgment for certain defendants as to part of the land involved, and plaintiff appeals. Affirmed.

Nunn & Nunn, of Crockett, for appellant.  
R. E. Minton and Nelms & Platt, all of Groveton, for appellees.

GRAVES, J. This suit was an action in trespass to try title, brought in the court below by the appellant as plaintiff against the appellees as defendants, to recover the Alex-

ander Henry survey of land in Trinity county, Tex. All of the defendants entered general pleas of demurrer, denial, not guilty, and of disclaimer as to other parts of the survey than such different parts of it as they severally specifically described and set up claims to by limitation; defendant R. L. Hutson so claiming one particular 160-acre tract, and all other defendants another and different 160 acres.

The cause was first tried in August, 1917, before a jury, upon whose verdict the court entered judgment in the lumber company's favor for the balance of the survey as a whole, after decreeing to R. L. Hutson the 160-acre tract he claimed, and to the remaining defendants the other 160 acres claimed by them. On motion for a new trial at the same term, the court set aside so much of its first judgment as awarded to the defendants other than R. L. Hutson their 160-acre tract, but refused to disturb his recovery of the 160 acres thereby vested in him. At the July term, 1918, the cause was tried for a second time between the lumber company and the defendants other than R. L. Hutson as to the 160-acre tract claimed by them, and upon a jury's verdict in their favor they were again given judgment for the same land as before.

[1] The lumber company appeals, contending, first, that the court erred in its charge in eliminating from the jury's consideration in the second trial the R. L. Hutson 160 acres; the theory being that the setting aside of the first verdict and judgment as to the other defendants had the legal effect of nullifying it as to him also. We are unable to agree with this position. The land awarded to R. L. Hutson was an entirely different tract from that claimed by the other defendants, his defenses to the appellant's suit were separate and distinct from theirs, and in such instances our Supreme Court has directly held that there may be two final judgments. *Boone v. Hulsey*, 71 Tex. 176, 9 S. W. 534 (on rehearing); *Mills v. Paul*, 80 S. W. 242-245; *Hess v. Webb*, 103 Tex. 46, 123 S. W. 111; *Danner et al. v. Walker-Smith Co. et al.*, 154 S. W. 295-302; *State v. Dayton Lumber Co.*, 164 S. W. 49.

It is next said the evidence was insufficient to support the jury's finding that the other defendants than R. L. Hutson had title to the 160 acres recovered by them under the 10-year statute of limitation. After a careful examination of the statement of facts, we conclude otherwise, and find that the proof justified the verdict and judgment. It may be that there was not such proof under an actual and specific claim of ownership for as much as 10 years prior to the O'Neill survey of September 18, 1905; but it is shown that immediately thereafter the particular 160 acres in question was itself surveyed, and it was then continuously claimed and

occupied up until the filing of this suit on September 12, 1916, a period in excess of 10 years.

[2] Lastly, it is claimed the verdict and judgment are unauthorized and cannot stand, because the defendant Southern Pine Lumber Company was permitted to recover the timber only upon the 160-acre tract otherwise awarded to its codefendants, when its pleading alleged it to be the owner of the land in fee. This assignment is thought to be devoid of merit; this company was a defendant in the suit, and having filed a plea of not guilty, as well as one of limitation as to the 160-acre tract, might show under them, as in fact it did, that it was a tenant in common with its codefendants in the ownership thereof, and had by virtue of its timber deed an interest in the fee of less than the whole. *Hutchins v. Bacon*, 46 Tex. at page 414; *Hill v. Whitworth*, 162 S. W. 434; *Lodwick Lumber Co. v. Taylor*, 100 Tex. 270, 98 S. W. 238, 123 Am. St. Rep. 803.

These conclusions require the overruling of all assignments of error and an affirmance of the judgment; that order will be entered.

Affirmed.

#### BRADEN v. CITY OF SAN ANTONIO. (No. 6284.)

(Court of Civil Appeals of Texas. San Antonio. Nov. 26, 1919.)

#### 1. MUNICIPAL CORPORATIONS ⇐159(6)—BURDEN OF PROOF IN ACTION BY REMOVED OFFICER FOR SALARY.

In an action by a removed city officer to recover salary, the burden is upon such officer, if so claiming, to show that reasons for his dismissal filed by the mayor in compliance with the provision of the city charter, were not the true reasons for the dismissal.

#### 2. MUNICIPAL CORPORATIONS ⇐159(5)—REMOVAL OF OFFICERS.

Where a clerk of a corporation court was removed by the mayor September 10th, and the mayor filed his reasons for the removal on September 21st, and the removal was approved by the council on September 23d, the removal was effective as of September 23d, even though the removal on September 10th was improper by reason of the failure to have reasons for the removal filed at such time.

Appeal from Bexar County Court; John H. Clark, Judge.

Suit by Joe Braden against the city of San Antonio. Judgment for defendant, and plaintiff appeals. Affirmed.

Leo Tarleton and A. L. Matlock, both of San Antonio, for appellant.

R. J. McMillan, J. D. Dodson, and U. S. Algee, all of San Antonio, for appellee.

FLY, C. J. Appellant sued appellee to recover the sum of \$900, alleged to be due him as clerk of the corporation court of said city. It was alleged that appellant was removed on September 10, 1912, and appellant's term of office did not expire until May 31, 1913, and that his salary was fixed at \$100 a month; that he was removed for political reasons, and without compliance with the provisions of the city charter, which require the mayor in making a removal to file his reasons at the time, and that such removal shall not go into effect until approved by a majority of the city council. The cause was submitted to a jury on special issues as to whether appellant was discharged from office because the mayor deemed him inattentive to the duties of the office and for the good of the service, and to avoid friction in the conduct of the business of the city, or on either of these grounds, or was he discharged solely for political reasons? The jury answered that he was discharged for the reasons placed on file by the mayor, and on those answers the court rendered judgment in favor of appellant for \$104.66, for salary for 23 days of September, 1912, with interest at 6 per cent. per annum from October 1, 1912.

[1] The evidence showed that on September 21, 1912, A. H. Jones, mayor of the city of San Antonio, filed his reasons, in writing, with the city clerk, for the removal of appellant from the office of the clerk of the corporation court, and the same was approved by a majority of the city council on September 23, 1912. The reasons given were "inattention to the duties of said office, and for the good of the service, and to avoid friction in the conduct of the business of the city." The question of whether the reasons given by the mayor were true ones was submitted to the jury, and were found to be the real reasons. The burden rested upon appellant to show that the true reasons for his dismissal were not filed by the mayor, and upon the testimony presented by appellant the jury found against him.

[2] Appellant contends that he went out of office on September 10th, and that, there being no reasons on file at that time, the filing of the reasons on September 21, and the approval of the council on September 23, did not comply with the requirements of the charter. That is doubtless true so far as September 10th is concerned, but it is not true as to September 23d, for the reasons were on file at that time.

The judgment is affirmed.

BENSON v. ASHFORD et al. (No. 6115.)

(Court of Civil Appeals of Texas. Austin.  
Oct. 29, 1919. Rehearing Denied  
Dec. 10, 1919.)1. CONTRACTS ⇐10(2)—EXECUTED CONTRACT  
NOT UNILATERAL.

A written contract for the construction of a house was not unilateral and unenforceable because signed only by the person for whom the house was to be constructed, where it was accepted by the other party and acted upon by him by building the house.

## 2. REFORMATION OF INSTRUMENTS ⇐18—MISTAKE OF LAW BY SCRIVENER.

A mistake by a scrivener in drawing an instrument which would warrant a reformation applies to mistakes of law as well as mistakes of fact, and a contract can be reformed where a scrivener uses a word in a mistaken sense.

## 3. LIMITATION OF ACTIONS ⇐127(4)—AMENDMENT TO PLEADINGS NOT NEW CAUSE OF ACTION.

In an action on a contract, an amendment by plaintiff to the pleadings, setting up a mistake in the contract and asking that the same be corrected, was not a new cause of action as respects the statute of limitations.

Error from District Court, McLennan County; H. M. Richey, Judge.

Suit by J. C. Ashford and another against Eula Benson. Judgment for plaintiffs, and defendant brings error. Affirmed.

See, also, 189 S. W. 1093.

H. C. Lindsey, of Waco, for plaintiff in error.

J. D. Willis and R. L. Neal, both of Waco, for defendants in error.

JENKINS, J. This was a suit by defendants in error upon promissory notes given by plaintiff in error for the erection of a house, and upon a contract giving a mechanic's lien on the house so erected. The defendants in error alleged a mutual mistake in wording the contract, in that it called for the erection of a frame house, whereas the contract was for the erection of a box and weatherboarded house.

The testimony shows that there was a verbal agreement to erect a box and weatherboarded house, a memoranda of which was reduced to writing, but not signed by the parties. Thereafter a lawyer undertook to reduce the contract to writing, and wrote the same as dictated by defendants in error; in the presence of plaintiff in error, except that he used the words "frame house," instead of "box and weatherboarded." His attention was called to this at the time, and he stated that the words "frame house" meant a house built of wood, as distinguished from one built of brick and cement. The court reformed and enforced the contract.

[1-3] Plaintiff in error's first contention is that the contract cannot be enforced, because it is unilateral, in that, while it was signed by the plaintiff in error, it was not signed by the defendants in error. The evidence shows that the contract was accepted by defendants in error and acted upon by them, in that they built the house. Such being the case, it was binding on both parties. *Martin v. Roberts*, 57 Tex. 568; *Campbell v. McFadin*, 71 Tex. 28, 9 S. W. 138. The mistake in the contract was as to the legal meaning of the words "frame house," both parties accepting the contract understanding that this phrase meant a box and weatherboarded house, as agreed upon between them. A mistake by a scrivener in drawing an instrument applies to law as well as to fact. 34 Cyc. 910, 919. The amendment which set up the mistake and asked that the same be corrected was not a new cause of action, and therefore limitation would not apply.

Plaintiff in error filed a cross-action, alleging mistake as to some of the specifications, and that the house was not built in accordance with the true contract. The court heard the evidence on this point, and found against plaintiff in error. The evidence justified such finding.

The finding of the court as to the amount of judgment to which defendants in error were entitled is also sustained by the evidence.

Finding no error of record, the judgment of the trial court is affirmed.

## FRANK v. SUFFORD. (No. 6307.)

(Court of Civil Appeals of Texas. San Antonio. Oct. 8, 1919.)

## ELECTIONS ⇐305(1)—APPEAL ONLY MODE FOR REVIEW IN ELECTION CONTEST.

Under Vernon's Sayles' Ann. Civ. St. 1914, art. 3065, a decision in an election contest can be reviewed only by appeal, and a writ of error to review the same must be dismissed.

Error from District Court, Brooks County; V. W. Taylor, Judge.

Election contest between George O. Frank and Ed. Sufford. There was a judgment for the latter, and the former brings error. Writ dismissed.

Terrell & Terrell, of San Antonio, for plaintiff in error.

J. W. Wilson, of Falfurrias, for defendant in error.

COBBS, J. This controversy grew out of a contested election case. It is brought to this court by an application for a writ of error.

Defendant in error files a motion to dismiss the same upon the ground that this court has no jurisdiction to entertain it, because it can only reach this court by appeal.

Such seems to be the settled law. Article 3065, Vernon's Sayles' St.; Buckler v. Turbeville, 17 Tex. Civ. App. 120, 43 S. W. 810; Jackson et al. v. Butler et al., 38 Tex. Civ. App. 613, 86 S. W. 772.

The motion therefore is granted, and the cause dismissed for want of jurisdiction.

#### HURST v. CRAWFORD et al. (No. 6298.)

(Court of Civil Appeals of Texas. San Antonio. Nov. 26, 1919.)

##### 1. JUDGMENT $\S$ 18(2)—PLEADING OF CONCLUSIONS OF LAW WILL NOT SUSTAIN.

A judgment cannot be based on a pleaded conclusion of law not warranted by the facts pleaded.

##### 2. HUSBAND AND WIFE $\S$ 273(4), 276(6) — COMMUNITY PROPERTY; SURVIVOR AND BONDSMEN NOT LIABLE IN ABSENCE OF DEVASTAVIT.

It is not true that any creditor having a claim against a community estate is entitled to recover his debt from the survivor and her bondsmen, if it does not exceed the amount of the bond, regardless of whether there has been a devastavit.

##### 3. APPEAL AND ERROR $\S$ 1172(1)—EFFECT OF PREMATURE HEARING ON PLEA OF PRIVILEGE.

That plaintiff permitted court to prematurely try issue on a plea of privilege filed under Rev. St. 1911, art. 1903, as amended by Acts 1917, c. 176, § 1 (Vernon's Ann. Civ. St. Supp. 1918, art. 1903), and thus waived his controverting affidavit, would not require the court on appeal to render judgment sustaining the plea, where the judgment must be reversed for other reasons.

##### 4. HUSBAND AND WIFE $\S$ 276(9)—VENUE OF SUIT AGAINST SURVIVOR IN COMMUNITY.

A survivor in community is not included within the provision of Rev. St. 1911, art. 1830, subd. 6, providing that suits against executors, etc., be brought in the county where the estate is being administered.

##### 5. VENUE $\S$ 5(2)—FORECLOSURE OF VENDOR'S LIEN IN COUNTY WHERE LAND IS SITUATED.

In view of Rev. St. 1911, art. 1830, subds. 5 and 12, venue of an action to foreclose a vendor's lien may be laid in the county where the land is situated.

Appeal from District Court, Frio County; Covey C. Thomas, Judge.

Suit by W. L. Crawford against Mrs. T. M. Hurst and others. Judgment for plaintiff, and the named defendant brings error. Reversed and remanded.

Thos. H. Ward, of Pearsall, for plaintiff in error.

J. D. Dodson, of San Antonio, for defendants in error.

MOURSUND, J. W. L. Crawford sued Mrs. T. M. Hurst, J. L. Westfall, and M. B. Duncan, alleging: That H. Hurst, the husband of Mrs. T. M. Hurst, had as part of the consideration for the conveyance to him by A. J. and Veda Spruill of 200 acres of land in Frio county assumed the payment of a note for \$2,300 to Wm. Boon and I. H. Clemons theretofore executed by said Spruills in part payment for, and secured by a deed of trust on, a tract of 413 acres, out of which said 200 acres was taken, and also executed to said Spruill four notes, one for \$500 and three for \$696 each; that a vendor's lien was expressly retained in said deed to Hurst to secure the payment of said notes; that plaintiff is the owner and holder of said notes; that H. Hurst died, and his wife qualified as survivor of the community estate of herself and her husband, gave bond in terms required by law, signed by her as principal and by defendants Westfall and Duncan as sureties, and took possession of such community estate. It was further alleged that by reason of these facts "each of said defendants have become and are liable to plaintiff to the value of said community estate so taken possession of in payment of said obligations of the said H. Hurst, which said obligations plaintiff alleges to be community debts of the said H. & T. M. Hurst." Nonpayment was alleged, and the facts showing right to recover attorney's fees. The prayer was that plaintiff have judgment against Mrs. Hurst, as community survivor, for his debt evidenced by said notes, and for foreclosure of liens, and against defendants Westfall and Duncan for any deficiency existing by reason of said judgment after said sales, to the amount of the value of the community estate delivered the defendant T. M. Hurst, as survivor in community, and for general relief.

Mrs. Hurst filed a plea of privilege, which was continued without prejudice, and at the following term on February 3, 1919, a controverting affidavit was filed. On February 4, 1919, the suit was dismissed as to Westfall, the plea of privilege overruled, and judgment entered in favor of plaintiff.

The case has been brought to this court by Mrs. Hurst and Duncan by writ of error. The record contains no findings of fact or statement of facts. The judgment contains a finding by the court that Mrs. Hurst and Duncan are liable to plaintiff for the amount due on all of said notes to the extent of the value of the estate of H. Hurst, deceased, at the time of the execution and filing of the bond given by Mrs. Hurst as community administratrix, and that said liability existed



by reason of the fact that H. Hurst was personally and primarily liable to the plaintiff for the full amount of principal, interest, and attorney's fees on all of said notes. Upon this finding is based the judgment, which is against "the defendants" for \$3,277.90 and for foreclosure of the vendor's lien against Mrs. Hurst, as community survivor of the estate of H. Hurst, deceased, upon the 200 acres described in the petition, and against "the defendants" for \$2,884.68 and foreclosure of a deed of trust lien against Mrs. Hurst, as community survivor of the estate of H. Hurst, deceased, upon the 413 acres described in the petition. The judgment, after providing for the issuance of an order of sale and directing the application of the proceeds of the sale, provides further that, if the land shall not sell for enough to pay off and satisfy the judgment, the officer shall "make the balance due against the defendants not to exceed the amount of the bond by them executed and filed in behalf of the defendant Mrs. T. M. Hurst, as survivor in community of the estate of H. Hurst, deceased, in the probate court of Stonewall county, Tex., as under execution."

[1,2] This judgment can be construed in no other light than one which awarded a personal judgment against Mrs. Hurst and Duncan, and provides for the satisfaction thereof, by stipulating that certain community land be first applied to its payment, and then that execution may issue to collect from them the balance of the judgment with the limitation that there cannot be collected more than the amount of the bond given as community survivor. Such a judgment is not warranted by the finding of the court upon which it purports to be based nor by the pleadings. No facts are alleged which would authorize a personal judgment against Mrs. Hurst or a recovery on the bond. A conclusion of law is pleaded to the effect that defendants have become and are liable to plaintiff to the value of the community estate so taken possession of by Mrs. Hurst; but such conclusion is not warranted by the facts pleaded, upon which it is based, and cannot be the basis for a judgment enforcing personal liability. It appears to have been assumed that any creditor hav-

ing a claim against the community estate is entitled to recover his debt from the survivor and her bondsmen, provided it does not exceed the amount of the bond, regardless of whether there has been a devastavit. That is not the law. *Bergstroem v. State*, 58 Tex. 92; *Leatherwood v. Arnold*, 66 Tex. 414, 1 S. W. 173; *Belt v. Cetti*, 100 Tex. 92, 93 S. W. 1000.

[3-5] It is contended that the court passed on the plea of privilege without complying with the provisions of article 1803, as amended in 1917 (chapter 176, § 1 [Vernon's Ann. Civ. St. Supp. 1918, art. 1903]), with respect to setting a time for hearing and serving notice on plaintiff of the filing of the controverting affidavit, and that therefore the court erred in overruling such plea. In fact, defendant even contends that the plaintiff by permitting the court to try the issue prematurely waived his controverting affidavit, and therefore the plea should have been sustained. We see no merit in the latter contention. If the issue was tried prematurely, the error of the court would justify the reversal of the judgment, but not the rendition of a judgment sustaining the plea, as the judgment must be reversed for other reasons. We deem it unnecessary to go into this matter further than to say that we are unable to see any ground upon which the plea of privilege might be sustained. It appears that a survivor in community is not included within the provisions of subdivision 6 of article 1830. *Jones v. McRae*, 16 Tex. Civ. App. 308, 41 S. W. 403; *Bank v. Daniel*, 172 S. W. 747. The rule applied in the cases of *Dickson v. Scharff*, 142 S. W. 980, and *McKay v. Bank*, 16 Tex. Civ. App. 632, 42 S. W. 868, would therefore not apply in this case. The petition alleges facts showing that the venue may be laid in Frio county under sections 5 and 12 of article 1830.

It may safely be assumed that no mistake was made with respect to the location of the land upon which foreclosure of liens was sought. We therefore see no prospect of Mrs. Hurst being able to sustain her plea by proof.

The judgment is reversed, and the cause remanded.

**GULF, C. & S. F. RY. CO. v. SANDERSON.**  
(No. 6096.)

(Court of Civil Appeals of Texas. Austin.  
Nov. 5, 1919. Rehearing Denied  
Dec. 10, 1919.)

**1. LIMITATION OF ACTIONS §127(12)—INTRODUCTION OF NEW CAUSE OF ACTION BY AMENDED PETITION.**

While pleadings in justice court may be informal, and great liberality is indulged both in substance and form, *held* that, when plaintiff's claim, filed in justice court, based on the refusal of a conductor of a train to stop at the station at which he desired to alight, was founded on an action *ex contractu*, an amendment, claiming damages for the conductor's insulting words and conduct, which sounded in tort, introduced a new cause of action, and was barred, where the amendment was not filed until more than five years after the cause of action accrued.

**2. CARRIERS §271—REGULATIONS BY CARRIERS AS TO STATIONS AT WHICH TRAINS STOP.**

A railroad company has the right to make reasonable rules and regulations for the operation of its trains, and to provide schedules and determine at what stations passenger trains shall stop, and it is the duty of a person proposing to become a passenger to ascertain before boarding a train whether it stops at his destination, and he cannot recover damages for failure of the conductor to stop where the train was not scheduled.

**4. CARRIERS §271—REFUSAL OF CONDUCTOR TO STOP TRAIN AT STATION WHERE IT WAS NOT SCHEDULED TO STOP.**

Where, when plaintiff requested the conductor to stop the train at a station at which it was not scheduled to stop, the conductor informed him that he was riding on a stock pass, and that he would not stop the train, and plaintiff, while the train was stopped at an intermediate station, procured a ticket to the station at which he desired to alight, *held* that, as the ticket notified him the train in question did not stop there, the conductor was justified in refusing to stop the train, though plaintiff had procured such ticket.

Appeal from Coleman County Court; W. Marcus Weathered, Judge.

Action by D. F. Sanderson against the Gulf, Colorado & Santa Fé Railway Company, begun in justice court and appealed to the county court. From a judgment there for plaintiff, defendant appeals. Reversed and rendered.

Snodgrass, Dibrell & Snodgrass, of Coleman, and Terry, Cavin & Mills, F. J. Wren, and O. B. Wigley, all of Galveston, for appellant.

Critz & Woodward, of Coleman, for appellee.

BRADY, J. Appellee instituted this suit in the justice court March 4, 1913, alleging in his written petition that appellant's agent at Zephyr, Tex., sold him about October 27, 1912, a ticket to Ricker, the next station on appellant's road, and he became a passenger upon a train going to Ricker; that the conductor accepted his ticket, but refused to stop the train at Ricker, and refused to allow him to alight therefrom at such station, although requested by appellee to do so; that appellee told the conductor that his, appellee's, wife was sick at Ricker, but that the conductor still refused to stop the train and permit appellee to alight; and that he was damaged in the sum of \$95 "by reason of the mental anguish suffered in not being permitted to alight from said train at said point and see his said wife, who was then sick; that other passengers were on the train and witnessed the refusal of defendant's conductor to permit said claimant to alight, which caused much embarrassment to claimant." Appellee also claimed damages in the sum of \$4 for the expense of a trip from Brownwood to Ricker, which was occasioned by his having been carried on through to Brownwood. To this pleading appellant interposed a general demurrer and a general denial.

On July 17, 1915, appellee filed his amended original petition in the justice court, which differed in substance from his original claim only in these particulars: His amendment shows that he expended 25 per cent. for the ticket from Zephyr to Ricker; that before reaching Zephyr the conductor refused to stop the train, because appellee was then riding on stock transportation; and that appellee informed the conductor that he had received a letter, informing him of the serious illness of his wife at Ricker; and that upon the refusal of the conductor to stop the train and permit him to get off at Ricker, he purchased a ticket to Ricker at Zephyr, where the train stopped a few minutes. The amendment still restricted appellee's claim for mental injuries to the refusal of the conductor to stop the train at Ricker, but appellee specifically alleged that by reason of failure to stop the train he was compelled to pay \$5 at Brownwood for a conveyance back to Ricker, and prayed for total damage in the sum of \$75.

No oral pleadings in the justice court were shown, and it is not claimed that there were any. The justice of the peace rendered judgment for appellee for the sum of \$22.50.

In the county court appellee filed his second amended original petition, which did not differ in substance from his first amended claim in the justice court, but he prayed for damages in the sum of \$100.

Appellant demurred to this pleading, and also specially answered that appellee was riding on the train in question on stock transportation, good for passage from Temple to

some point beyond Brownwood, and that on the way the conductor had informed appellee, before the train reached Ricker, that it was not scheduled to stop there, and did not and would not stop at Ricker; that with this knowledge appellee got off the train at Zephyr, and purchased a ticket to Ricker, and that he reboarded the train with full knowledge that it was not scheduled to stop at Ricker, and that he could have used other trains to reach it; that therefore appellant was not under any duty to transport appellee on the particular train to Ricker, or to stop it there; and that appellee was estopped to claim any damages.

On June 17, 1918, in the county court, appellee filed his third amended original petition, in which he alleged that the conductor informed him that he was then riding on livestock transportation, and therefore he could not stop the train at Ricker, but that appellee could purchase a ticket at Zephyr, reading to Ricker, and that the train would then be stopped, and appellee permitted to alight. In this pleading, appellee for the first time alleged that in his conversation with appellee the conductor used insulting language, and acted towards him in a harsh and angry manner in the presence of strangers; and that the acts, words, and conduct of the conductor caused him great humiliation and shame. In other respects this pleading is substantially the same as the preceding ones, but appellee increased his claim for damages to \$150.

Appellant demurred generally and specially to the third amended claim, and specially pleaded that the claim for damages for alleged insulting words and conduct of the conductor was barred by the two and four years statutes of limitation, in that it constituted a new cause of action asserted more than four years after the cause of action accrued.

The case was submitted to a jury upon special issues, which in substance submitted the questions whether the acts or words of the conductor were such as would naturally humiliate appellee, and did they actually humiliate him, and the amount of damages for such humiliation. The jury answered these issues affirmatively, and placed the damages at \$25, upon which the court entered judgment for appellee.

The court, over appellee's protest, refused to submit to the jury that phase of the case in which appellee claimed damages for the failure and refusal of appellant's conductor to stop the train, and to permit appellee to get off at Ricker.

#### Opinion.

[1] The first question that arises upon this appeal is whether appellee's third amended original claim or petition, which was filed over five years after the cause of action accrued, and which claimed damages for mental distress and humiliation because of the al-

leged acts, words, and conduct of the conductor, constituted a new cause of action, which was barred by the two and four years' statutes of limitation. Those allegations being the basis of the verdict and judgment, we would be required to reverse this case if a new cause of action was asserted. It is conceded by appellee's counsel that, if his original petition was not sufficient to admit proof of the facts concerning this phase of the case, an amendment filed more than two years thereafter would be too late.

The rule in this state is that pleadings in the justice court may be informal, and the same strictness is not required as in the district and county courts. Great liberality is indulged as to pleadings in the justice court, both in substance and form. Keeping in mind this rule, we have carefully compared appellee's third amended claim with his previous pleadings, and have come to the conclusion that, indulging the greatest latitude, the cause of action alleged in the latter pleading is not embraced within any of the former claims. The pleadings in the justice court were restricted to an action for damages for mental suffering and distress, arising out of alleged breach of contract. Conceding that it was a case in which damages for mental suffering were recoverable, which may be doubted, it was clearly an action *ex contractu*; whereas, the claim for damages resulting from the conductor's alleged insulting words and conduct sounds in tort.

Under the test laid down by our Supreme Court in *Phoenix Lbr. Co. v. Houston Water Co.*, 94 Tex. 456, 61 S. W. 707, to determine the identity of causes of action, we are clearly of the opinion that the two were not the same. It follows that the latter claim was barred by limitation, and that appellant's assignments attacking the verdict and judgment on this ground must be sustained.

[2-4] There is another phase of the case which must be considered. Appellee in his brief has filed a cross-assignment of error, complaining of the trial court's refusal to submit the question of damages alleged to have been sustained by reason of the failure of the conductor to stop the train and permit him to alight at Ricker. The trial court evidently declined to present this question to the jury upon the theory that the evidence did not show any contract or duty upon the part of appellant to stop the train at Ricker. The undisputed evidence showed that the particular train was not scheduled to stop at Ricker, and the ticket purchased by appellee at Zephyr upon its face provided that it was "good only on trains scheduled to stop at destination."

The rule is well established in this state that a railway company has the right to make reasonable rules and regulations for the operation of its trains, and to provide schedules and determine at what stations trains should

stop, under certain conditions and regulations. It is also the general rule that it is the duty of a person proposing to become a passenger to ascertain, before boarding the train, whether it stops at his destination; and that he cannot recover damages for the failure of the conductor to stop at a station where the train is not scheduled to stop. *Beauchamp v. Railway Co.*, 56 Tex. 240; *G., C. & S. F. Ry. Co. v. Moore*, 98 Tex. 302, 83 S. W. 362, 4 Ann. Cas. 770; *T. & P. Ry. Co. v. Bell*, 39 Tex. Civ. App. 412, 87 S. W. 730; *L. & N. Ry. Co. v. Caddie*, 162 Ky. 205, 172 S. W. 514, L. R. A. 1915D, 705.

However, appellee attempts to avoid this rule upon the grounds that he did not read, nor have time to read, his ticket before boarding the train, and that he believed from what the conductor had said to him about having no ticket, and about his riding on a stock pass, that if he bought a ticket the train would stop, and the further fact that he bought the ticket in the presence of the conductor; that he had previously ridden on this same train which had stopped at Ricker, and that he knew nothing about the published schedule.

Appellee cites several cases in support of his contention that these circumstances created an exception to the rule that he is bound by the regulations and schedules and the provisions of the ticket, among which are: *Renfro v. Tex. Central Ry. Co.*, 141 S. W. 820; *M. K. & T. v. Herring*, 61 Tex. Civ. App. 543, 127 S. W. 1155, 130 S. W. 1039, decided by

this court. In these cases, however, the facts were materially different. In each of them there was either a breach of a plain contract, or there were representations and statements by the employes of the railway company upon which the passenger relied, and by which he was misled. In the instant case, the circumstances relied upon by appellee to take it out of the rule are, in our opinion, entirely too remote. While appellee testified that the conductor was standing near the window at Zephyr when he purchased his ticket, there is no testimony that the conductor knew of such purchase, or of appellee's intention to use the ticket on the particular train as a basis for his demand that it stop at that point. Appellee had been previously informed by the conductor that the train did not stop at Ricker, and that he would not let him off there. The mere statement of the conductor that he was riding on a stock pass and had no ticket, in connection with appellee's request that he stop the train at Ricker, does not amount to a representation that if he purchased a ticket to that destination he would stop the train, although not scheduled to stop there.

We conclude that, in the circumstances of this case, appellant was under no duty to stop the train and permit appellee to get off at the station in question; and appellee's cross-assignment of error is overruled.

For the reasons indicated, this case will be reversed, and here rendered for appellant. Reversed and rendered.

**McCLENDON et al. v. BOARD OF HEALTH  
OF CITY OF HOT SPRINGS.**  
(No. 85.)

(Supreme Court of Arkansas. Dec. 8, 1919.  
Concurring Opinion, Dec. 22, 1919.)

**1. MUNICIPAL CORPORATIONS §123 — CITY  
MANAGER AN "OFFICER" AND NOT EMPLOYÉ.**

A city manager appointed, under Acts 1917, p. 568, to manage the affairs of the municipality, who has the broadest powers of supervision, is an officer, not merely an employé, an officer as distinguished from employé being of greater importance, dignity, and position, and being required to take an official oath before he assumes his office, which is a special trust or charge created by competent authority.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Officer.]

**2. MUNICIPAL CORPORATIONS §124(3) —  
QUALIFICATIONS NECESSARY TO APPOINTMENT  
OF CITY MANAGER.**

That provision of Acts 1917, p. 568, for city manager of municipalities, that the officer need not be a resident of the city is invalid under Const. art. 19, § 3, providing that no person shall be elected or appointed to fill an office who does not possess the qualifications of an elector.

**3. STATUTES §64(4)—EFFECT OF PARTIAL IN-  
VALIDITY.**

The invalidity of the provision of Acts 1917, p. 568, providing for city managers of municipalities, that such officer need not be a resident of the city does not carry with it the entire act, for it can be stricken out and leave the act as a whole a complete law, capable of enforcement.

**4. HEALTH §3—POWER OF CITY MANAGER TO  
APPOINT BOARD OF HEALTH.**

As Acts 1913, p. 348, creating city boards of health, necessarily constitutes such boards a department of the city government, a city manager appointed under Acts 1917, p. 568, may appoint such board, the provisions of the earlier act, giving the mayor power of appointment, being repealed by that provision of Acts 1917, repealing all inconsistent acts.

Appeal from Circuit Court, Garland County; Scott Wood, Judge.

Action by George R. Belding and others, composing the Board of Health of the City of Hot Springs, against J. W. McClendon and others. From a judgment for the former, the latter appeal. Affirmed.

O. H. Sumpter, of Hot Springs, for appellants.

R. G. Davies, of Hot Springs, for appellees.

WOOD, J. The city of Hot Springs adopted the provision of Act 114 of the Acts of 1917, providing for a commission manager of municipal governments for cities of the first class. The board of commissioners, consist-

ing of the mayor and four commissioners duly elected under the act, appointed George R. Belding city manager according to the provisions of the act providing for such appointment and prescribing the duties of city manager.

Act 96 of the Acts of 1913 provides for a board of health in cities of the first and second class, and authorizes the mayor of such cities to appoint a city board of health consisting of five persons. J. W. McClendon was the duly elected mayor of the city of Hot Springs. On the 1st day of May, 1919, he appointed the members of the board of health of the city of Hot Springs. The persons so appointed were duly qualified to act, and under the appointment organized what they contend was the board of health for the city of Hot Springs.

On the 9th of May, 1919, George R. Belding, the city manager, appointed five other persons as members of the board of health of the city of Hot Springs, who were also duly qualified to act as such, and under such appointment organized what they contend was the board of health for the city of Hot Springs.

This action was instituted in the circuit court by George R. Belding and those appointed by him as the board of health against J. W. McClendon, the mayor, and those appointed by him as the board of health. The purpose of the action was to determine whether or not the mayor of the city of Hot Springs had authority under the law to appoint the city board of health, or whether that authority was vested in the city manager.

The circuit court held that the city manager had the power of appointment, and that the board appointed by him were the duly constituted board of health of the city of Hot Springs. From the judgment ousting the members of the purported board of health appointed by the mayor is this appeal.

Sections 33 and 34 of Act 114 of the Acts of 1917 are as follows:

"Sec. 33. The mayor and city commission shall elect the city manager, who shall be the administrative head of the municipal government under the direction and supervision of the city commission, who shall hold office at the pleasure of the city commission. He shall be appointed without regard to his political beliefs and need not be a resident of the city at the time of his appointment, and shall be a person specially fitted by education, training and experience to perform the duties of said office. He shall be responsible for the efficient administration of all departments within the scope of his duties. He shall execute a bond in favor of the city for the faithful performance of his duties in such sum and with such surety or sureties as may be fixed and approved by the city commission. During the absence or disability of the city manager, the city commission may designate some properly qualified person to execute the functions of the office.

"Sec. 34. The powers and duties of the city manager shall include the following:

"(a) To see that the laws and ordinances are enforced.

"(b) To organize, continue or discontinue such division or departments from time to time as to him may be deemed necessary and expedient, and to assist and remove all heads of departments, and all subordinate officers and employes of the city; all appointments to be upon merit and fitness alone. He shall fix salaries and wages of all subordinates and employes.

"(c) To exercise control over all such departments or divisions so created, or that may hereafter be created, which shall be made subject to the supervision of the city manager.

"(d) To see that all terms and conditions imposed on the city and its inhabitants, or any public utility franchise, are faithfully kept and performed, and upon knowledge of any violation thereof, to call the same to the attention of the city attorney, who is hereby required to take such steps as are necessary to enforce the same.

"(e) To attend all meetings of the commission, with the right to take part in the discussions, but having no vote.

"(f) To recommend to the commission for adoption such measures as he may deem necessary or expedient.

"(g) To act as budget commissioner and to keep the city commission fully advised as to the financial condition and needs of the city.

"(h) To keep full and complete records of the doings of his office, and to render as often as may be required by the city commission a full report of all operations during the period reported on, and annually, or oftener, if required by the city commissioners, to make a synopsis of all reports for publication.

"(i) To keep the city commissioners fully advised as to the needs of the city within the scope of his duty and to furnish the city commission on or before the 31st day of December of each year a careful estimate in writing of the appropriations required during the next ensuing fiscal year for the proper conducting of the departments of the city under his control.

"(j) To keep repaired all city buildings, and to purchase all supplies for every department of the city.

"(k) To perform such other duties as may be prescribed by this act or be required of him by ordinance or resolution now in effect, or which may hereafter be enacted."

Section 36 provides for the removal of the city manager by a majority vote of the city commission by presenting written statement setting forth the reason for his removal, a copy of which shall be delivered or mailed to him. The city manager is given five days within which he may request a hearing by the city commission, and in that event his removal shall not take effect until a hearing is had and a written decision rendered by a majority of the city commission.

Among these provisions of the act is section 40, which in part is as follows:

"(a) Whenever, in the laws of this state or in the ordinance of a city adopting the provi-

sions of this act, reference is made to the 'council' or 'aldermen,' such reference shall be deemed made to the 'city commission' and 'commissioners' respectively created and elected under the new form of government hereby created.

"(b) When any officer or office is named in any law of the state or ordinance of such city, it shall, when applied to cities under this act, be construed to mean the officer or office having the same functions or duties under the provisions of this act or under the ordinances passed under authority thereof."

Another provision of the act (114 of the Acts of 1917) is:

"Sec. 15. The mayor and commissioners shall act, possess and exercise all executive, legislative and judicial powers and duties now had, possessed and exercised by the mayor, city council, board of public affairs, and all other officers and offices in cities of the first class, except as otherwise expressly provided herein."

Act 114 concludes with this clause, "All laws and parts of laws in conflict herewith are hereby repealed."

[1] In *Throop v. Langdon*, 40 Mich. 673-682, Judge Cooley says:

"An office is a special trust or charge created by competent authority. If not merely honorary, certain duties will be connected with it, the performance of which will be the consideration for its being conferred upon a particular individual, who for the time will be the officer. The officer is distinguished from the employe in the greater importance, dignity and independence of his position; in being required to take an official oath, and perhaps to give an official bond; in the liability to be called to account as a public offender for misfeasance or nonfeasance in office, and usually, though not necessarily, in the tenure of his position. In particular cases other distinctions will appear which are not general."

In *Shelby v. Alcorn*, 36 Miss. 273, 72 Am. Dec. 169, the court said:

"It may be stated as universally true that where an employment or duty is a continuing one, which is defined by rules prescribed by law and not by contract, such a charge or employment is an office, and the person who performs it is an officer."

In *Lucas v. Futrall*, 84 Ark. 540, 106 S. W. 667, we quoted the above from the Supreme Court of Mississippi, and to the same effect from other adjudicated cases.

"While no hard and fast rule upon the subject" can be announced that will be applicable to all cases, yet when the rules generally adopted by the text-writers and the authorities as cited and quoted by us in *Vincenheller v. Reagon*, 69 Ark. 460, 64 S. W. 278, and *Lucas v. Futrall*, supra, for distinguishing between an office and employment, are kept in mind, there can be no doubt that, measured by these usual tests, the position of city manager under Act 114 of the Acts of

1917 is an office, and his duties are those of a public officer.

A glance at the provisions of the act prescribing the powers and duties of the city manager under the commission and city manager plan of government, and also the powers and duties prescribed for the mayor under the old or aldermanic plan for cities of the first class as contained in sections 5611-5617, inclusive, of Kirby's Digest, shows that it was the intention of the Legislature, by Act 114 of the Acts of 1917, to transfer many of the powers and duties of the mayor under the aldermanic plan to the city manager under the commission and city manager plan.

A comparison of the statutes will show that under the commission and city manager plan as set forth in Act 114 the city manager is clothed with those executive and administrative functions and duties which under the old or aldermanic plan were conferred upon and discharged by the mayor. The city manager is the head of the executive and administrative departments of the government, but he had no legislative functions such as the mayor had under the old form and such as he has now under the commission form.

Under a purely commission form administrative authority and responsibility is usually divided among the commissioners, but under the present commission and city manager form all strictly executive and administrative authority, which under the old form was vested in the mayor and which under the purely commission form was vested in the commission, is now, under the commission and city manager form (under Act 114), vested in the city manager. So that under the latter form there is no division of administrative and executive functions among several persons, but these are concentrated in the one person, the city manager.

Without entering into a minute analysis of the provisions prescribing his functions and duties, it suffices to say that the various provisions of the act creating the position of city manager and prescribing his functions and duties show that it was the intention of the Legislature to make such position an office and not an employment. His duties are such as are prescribed by the Legislature or by ordinance or resolution passed by the board of commission. They are public in character. They are also of great dignity and responsibility and in no sense contractual.

We conclude, therefore, that the position of city manager is an office, and that the person appointed by the commission to exercise its functions and duties is an officer.

[2, 3] Being an officer, the provision that he need not be a resident of the city at the time of his appointment, as contained in section 33, is contrary to article 19, § 3, of the Constitution, providing that no person shall be elected or appointed to fill an office who does not possess the qualifications of an elector. But a careful review of the various provisions of the act convinces us that the Legislature would have passed the law with this provision eliminated, and that it can be stricken out and leave the act as a whole a complete law capable of enforcement.

[4] It will be observed that section 34 of the act provides, among other things, as follows:

"(b) To organize, continue or discontinue such division or departments from time to time as to him may be deemed necessary and expedient, and to assist and remove all heads of departments, and all subordinate officers and employees of the city; all appointments to be upon merit and fitness alone. He shall fix salaries and wages of all subordinates and employees."

The provision of Act 96 of the Acts of 1913 creating a city board of health necessarily constitutes such board a department of the city government, and the section above quoted, conferring upon the city manager the power to organize, continue, and remove all heads of departments, and prescribing that all appointments shall be upon merit and fitness, alone clearly vested the city manager with the power to appoint the city board of health.

Section 14 of Act 96 of the Acts of 1913, conferring upon the mayor the power to appoint members constituting the said board of health, is necessarily repealed by section 34 b, Act 114, Acts 1917, above quoted. The two provisions are in direct conflict, and the last must prevail.

The judgment of the circuit court denying the petition of appellants is therefore correct, and must be affirmed.

MCCULLOCH, C. J. (concurring). My conclusion is that the position of city manager and also membership on the board of health is each, under the statute, an employment, and not an office (*Middleton v. Miller County*, 134 Ark. 514, 204 S. W. 421), and that the statute in its entirety is valid. I concur in the judgment solely on that ground.

I am authorized to say that Mr. Justice SMITH also concurs on this ground.

## DAVIS v. STATE. (No. 44.)

(Supreme Court of Arkansas. Dec. 8, 1919.  
Dissenting Opinion, Dec. 22, 1919.)

## 1. CRIMINAL LAW §407(2)—STATEMENTS BY THIRD PERSON IN PRESENCE OF ACCUSED ADMISSIBLE.

A statement in the presence of accused calling for a denial is admissible in evidence, although it does not show that accused actually heard the statement, where the natural thing would have been for him to hear it.

## 2. CRIMINAL LAW §407(2)—STATEMENT OF THIRD PERSON CALLING FOR DENIAL ADMISSIBLE.

In a homicide case, a statement of one jointly indicted that he and accused were cutting wood and saw a team coming down the road, and that he jumped over a fence and caught the team and saw deceased lying in the wagon bed, was a statement which was admissible as calling for a denial when made in the presence of accused, as such statement tended to show that accused was present at such time.

## 3. CRIMINAL LAW §424(3)—REMARKS OF CO-CONSPIRATOR AFTER COMPLETION OF CONSPIRACY NOT ADMISSIBLE.

Where several persons were charged with murder, a statement made by one of them some time after the murder, in the absence of the other, was not admissible on the theory that it was the statement of a coconspirator; statements made by coconspirators after the conspiracy has been completed not being admissible.

## 4. CRIMINAL LAW §424(5)—STATEMENT ONE HOUR AFTER THE CRIME NOT RES GESTÆ.

A statement by a codefendant in the absence of appellant, made an hour after a killing, was not admissible as res gestæ in a prosecution for murder arising out of the killing.

## 5. CRIMINAL LAW §1160(7)—ADMISSION OF EVIDENCE OF DECLARATIONS OF CODEFENDANT PREJUDICIAL.

Admission in evidence of a declaration of a codefendant to the effect that accused was near the place of the killing at the time thereof, made in the absence of accused, was not rendered harmless because there was other testimony that the same declaration was made by the same person in the presence of accused and was not denied, accused not testifying or introducing any evidence, as a denial of guilt challenges truth of state's evidence, so that it cannot be said that state's testimony is undisputed though uncontradicted by testimony on the part of accused.

McCulloch, C. J., dissenting.

Appeal from Circuit Court, Lawrence County; Dene H. Coleman, Judge.

Oliver Davis was convicted of murder, and appeals. Reversed and remanded.

Ponder & Gibson, of Walnut Ridge, for appellant.

Jno. D. Arbuckle, Atty. Gen., and Robert C. Knox, Asst. Atty. Gen., for the State.

HUMPHREYS, J. Appellant was jointly indicted with his brother, Homer Davis, and separately tried and convicted for the murder of Charles Whittaker, in the Western District of Lawrence county, and adjudged and sentenced to life imprisonment in the penitentiary as a punishment therefor. From the judgment of conviction, an appeal has been duly prosecuted to this court. Appellant introduced no evidence. The history of the crime, according to the state's evidence, is, in substance, as follows: Charles Whittaker borrowed a wagon from R. G. Ritchie, residing west of Homer Davis' home, on the morning of December 18, 1917, to move Jim Phillips and wife, who resided east of the Homer Davis home. At the time he borrowed the wagon, Ernie Davis, a younger brother of Homer and appellant, was at Richie's, and left before Whittaker. Whittaker left about 15 minutes thereafter, going east. He stopped a while and talked to J. M. Headrick, who resided about 200 yards west of the Homer Davis home. From the Headrick home, he proceeded on his way, standing in his wagon and smoking a pipe, and, in this position, passed out of Mr. Headrick's sight, on account of a hill situated between the two houses, which served as an obstruction to the view. Time enough had elapsed for Whittaker to reach Homer's home when a shot was heard by Mr. Headrick in that direction. Shortly after the shot, the body of Whittaker was found lying diagonally across the bed of the wagon, dead, with a gunshot wound in the right-hand side of the skull, behind the ear. The shot entered from behind. There were no powder burns. Snow was upon the ground, and there was a pool of blood in about 15 feet from the gate, in front of Homer's house which had the appearance of being covered up with a corn scoop. There were tracks between the house and pool of blood. A scoop which fit in the marks made near the blood was on Homer's porch. Blood was found on the porch and doorknob. Some gun wadding was found on a direct line between the pool of blood and a little house that stood in the yard. Blood appeared at intervals between the house and where the dead body was found, but none was found west of the house in the direction from which Whittaker came. In an hour or so after Whittaker was killed, John Selsor, who had met him going in the direction and about 20 rods west of Homer's house, in passing back that way, saw Homer and his wife in their buggy fixing to leave, and observed Oliver Davis and his mother on Homer's porch. Oliver Davis resided with his father about 200 yards from Homer's dwelling. Bad feeling existed between Whittaker and the Davis family. That night, Homer and Oliver were



arrested and placed under guard at their father's home.

Over the objection and exception of appellant, three witnesses, L. W. Kell, John Jean, and J. M. Headrick, were permitted to testify as to a statement made by Homer in the presence of Oliver during the time they were being guarded. The statement, according to witness Kell, the deputy sheriff, was as follows:

"Homer made the statement, I think that night, that he and Oliver were sawing wood, just across the fence there, and seen a team coming down the road, and thought it was Tom Hall's team, and he run out and caught the team and seen it was Charley Whittaker and hung up the lines on the wagon bed and let them go on."

According to witness J. M. Headrick, as follows:

"Well, Mr. Homer Davis said that he was not uneasy; that they had not done anything to be uneasy for; that him and Ol. was there sawing wood, and he looked up the road and saw the team coming and thought it was Tom Hall's team running away, and he just jumped over the wire fence, he says, and caught him; and about that time he looked back, he said, into the wagon, and saw it was Charley Whittaker, and that he was shot or dead—I don't remember exactly which word he used—but anyhow saw it was Charley Whittaker in the wagon, and he just hung his lines up on the corner of the wagon bed and let them go on."

According to witness John Jean, as follows:

"And they (Homer and Oliver) were sawing wood, and they seen a team coming along without any driver and coming in a pretty pert gate, and Homer said he run out to head the team and stopped them, and kinder peeped up and seen who was in the wagon, seen who it was, and said it was just such a shock to him and unnerved him so he just had to sit down, and did. And he throwed the lines up on the wagon bed and turned the team loose, and it went on."

Over the objection and exception of appellant, R. G. Ritchie was permitted to testify that, in appellant's absence, about one hour after the tragedy occurred, he passed Homer's home and hollowed to Homer and asked, "What on earth is the matter with Charley down there?" And Homer said:

"God! I don't know. I seen the wagon come running down the hill there, and I thought it was Tom Hall's team, and I jumped over the fence and stopped them and went back to where the wagon was, and it was Charley Whittaker, and I turned them loose and let them go on down the road."

Appellant insists that the statement made by Homer Davis to D. W. Kell, John Jean, and J. M. Headrick was not competent, because: First, it was not shown that appellant heard the statement; and, second, because the statement contained nothing which

called for an explanation or denial on his part.

[1] 1. The witnesses all said the statement was made at the time Homer and Oliver were arrested and placed under guard at their father's home, and in the presence of Oliver. It is hard to realize how a statement made under these circumstances could have escaped the attention of appellant. The natural thing would have been for him to hear it, and the jury were warranted in so finding.

[2] 2. The statement tended to establish appellant's presence at the time the tragedy occurred, and, in the opinion of a majority of the court, if believed by the jury, when taken in connection with all the other facts and circumstances in the case, tended to connect him with the crime. Therefore the jury were warranted in finding that the statement called for a denial on his part, if not present.

[3-5] It is also insisted that the court committed reversible error in admitting the statement made by Homer Davis to R. G. Ritchie in the absence of appellant. This statement was admitted as substantive evidence against appellant, on the theory that it was the statement of a coconspirator in the crime. Its admission cannot be justified on that ground, because it was made in the absence of appellant and after the conspiracy, if one existed, had been completed. Its introduction cannot be justified on the ground that it was a part of the *res gestae* because more than an hour intervened between the commission of the crime and the time the statement was made. The evidence was clearly incompetent; but, conceding it to be so, the learned Attorney General insists that it was not prejudicial for the reason that a statement of like nature was established by the undisputed evidence of other witnesses made by Homer in the presence of appellant while under guard at their father's home. In felony cases, when the defendant pleads not guilty and introduces no evidence, juries are not required to accept as conclusive evidence of the state, though uncontradicted. Under such circumstances, the denial of guilt challenges the truth of the state's evidence, and it cannot be said that the state's testimony is undisputed, though uncontradicted by testimony on the part of defendant. Had appellant introduced testimony on the point, which coincided with that of the state, then it might be said with reason that there was no dispute in the evidence. This court, in the case of *Parker v. State*, 130 Ark. 284, 197 S. W. 283, quoted with approval from the case of *United States v. Taylor* (C. C.) 11 Fed. 470, as follows:

"By his plea of not guilty the defendant must be understood as denying the truth of the information or indictment and as not conced-

ing the truth of what the witnesses for the government have sworn to. This is so, notwithstanding the fact that no witnesses for the defendant contradicted the statements of the witnesses for the prosecution. In this condition of the testimony it was the right of the jury to pass upon the credibility of the witnesses even if unimpeached as to character, and to consider whether, upon applying all the tests of manner, clear or confused statement, prejudice and accuracy of memory, they were to be believed. It was within the province of the jury to disbelieve the witnesses for the government. See, also, *Territory v. Kee* [5 N. M. 510], 25 Pac. 924; *State v. Wilson*, 62 Kan. 621 [64 Pac. 23], 52 L. R. A. 679; *State v. Godman*, 145 N. C. 461 [59 S. E. 132], 123 A. S. R. 467; *Huffman v. State*, 29 Ala. 40; *Thompson on Trials* (2d Ed.) vol. 2, § 2149."

It may be that the jury accepted the testimony of L. W. Kell, John Jean, and J. M. Headrick because in part corroborated by this testimony of R. G. Ritchie. It was within the province of the jury to treat this testimony as corroborative of the statement made in the presence of Kell and others, and, if they did so, it necessarily played a part in bringing about the conviction of appellant. It was therefore material and not merely cumulative.

The question of whether the verdict and judgment are supported by sufficient legal evidence is eliminated by our conclusion that the court admitted incompetent evidence to the prejudice of appellant's right.

For the error indicated, the judgment is reversed, and the cause remanded for a new trial.

**MCCULLOCH, C. J.** (dissenting). The statement of Homer Davis to R. G. Ritchie was purely self-serving, and did not tend to connect appellant with the commission of the crime, as did the testimony of the other three witnesses, who gave testimony concerning statements of Homer Davis, and the testimony of Ritchie could not have had any effect prejudicial to appellant. Besides, the substance of the statement to Ritchie was embraced in the statement to the other three witnesses, Kell, Jean, and Headrick, and the testimony of those three witnesses was undisputed.

The rule has frequently been laid down by this court that in a criminal case, as well as in a civil case, the admission of incompetent evidence should be treated as harmless, and not to cause a reversal of the judgment, where the fact sought to be proved was established by other undisputed evidence. *Lee v. State*, 78 Ark. 77, 93 S. W. 754; *Renfroe v. State*, 84 Ark. 16, 104 S. W. 542; *Farrell v. State*, 111 Ark. 180, 163 S. W. 768; *Taylor v. State*, 113 Ark. 520, 169 S. W. 341; *Kelley v. State*, 133 Ark. 261, 202 S. W. 49. In the case of *Farrell v. State*, supra, we said:

"It is well settled in this state that there is no prejudicial error in admitting incompetent testimony of a fact that has been proved by the undisputed evidence."

It is not discoverable in any of the opinions in the cases cited above that the testimony can only be treated as undisputed where the accused has introduced testimony on the point "which coincided with that of the state." In fact, a perusal of the cases cited above will show that in most of them, if not all, the undisputed evidence was adduced by the state. However, it is unimportant, I think, the source from which the undisputed evidence emanates, for if it is undisputed and uncontradicted, so that the jury has no right to arbitrarily reject it, then there can be no harmful result flowing from the introduction of incompetent evidence tending to establish the same fact.

Appellant adduced no testimony in the trial of this case, and the statements of his brother, Homer Davis, were proved by the undisputed testimony of three unimpeached witnesses. One of them was the deputy sheriff who made the arrest, and there was not the slightest hint in the argument of counsel of the existence of any ground for questioning the testimony of those witnesses.

I think the judgment should not be reversed for an error which obviously could not have had any harmful effect.

#### DYER & CO. v. DELIGHT LUMBER CO. (No. 38.)

(Supreme Court of Arkansas, Dec. 8, 1919.)

#### 1. APPEAL AND ERROR ¶544(1)—DIRECTION OF VERDICT SUSTAINED WHERE THERE IS NO BILL OF EXCEPTIONS.

Correctness of ruling of court directing verdict for defendant depends on testimony introduced, and where there is no bill of exceptions judgment rendered on verdict for defendant must be affirmed.

#### 2. APPEAL AND ERROR ¶613(1)—BILL OF EXCEPTIONS MUST BE SIGNED BY PARTIES OR CERTIFIED BY JUDGE.

The facts which occur in the trial can only be brought to the Supreme Court for review by bill of exceptions, certified by the trial judge, or signed by the parties in the manner provided by statute.

#### 3. APPEAL AND ERROR ¶553(2)—STENOGRAPHER'S CERTIFIED TRANSCRIPT OF NOTES MUST BE APPROVED BY JUDGE.

A stenographer's certificate as to correctness of the record of the testimony taken down by him, unless approved by the presiding judge, cannot have the effect of making such evidence a part of the bill of exceptions, although such certificate may be found in the transcript of the record.

Appeal from Circuit Court, Pike County; Jas. S. Steel, Judge.

Suit in justice court by Dyer & Co. against the Delight Lumber Company. There was a judgment by default against defendant in the justice court, and on appeal a verdict was directed for defendant, and judgment rendered thereon, and plaintiff appeals. Affirmed.

Dyer & Co. commenced this suit before a justice of the peace against Delight Lumber Company to recover \$53.84 alleged to be the balance due it for hay sold to the defendant. There was a judgment by default against the defendant in the justice court. The defendant duly appealed to the circuit court, and the case was tried de novo. At the conclusion of the testimony the court directed a verdict for the defendant. Judgment was rendered upon the verdict, and the plaintiff has appealed.

O. A. Featherston, of Murfreesboro, for appellant.

Langley & Johnson, of Murfreesboro, for appellee.

HART, J. (after stating the facts as above). [1, 2] The correctness of the ruling of the circuit court depends upon the testimony introduced before it. The facts which occur in the trial of a case can only be brought to this court for review by a bill of exceptions certified by the trial judge, or signed by the parties in the manner provided by statute. *Moore v. Cairo & Fulton Rd. Co.*, 36 Ark. 262; *Wright v. Midland Valley Rd. Co.*, 111 Ark. 196, 163 S. W. 1151.

[3] It is insisted by counsel for the defendant that the judgment must be affirmed, because there is no bill of exceptions in the present case, and in this contention we think counsel are correct. There is in the transcript what purports to be the deposition of the secretary and treasurer of the plaintiff, with 11 letters attached to it as exhibits, which are accompanied by the certificate of the court stenographer that they are true and correct transcripts of his notes taken at the trial of this cause in the circuit court, and that the notes are a true and correct report of all the proceedings had at the trial of the case. A stenographer's certificate as to the correctness of the record of the testimony taken down by him unless approved by the presiding judge could not have the effect of making such evidence a part of a bill of exceptions, although such certificate may be found in the transcript of the record. *Abbott v. Kennedy*, 133 Ark. 105, 201 S. W. 830; *Mullett v. Morris*, 117 Ark. 377, 174 S. W. 1161; *Dozier v. Grayson-McLeod Lumber Co.*, 100 Ark. 244, 140 S. W. 7. In the last-mentioned case the court said:

"In the case of *Moore v. State*, 65 Ark. 330 [46 S. W. 127], it was held that the stenogra-

pher's report provided for by this statute could be made available on appeal only by being made a part of the bill of exceptions. The stenographic report of the proceedings of a court is only a modern, progressive mode of securing that which was formerly made by writing same in longhand. The statute did not dispense with the duty imposed upon the judge to examine such report, and his discretion to correct the same. Before the testimony thus taken by the official stenographer can properly be made a part of the bill of exceptions, it should be examined by the judge, and he must determine whether or not it is correct. In any event it is imperative that it must be in existence and a part of the bill, sufficiently identified at the time the bill is allowed and signed by the judge. The stenographer is but a means of taking and transcribing the oral proceedings; but he has no authority or discretion to determine whether the report so made by him is a true and correct report of such proceedings. It is the duty of the judge, and solely within his judicial discretion, to pass upon its correctness and allow same, before it can become a part of the bill of exceptions."

There is nothing but the stenographer's certified transcript of his notes in the present case. It was not signed by the judge, and there is nothing to show that it was examined or approved by him. Consequently there is no bill of exceptions, and we cannot know whether the testimony introduced warranted the circuit court in directing a verdict for the defendant.

Therefore the judgment must be affirmed.

# SHORES-MUELLER CO. v. PALMER et al. (No. 25.)

(Supreme Court of Arkansas. Dec. 1, 1919.)

## 1. GUARANTY $\S$ 1, 82(3)—SUIT AGAINST GUARANTORS AND PRINCIPAL IN SAME ACTION.

An agreement guarantying honest and faithful performance of sales contract by buyer was a contract of guaranty, and, where it was attached to so as to become a part of the sales contract, the guarantors and buyer could be sued in same action.

## 2. PRINCIPAL AND SURETY $\S$ 126(6)—DISCHARGE UPON CREDITOR'S FAILURE TO SUE PRINCIPAL UPON NOTES; "SURETY."

Guarantor of buyer's faithful performance of sales contract by agreement attached to and made part of the sales contract is a "surety," within Kirby's Dig. §§ 7921, 7922, exonerating "surety" from liability upon creditor's failure to bring action against principal within 30 days after notice in writing to so do from surety.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Surety.]

## 3. PRINCIPAL AND SURETY $\S$ 6—"SURETY;" "GUARANTOR."

There is a difference between the contract of a surety and that of guarantor, in that the

contract of a "surety" starts with the agreement, and the liability of a "guarantor" is established for the first time with the default of the principal debtor.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Guarantor.]

**4. PRINCIPAL AND SURETY** ¶126(6)—CREDITOR'S FAILURE TO SUE PRINCIPAL.

Surety's discharge from liability in Arkansas upon creditor's failure to sue principal within 30 days from receiving surety's notice to so do under Kirby's Dig. §§ 7921 and 7922, was not affected by fact that the contract was entered into in another state.

**5. CONTRACTS** ¶325—REMEDY GOVERNED BY STATE WHERE ACTION IS BROUGHT.

When a party comes into court to enforce his remedy on a contract, that remedy will be enforced in accordance with the laws of this state regulating the remedy, and not according to the remedy of state where contract was made.

**6. INSANE PERSONS** ¶26—ADJUDICATION AS PROOF OF PRIOR INSANITY.

That a person is at one time adjudicated to be insane does not establish insanity at a prior time.

**7. CORPORATIONS** ¶642(4½)—SALES ¶7—FOREIGN CORPORATIONS; SALES CONTRACT OR AGENCY.

Contract, whereby manufacturer sold certain goods to so-called "salesman" to be resold by the "salesman," was a contract for the sale of goods, and not a contract of agency; and, where it was entered into in manufacturer's state, it did not require manufacturer to comply with regulations concerning foreign corporations doing business in state in which salesman was to resell goods.

Appeal from Circuit Court, Phillips County; J. M. Jackson, Judge.

Suit by the Shores-Mueller Company against W. J. Palmer, John Palmer, W. B. Jarrett, Walter G. Kindel, and L. E. Kindel, guardian of Walter G. Kindel. Judgment of dismissal as to defendants other than Walter G. Kindel, and plaintiff appeals. Judgment, in so far as it dismisses complaint as to first three named defendants, affirmed, and, in so far as it dismisses complaint against last-named defendants, reversed and remanded.

Shores-Mueller Company, an Iowa corporation, brought this suit against W. J. Palmer, John Palmer, W. B. Jarrett, Walter G. Kindel, and L. E. Kindel, guardian of Walter G. Kindel, to recover the price of certain merchandise. On the 4th day of March, 1913, the Shores-Mueller Company, an Iowa corporation, entered into a written contract with W. G. Kindel of Marvell, Ark., to sell him certain toilet goods, household medicines, veterinary remedies, and other goods manufactured by said company. The company agreed to sell the goods to Kindel at wholesale prices, and the latter agreed to pay his account in

monthly installments. The company agreed to furnish him, free of charge, on board the cars at its factory in Iowa, a reasonable amount of advertising matter, report and order blanks, and to give him, free of charge, instructions and advice through letters and bulletins as to the best methods of selling its products to customers. Throughout the contract Kindel is called the salesman. The contract was accepted by the company at its home office in Cedar Rapids, Iowa. W. J. Palmer, John Palmer, and W. B. Jarrett signed the following, which was attached to the contract and became a part of it.

"In consideration of Shores-Mueller Company extending credit to the above-named person, we hereby guarantee to it, jointly and severally, the honest and faithful performance of the said contract by him, waiving notice of acceptance and all notices, including notice of salesman's default, and agree that any extension of time or change of territory shall not release us from liability hereon."

On the 30th day of March, 1916, the probate court of Phillips county, Ark., adjudged Walter G. Kindel to be an insane person and committed him to the state hospital for nervous diseases, where he has since been confined. L. E. Kindel was appointed his guardian and duly qualified as such. On the 12th day of September, 1916, W. J. Palmer, John Palmer, and W. B. Jarrett gave the Shores-Mueller Company notice in writing to require it to commence suit against Walter G. Kindel at once. The said company failed to comply with this notice within 30 days after it was served upon it.

The circuit court dismissed the suit against the defendants W. J. Palmer, John Palmer, and W. B. Jarrett on the ground of plaintiff's failure to comply with sections 7921 and 7922 of Kirby's Digest. The circuit court dismissed the suit against L. E. Kindel, as guardian of Walter G. Kindel, on the ground that the subject-matter of the suit was business transacted in this state by the plaintiff and that it had failed to comply with the laws of the state with regard to foreign corporations doing business here. The case is here on appeal.

R. B. Campbell, of Helena, and Sam Latkin, of Little Rock, for appellant.

Moore & Vineyard, P. R. Andrews, and J. G. Burke, all of Helena, for appellees.

HART, J. (after stating the facts as above). [1, 2] The court was right in dismissing the suit as to W. J. Palmer, John Palmer, and W. B. Jarrett, and wrong as to dismissing it against L. E. Kindel, as guardian of Walter G. Kindel, an insane person. In the first place, it may be stated that appellant could sue appellees in one action and that the contract signed by W. J. Palmer, John Palmer,

and W. B. Jarrett was a contract of guaranty. *Fluhart v. W. T. Rawleigh Co.*, 126 Ark. 307, 190 S. W. 118. These parties gave appellant notice in writing to bring suit at once against the principal debtor under sections 7921 and 7922 of Kirby's Digest. The sections read as follows:

"Sec. 7921. Any person bound as surety for another in any bond, bill or note, for the payment of money or the delivery of property, may, at any time after the action hath accrued thereon, by notice in writing, require the person having such right of action forthwith to commence suit against the principal debtor and other party liable.

"Sec. 7922. If such suit be not commenced within thirty days after the service of such notice, and proceeded in with due diligence, in the ordinary course of law, to judgment and execution, such surety shall be exonerated from liability to the person notified."

[3] This brings us to the consideration of the question of whether or not a guarantor under a contract like the present one is a surety within the meaning of the statute. It is true that there is a difference between the contract of a surety and that of a guarantor, in this, that the contract of a surety starts with the agreement, and that the liability of a guarantor is established for the first time with the default of the principal debtor. At the same time, a guaranty contract is generally regarded as a breach of suretyship, and the effect of the reasoning in the case of *Hall v. Equitable Surety Co.*, 126 Ark. 535, 191 S. W. 32, is to hold that a guarantor is a surety within the meaning of sections 7921 and 7922 of Kirby's Digest. In that case the court held that the sureties on a bond in an indemnity contract did not come within the statute, but treated guaranty contracts as coming within the provisions of the statute.

It is the contention of counsel for appellant that the contract sued on is an Iowa contract, and that the notice to sue must be given in accordance with the laws of that state, and that the court erred in dismissing the cause of action because appellant did not bring suit within 30 days after notice given under the statute of Arkansas. The record shows that the contract sued on is an Iowa contract, and this court has held that matters bearing upon the interpretation, execution, and validity of a contract are to be determined by the law of the place where the contract is made. *J. R. Watkins Medical Co. v. Johnson*, 129 Ark. 384, 196 S. W. 465, and cases cited. The authorities on the question of giving notice are divided. In *Tenant v. Tenant*, 110 Pa. 478, 1 Atl. 532, the court held that the right of a surety to discharge his obligation by a disregarded notice to the creditor to pursue the principal debtor is a matter affecting the obligation of the contract, and must therefore be determined by the law of the place of the contract. The

court said that the right of a surety to discharge his obligation by notice to the creditor to pursue the debtor is a part of the law of the contract, and is therefore a part of the contract itself.

[4] The court further said that it is the qualification of the obligation of the contract, reducing it from a peremptory and absolute obligation to one of a qualified or conditional character. On the other hand, in *Scales v. Cox*, 106 Ind. 261, 6 N. E. 622, the statutory right of a surety to require the creditor to institute suit within a given time upon a contract in which he has become surety only matures when a right of action has accrued to the creditor, and the court recognized that such a statute was one regulating the remedy against sureties and was not a part of the contract. We think this holding is in accord with our own decisions on the question. In discussing the statute in *Hempstead & Conway v. Watkins*, 6 Ark. 317, at page 355 (42 Am. Dec. 696), the court said:

"The statute is but declaratory, and an extension of an existing and originally equitable remedy, and which has been adopted and converted by courts of law into a subject of legal cognizance. The statute extends the original remedy, or so qualifies it that the surety is not bound to show the injury resulting from the subsequent insolvency of the principal to entitle himself to a discharge from his suretyship."

In *Wilson v. Tebbetts*, 29 Ark. 579, 21 Am. Rep. 165, the court held that the discharge of one of several sureties by the failure of the creditor to sue within 30 days after notice under the statute is personal to him, and will not affect the liability of his cosureties. In discussing the statute the court said:

"The office of the statute is to impose a duty on the creditor to come to the relief of the surety in case of apprehended danger of liability, by reason of the inability of the principal creditor to pay. It confers a privilege upon the surety to be thus released from his suretyship, and, as a consequence of neglect of the creditor to sue, the loss of his remedy against such surety. We have repeatedly held that the surety who gives such notice is discharged from the payment of the debt, unless suit is brought within the time prescribed by the statute."

[5] We are of the opinion that the statute affects the remedy of the creditor, and that it is not a part of the contract. It is well settled in this state that, when a party comes into court to enforce his remedy upon a contract, that remedy will be enforced in accordance with the laws of this state regulating the remedy, and not according to the remedy of the state where the contract was made. *Lawler v. Lawler*, 107 Ark. 70, 153 S. W. 1113, and *Huff v. Iowa City State Bank*, 134 Ark. 495, 204 S. W. 306.

[6, 7] The court was wrong in dismissing the complaint as to L. E. Kindel, as guardian of Walter G. Kindel, an insane person. The

record does not show that Walter G. Kindel was insane at the time he executed the contract sued on. The fact that he was subsequently adjudicated to be insane does not establish insanity at a prior time. This is conceded by counsel for appellees, but they contend that the subject-matter of the contract sued on was doing business in this state, and that appellant is not entitled to recover because it is a foreign corporation and did not comply with the laws of this state with regard to foreign corporations doing business here. We have not set out the contract sued on in full, and do not deem it necessary to do so; for it is very similar to other contracts which have been construed adversely to the contention of appellees. It is true Walter G. Kindel is called the salesman in the contract, and that appellant agreed to give Kindel instructions about selling its manufactured products; but these matters, when considered in connection with the other parts of the contract, do not make it a contract of agency. When it is construed from its four corners, the contract in plain terms sells to Kindel certain toilet goods, household medicines, veterinary remedies, and other goods manufactured by appellant, and it is a contract for the sale of these goods in the state of Iowa. Therefore it was not necessary for appellant to comply with the regulations concerning foreign corporations doing business in this state before bringing suit on the contract. *J. R. Watkins Med. Co. v. Johnson*, 129 Ark. 384, 196 S. W. 465.

It follows that the judgment, in so far as it dismisses the complaint against W. J. Palmer, John Palmer, and W. B. Jarrett is affirmed; and in so far as it dismisses the complaint against L. E. Kindel, as guardian of Walter G. Kindel, the judgment will be reversed, and the cause remanded for further proceedings according to law.

#### HAYES v. BISHOP. (No. 41.)

(Supreme Court of Arkansas. Dec. 8, 1919.)

##### 1. EQUITY $\S$ 42(1) — WAIVER OF RIGHT TO HAVE CAUSE TRANSFERRED TO LAW COURT.

In suit in equity, defendant waived the right to ask for a trial at law of the issues raised by failure to request to have cause transferred to law side of court.

##### 2. JUDGMENT $\S$ 564(1) — CONCLUSIVENESS OF JUDGMENT FURNISHING BASIS OF SETTLEMENT.

Decree in action for partition and division of estate, which instead of finally settling the respective rights of the litigants merely furnished the basis for such settlement, did not bar a subsequent action to recover payments made in excess of those required under the decree by reason of accident, oversight, or mistake.

##### 3. PAYMENT $\S$ 85(1) — RECOVERY OF EXCESS PAYMENTS UNDER SETTLEMENT.

Where judgment in suit for partition and division of an estate furnished the basis for a settlement, a party who by accident, oversight or mistake made a payment in excess of that required by decree was entitled to recover the excess.

Appeal from Washington Chancery Court; Ben F. McMahan, Chancellor.

Suit by Annie Bishop against Rebecca Cloer Hayes. Judgment for plaintiff, and defendant appeals. Affirmed.

Walker & Walker, of Fayetteville, and W. N. Ivie, of Rogers, for appellant.

O. P. McDonald, of Fayetteville, for appellee.

SMITH, J. Appellant is the sole heir at law of W. W. Bishop, who died intestate in Washington county, August 13, 1916, leaving the appellee surviving him as his widow and the stepmother of appellant. Bishop owned at the time of his death real estate of the value of \$15,000 and personal property worth between \$2,000 and \$3,000 and owed between \$400 and \$700 in unsecured debts. The widow was appointed administratrix, and took charge of all the property, and was administering the estate when suit was filed by appellant in the chancery court, praying a partition and division of said estate. An answer and cross-appeal was filed by the widow, in which she alleged that the estate was largely indebted to her for advances made to said estate. This litigation was settled by a stipulation in writing, which was incorporated into and made a part of the decree entered in that cause. It was there recited that the parties were each to quitclaim to the other certain lands owned by Bishop at the time of his death.

In regard to the personal property the stipulation was as follows:

"Mrs. Annie Bishop is to have one-third of all the personal property belonging to the estate of W. W. Bishop after the payment of all debts of the estate of W. W. Bishop, among which are the following: One hundred dollars borrowed of the First National Bank by Mrs. Bishop, and paid by her; \$55 paid by her for burial lot; \$25.25 paid by her for repairs on Ladd building; feed bill paid by her, \$16.40; \$194.50 paid by her to J. F. Moore for funeral expenses; \$100, attorney's fee to be paid O. P. McDonald, attorney for administratrix; and not to exceed \$150 to be paid to Mrs. Annie Bishop for all fees and allowances as administratrix of W. W. Bishop.

"It is understood that all rents due, whether paid or unpaid, up to and including December 12, 1916, are to be treated and considered as part of the personal property of said W. W. Bishop; it is understood and agreed that Mrs. Rebecca Cloer is to have as her absolute property her father's desk, and that Mrs. Annie

Bishop is to have the little cot, both of which are in the office of the deceased. It is also understood that Rebecca Cloer is to pay to the estate of W. W. Bishop all rent due for the house in which she is now living, amounting to about \$100.

"It is also understood that all personal property, including bank stock, except such household goods as Mrs. Anna Bishop desires to retain at the invoice or at an agreed price, agreed upon between the parties, is to be reduced to cash, and that the estate shall be settled up and proceeds divided within 30 days from this date."

It will be observed that this decree, instead of finally settling the respective rights of the litigants in this estate, merely furnished the basis for such settlement, and pursuant to its provisions the parties—accompanied by their respective attorneys—met to make a settlement on the basis recited in the decree.

Thereafter the present suit was filed, in which the matters above stated were recited, and it was there alleged that on casting up the accounts appellee was charged as administratrix with the sum of \$2,655.82, and was given credits aggregating \$1,308.52. It was there further alleged that—

"Appellee was entitled to \$150 inheritance tax, and \$100 due from appellant as rent, and \$102.50 paid out by appellee for nurse help and other expenses as additional credits, thereby making a total credit of \$1,661.02, but that said appellee should be charged with \$50, which she had received credit for, to be paid Rice & Dickson, as attorney's fee, which she did not have to pay, but alleged that by oversight and mistake these additional credits and charges were not made in said settlement, and that by such mistake and oversight she had overpaid the appellant herein in the sum of \$138.55; that she had paid her \$841.75 when there was only due her, if the same had been correctly figured, the sum of \$703.20."

Judgment for this overpayment was prayed.

Appellant demurred to this complaint on the grounds that it did not state facts sufficient to constitute a cause of action, and because the court had no jurisdiction of the subject-matter. This demurrer was overruled, whereupon an answer was filed, alleging that the matters set up in the complaint had been adjudicated and settled by the former decree, and further alleging that in the final settlement appellee had failed to pay her the full amount coming to her under the settlement, and that there was a balance of \$83.33 due her, for which she prayed judgment.

The cause was submitted on the pleadings and the depositions of the parties. Appellee identified Exhibit B to her complaint as the settlement between the parties made pursuant to the first decree, and testified that prior to the signing of said Exhibit B there was another agreement, which is designated Exhibit D, with reference to the inheritance

tax, and which contained a recital of the demands against the estate, together with the bank deposits which had been made to its credit.

There was also offered in evidence a writing designated as Exhibit C, which had been signed by the parties, and reading as follows:

"It is stipulated and agreed that out of the personal estate going to Mrs. Cloer under settlement this day made, Mrs. Annie Bishop, administratrix, is to retain in her possession the sum of \$150 to be applied on that part of inheritance tax due from Rebecca Cloer on the estate of her deceased father, W. W. Bishop; in the event that this amount is not sufficient to cover that portion of inheritance tax due from Mrs. Cloer, Mrs. Cloer is to pay any excess over and above said amount; and in the event that it does not require all of said amount to pay Mrs. Cloer's part of said inheritance tax, Mrs. Bishop is to refund to her the excess remaining in her hands.

"It is further stipulated that, should any debts be probated against the estate of W. W. Bishop, deceased, other than those agreed upon and allowed and set forth in the partial stipulation agreed upon this date, the same are to be paid by Annie Bishop and Rebecca Cloer, Mrs. Bishop to pay one-third and Mrs. Cloer to pay two-thirds.

"Dated this 19th day of December, 1916."

Appellee further testified that on the 19th of December, 1916, pursuant to the settlement made that day, she paid the appellant the sum of \$841.75, and that said payment was excessive in the sum sued for, and that this excess was paid as the result of a mistake made by appellee's attorney in incorrectly figuring the accounts between the parties.

Appellant testified that the balance represented by the check given her was arrived at after an extended conference, and the check was received as payment in full of her part of the personal estate after all the claims had been settled.

The court found the fact to be that in making the settlement pursuant to the decree on the stipulation, "by accident, oversight, and mistake, the said Annie Bishop paid to the said Rebecca Cloer the sum of \$104.23 more than the amount which was due her," and that she should recover the sum so overpaid.

[1] It is first insisted as ground for the reversal of the decree that this is a suit for money had and received, and therefore cognizable only in a court of law. But no request to have the cause transferred was made, and, in the absence of that request, appellant will be held to have waived the right to ask for a trial at law of the issues raised. *Goodrum v. Merchants' & Planters' Bank*, 102 Ark. 326, 144 S. W. 198, Ann. Cas. 1914A, 511.

[2] We think the first decree is no bar to the present suit, for the reason that it did not purport to adjudicate finally the rights of the parties, but contemplated the settlement subsequently made pursuant to its terms.

[3] It is said appellee should not be permitted to recover here because she does not offer to return the benefit she obtained in this settlement, and that this is not a suit to set aside the settlement on the ground of fraud, accident, or mistake, but simply a suit for money had and received. As has been said, this is not a suit to set aside a former decree, but is one to recover a sum alleged to be due upon a correct settlement under its terms. The court found that in making the settlement "by accident, oversight, or mistake" an excessive payment was made, and we think appellee had the right to sue to recover this excess; and, as the correctness of the amount of the alleged excess as found by the court is not disputed, the decree will be affirmed.

**FAUCETTE v. PATTERSON et al. (No. 7.)**  
(Supreme Court of Arkansas. Nov. 24, 1919.)

**1. HIGHWAYS §90—REPEAL OF STATUTE CREATING DISTRICT.**

Acts 1917, p. 1149, providing for the construction of a highway, *held* repealed by Acts 1919, p. 134, on the same subject, notwithstanding it contains no express provision to that effect.

**2. STATUTES §170—REPEAL; APPLICABILITY OF CONSTITUTIONAL PROVISION ABOLISHING DOCTRINE OF STATUTORY REVIVOR.**

Where repealing act operates by implication, and does not directly or expressly repeal the original act, the provision of Const. art. 5, § 22, that laws shall not be revived by reference to title only, does not apply, and therefore the act repealed may be revived by reference to its title in a subsequent act expressly repealing the act in which by implication the original act was repealed.

**3. STATUTES §170—REPEAL; STATUTORY REVIVOR.**

Acts 1917, p. 1149, providing for the construction of a highway, *held* revived by express words in Acts 1919, p. 327, repealing in express terms Acts 1919, p. 134, all on the same subject.

Appeal from White Chancery Court; John E. Martineau, Chancellor.

Suit by C. C. Faucette against Henry Patterson and others to enjoin the construction of a highway. Judgment for defendants on demurrer, and plaintiff appeals. Affirmed.

Harry Neely, of Searcy, for appellant.

W. D. Davenport, of Searcy, for appellees.

Ponder & Gibson, of Walnut Ridge, amici curiae.

HART, J. C. C. Faucette, as a landowner in White county, Ark., within the limits of the North Arkansas highway improvement district No. 1, as laid out by Act No. 213 of

the Acts of the General Assembly for the year 1917, brought suit in equity against the commissioners of said highway improvement district for the purpose of enjoining them from proceeding with the construction of the road and from issuing bonds and collecting taxes. The court sustained a demurrer to the complaint, and, plaintiff declining to plead further, his complaint was dismissed for want of equity. The plaintiff has appealed.

The facts as alleged in the complaint are as follows:

The Legislature of 1917 passed an act creating North Arkansas highway district No. 1. The district was formed for the purpose of improving a public road beginning east of the corporate limits of Argenta, or North Little Rock, and extending through the counties of Pulaski, Lonoke, White, Jackson, and Independence, to the corporate limits of Batesville. The act contained 37 sections. It provided for the appointment of commissioners, the adoption of plans for the construction of the road, the assessment of benefits, and the collection of taxes to pay for the cost of construction. 2 Acts 1917, p. 1149.

The Legislature of 1919 passed an act to create the Arkansas and Missouri highway districts, which was termed Special Act No. 82. The purpose of this act was to secure the construction of a highway from the city of North Little Rock, Ark., through the counties of Pulaski, Lonoke, White, and Jackson. Four improvement districts were created by the act; one for each of the above-named counties. The act contained 28 sections, and provided for the construction of the road, the assessment of benefits, and the collection of taxes to pay for the same. The act contained the emergency clause, and was approved February 14, 1919. At the same session of the Legislature Special Act No. 128, entitled "An act to facilitate the building of a highway between Little Rock and the Missouri state line," was passed. It contained the emergency clause and was approved February 26, 1919.

Section 1 of the latter act provides that the Arkansas and Missouri highway district, in White county, created by Act No. 82 of the 1919 session, be abolished, in so far as White county is concerned, and it further provides that the proposed highway through White county shall be constructed under the provisions of Act No. 213 of the General Assembly of 1917, above referred to. Section 2 provides that the proposed highway from North Little Rock through Pulaski, Lonoke, and Jackson counties be constructed under the terms of Act No. 82 of the session of 1919, above referred to, and that Act 213 of the session of 1917, above referred to, be repealed in so far as it relates to the con-



struction of the highway through Pulaski, Lonoke, and Jackson counties.

It is the contention of counsel for the plaintiff that Special Act No. 82 of the Acts of the session of 1919 repeals by necessary implication Act No. 213 of the Acts of 1917. This contention is based upon the ground that the later act makes a revision of the former one, and frames a new statute relative to the same subject-matter, and that from the framework of the act the Legislature designed a complete scheme for the construction and improvement of a road from the corporate limits of North Little Rock to a point in Jackson county where it would connect with another improved road running into the state of Missouri. It will be noted that Special Act No. 82 of the session of 1919 is expressly repealed, so far as it affects the construction of the road in White county by Special Act No. 128 passed at the same session, and the repealing act provides that the proposed highway through White county shall be construed under the provisions of Act No. 213 of the General Assembly for the year 1917.

[1] It is claimed by counsel for the plaintiff that the act in this respect is unconstitutional, because it is in violation of article 5, § 22, of the Constitution of 1874. The section is as follows:

"No law shall be revived, amended, or the provisions thereof extended or conferred by reference to its title only; but so much thereof as is revived, amended, extended or conferred shall be re-enacted and published at length."

Section 7796 of Kirby's Digest is as follows:

"When a statute shall be repealed and the repealing statute shall afterward be repealed the first statute shall not thereby be revived unless by express words."

Act No. 82 of the Acts of 1919 revises the whole subject-matter of Act No. 213 of 1917, and is evidently intended as a substitute for it, although it contains no express words to that effect, and we think operates to repeal it. *Mears v. Stewart*, 31 Ark. 17; *West Union Tel. Co. v. State*, 82 Ark. 303, 101 S. W. 745. Act No. 82 of the session of 1919 does not expressly repeal Act No. 213 of the Acts of 1917, and it may be assumed that the earlier act is repealed by necessary implication by the passage of the later act, and still the decision of the chancellor in sustaining the demurrer to the complaint was correct.

[2] It will be borne in mind that Act No. 82 of the session of 1919 was expressly repealed by Act No. 128 of the same session, in so far as it affects the construction of the proposed road in White county. Where the first repealing act operates by way of implication and does not directly or expressly repeal the original act, the constitutional pro-

vision abolishing the doctrine of statutory revivor does not apply. *Home Ins. Co. v. Taxing Dist.*, 4 Lea (Tenn.) 644; *State v. King*, 104 Tenn. 156, 57 S. W. 150; *Zickler v. Union Bank & Trust Co.*, 104 Tenn. 277, 57 S. W. 341; *Manchester Twp. Supervisors v. Wayne County Com'rs*, 257 Pa. 442, 101 Atl. 736, Ann. Cas. 1918B, 278.

In *Home Insurance Co. v. Taxing District*, supra, the court had under consideration a provision of the Constitution of Tennessee that "All acts which repeal, revive or amend former laws shall recite in their caption or otherwise the title or substance of the law repealed, revived or amended," and held that it did "not apply to acts which, by their positive provisions operate a repeal of previous acts by necessary implication." Judge Cooper, who delivered the opinion of the court, said:

"The question, in this view, is not one altogether of first impression. Several of the state Constitutions contain similar provisions; that is, provisions designed for the same purpose, some of them couched in stronger language. A common provision in many of these Constitutions is thus worded: 'No act shall ever be revived or amended by mere reference to its title, but the act revived or section amended shall be set forth or published at full length.' *Cooley*, Const. Lim. p. 151, note 1. 'It has been uniformly held,' says Judge Cooley, 'that statutes which amend others by implication are not within these constitutional provisions, and that it is not necessary that they even refer to the acts or sections which by implication they amend.'"

In conclusion, Judge Cooper said:

"That the constitutional provision under consideration does not apply to repeals by implication seems to be sustained by reason, as it certainly is by authority."

In *People v. Mahaney*, 13 Mich. 481, the court held that a law which does not assume in terms to revise, alter, or amend any prior act, but by various transfers of duties has an amendatory effect by implication, although it expressly repeals all inconsistent acts, does not conflict with section 25 of article 4 of the Constitution. Section 25, art. 4, of the Michigan Constitution, is exactly like section 22, art. 5, of the Arkansas Constitution. The court further held that it is not the meaning of this provision of the Constitution that, upon the passage of each new law, all prior laws which it may modify by implication shall be re-enacted, and published at length as modified. Judge Cooley, who delivered the opinion of the court, in discussing the subject, said:

"This constitutional provision must receive a reasonable construction, with a view to give it effect. The mischief designed to be remedied was the enactment of amendatory statutes in terms so blind that legislators themselves were sometimes deceived in regard to their effect, and

the public, from the difficulty in making the necessary examination and comparison, failed to become apprised of the changes made in the laws. An amendatory act, which purported only to insert certain words, or to substitute one phrase for another in an act or section, which was only referred to, but not republished, was well calculated to mislead the careless as to its effect, and was, perhaps, sometimes drawn in that form for that express purpose. Endless confusion was thus introduced into the law, and the Constitution wisely prohibited such legislation. But an act complete in itself is not within the mischief designed to be remedied by this provision, and cannot be held to be prohibited by it without violating its plain intent."

To the same effect, see *Cooley*, Const. Lim. (7th Ed.) pp. 215, 216.

The contrary rule has been announced in *Stirman v. State*, 21 Tex. 734. In that case, and other cases of like character, it is held that the law makes no distinction between express and implied repeals. However, after due consideration, we are of the opinion that the rule announced by Judge Cooley and by Judge Cooper should be followed. Both of them were judges of great learning, and their memories are revered by the legal profession throughout the United States. Moreover, the holding is in accord with an opinion of our own court in *Scales v. State*, 47 Ark. 476, 1 S. W. 769, 58 Am. Rep. 768. The opinion in that case was delivered by Chief Justice Cockrill, a distinguished judge of this court, and in discussing the provision of the Constitution under consideration he said that the provision does not prohibit the repeal of a law by reference to its title, and the prohibition can be extended by implication only. The learned judge further said that the power of the Legislature is not to be cut off by inference, save where the inference is too strong to be resisted. In this connection it may be observed that the common-law rule is that, if a statute that repeals another is itself repealed afterwards, the first statute is thereby revived, without any formal words for that purpose. *Commonwealth v. Churchill*, 43 Mass. (2 Metc.) 118, and case note to Ann. Cas. 1918B, at page 281. By statute it is now provided in effect in this state that the repeal of a repealing statute shall not operate to revive the original statute, unless it is expressly so provided in the last repealing statute. Kirby's Digest, § 7796.

[3] In the case at bar the original act, being Act 213 of the Acts of 1917, was revived by express words in Act No. 128 of the session of 1919, which in express terms repeals Act No. 82 of the session of 1919, in so far as White county is concerned. It follows that the Act No. 213 of the Acts of 1917 is in force, so far as the construction of the road in White county is concerned. Hence the court was correct in sustaining the demurrer

to the complaint, and, after the plaintiff declined to plead further, in dismissing his complaint for want of equity.

Therefore the decree will be affirmed.

FLURRY et al. v. THOMAS et al. (No. 34.)  
(Supreme Court of Arkansas. Dec. 8, 1919.)

PARTITION ~~§~~94(2)—DUTY OF COURT TO RE-  
VISE ALLOTMENTS BY COMMISSIONERS.

The fact that two sets of partition commissioners had made somewhat similar allotments to appellants does not relieve the trial court from determining whether the second allotment constituted a just division of the lands, where appellants' exceptions were supported by affidavits raising such an issue.

Appeal from Logan Chancery Court; J. V. Bourland, Chancellor.

Partition proceedings between T. M. Flurry and others and Nancy Thomas and others. From a decree overruling exceptions to the commissioners' allotment and confirming their report, the first-named parties appealed. Reversed and remanded, with directions.

Jno. M. Parker, of Dardanelle, for appellants.

MCCULLOCH, C. J. Appellants and appellees are owners as tenants in common of 40 acres of land in Logan county, and this action was instituted for the purpose of having a partition of said lands. The chancery court rendered a decree for partition, there being no controversy as to the several interests of the respective parties, and appointed commissioners, who made a report allotting 13½ acres on the north side of the 40-acre tract to appellants, on condition that appellants pay to appellees the sum of \$200 for the purpose of equalizing the valuation of the several tracts allotted. Exceptions to the report were filed by appellants, which the court sustained, and the court appointed new commissioners, who made a report at the next term of court awarding to appellants 10 acres on the north side of said tract. Appellants filed exceptions to the last report, and also filed in support of the exceptions the affidavits of numerous parties who resided in the neighborhood and were familiar with the condition and value of the lands. The testimony set forth in the affidavits tended to show that the 10-acre tract allotted to appellants was, to a very considerable extent, inferior in quantity and value to the other portions of the land, and that the allotment to appellants was not fair and equal, either in value or quantity.

The court refused to hear testimony on the question of quality and value of the sev-

eral tracts allotted to the parties on the ground stated in the decree that the last allotment made by the commissioners was practically the same as that made by the first commissioners. The court overruled appellants' exceptions and confirmed the report, from which appellants have prosecuted an appeal.

The chancery court erred in refusing to hear testimony as to the quality and value of the land. The last allotment made by the commissioners was not practically the same as that made in the former report, but, even if that had been true, it does not preclude the court from determining whether or not the allotment constituted a fair and just division of the lands according to value and quality.

The decree is therefore reversed, and the cause remanded, with directions to the chancery court to hear testimony on the subject of the fairness and equality of the allotments made by the commissioners.

### SOUTHERN EXPRESS CO. v. FREEZE et al. (No. 42.)

(Supreme Court of Arkansas. Dec. 8, 1919.)

#### 1. CARRIERS $\Leftrightarrow$ 72 — TITLE TO GOODS AFTER DELIVERY TO CARRIER.

Title to goods delivered to carrier remained in consignor, where there had been no sale to consignee.

#### 2. CARRIERS $\Leftrightarrow$ 82 — DELIVERY TO PARTY OTHER THAN CONSIGNEE.

Carrier should have delivered shipment to consignee only, where there was nothing about shipment to indicate that a party other than the consignee had the right to receive it.

#### 3. CARRIERS $\Leftrightarrow$ 94(3) — INSUFFICIENCY OF EVIDENCE TO SHOW AGENCY.

In action against express company for wrongful delivery, evidence held insufficient to constitute person to whom shipment was delivered an agent for consignee to receive shipments without consignee's knowledge or consent.

Appeal from Circuit Court, Craighead County; R. H. Dudley, Judge.

Action by R. A. Freeze and others against the Southern Express Company. Judgment for plaintiffs, and defendant appeals. Affirmed.

E. L. Westbrooke, of Jonesboro, for appellant.

Basil Baker and Horace Sloan, both of Jonesboro, for appellees.

SMITH, J. Appellee, who is in the meat business in Jonesboro, shipped by the appel-

lant express company a consignment of meat to John Gregory, at Trumann, Ark., which was delivered to one V. E. Safley, who upon its receipt signed the name of Gregory, by himself. It was shown at the trial from which this appeal was prosecuted that Gregory knew nothing of the shipment and gave Safley no authority either to receive it or to sign his name upon its receipt. Judgment was rendered against the express company for the value of the meat, and a reversal of that judgment is asked here on two grounds: First, that appellee has no right to sue; and, second, the express company is absolved from liability for the misdelivery of the shipment because of appellee's negligence in making it.

[1] In opposition to appellee's right to maintain this suit, cases are cited to the effect that the delivery of goods to a carrier for purpose of shipment is a delivery to the consignee, and, on the authority of these cases, it is said that the title to this shipment passed out of the shipper upon its delivery to the express company. The cases cited are not in point here, for the reason that the consignee disclaims any interest in or title to the shipment. If there was no sale, the title remained in the consignor.

The negligence of appellee is said to consist in shipping the goods without verifying Safley's authority to place the order for them. It appears that appellee had been making C. O. D. shipments of meat to Safley, who was not regarded by appellee as being entitled to credit. Safley called appellee over the phone and advised that he and Gregory had formed a copartnership, and asked appellee if he would ship meats to this copartnership. Appellee advised that he would extend credit to Gregory, and would ship meats to his order. Thereupon Safley ordered that the shipment in question be made to Gregory, and that was done. Gregory and Safley had not formed a copartnership, and had no business connections whatever, except that Safley rented from Gregory the building in which he operated a butcher shop.

[2] It is said that appellee was negligent in failing to secure a confirmation of this order from Gregory before making the shipment. We do not think, however, that appellee was guilty of any conduct which deprived him of his right to expect that the shipment would be delivered to the consignee, and to no other person. There was nothing about the shipment to indicate that Safley had any right to receive it, and delivery should have been made, therefore, only to the consignee. *C., R. I. & P. Ry. Co. v. Pfeifer*, 90 Ark. 524, 119 S. W. 642, 22 L. R. A. (N. S.) 1107.

[3] On his cross-examination Gregory testified as follows:

"Q. Didn't you receive a shipment of eggs there from the Graves Commission Company,

at Cabool, Mo., that had been ordered by Mr. Safey? A. No, sir; I ordered the eggs myself.

"Q. Do you remember when this case was tried in the justice of the peace court? A. Yes, sir.

"Q. Didn't you state there that these eggs were ordered from the Graves Commission Company, and that Mr. Safey got them out of the express office and signed your name for it, by himself as agent? A. I don't remember. He didn't, unless I gave him authority to."

We think this testimony insufficient to constitute Safey an agent for Gregory to receive shipments consigned to Gregory, without the knowledge or consent of Gregory.

The cause was submitted to the court sitting as a jury, and judgment was rendered against the express company for the value of the meats.

No error appearing, that judgment is affirmed.

#### WILKINSON v. ST. FRANCIS COUNTY ROAD IMPROVEMENT DIST. NO. 1 et al. (No. 43.)

(Supreme Court of Arkansas. Dec. 8, 1919.)

#### 1. HIGHWAYS $\S$ 135—ENHANCEMENT OF VALUE AS DECISIVE QUESTION IN MAKING ASSESSMENT.

In making assessment to pay for any proposed road improvement, the question is to what extent the proposed improvement will enhance the value of the property against which the assessment is to be levied, for it is the enhanced value that is taxed.

#### 2. HIGHWAYS $\S$ 142—NO SUBSTITUTION OF JUDGMENT OF JUDGES ON REVIEW OF ASSESSMENTS.

The judgment of the judges reviewing assessments for a road improvement should not be substituted for that of the assessors who made the assessments, unless the evidence clearly shows that the assessment is erroneous.

#### 3. EVIDENCE $\S$ 5(2) — JUDICIAL NOTICE OF PRACTICABILITY OF LEVEES AND DRAINS.

It is a matter of common knowledge that levees and drains have passed beyond the experimental stage.

#### 4. MUNICIPAL CORPORATIONS $\S$ 487—RIGHT OF COUNTRY OWNER TO COMPLAIN OF CITY ASSESSMENTS FOR ROADS.

Where town and country land is assessed for the cost of a road improvement, the owner of country land can complain of no inequalities in the assessment of town lots, except that the municipal assessments are too low as a whole.

#### 5. HIGHWAYS $\S$ 140—ZONE SYSTEM OF ASSESSMENTS NOT REQUIRING JUDICIAL REDUCTION.

Assessments of lands by a road improvement district on a zone system, \$7 an acre on lands within a mile of the road, \$6 an acre on land

within two miles of the road, etc., were not subject to judicial reduction, though as a result of such method of assessment lands worth more than \$100 an acre would pay no more tax than lands worth less than \$5 an acre; the assessments having been made in good faith by a board of competent men named by statute.

Appeal from St. Francis Chancery Court; A. L. Hutchins, Chancellor.

Proceeding for reduction of assessments by C. M. Wilkinson against St. Francis County Road Improvement District No. 1 and others. From a decree approving the assessments, petitioner appeals. Affirmed.

W. J. Lanier, of Forrest City, for appellant.

Rose, Hemingway, Cantrell & Loughborough, of Little Rock, and S. S. Hargraves, of Forrest City, for appellees.

SMITH, J. Appellant is a large landowner in road improvement district No. 1 of St. Francis county, which was created by Act No. 157 of the Acts of 1917 (Acts 1917, p. 814), and he seeks by this appeal to have the assessments against his lands vacated and set aside upon the ground that they are excessive, confiscatory, and disproportionate to other assessments. This is a direct proceeding to review by appeal the refusal of the chancery court to revise and reduce appellant's assessments. He insists that the assessments were made by zones; the assessments against each tract being determined solely by a consideration of the zone within which the lands are located, and without reference to the benefits to be derived from the proposed improvement.

It is undisputed that the assessment was made by zones, under which all lands lying within one mile of the proposed road were placed in the first zone and a betterment of \$7 per acre assessed, and that lands lying more than one mile but within two miles of the road were placed in the second zone and a betterment of \$6 per acre assessed, and so on with other zones; the theory being that betterment from the improvement was in proportion to proximity to it. As a result of this theory and method of assessment it is undisputed that lands lying in the same zone will have the same acreage assessment, and that lands shown to be worth more than \$100 per acre will pay no more tax than lands shown to be now worth less than \$5 per acre.

But the assessment is not necessarily to be condemned on that account. In the case of Board of Improvement v. Southwestern Gas & Electric Co., 121 Ark. 105, 180 S. W. 764, the board of assessors made a horizontal assessment of 20 per centum of the value of the real property in the district as assessed for state and county purposes. The purpose for which that district was organized was to ac-

quire, construct, and equip a water plant and system. In that case the court below had held the assessment illegal and erroneous, but in reversing that finding we said:

"If the chancellor meant to hold that the assessors could not, even after giving due consideration to all the elements which go to make up the benefits to be derived from the stated improvements, make an assessment which resulted practically in a percentage of the value according to the assessment of taxes for state and county purposes, he was in error, for there is no sound reason why that method may not be adopted, if that basis of assessment results in arriving at the real benefits from the improvement. If, however, a basis of that kind is adopted arbitrarily, and without any relation to the real benefits to be derived, it is invalid, and should be set aside. We have decided in numerous cases that a legislative ascertainment that benefits from a local improvement accrue in proportion to the value of the property affected will be respected, unless it be demonstrated to a certainty that a mistake has been made."

Upon a review of the testimony in that case we reached the conclusion that the testimony did not warrant the conclusion that the board of assessors had acted arbitrarily in reaching the conclusion that the benefits to all property in the district would accrue in proportion to values. The assessors in that case were men familiar with the real property in the district, and in their meetings they had reached the conclusion that all the property in the district would be relatively benefited in proportion to the value thereof—the assumption being that the assessment of value by the county assessor was correct—and that a percentage assessment based on that valuation would represent the true benefits to be derived from the improvement. In that case it was shown that some of the property in the district was so situated that it did not then need the supply of water which was to be afforded by the construction of the improvement; yet we held that that fact was not necessarily conclusive that the benefits to all the property in the city might not accrue alike in proportion to the value of each piece of property.

In the case of *Alcorn v. Bliss-Cook Oak Co.*, 133 Ark. 118, 201 S. W. 797, the directors of a levee district sitting as a board of assessors imposed a tax of 10 cents per acre upon each acre of land in the district. This assessment was resisted by the Oak Company on the ground that it was not proportionate to benefit. We approved the assessment, however, and in doing so said that—

"If the construction of the levee increases the values of the different classes of land within the district proportionately, there is no injustice. In this way the burden will be distributed in proportion to the benefits."

216 S.W.—20

In the case of *Rogers v. Arkansas & Louisiana Highway Improvement District*, 213 S. W. 749, we said:

"The question is, not what the usable value of the road is to a particular tract of land, but to what extent has the improvement enhanced the value of the land? It is against this enhanced value or betterment that the tax is levied to pay for the construction of the improvement, which is to bring about the enhanced value."

[1, 2] In making the assessments to pay for any proposed improvement, the question is, To what extent will the proposed improvement enhance the value of the property against which the assessment is to be levied? for it is this enhanced value which is taxed. The method of arriving at that enhanced value is to be determined by the men charged with that duty, and, as we have frequently said, the judgment of the judges reviewing the assessments should not be substituted for that of the assessors who made the assessments, unless the evidence clearly shows that the assessment is erroneous.

Applying that test, what disposition shall be made of the assessment in the present case? The board here consists of seven members, who are named in the act, and who appear to be successful men of affairs, who have a general knowledge of the lands in the district. It must be confessed that portions of the testimony of some of these commissioners would appear to indicate that distance from the road was the only thing taken into account in assessing the betterments. But we think this a mere infelicity of speech, and while, as we have stated, lands in the same zone, differing widely in market value and in usable value, received the same assessment per acre, this result was achieved because the commissioners had determined that each piece of land in the first and other zones received benefits equal to those of other lands in the same zones. Of course, mathematical accuracy in this respect is not required, because values and benefits are at last mere matters of opinion, and we can expect nothing more than an intelligent judgment honestly and fairly exercised. The commissioners all testified that it was their purpose to make a fair, just, equal, and proportionate assessment of the benefits, and that the assessment by zones met that requirement. It is true one or more of the assessors thought the assessment should be made ad valorem; but they yielded to the majority, and it is not shown that a substantially different result would have been reached, had that method been employed.

[3] There is testimony that much of the land owned by appellant received an assessment greater than its present market value. These were lands shown to be of small value, chiefly because of the recurring overflows

from the L'Anguille river, which winds its tortuous course through them. It is not shown or contended that these lands are beyond reclamation by drainage or by levees, and it is a matter of such common knowledge that courts may know it that levees and drains have passed beyond the experimental stage.

[4] Considerable testimony was offered for the purpose of proving inequalities in the assessments of lots in the city of Forrest City and in the town of Palestine; but the owners of these lots, against which these inequalities are said to exist, do not appear to have complained, and as appellant owns none of those lots his only right to complain would be that the municipal assessments are too low as a whole, and as that complaint is not made this testimony appears to be immaterial in this litigation.

[5] Upon a consideration of all the testimony in this case, we do not feel warranted in revising appellant's assessments, and the decree of the court below approving them is therefore affirmed.

#### REED v. FIRST NAT. BANK OF CORNING. (No. 33.)

(Supreme Court of Arkansas. Dec. 8, 1919.)

JUDGMENT ¶117—IN FORECLOSURE OF VENDOR'S LIEN MUST CONFORM TO PLEADING.

In action to foreclose vendor's lien, complaint, in which the only reference to certain defendant was allegation "that plaintiff understands that defendant E. is claiming some interest or claim on said lot," *held* insufficient to warrant default decree against such defendant personally for recovery of amount of purchase-money notes.

Appeal from Clay Chancery Court; Archer Wheatley, Chancellor.

Action by the First National Bank of Corning against Ernest Reed and another. From that portion of decree against defendant Reed personally, for recovery of amount of notes, he appeals. Reversed, in so far as a personal decree against appellant.

C. T. Bloodworth, of Corning, for appellant.

MCCULLOCH, C. J. Appellee instituted this action in the chancery court of Clay county (Western district) against appellant and one Brown to foreclose a lien on certain real estate for the purchase price. It was alleged in the complaint that J. E. Matthews sold the real estate in question to Brown, and that Brown executed to Matthews the promissory notes in suit, which were assigned to appellee by Matthews. The only refer-

ence in the complaint to appellant was as follows:

"That plaintiff understands that the defendant Ernest Reed is claiming some interest or claim on said lot."

The notes were exhibited with the complaint. Appellant and Brown were both served with summons to appear in the action, but neither appeared, and there was a default decree against both of them, which was for the recovery of the amount of the notes (\$740.80) and for foreclosure of the vendor's lien on the real estate conveyed by Matthews to Brown. Appellant has prosecuted an appeal from the personal decree against him for recovery of the amount of the notes.

The decree was obviously wrong to the extent that it was for the recovery of the amount of the notes from appellant personally. The complaint contained no allegation which would be sufficient to warrant such a decree. The only allegation was that he was claiming some interest in the lot sold by Matthews to Brown. This feature of the decree may have been an inadvertence or misprision of the clerk in entering the decree; but, as the decree stands upon the record, it is erroneous, and appellant is entitled to a reversal to that extent.

#### LONG v. STATE. (No. 182.)

(Supreme Court of Arkansas. Nov. 8, 1919.)

1. BURGLARY ¶41(6) — EVIDENCE SUSTAINS CONVICTION.

In a prosecution for burglary, evidence *held* sufficient to connect defendant with the crime.

2. LARCENY ¶55 — EVIDENCE SUSTAINS CONVICTION.

In a prosecution for larceny, evidence *held* sufficient to connect defendant with the crime.

3. BURGLARY ¶28(6) — IDENTIFICATION OF OWNER OF BUILDING.

In a prosecution for burglary, where proof showed that building was owned by an improvement district, an entity capable of owning or possessing property, a conviction was sustained, although the indictment described the improvement district as a corporation, and the evidence failed to show that it was a corporation.

4. LARCENY ¶64(1) — POSSESSION OF RECENTLY STOLEN PROPERTY.

The unexplained possession of recently stolen property is a fact from which an inference of guilt may be drawn.

5. CRIMINAL LAW ¶759(4) — INSTRUCTION ON WEIGHT OF EVIDENCE.

In a larceny case an instruction that "the possession of property recently stolen affords

presumptive evidence of guilt" was erroneous, as being upon the weight of the evidence; the unexplained possession of recently stolen property being only a fact from which an inference of guilt may be drawn.

**6. CRIMINAL LAW §1059(2)—REVIEW; EXCEPTION IN GROSS TO INSTRUCTIONS.**

An exception "to the entire oral charge" was in gross and availed nothing, where the oral charge contained several instructions and part of them were correct.

Appeal from Circuit Court, White County; J. M. Jackson, Judge.

Ernest Long was convicted of grand larceny and burglary, and appeals. Affirmed.

Cul L. Pearce, of Bald Knob, and Harry Neely, of Searcy, for appellant.

Jno. D. Arbuckle, Atty. Gen., and Robert C. Knox, Asst. Atty. Gen., for the State.

**HUMPHREYS, J.** Appellant was indicted, tried, and convicted in the White circuit court of grand larceny and burglary. His punishment for the larceny was fixed at one year in the penitentiary, and for the burglary at three years in the penitentiary. An appeal has been duly prosecuted to this court, and a reversal of the judgment of conviction and assessment of penalties is sought upon the following grounds:

First. Because the evidence fails to connect appellant with breaking and entering the house, as charged in the indictment.

Second. Because the state failed to prove that the Searcy Electric Light Improvement District No. 1 was a corporation.

Third. Because the court erred in instructing the jury as to the effect of the possession of recently stolen property.

1. The indictment, in the first count, charged, in substance, that appellant feloniously did break and enter a house used and possessed by the Searcy Electric Light Improvement District No. 1, a corporation, with the felonious and burglarious intent to steal and carry away personal property, over the value of \$25, of Carlyle Pettey, and in the second count charged the larceny of the personal property aforesaid in apt words and form.

The evidence showed that appellant, in company with his brother, Will Long, went from Little Rock to Searcy on the evening before the burglary, reaching Searcy at about 7 o'clock. They left Searcy together early on the morning of March 4th. Between 12 and 1 o'clock on the night of the burglary appellant was seen in company with his brother, who confessed to the crime, in about a block of the light plant. His brother, Will Long, at the time had a bundle under his arm. The property stolen consisted of an overcoat, a pair of trousers, and

two flash lights, and belonged to Carlyle Pettey. The burglary and theft occurred on the night of the 3d day of March, 1919; the house being entered by pushing open a window which had not been latched or bolted. The house entered was in the possession and occupied by the Searcy Electric Light Improvement District No. 1. Early in that month appellant sold the overcoat in question to his uncle, F. P. Long, and one of the flash lights to his cousin, W. D. Bateman. The trousers were found in the home of his uncle, F. P. Long. Appellant explains his possession of the goods by saying he got them from his brother. His brother, Will Long, testified that appellant was not with him at all on the night of the burglary. Appellant admitted, however, that he was with him on that night in Searcy.

[1, 2] We cannot agree with the appellant that the evidence is insufficient to connect him with the crime. He was in company with his brother near the scene of the burglary and larceny at a late hour on the night the crimes were committed. They came to Searcy from Little Rock together, reaching there about 7 o'clock p. m. on the 3d of March, and left together early the next morning. His brother confessed to the commission of the crime on that night, and soon thereafter the possession of the property was traced to appellant, who converted a part of it to his own use by sale thereof to his kinsmen. On the night of the burglary appellant and his brother were seen at a late hour near the house that was burglarized, and at the time appellant's brother had a bundle under his arm. We think this evidence sufficient to support a finding that appellant participated in the burglary and larceny.

[3] 2. It developed in the testimony that the house which was burglarized was owned by the Searcy Electric Light Improvement District No. 1, and that said electric light company was known, under the statutes of Arkansas, as an improvement district. It is insisted by appellant that there is a variance between the evidence and the indictment, for the reason that said company is described in the indictment as a corporation. The purpose of the charge and proof was to identify the particular house burglarized as belonging to some person or entity capable of owning or possessing property. The proof that the company was an improvement district sufficiently establishes it as such an entity, and, for that reason the kind or character of the entity is immaterial. Section 2233 of Kirby's Digest reads as follows:

"Where an offense involves the commission, or an attempt to commit, an injury to person or property, and is described in other respects with sufficient certainty to identify the act, an erroneous allegation as to the person injured, or attempted to be injured, is not material."

✓ In the construction of this statute it has been held that—

"An indictment for receiving stolen property belonging to a partnership is sufficient if it correctly names the partnership, though an error is made in giving the initials of one of the partners." *Andrews v. State*, 100 Ark. 184, 139 S. W. 1134.

And in the later case of *Ivy v. State*, 109 Ark. 446, 160 S. W. 208, in construing the same statute, this court said:

"The court, having already held that it is not a variance from the allegations of the indictment to prove the names of the partners, other than as alleged, is of the opinion that the failure to prove the names of the individuals at all as alleged is not a fatal variance."

In the instant case the house burglarized was sufficiently identified or described by naming the possessor or owner thereof as the Searcy Electric Light Improvement District No. 1, which the proof shows is an entity capable of owning and occupying property; so an erroneous allegation in the indictment to the effect that it was a corporation is immaterial.

3. The instruction complained of as erroneous by appellant told the jury that "the possession of property recently stolen affords presumptive evidence of guilt." The instruction is justified by learned counsel for the state by the language used in the case of *Douglass v. State*, 91 Ark. 492, 121 S. W. 923. The language referred to is as follows:

"But the possession of property recently stolen does raise a presumption tending towards guilt," etc.

[4, 5] The language used by the learned judge who handed down the opinion in that case was inaccurate. The rule is that the unexplained possession of recently stolen property is a fact from which an inference of guilt may be drawn. The instruction complained of in the instant case was clearly an instruction on the weight of the evidence. This court said, in the case of *Duckworth v. State*, 83 Ark. 192 (103 S. W. 601) quoting from the syllabus:

"It was error to instruct the jury in a larceny case that the unexplained possession of recently stolen goods, corroborated by other evidence, is sufficient to convict; it being the exclusive province of the jury to determine when the evidence is sufficient to convict."

The same rule was announced in the cases of *Sons v. State*, 116 Ark. 357, 172 S. W. 1029, and *Mitchell v. State*, 125 Ark. 260, 188 S. W. 805.

[6] Appellant, however, is not in a position to take advantage of this error. The erroneous instruction is one of several contained in the oral charge. The exception to it was in the following form:

"Note, also, our exception to the entire oral charge."

This exception was preserved by a request for a new trial in the following language:

"Because the court erred in his oral charge to the jury."

The exception and preservation thereof are clearly an exception in gross. An exception en masse to instructions cannot avail, unless all the instructions are erroneous. *Wells v. Parker*, 76 Ark. 41, 88 S. W. 602, 6 Ann. Cas. 259; *K. C. Sou. Ry. Co. v. Morris*, 80 Ark. 528, 98 S. W. 363, 10 Ann. Cas. 618; *Ward v. Sturdivant*, 86 Ark. 103, 109 S. W. 1168; *H. D. Williams Cooperage Co. v. Clark*, 105 Ark. 157, 150 S. W. 568. The other instructions contained in the oral charge were correct.

The judgment is therefore affirmed.

DEAN v. COLE et al. (No. 45.)

(Supreme Court of Arkansas. Dec. 8, 1919.)

1. HOMESTEAD §=162(1)—ABANDONMENT BY REMOVAL WITH NO INTENTION TO RETURN.

In order to constitute abandonment of a homestead, the homestead claimant must remove therefrom with an intention not to return.

2. HOMESTEAD §=123—AVAILABILITY OF EXEMPTION TO BUYER FROM CLAIMANT.

A homestead claimant may sell the homestead free from any judgment rendered against him, or execution issued thereon, except for claims which may be enforced against a homestead, under Const. art. 9, § 3, and Kirby's Dig. § 3898.

3. HOMESTEAD §=193—TIME TO ASSERT CLAIM.

The failure by a homestead claimant to claim the exemption before sale of the land on execution, or to file a description or schedule of it in the recorder's or clerk's office, does not work a forfeiture of the homestead right, which, under Kirby's Dig. § 3902, may be asserted when suit is brought for possession of the lands constituting the homestead.

Appeal from Crawford Chancery Court; J. V. Bourland, Chancellor.

Suit by Fred Dean against J. T. Cole, wherein T. A. Cole filed intervention. From a decree dismissing the complaint, and quieting title in the intervener, complainant appeals. Affirmed.

J. B. London, of Van Buren, for appellant. Starbird & Starbird, of Alma, for appellees.

HUMPHREYS, J. This suit was begun in the circuit court of Crawford county by appellant against appellee J. T. Cole to recover possession of 120 acres of land in said



county. Appellant alleged ownership and the right to possession of said lands by purchase at an execution sale under a judgment obtained by him against J. T. Cole on the 3d day of July, 1916, and that appellee J. T. Cole, through his tenant, Joe Mullen, was in the wrongful possession thereof.

Appellee T. A. Cole filed an intervention, alleging that he was the owner of said lands by purchase from appellee J. T. Cole and Russle Cole on the 9th day of March, 1917; that at the time he so purchased them, and at the time appellant obtained judgment and sold the lands under execution and obtained a sheriff's deed thereto, said lands were the homestead of J. T. and Russle Cole; and that he, by tenant, and not J. T. Cole, was in the actual and rightful possession of said real estate. Intervener prayed that his title be quieted against the claim of appellant, and moved and obtained a transfer of the cause to the chancery court of said county. In that court appellant filed an answer, denying the material allegations set forth in the intervention.

We have refrained from setting out the other issues joined in the pleadings, because the determination of the issue stated is decisive of the case. The cause was submitted to the court upon the pleadings and evidence, from which it was found that, at the time appellant obtained judgment against appellee J. T. Cole, sold the land in controversy under execution, became the purchaser thereof, and obtained his deed thereto, said lands were the homestead of appellee Jesse Cole and Russle Cole; that T. A. Cole purchased said lands from J. T. and Russle Cole, free from any judgment or execution lien in favor of appellant. A decree was rendered in accordance with the findings of the court dismissing appellant's original complaint and quieting the title to said lands in T. A. Cole, from which findings and decree an appeal has been prosecuted to this court.

The facts relating to the main issue in the case are, in substance, as follows: On the 3d day of July, 1916, appellant recovered judgment against J. T. Cole in the circuit court of Crawford county for \$59.10, including costs. On the 5th day of February, 1917, execution was issued, and on the 8th day of the same month levied upon the lands in controversy. Said lands were sold under the execution, and purchased by appellant for the amount of his judgment and costs. After the expiration of redemption, to wit, on the 27th day of April, 1918, the sheriff executed appellant a deed for said lands. Russle Cole inherited an undivided one-third interest in said lands from her father, Samuel Smith, who died intestate in the year 1913. Gussie Meadors, another daughter, also inherited an undivided one-third interest therein. On the 8th day of September, 1915, Gussie Meadors sold the land to either J. T. Cole or

Russle Cole, or to both, and she and her husband conveyed it to J. T. Cole and Russle Cole, who were, and are, husband and wife. In order to pay the purchase money for the undivided one-third interest sold by Gussie Meadors and conveyed to the Coles, J. T. Cole and Russle Cole executed a mortgage upon an undivided two-thirds interest in said land for \$500 to J. H. Cole. Immediately after the purchase of the Gussie Meadors interest in said land, J. T. Cole and Russle Cole moved upon and occupied it as their homestead. In April, 1916, they, with their children, moved to Van Buren and lived in a rented house. They both testified it was their intention to return to the lands, but, in the meantime, they were compelled to sell it in order to pay the mortgage. On the 9th day of March, 1917, they sold the land to T. A. Cole, the intervener, who, as a part of the consideration therefor, paid the mortgage. J. T. Cole was a married man, the head of a family, and a resident of the state of Arkansas at the time the lands were purchased and thereafter. The lands were situated in the county, and an undivided one-third interest therein was of the value of about \$1,000. Neither J. T. Cole nor Russle Cole owned any other lands.

[1] Appellant contends that, when J. T. and Russle Cole moved off the land to Van Buren, they lost their homestead right therein by abandonment. In order to constitute abandonment of a homestead, the homestead claimant must remove therefrom with an intention not to return. No such intention appears from the facts and circumstances in the case. Their avowed intention was otherwise. They did not purchase another home, but lived temporarily in a rented house after they moved to Van Buren. When the lands were about to be sold under execution, J. T. Cole protested, and notified the prospective bidders that, if they bought, it would be subject to his homestead right. Their avowed intention to return to the land was thwarted by necessity. The mortgage given to obtain the money to purchase a part of the lands practically absorbed it. The chancellor is therefore sustained in the finding that it was the homestead of J. T. and Russle Cole, when appellant obtained his judgment and sold the land under execution.

[2] Again, it is insisted by appellant that the plea of homestead as defense to judgment or execution liens is available only to the homestead claimant, and not to his grantee. Under article 9, § 3, of the Constitution of 1874, and the Homestead Act of the General Assembly of 1887 (Kirby's Digest, § 3898), homesteads are not subject to judgment or execution liens on ordinary claims, but only such claims as are specified in the Constitution and act. The claim in the instant case is not one of the specified claims that may be enforced against a homestead. A homestead

claimant may therefore sell his homestead free from any judgment rendered against him or execution issued thereon, unless for claims which may be enforced against a homestead under the Constitution and act. *Isbell v. Jones*, 75 Ark. 591, 88 S. W. 593.

[3] Lastly, it is insisted that T. A. Cole cannot avail himself of the plea of homestead as a defense against the execution sale, because J. T. and Russle Cole forfeited their homestead right before they sold the lands to him, by failing to claim it as exempt before the execution sale, or by failing to file a description or schedule of same in the recorder's or clerk's office. Such failure on the part of a homestead claimant does not work a forfeiture of the homestead right. The right may be asserted when suit is brought for possession of the lands constituting the homestead. Section 3902, Kirby's Digest; *Isbell v. Jones*, supra.

No error appearing, the decree is affirmed.

#### OIL TROUGH GIN CO. v. DIRECTOR GENERAL OF RAILROADS. (No. 37.)

(Supreme Court of Arkansas. Dec. 8, 1919.)

##### 1. TRIAL §—177 — EFFECT OF REQUEST BY BOTH PARTIES FOR PEREMPTORY INSTRUCTION.

Where both parties request peremptory instructions and do nothing more, they assumed the facts to be undisputed and submit to the judge the determination of the inferences to be drawn therefrom.

##### 2. CARRIERS §—134 — SUFFICIENCY OF EVIDENCE OF LOSS OF SHIPMENT IN TRANSIT.

Where a shipper introduced evidence tending to show that cotton seed weighed a certain amount when loaded for shipment, but also showed a smaller weight secured at destination before delivery to the consignee, held, that there was a conflict as to the weight of the cotton seed shipped supporting a directed verdict for defendant.

Appeal from Circuit Court, Independence County; Dene H. Coleman, Judge.

Action by the Oil Trough Gin Company against the Director General of Railroads. Judgment for defendant, and plaintiff appeals. Affirmed.

Appellants brought this suit against appellee to recover damages in the sum of \$701.83 for loss sustained by them in the transportation of a car of cotton seed alleged to have occurred on account of the negligence of appellee.

On the part of the appellants, it was shown that the Oil Trough Gin Company is a partnership composed of J. M. Stephens and L.

L. Ellison. According to the testimony of J. D. Ford, he was the bookkeeper of the firm during the ginning season in the fall of 1917. The firm operated its gin at a place five or six miles distant from Newark, Ark. The firm sold a carload of cotton seed to the Forrest City Cotton Oil Company at Forrest City, Ark. The usual custom of the firm in cases of this sort was to weigh the cotton seed in wagons at the gin and then haul it to Newark, where it was placed in a car on the railroad to be carried to the point of destination. Ford weighed the wagons which started from the gin to Newark with the cotton seed in question. The amount so weighed by him amounted to 60,050 pounds. The drivers of the last two wagons testified that they unloaded their seed from their wagons and placed it in a car. This filled the car up to the roof, except a place right at the door where a man would stand who was shoveling the seed back. None of the drivers of the other wagons were placed on the stand.

J. A. Rouse helped to load the car of cotton seed in question and testified that the last two loads filled the car up to the roof. He further stated that he was paid by the ton for loading seed and had often loaded cars of the size of the one in question in the present case; that the returns from the point of destination governed as to his payment for loading the cars, and, based on his past experience, he said that he was sure that the car in question contained 60,000 pounds of seed. The car was sealed up when it was loaded. A bill of lading was issued, and the bill of lading placed the weight at 80,000 pounds with this notation (weight subject to correction).

Appellants also introduced in evidence the freight bill which was issued at Forrest City, Ark., the point of destination. The freight bill showed the weight of the cotton seed to be 40,100 pounds. Here the appellants rested, and appellee moved the court for an instructed verdict. Thereupon appellants, also, asked the court for an instructed verdict. Neither party asked for any further instructions.

The court directed a verdict for appellee, and the case is here on appeal.

Jno. B. & J. J. McCaleb, of Batesville, for appellant.

Troy Pace, of Little Rock, for appellee.

HART, J. (after stating the facts as above). [1] The effect of our decisions is that, where both parties request a peremptory instruction and do nothing more, they thereby assume the facts to be undisputed, and submit to the judge the determination of the inferences proper to be drawn from them. *St. L. Southwestern Ry. Co. v. Mulkey*, 100 Ark. 71, 139 S. W. 643, Ann. Cas. 1913C, 1339, and *St. Louis, I. M. & So. Ry. Co. v. Ingram*, 113 Ark. 377, 176 S. W. 692.

[2] Counsel for appellants concede this to be the effect of our decisions, but they contend that under the undisputed evidence the court should have directed a verdict for appellants. We do not agree with counsel in this contention. It is true that, under the evidence adduced by appellants, they made out a case against appellee; but it cannot be said that the evidence in their favor is undisputed. The bookkeeper for appellants weighed out 60,000 pounds of cotton seed for the purpose of having the same shipped to Forrest City, Ark. These wagons started towards Newark, but the witness did not know whether all or only part of the seed reached their destination. Only two of the haulers testified. They said they hauled the two last loads, and that when they placed the seed in the car the car was full up to the roof. A witness who helped load the car said that he was paid by the ton for loading cars of seed, and that he was paid by the amount shown in the freight bill or returns to have been received by the consignee at the point of destination. He felt sure, judging from his past experience, that the car in question contained 60,000 pounds of seed. The weight of seed was placed in the bill of lading at 80,000 pounds with this notation (weight subject to correction). This evidence was sufficient to have warranted a verdict for appellants, but it is not undisputed. The car was sealed up after it was loaded and carried to its destination at Forrest City, where it was weighed by the railroad company before it was unloaded. Its weight there was shown to be 40,000 pounds. This was the weight placed in the freight bill which was introduced by appellants without objection. This testimony tended to contradict the other testimony introduced by appellants. The jury might have found from it that the car having been weighed at point of destination before it was delivered to consignee, and that the weight being only 40,000 pounds, the other witnesses for the plaintiff were mistaken in placing or estimating the weight of the seed at 60,000 pounds.

Therefore it cannot be said that the testimony in favor of appellants is undisputed, and the judgment must be affirmed.

SUMPTER et al. v. HOT SPRINGS SAVINGS, TRUST & GUARANTY CO.  
et al. (No. 124.)

(Supreme Court of Arkansas. Oct. 6, 1919.)

1. APPEAL AND ERROR ¶485(1)—SUPERSEDEAS ONLY STAYS PROCEEDINGS UNDER JUDGMENT.

An appeal and supersedeas do not have the effect of vacating the judgment, but only stay proceedings thereunder.

2. MORTGAGES ¶524—POWERS OF CHANCERY COURT AFTER SALE ON EXECUTION.

In view of Kirby's Dig. § 3262, an execution can be raised on a bond executed by purchaser at sale of mortgaged land in the manner provided in sections 3260, 3261, without an order of the court, and the execution of such a bond is wholly independent of a sale made by a chancery court in the enforcement of a decree of foreclosure, and such court, after a sale under execution, cannot confirm the sheriff's sale, or appoint a commissioner to make a deed, or issue a writ of possession.

3. LANDLORD AND TENANT ¶53(2)—AFTER PASSAGE OF TITLE RESPONSIBILITY OF TENANT IS TO NEW OWNER.

Where landlord's title has passed to another by process of law, the tenant's responsibility is then to the true owner.

4. INJUNCTION ¶46—TRESPASS AND THREATS OF OUSTER WILL NOT BE ENJOINED, DEFENDANT BEING SOLVENT.

Trespass and threats of ouster, not of a continuous or irreparable nature, will not be enjoined; defendants not being insolvent.

5. EQUITY ¶442—VALIDITY OF EXECUTION SALE NOT SUBJECT FOR A BILL OF REVIEW.

The validity of an execution sale made under an execution issued on maturity of a bond executed after foreclosure sale, as provided in Kirby's Dig. §§ 3260, 3261, was not a proper subject for a bill in review; sale having been made after the final adjudication in the original foreclosure proceedings.

6. TRESPASS ¶27—IN ACTION BY PURCHASER AT EXECUTION SALE DEFENDANT COULD ALLEGE INVALIDITY OF SALE.

In an action for trespass by a purchaser of land at execution sale against the former owner, defendant could set up as a defense that the execution sale was not according to law.

7. EJECTMENT ¶23 — IN ACTION BY PURCHASER AT EXECUTION SALE DEFENDANT COULD SET UP ITS INVALIDITY.

In ejectment by a purchaser of land at execution sale, defendant could properly set up invalidity of the sale as a defense.

Appeal from Garland Chancery Court; J. P. Henderson, Chancellor.

Suit by the Hot Springs Savings, Trust & Guaranty Company and another against Nannie E. Sumpter and others. From a decree for plaintiffs, defendants appeal, and plaintiffs file a cross-appeal. Reversed, with instructions.

The appellee Hot Springs Savings, Trust & Guaranty Company, being the owner and holder of a note and mortgage for \$14,000, given to it by appellant Mrs. Nannie E. Sumpter, proceeded in the chancery court of Garland county to foreclose said mortgage. It obtained judgment and decree of foreclo-

sure and order of sale against all property described in the deed of trust, including lot 1, in block 112, in the city of Hot Springs, known as the Sumpter House property. Mrs. Nannie E. Sumpter pleaded usury as a defense in that action. From the judgment and decree of foreclosure, an appeal was prosecuted by Mrs. Nannie E. Sumpter, which was affirmed, and a judgment entered in the Supreme Court against her and her bondsmen, William Sumpter, Orlando H. Sumpter, and D. F. Radford, for the amount of the indebtedness, interest, and costs. A mandate was secured, and, upon the filing thereof in the chancery court of Garland county the commissioner was directed to sell the property described in the decree, in accordance with the terms specified in the order. Mrs. Nannie E. Sumpter requested that lot 1, block 112, known as the Sumpter House property, be sold first, which was done, at which sale William Sumpter bid \$17.100, being the amount of the judgment and costs to that date. He executed his bond, with Orlando H. Sumpter and Mrs. Nannie E. Sumpter as sureties thereon, for the payment of said sum, and the sale was confirmed by the court. The bond was not paid at maturity, and the court directed the clerk to issue an execution on the bond. The sheriff levied upon all the property described in the original decree of foreclosure, and on the 3d day of September, 1917, sold same in separate parcels, at which sale appellee, Hot Springs Savings, Trust & Guaranty Company, purchased each tract for a specified amount. The total amount of the bids for the several tracts was insufficient to pay the amount due on the bond. On the 10th day of August, 1918, Mrs. Nannie E. Sumpter, William Sumpter, and Orlando H. Sumpter filed a bill of review, containing a motion to set aside the sale of said property under execution, to which a demurrer was filed. Upon hearing, Mrs. Nannie E. Sumpter, William Sumpter, and Orlando H. Sumpter refusing to elect between the causes of action set up in the bill of review, said bill was dismissed, upon the ground that it contained a misjoinder of causes of action and parties. From the decree dismissing the bill of review, an appeal was prosecuted to, and is now pending in, this court.

Ah alias execution was obtained and levied upon other property belonging to the bondsmen of William Sumpter to satisfy the balance not paid by the sales under the first execution. The Hot Springs Savings, Trust & Guaranty Company also became the purchaser of the property sold under the alias execution. On the 19th day of December, 1918, after the expiration of one year from the date of the execution sales, the sheriff executed a deed to the Hot Springs Savings, Trust & Guaranty Company for all the property it had purchased at said execution

sales. Mrs. Nannie E. Sumpter had remained in the possession of lot 1, block 112, known as the Sumpter House property, under tenant, until early in December, 1918. Her tenant, Mr. Mark, was renting the property under monthly contract. He sold the furniture in the hotel and the balance of his monthly term to J. F. George. Upon hearing that the Hot Springs Savings, Trust & Guaranty Company had obtained a deed to the property from the sheriff, J. F. George attorned to it, by paying one month's rent in advance, on the 26th day of December, 1918, for the use of the Sumpter House property. Thereupon, Orlando H. Sumpter, representing himself, Mrs. Nannie E. Sumpter, and Ida M. Sumpter, widow of William Sumpter, who had died early in December, 1918, nailed up some of the doors in the Sumpter House and threatened to put J. F. George and his guests out. Thereupon appellees, the Hot Springs Savings, Trust & Guaranty Company and J. F. George, instituted a suit in the Garland chancery court against the appellants, seeking an injunction to prevent appellants from interfering with their possession. Subsequently the appellees filed two amended complaints, to each of which complaints appellants filed demurrers, motions to strike, and, specifically reserving the points raised in the demurrers and motions to strike, filed an answer and cross-complaint to each of said complaints. The pleadings on the part of the appellees, as finally amended, were in the alternative: First, that they were in possession, and their possession was being disturbed by appellants; second, if not in possession, they were entitled to have a confirmation of the execution sale made by the sheriff, and a deed issued to the Hot Springs Savings, Trust & Guaranty Company by a commissioner of the chancery court, and a writ of assistance to place them in possession of all the property they had purchased at both execution sales. Appellants' defenses were, in substance, that they were themselves in possession of the hotel property by tenant, that the chancery court had no jurisdiction to confirm the sales of the sheriff under execution, or to order a commissioner to make a new deed to the Hot Springs Savings, Trust & Guaranty Company, or to issue a writ for possession.

The chancery court dissolved the temporary injunction it had issued in favor of appellees, and dismissed the bill for permanent injunction; also struck out the answer and cross-bill of appellants upon the ground that they set up the same matter that was contained in the bill of review; also treated the sale of the sheriff, under the first execution, as a sale under order of court, confirmed it, and directed a commissioner, specially appointed for that purpose, to make a deed for all of the lands sold under the first execution to the Hot Springs Savings, Trust &

Guaranty Company; also issued a writ in favor of appellees, Hot Springs Savings, Trust & Guaranty Company and J. F. George, for the possession of the Sumpter House property, and declined to approve the sale of the sheriff under the second execution, and to direct deed and issue writ of possession in favor of the Hot Springs Savings, Trust & Guaranty Company for the property sold and purchased by it under said execution. The case is before us for trial de novo on appeal and cross-appeal.

R. G. Davies and O. H. Sumpter, both of Hot Springs, for appellants.

C. T. Cotham and C. C. Sparks, both of Hot Springs, for appellees.

HUMPHREYS, J. (after stating the facts as above). [1] It is first insisted by appellants that, because a judgment was rendered in the Supreme Court on appeal, in the original foreclosure proceeding against Mrs. Nannie E. Sumpter and her bondsmen on the supersedeas bond, the Hot Springs Savings, Trust & Guaranty Company had no right to take a mandate and attempt to enforce the collection of its original judgment and decree of foreclosure in the chancery court. Such is not the effect of an appeal with supersedeas. This court said in the case of *Miller v. Nuckolls*, 76 Ark. 485, 89 S. W. 88, 113 Am. St. Rep. 101, 6 Ann. Cas. 513, that—

"An appeal and supersedeas do not have the effect of vacating the judgment, but only stay proceedings thereunder."

[2] It is next insisted that the chancery court had no jurisdiction to approve a sheriff's sale made under general execution, directed and issued on the bond, executed for the purchase money of the Sumpter House property by William Sumpter, as principal, and Mrs. Nannie E. Sumpter, and Orlando H. Sumpter, as sureties, upon their failure to pay it. The execution referred to under which the sale was made was a general execution issued on said bond, which had been executed in the manner provided in sections 3260 and 3261 of Kirby's Digest. It is provided by section 3262 of Kirby's Digest that "all such bonds shall have the force and effect of a judgment. \* \* \*" This execution could have been raised as well without as with an order of the court. The order of the court directing it does not give it any additional force and effect. The sale under an execution on such a bond is strictly a statutory proceeding. No authority is given in the statute authorizing a court to confirm a sale of real estate made thereunder, nor to order the sheriff to make the sale and make a deed to the purchaser, nor to issue a writ of possession for the property sold under it. It is a proceeding wholly independent of an order of sale made by a chancery

court in the enforcement of a decree of foreclosure. In that character of sale, it is the duty of the court to fix the time, place, and terms of sale, and the court making such an order is authorized to confirm the sale and order a deed, and issue a writ for the possession of the specific property sold thereunder. The chancery court therefore erred in confirming the sheriff's sale made under the first writ of execution, in appointing a commissioner to make a deed, and in issuing a writ of possession for the Sumpter House property in favor of appellees, Hot Springs Savings, Trust & Guaranty Company and J. F. George.

[3-7] It is contended, however, by appellees, that, because J. F. George, Mrs. Nannie E. Sumpter's tenant, attorned to the Hot Springs Savings, Trust & Guaranty Company, it was in possession of the property, and had a right to injunctive relief to protect its possession against trespassers, and that, under the rule that when the chancery court takes jurisdiction for one purpose it will give complete relief, it was entitled to have the sheriff's sale confirmed, a court deed, and a writ for possession. If the execution sale was regular, the effect of the sheriff's deed was to divest whatever title William Sumpter and his sureties, Orlando H. Sumpter and Mrs. Nannie E. Sumpter, had in the real estate sold under both executions, and to vest it in the Hot Springs Savings, Trust & Guaranty Company. Where the landlord's title has passed to another by process of law, the tenant's responsibility is then to the true owner. *Earle v. Hale*, 31 Ark. 470. The rule is laid down in 24 Cyc. at page 956, that—

"A tenant may attorn to the purchaser of his landlord's interest at an execution sale, or at a foreclosure sale."

Presuming, then, in the regularity of the execution sale and that appellees were, and are, in the rightful possession of the Sumpter House property, it does not follow that injunctive relief may be invoked to protect their possession against trespasses remedial at law. The trespasses and threats of ouster alleged in the complaint were not of such continuous and irreparable nature as would call for injunctive relief. Appellees, being in possession of the Sumpter House property, had a right to sue the Sumpters at law for any damages occasioned by their trespasses; it not being alleged that they were insolvent. This is the substance of their complaint as to said property. As to the other property purchased, for which they held a sheriff's deed, the complaint can only be treated as a suit in ejectment if appellants are resisting possession thereof. The answer of appellants indicates that they are resisting the right to recover possession of

the latter property, and also the action for damages on account of trespasses as to the Hotel Sumpter property, because the execution sale was not made according to law. It is said that such a defense cannot be interposed, because the validity of the execution sale was involved in the bill for review. It was not a proper subject for a bill in review, because the sale was made after the final adjudication in the original foreclosure pro-

ceeding. It was proper subject-matter for defense in the suit of appellees for damages on account of trespasses to the Sumpter House property, and in a suit for the possession of the other property sold at the first execution sale. The court erred in striking out that portion of appellant's answer.

For the errors indicated, the decree is reversed, with instructions to transfer the suit to the circuit court.

REESE v. CITY OF ST. LOUIS. (No. 20154.)  
(Supreme Court of Missouri, Division No. 2.  
Oct. 14, 1919. Rehearing Denied  
Dec. 4, 1919.)

1. APPEAL AND ERROR  $\S$  877(5)—JUDGMENT  
ON DEMURRER TO EVIDENCE UNAPPEALED  
FROM IS RES JUDICATA.

Demurrer to the evidence, sustained by the trial court at the close of the trial in favor of one of the two defendants, unappealed from by plaintiff, became res judicata, and marked the end of the litigation so far as such defendant was concerned.

2. MUNICIPAL CORPORATIONS  $\S$  812(7)—NOTICE  
OF INTENTION TO SUE FOR INJURIES INSUFFICIENT AS TO TIME.

Notice to city that injuries to driver of wagon, due to a depression in a street, occurred "on or about" a certain date, held not a compliance with Acts 1913, p. 545, § 1, providing for such notices, and requiring statement of the time when the injury was received.

Appeal from St. Louis Circuit Court;  
Kent K. Koerner, Judge.

Action by Katy Reese against the City of St. Louis, and, by amendment, against the Southwestern Telegraph & Telephone Company. From judgment for plaintiff against it, defendant City appeals. Reversed.

The plaintiff brought this action originally against the city of St. Louis, to recover damages on account of the death of her husband, David M. Reese, alleged to have been caused by the negligence of said city. On the 31st day of August, 1914, the plaintiff amended her petition by making the Southwestern Telegraph & Telephone Company a party defendant. The petition upon which the suit was tried alleged that plaintiff was the wife of deceased up to his death, and alleged the corporate character of both defendants and a number of other facts by way of inducement. It then proceeds as follows:

"That on said date [March 27, 1914] deceased was lawfully driving along Washington avenue, in the exercise of ordinary care for his own safety, and said wagon ran into a hole alleged to exist on said Washington avenue, and in consequence of the jolt or shock, caused by said wagon running into said hole, deceased was thrown from it upon the street and run over, and thereby sustained injuries from which he subsequently died, and that the occasion of running his wagon into said alleged hole and the death consequent thereto, were caused in these respects:

"First. That the defendant Southwestern Telegraph & Telephone Company, under the supervision of the defendant city of St. Louis, carelessly and negligently filled an excavation theretofore made by it, so as to leave the said hole in said street, whereby was occasioned the fall of David M. Reese, and his death consequent thereto.

"Second. That defendants, although on said day they knew, or in the exercise of ordinary

care would have known, the dangerous condition of said street, and the existence of said hole therein, carelessly and negligently failed then, or at any other time, to fill said hole, so as to render said street safe for persons using the same, whereby was occasioned the fall of the said David M. Reese, and his death consequent thereto.

"Third. That the defendants, although on said day they knew, or in the exercise of reasonable care would have known, the dangerous condition of said street, and the existence of said hole thereon, carelessly and negligently failed then, or at any other time, to place any guard or protection around said hole, so as to prevent persons using said street to be harmed by said hole, whereby was occasioned the fall of said David M. Reese, and his death consequent thereto."

To this petition each defendant filed a separate answer, consisting of a general denial and a plea of contributory negligence upon the part of deceased. To each of these answers the plaintiff replied, with a general denial of the new matter set up in the answer. The hole referred to in the petition, according to the testimony, was a "saucer-like" depression in the pavement, which from north to south measured 6 feet, and from east to west 5 feet and 10 inches, and 3¼ inches deep in the center. Deceased at the time of his injury was driving a jumbo transfer wagon at the place of said depression, and while his attention was diverted to one Bremer, who had boarded the wagon from the rear, in conversation and in trying to make room for him in a seat designed only for one man to ride in, which was a violation of the rules of the transfer company, he drove his wagon into said saucerlike depression, fell from it, and was run over and killed. Bremer escaped with his life, but was quite severely injured. Both deceased and Bremer were under the influence of intoxicating liquor. Reese had a quart and a pint of whisky in the seat on which he was riding, which showed they had been subjected to liberal use. Bremer had a bottle of whisky in his pocket, and had before getting on the wagon drunk a large quantity of beer. At the hospital the fumes of liquor were so strong on both of these parties that physicians administering to their necessities testified that they were under its influence. The whisky deceased had on the seat in which he was riding, unsupported and with a serenity worthy of a better cause, withstood the drive over said depression, and was taken therefrom without breaking a bottle or spilling a drop.

At the conclusion of the trial the court gave a demurrer to the evidence as to the Southwestern Telegraph & Telephone Company, and overruled the demurrer asked by the city, and submitted the cause to the jury as to it, which resulted in a verdict of \$10,000 in favor of plaintiff. No appeal was taken by plaintiff from the action of the court in giving

the demurrer in favor of the telephone company. The city, after failing to get a new trial upon proper motions filed, has appealed in due form to this court.

Charles H. Daues and Everett Paul Griffin, both of St. Louis, for appellant.

Robert C. Grier, of St. Louis, Edward H. Mitchell, of Lordsburg, N. M., and Thomas P. Moore, of St. Louis, for respondent Reese.

Jeffries & Corum, of St. Louis (D. A. Frank, of St. Louis, of counsel), for respondent Southwestern Telegraph & Telephone Co.

MOZLEY, C. (after stating the facts as above). [1] The demurrer given by the court at the close of the trial in favor of the Southwestern Telegraph & Telephone Company, unappealed from by the plaintiff, became res adjudicata, and marked the end of the litigation so far as it was concerned. If the plaintiff was satisfied with the demurrer being given, we fail to discover any reason for complaint elsewhere. It results that the Southwestern Telegraph & Telephone Company has no business in connection with this case in this court, and no further attention will be paid to it.

[2] Can plaintiff recover against the city of St. Louis? We think not, for the reason that she has not complied with the condition precedent prescribed by the statute, which must be complied with strictly before suit is brought. The law of Missouri (Laws 1913, p. 545, § 1) reads as follows:

"No action shall be maintained against any city of this state which now has or may hereafter attain a population of one hundred thousand inhabitants, on account of any injuries growing out of any defect in the condition of any bridge, boulevard, street, side walk or thoroughfare in said city, until notice shall first have been given in writing to the mayor of said city, within ninety days of the occurrence for which such damage is claimed, stating the place where, the time when such injury was received, and the character and circumstances, of the injury, and that the person so injured will claim damages therefor from such city."

Plaintiff gave notice of intention to sue under section 8863, R. S. 1909, which is, with a few minor changes unimportant here, the same as the statute above quoted. The vital question is: Has the plaintiff given a notice of intention to sue that squares with the requirements of said statute? We think not. The notice reads as follows:

"St. Louis, Missouri, May 8, 1914.

"To the Mayor of the City of St. Louis, City Hall, St. Louis, Mo.—Sir:

"You are hereby notified, in accordance with section 8863, of the Revised Statutes of Missouri 1909, that the undersigned, Katy Reese, will make claim for damages against the city of St. Louis on account of the death of her husband, David M. Reese, caused by said David M. Reese being thrown from a wagon upon which he was riding, run over, and fatally injured, when one wheel of said wagon ran into a

hole in the paving on Washington avenue, at a point opposite or near No. 210 Washington avenue, north of city block 65, in the city of St. Louis, state of Missouri, on or about the 27th day of March, 1914.

"[Signed]

Katy Reese.

"State of Missouri, City of St. Louis—ss.:

"I, Katy Reese, being duly sworn, upon my oath state that the facts concerning the death of my husband, David M. Reese, as set forth in above notice, are true, to the best of my knowledge and belief.

"[Signed]

Katy Reese.

"Subscribed and sworn to before me this the 8th day of May, 1914. My commission expires February 21, 1916.

"[Seal.] E. H. Mitchell, Notary Public.

"Service of above notice acknowledged this 13th day of May, 1914.

"Henry W. Kiel,

"Mayor of the City of St. Louis."

It will be observed from the above notice that the injury sued for is said to have happened "on or about the 27th day of March, 1914." The statutes above referred to are mandatory as to the place where and the time when the accident occurred, and the place where and the time when it occurred must be stated with exactness. The purpose of the statute is manifest. Its design is to protect large cities from the assertion of stale, fraudulent, or fictitious claims for damages, by giving such cities opportunity to make an early investigation of the facts, and it is plain that the purpose of the statute would be wholly thwarted, were it not mandatory as to the requirements of the notice of intention to sue. Our court en banc has recently passed upon the precise question in the instant case in case of Hackenjos v. City of St. Louis, 203 S. W. 986. There the notice to the mayor of intention to sue for damages, in describing when the accident happened, employed the words "on or about" a certain date. In the case in hand the notice states the accident happened "on or about the 27th day of March, 1914." Thus the case in hand and the case cited are on all fours. The court held, after a very full consideration of the question, that a notice stating "on or about" was not a compliance with a statute requiring as a condition precedent to bringing the action, that the precise time of the accident be set forth therein, and affirmed the lower court in giving judgment of nonsuit against plaintiff.

Under the ruling of this case, which we are quite sure is correct, we hold in the instant case that the notice of intention to sue was not a compliance with the mandatory provisions of the statute, and accordingly reverse the judgment.

RAILEY, C., not sitting.

WHITE, C., concurs.

PER CURIAM. The foregoing opinion of MOZLEY, C., is hereby adopted as the opinion of the court. All concur.



EVERSMEYER v. BROYLES et al.  
(No. 20191.)(Supreme Court of Missouri, Division No. 2.  
July 5, 1919. Rehearing Denied  
Dec. 4, 1919.)1. EJECTMENT  $\S$ 114—DETERMINATION OF  
GOVERNMENT SURVEY LINE OR CORNER FOR  
LOCATION.

In an action of ejectment, where a government survey of a line or corner is in dispute, and the issue in the case turns upon its location, the judgment must determine and state in some manner just where it is, so that it can be located.

2. BOUNDARIES  $\S$ 3(8)—SECTION LINES AND  
CORNERS OF SURVEY FIXED WITHOUT MONU-  
MENTS.

Section lines and corners in a government survey are fixed and determined, whether marked by visible monuments or not.

3. EJECTMENT  $\S$ 114—SUFFICIENCY OF DE-  
SCRIPTION OF LAND BY JUDGMENT.

Description of land by judgment for plaintiff in ejectment held not so vague and uncertain as to render the judgment void, in that it could not be determined from the description whether the land was or lay within the northeast fractional quarter of a section, as alleged in the petition, or in a survey mentioned in the judgment and entirely without such fractional quarter.

4. EVIDENCE  $\S$ 82, 83(7) — PRESUMPTION AS  
TO DESCRIPTION OF LAND BY JUDGMENT.

It must be assumed that the court, trying an action of ejectment and rendering judgment for plaintiff, acted regularly and with full knowledge of the situation in describing the land in the judgment; so that it must be presumed that the sheriff, enforcing the judgment, would know where to find the section, corner, or section line involved, the judgment covering the land described, following the courses and distances wherever the same might fall, and such courses and distances being limited to known lines and monuments.

5. JUDGMENT  $\S$ 527—DESCRIPTION OF LAND  
IN JUDGMENT IN EJECTMENT.

In suit to enjoin levy of an execution and for annulment of the judgment in ejectment on which it was issued, on the ground that the description of the land was defective, findings of the trial court for the judgment defendant held conclusive, in view of the state of the record, not showing that the judgment, in view of its description, actually was for the recovery of land not described in the petition.

6. JUDGMENT  $\S$ 521—NO DISPUTE OF FACT  
FOUND ON COLLATERAL ATTACK.

In his suit to enjoin execution on an ejectment judgment, defendant in the ejectment suit cannot be heard to dispute a fact found by the trial court.

7. JUDGMENT  $\S$ 521—UNAVAILABILITY ON  
COLLATERAL ATTACK OF DEFENSE ORIGINALLY  
AVAILABLE.

Defendant in ejectment should have set up the defense that he was the owner of an un-

divided third part of the land, and it can avail him nothing in his suit to enjoin levy of execution and for annulment of the ejectment judgment; he cannot be heard to object to the regularity of the ejectment proceeding, or urge any claim which he might have presented then in defense.

Appeal from Circuit Court, Montgomery County; E. S. Gantt, Judge.

Suit by Eno Eversmeyer against W. W. Broyles and Richard T. Bennett. From a judgment for defendants, plaintiff appeals. Affirmed.

Sutton & Huston, of Troy, Hostetter & Haley, of Bowling Green, and Rosenberger & Dowell, of Montgomery City, for appellant.

Avery & Killam, of Troy, and W. C. Hughes and S. S. Nowlin, both of Montgomery City, for respondents.

WHITE, C. The plaintiff brought suit in the circuit court of Lincoln county to enjoin the levy of an execution and the annulment of the judgment upon which the execution was issued. The case in which the judgment was rendered was ejectment. The defendant here, W. W. Broyles, was plaintiff, and the plaintiff here was defendant. It is alleged that the defendant Richard T. Bennett, sheriff of Lincoln county, is about to serve the execution.

The bill of plaintiff sets out the pleadings, proceedings, and judgments in the case of Broyles v. Eversmeyer. The petition in that case stated a cause of action in ejectment in the ordinary form for the recovery of a tract of land in Lincoln county, described as follows, to wit: All the northeast fractional quarter of section 28, township 50, range 1 west. The petition stated that the defendant, Eversmeyer was wrongfully in possession of the same, and that the plaintiff, Broyles, was damaged in the sum of \$500 by the withholding of possession, and that the monthly rents and profits of the premises was \$15. The judgment in the case of Broyles v. Eversmeyer is then set out, and it recites that the court heard the evidence and found the plaintiff was the owner and entitled to the possession of—

"all of the northeast fractional quarter of section 28, township 50, range 1 west, and that afterwards on the 2d day of January, A. D. 1906, the defendant herein, Eno Eversmeyer, entered upon said lands and took possession thereof, and ever since that time and now has wrongfully continued in possession thereof, and unlawfully withheld and now withholds possession thereof from the plaintiff that part of the said northeast fractional quarter of section 28, township 50, range 1 west, described as follows: Beginning on the north line of fractional section 28, township 50, range 1 west, at a point 610 feet west of the northeast corner of said fractional section 28; thence with the line between said fractional section 28 and survey 1744, S.

89 degrees E. 450 feet; thence S. 10 degrees W. 800 feet; thence N. 75 degrees W. 1,100 feet; thence S. 10 degrees W. 60 feet; thence leaving said line between fractional section 28 and survey 1744, and running S. 84½ degrees E. 288 feet; thence S. 52 degrees E. 1,002 feet; thence N. 46 degrees E. 406 feet; thence N. 17 degrees 10' E. 482 feet; thence N. 33½ degrees W. 133 feet; thence N. 70 degrees W. 105 feet; thence N. 10 degrees E. 246 feet; thence N. 23 degrees W. 490 feet, to the north line of said fractional section 28; thence west with said section line 183 feet, to the place of beginning—containing about 11¼ acres.

"The court doth further find that plaintiff has been damaged in the sum of \$360 by reason of defendant's action in taking possession of said land and withholding the same from the plaintiff since the second day of January, 1905, to this date; the court further finds that the value of the monthly rents and profits of said lands is \$7.50.

"It is therefore ordered, adjudged, and decreed by the court that plaintiff have and recover against the defendant a judgment of restitution for the possession of the aforesaid lands, so found by the court to have been unlawfully taken and withheld by defendant from plaintiff, and that he have a writ of restitution therefor, and also that plaintiff have and recover from defendant a judgment for the sum of \$360 for his damage as found by the court by reason of the defendant taking and withholding possession of said lands from the plaintiff, and that he also have judgment against the defendant for the value of the rents and profits found by the court at the rate of \$7.50 per month from the date of the rendition of this judgment until possession is delivered to plaintiff and for the costs expended about the prosecution of this suit and as taxed by this court, and that he have execution therefor."

The bill in this case then alleges that a writ of possession and execution had been issued upon this judgment, directing the sheriff of Lincoln county to oust the plaintiff from the possession of the lands described in the judgment, and to levy the damages and costs adjudged in favor of Broyles and against Eversmeyer.

The bill further alleges that it cannot be determined, from the terms and provisions of the said judgment, where the tract of land lies which is adjudged to belong to Broyles. It is averred that there are two tracts of land, tract A and tract B, and that it is impossible to determine which tract is meant by the description in the judgment; that tract A lies wholly without fractional section 28, township 50 range 1 west; and that tract B lies wholly within the northeast fractional quarter of section 28. It is further averred that the plaintiff, Eversmeyer, is in possession, and has been since the commencement of the suit of Broyles v. Eversmeyer, of only an undivided one-third part of tract A, and therefore if tract A was the tract intended, the judgment is wrong, in that it should have adjudged the recovery only of an undivided one-third, and should have adjudged

recovery of only one-third of the damages, rents, and profits.

It is further averred that if tract B is the tract sued for and intended to be described in the judgment, then Broyles, the plaintiff in said ejectment suit, was at the time of the rendition of the judgment, and at the commencement of the suit and ever since has been, in exclusive possession, and therefore is not entitled to a judgment for possession or the recovery of damages of rents and profits for the withholding of such possession.

It is further alleged in the bill that the plaintiff had a meritorious defense to the suit in the case of Broyles v. Eversmeyer, and that he was the owner in fee of an undivided one-third of tract A and entitled to the possession of same. The plaintiff, Eversmeyer, then prays for a temporary restraining order enjoining the defendant from levying upon and selling plaintiff's property under the said execution and from interfering with plaintiff's possession of said tract A, and that the said writ of injunction upon final hearing may be made perpetual, and that the said judgment may be annulled and Broyles be restrained from attempting hereafter to enforce it.

The defendants filed a demurrer to this bill, which was by the trial court sustained. The plaintiff declining to plead further, his bill was dismissed, and from that judgment he appealed.

[1-4] I. The first point made by appellant is that the description in the judgment attacked is so vague and uncertain as to render the judgment void; that it cannot be determined from the description of the land whether it lies within the northeast fractional quarter of section 28, or in survey 1744 mentioned in the judgment, and entirely without the northeast fractional quarter of section 28. It is argued that the sheriff, in serving the execution which contains a description of the property, following the judgment, must have some definite fixed monument by which to identify the land; that no fixed monument from which to begin the measurements and calls for distances appears in the description, and therefore the sheriff would not know where to begin.

The description clearly states the beginning point from which the description must start, and that is the northeast corner of fractional section 28. If we understand appellant, he contends there is no monument by which to locate that point. The plaintiff's bill in this case states nowhere that there is any uncertainty about that section corner, nor about the location of the line dividing that section from survey No. 1744. It is true, in an action of ejectment, where a government survey of a line or corner is in dispute, and the issue in the case turns upon its location, the judgment must determine and state in some manner just where it is, so that it can be located. *Brummell v. Harris*,

148 Mo. 446, 50 S. W. 93; Benne v. Miller, 149 Mo. loc. cit. 245, 50 S. W. 824. But section lines and corners in a government survey are fixed and determined, whether there are visible monuments there or not. Bradshaw v. Edelen, 194 Mo. 661, 92 S. W. 691; Granby Mining & Smelting Co. v. Davis, 156 Mo. 422, loc. cit. 430, 431, 57 S. W. 126; Carter v. Hornback, 139 Mo. loc. cit. 243, 40 S. W. 893.

The cases cited by appellant in support of his position that the judgment should show a fixed, visible monument by which the sheriff might locate the land, all are cases where there was a dispute as to the position of a line or a corner, and the location of such line or corner was an issue in the case. It is not alleged that there was any dispute as to the location of the section corner or section line, nor that the sheriff would have any difficulty in finding them; it must be presumed that the court acted regularly and with full knowledge of the situation. Therefore it must be presumed that the sheriff would know where to find them. The judgment would cover the land described, following the courses and distances wherever the same might fall; the courses and distances, of course, being limited to known lines and monuments. Kronenberger v. Hoffner, 44 Mo. 185; Smith v. Catlin Land & Imp. Co., 117 Mo. 438, 22 S. W. 1083.

[5] II. But it is contended that, beginning 610 feet west of the northeast corner of fractional section 28, and following the courses and distances named in the description, he would run entirely without fractional section 28, and the land would lie wholly in survey No. 1744, and in that case the judgment would be for the recovery of land not described in the petition. In answer to this, there is a finding by the court that the land described is a part of the northeast fractional quarter of section 28, and therefore within the allegation of the petition; and nothing appears in the record of that case, nor in the allegations of the bill to show the contrary. The appellant has presented no plat showing the location, dimensions, or contour of fractional section 28, nor of survey No. 1744. We do not know on which side of fractional section 28 survey 1744 is, except as it may be inferred from this inscription in the judgment. The description begins on the north line of fractional section 28, therefore it must be a point somewhere on that section, and not off it, and the first call runs with the line between fractional section 28 and survey 1744. Therefore, whether the distance of this beginning point from the northeast corner of section 28 is 610 feet, or more or less, it would be on the north line of that section 28, and on the line between that section and 1744. The last call of the description runs with the north line of the fractional section, 183 feet west to the place of beginning. We can follow the description backwards as well as

forwards to ascertain the true location of the land described. The beginning point, then, is on the north line and on the line between survey 1744 and section 28, and the north side of the tract described is 183 feet wide. All of this last call, then, is clearly within section 28.

But the first call follows the line between section 28 and survey 1744, as likewise do the second, third, and fourth calls. This is evident from the fact that the fifth call begins with, "Then leaving said line between fractional section 28 and survey 1744," indicating that all previous calls have followed that line. Now, it is apparent from the first, second, third, and fourth calls that survey 1744 lies west of section 28. The next call, after leaving the line between section 28 and survey 1744, runs S. 84½ degrees E., and the next S. 52 degrees E., and these two calls, bearing eastward, certainly carry into section 28, and not westward into survey 1744. The other calls then encircle the tract, so as to bring the last call to start 183 feet east of the beginning point. There is nothing in that description which necessarily places the land described, nor any part of it, outside of section 28. There is no allegation as to how wide east and west the northeast fractional quarter of section 28 is, nor where the line runs between that and survey 1744, except as that dividing line is set out in the judgment. On this state of the record the finding of the trial court is conclusive.

[6] III. It is further complained by the plaintiff that if tract B is meant to be described Broyles is already in possession, and if tract A is meant to be described Eversmeyer is in possession of only a one-third interest. But the trial court in the ejectment suit found that Broyles was entitled to possession of the tract sued for, and Eversmeyer was in possession and unlawfully withheld same. Eversmeyer cannot be heard to dispute that fact in this collateral attack upon the judgment.

[7] Plaintiff further alleges that he has a meritorious defense to that ejectment suit, and that he is the owner of an undivided one-third part of tract A. Then that is a defense which he should have set up in the ejectment suit; it can avail him nothing here. In fact, all the objections urged by appellant in this case against the propriety of the judgment in the ejectment suit of Broyles v. Eversmeyer were available to him and should have been presented as a defense to that action. He cannot now be heard to object to the regularity of that proceeding, or urge here in support of his rights to the land any claim which he might have presented in defense of that action. Spratt v. Early, 199 Mo. loc. cit. 501, 97 S. W. 925; St. Louis v. United Railways, 263 Mo. loc. cit. 424, 174 S. W. 78.

The bill speaks of tract A and tract B as

if the description in the judgment might fit either tract. Appellant does not explain how that could be done, except to say that following the courses and distances would carry the land out of section 28. He claims in his brief, though it is not alleged in the bill, that 610 feet west of the northeast corner of section 28 is 283 feet west of the line between that section and survey 1744; that is, the north line of the section is only 327 feet long. If that is true, then the beginning point would stop 283 feet short of 610 feet west of that corner, at the dividing line, and follow it. Appellant finds difficulty in that, and, in fact, the entire trouble expressed by appellant arises from the assumption that the northeast corner of fractional section 28, as well as the line between that fractional section and survey 1744, are not monuments. What appellant means by that we presume is that there are no fixed, visible marks on the ground to designate their positions. As said above, it does not matter whether there are any marks there or not, so long as their location is not disputed.

The judgment is affirmed.

RAILEY and MOZLEY, CO., concur.

PER CURIAM. The foregoing opinion by WHITE, C., is adopted as the opinion of the court. All concur.

#### McCORD v. SCHAFF. (No. 20214.)

(Supreme Court of Missouri, Division No. 2, October Term, 1919.)

#### 1. MASTER AND SERVANT §180(5)—LOCOMOTIVE ENGINEER VICE PRINCIPAL FOR WHOM NEGLIGENCE RAILROAD IS LIABLE.

A locomotive engineer is the railroad's vice principal, and, where his negligence in not having sufficient water in the boiler results in an explosion causing the fireman's death, the railroad is liable for damages under the federal Employers' Liability Act (U. S. Comp. St. §§ 8657-8665).

#### 2. EVIDENCE §77(5)—DEFENDANT'S FAILURE TO CALL EMPLOYEES AS WITNESSES.

In an action against a railroad company for negligence resulting in the death of its locomotive fireman, the defendant's failure to call as witnesses the engineer and student fireman, who were on the engine at the time of the fatal explosion, is a strong circumstance against the defendant.

#### 3. MASTER AND SERVANT §287(4)—EVIDENCE OF LOCOMOTIVE ENGINEER'S NEGLIGENCE SUFFICIENT TO GO TO THE JURY.

In an action under the federal Employers' Liability Act (U. S. Comp. St. §§ 8657-8665) for the death of a locomotive fireman in an explosion, evidence held sufficient to go to the

jury on the question as to the engineer's negligence in not having sufficient water in the boiler.

#### 4. DEATH §104(3)—INSTRUCTIONS IGNORING LIFE EXPECTANCY OF FATHER SUING FOR DEATH OF SON IMPROPER.

In a father's action for the death of his son, it is error to give an instruction authorizing damages based solely on the expectancy in life of deceased, ignoring consideration of the expectancy in life of the plaintiff who, according to the course of nature, would die first.

#### 5. DEATH §58(2)—CONTRIBUTIONS BY DECEASED FOR PARENTS' SUPPORT MUST BE PROVED.

In father's action for the death of his son, plaintiff in making out his case must prove the donations made by the son for support of his parents.

Williams, P. J., dissenting.

Appeal from Circuit Court, Saline County; Samuel Davis, Judge.

Action by James McCord, administrator of the estate of Orvis McCord, deceased, against Charles E. Schaff, receiver of the Missouri, Kansas & Texas Railway Company. Judgment for plaintiff, and defendant appeals. Reversed and remanded.

This action was brought under the federal Employers' Liability Act (Act April 22, 1908, c. 149, 35 Stat. 65 [U. S. Comp. St. §§ 8657-8665]), and seeks to recover damages on account of the death of Orvis McCord, who was a fireman on an engine and an interstate employé of defendant. On the 4th day of July, 1916, the engine on which McCord was working as fireman, when about 15 miles from Sedalia, Pettis county, Mo., pulling an extra freight, exploded, and so injured McCord that he died a few hours later without regaining consciousness. The explosion occurred by reason of not having sufficient water in the boiler of the engine. In addition to the fireman, the engineer and a student fireman were on the engine at the time; but there is nothing in the record of any injury to either of them. The petition was in two counts identical, except in count one it was sought to recover for alleged conscious pain between the time of the accident and the death of McCord a few hours later, but upon this count the jury found for the defendant. The second count was finally amended, so that the cause of action was based upon the alleged negligence of the engineer in failing to see that said engine was supplied with sufficient water to the boiler to prevent an explosion. It is conceded, however, by both sides, that the explosion happened because the water was allowed to get too low in the boiler to cover the crown shield. At the time of the death of McCord, he was 27 years of age, and the plaintiff, James McCord, was 56

years of age, and the mother Laura McCord, 54 years of age. Trial of the case in the circuit court of Saline county, where it had gone on a change of venue from Pettis county, after demurrer to the evidence had been overruled, resulted in a verdict for defendant on the first count of the petition and a verdict for plaintiff on the second count in the sum of \$10,000, apportioned by the jury \$5,000 to plaintiff and \$5,000 to the mother. Motion for new trial was overruled, and the cause is properly lodged in this court on appeal.

J. W. Jamison, of St. Louis, for appellant.  
Claude Wilkerson, of Sedalia, and F. P. Sizler, of Monett, for respondent.

MOZLEY, C. (after stating the facts as above). [1] The engineer on the engine that exploded was vice principal of the defendant, and, if his conduct amounted to negligence contributing in whole or in part to the death of McCord, the defendant is bound thereby, because the engineer's negligence was the defendant's negligence. It is conceded that the explosion of the engine was caused by lack of sufficient water to cover the crown shield. A great deal of speculation, expert testimony, etc., was indulged in as to whether the appliances for supplying water to the boiler were defective; but as the case was tried before a jury on a charge of negligence on the part of the engineer, in this, that he was in charge of said locomotive, and that it was his duty to see that said engine was properly supplied with water, that he negligently failed to perform that duty, and the explosion resulting in the death of McCord proximated from such negligence, we are unable to see how defective appliances (and they were not defective) could affect the case. The whole question, as we see it, is: Was it the duty of the engineer to see that the boiler was properly supplied with water? (Incidentally, we remark that the engineer did not testify at the trial, nor did the student fireman who was on the engine, although there is no evidence that either was injured.) These appliances for furnishing water to the boiler were placed thereon by defendant for the express purpose of enabling the engineer, by their timely use, to avoid the catastrophe that happened. Under the rule of the defendant, No. 502, the dead fireman was under the direction and control of the engineer. The rule reads:

"Firemen when on the road, are under the supervision and direction of the engineer, and must obey the orders of the engineer respecting the proper use of fuel and the performance of their duties."

As to whose duty it was, under the rule, to pump water to the boiler, the following appears in the testimony of William Rothmeyer, road foreman of engineers for defendant:

216 S.W.—21

"Q. What about pumping water? A. That is conditional with the engineer and fireman. We haven't placed any restrictions on the fireman pumping the engine. If the fireman is qualified and the engineer wants to assume the responsibility of him pumping that engine, why, that is optional with the two, and if he asks to pump the engine he can do so."

There is no evidence beyond the merest speculation that the dead fireman had made any attempt to pump water into the boiler, or that he was directed to do so, or that he asked to pump said engine or assumed to do so; and, it being the unquestioned duty of the engineer to pump it, his failure to do so, thereby causing the explosion and the death of McCord, was a negligent act for which defendant is responsible.

[2] As stated above, neither the engineer nor the student fireman who were on the engine when the explosion occurred were called by defendant as witnesses at the trial of the case, notwithstanding each of them were in possession of the facts of the explosion and the movements of the deceased fireman just preceding the explosion. It has been held that failure of a party to call witnesses within his power, who know vital facts affecting the issue upon which the case is tried, is taken as a strong circumstance against such party. *Reyburn v. Railroad*, 187 Mo. 565, loc. cit. 575, 86 S. W. 174; *McClanahan v. Railroad*, 147 Mo. App. 368, loc. cit. 411, 128 S. W. 535; *Evans v. Trenton*, 112 Mo. loc. cit. 404, 20 S. W. 614.

[3] Without pursuing this feature of the case further, we think there was sufficient evidence to go to the jury on the question of whether or not the engineer was negligent, and their finding that he was negligent ought not be disturbed.

[4] A great many points are urged by appellant for a reversal of the case which are unnecessary to discuss or decide, since under our view it will have to be reversed and remanded on account of a vitally improper instruction given to the jury on behalf of plaintiff, on the measure of damages. Said instruction reads as follows:

"If you find the issues for the plaintiff under the second count of the petition, you should, in assessing the damages, take into consideration the age and earning capacity of the deceased and the amounts, if any, that he had been contributing to his parents, and you should give such sum as you may believe to be a fair and just compensation, for whatever sum you may believe from the evidence the said Orvis McCord was reasonably certain to have contributed to his parents had he not been killed, and such a sum should be sufficient to compensate them for the pecuniary loss, if any, they have sustained by reason of the death of the said Orvis McCord, but not to exceed the sum of \$20,000, the amount prayed for in the petition."

The damages authorized to be recovered by this instruction are based solely on the ex-

pectancy in life of deceased and do not take into consideration the expectancy in life of the plaintiff or in any wise advise the jury that plaintiff's expectancy is a matter necessary to take into consideration in determining what the amount of the verdict should be. It has been held, in a number of cases which we think were, well considered, that the expectancy of the plaintiff must be determined by the jury, and that failure to do so is error.

Under the proof in this case, the expectancy of the plaintiff was vastly less than that of deceased, and it therefore became vital to a just verdict that the damages assessed be based upon the expectancy of plaintiff rather than upon that of deceased. In the case of *Illinois Central R. R. Co. v. Crudup*, 63 Miss. 291, loc. cit. 303, it was held that the expectancy of the one who, according to the course of nature, would die first, was the one upon which the damages awarded should be based. The court said:

"If it be shown that the deceased in the course of nature would have died first, his expectation of life should control, for he could confer no benefit after his death; on the other hand, if the next of kin would die first, his expectation should govern, for he could not receive a benefit from any one after his death. Since the plaintiff, the father of the deceased, would by all known probabilities have died in the course of nature before his son, his expectancy and not that of the son should control."

In the case of *Stevens v. K. C. Light & Power Co.*, 208 S. W. 630, loc. cit. 631, the cause was reversed and remanded, and we think properly so, on account of an instruction given to the jury by the court below. That instruction, like the one under consideration, made the basis of recovery the expectancy in life of deceased wholly ignoring the expectancy of the plaintiff. The court (Kansas City Court of Appeals) passing on that instruction said:

"There is a further objection to the instruction. It bases the damages to plaintiffs on the expectancy of life of the deceased alone, when in fact the expectancy of life of the plaintiff must also be considered. Her damages consisted in the loss of deceased's support. There are two lives to be considered, hers and her deceased husband's. She was only entitled to damages estimated on the length of his life, if she lived longer than he, for no damages could accrue to her after her death. The husband's duty to support his wife ceases, of course, at her death. Therefore her loss in his death cannot reach beyond her own life."

[5] The jury was not advised or directed, as they should have been, by the instruction under consideration, that the verdict should have been based solely on the expectancy in life of plaintiff, since, as above pointed out, his expectancy was vastly less than that of deceased, and, according to the course of na-

ture, he would die first. But it is manifest that the jury did base its verdict upon the wrong expectancy without giving plaintiff's expectancy any consideration whatever. This is made certain by the grossly excessive amount of damages awarded. Plaintiff was 56 years of age; his expectancy in life was, therefore according to recognized mortality tables, 16.89 years. The extent of his right to recover was the support (in money) deceased would probably have given him during the life of his expectancy had not deceased lost his life. What the record shows deceased had already given does not enter into the matter, except in so far as it gives a basis to reckon from as to what future contributions may have been. This court will take judicial notice of many things; but we think this rule has never been so far extended in its application as to include matters known only to the plaintiff, matters which are vitally necessary to him by way of proof in making his case. We say this, because there is in the record nothing of certainty disclosing what the monthly contributions were. It is passing strange that plaintiff, who knew all the facts, and his counsel who questioned him on the witness stand, did not develop by the testimony the exact number of months during which no donations were made and the exact number of months during which donations were made, and the amount each month, and thus not have left the court to grope in darkness over a vital matter which it could not possibly know anything about save what the record so meagerly discloses. The plaintiff furnished the whole of the testimony as to these donations, as follows:

"Well, now, the amount of money he sent me would depend entirely upon the amount of business on the road and the amount of salary he was drawing. Some months he would not send anything. One month he sent \$50. Sometimes he would send \$20, sometimes \$10, and sometimes \$5."

Further than this the record is absolutely barren. How many months during the year he sent nothing the record does not tell. How many months he sent \$20, \$10, or \$5, the record is likewise silent, and we are left in the dark without means of knowing the truth of the matter. We have no right to guess at it, since, as before stated, it was a part of plaintiff's proof which was highly important to make clear by his testimony. We are not justified in guessing at it for him, nor will we do so. The record, so far as the proof justifies a statement, discloses a donation of \$85 a year to the plaintiff; these being the amounts named by the plaintiff as having been contributed. This sum multiplied by plaintiff's expectancy equals \$1,435.65, and thus it is seen that the verdict returned was not only reckoned from the wrong basis, but, in addition, as above stated, is grossly excessive.

The jury not having been advised properly by the instruction supra, the verdict returned results in a miscarriage of justice and should be reversed and remanded.

It is so ordered.

RAILEY, C., not sitting. WHITE, O., concurs.

PER CURIAM. The foregoing opinion of MOZLEY, C., is hereby adopted as the opinion of the court.

WILLIAMS P. J., dissents.

MATLACK v. KLINE et al. (No. 20260.)

(Supreme Court of Missouri, Division No. 2.  
Oct. 14, 1919. Motion for Rehearing  
Denied Dec. 4, 1919.)

1. INTERPLEADER  $\S$ 23—PLEADING DEFENDANTS' INTERESTS.

A petition in the nature of a bill of interpleader should fairly and fully define the nature and interests of defendants, of which plaintiff had full knowledge; such being material allegations.

2. COURTS  $\S$ 231(52) — DETERMINATION OF AMOUNT IN CONTROVERSY FROM RECORD, WHERE PLEADINGS INSUFFICIENT.

Where an examination of the pleadings alone does not suffice to determine satisfactorily the pecuniary jurisdiction, a review of the record is authorized, and where the agreed statement of facts fixes the amount in excess of the minimum necessary, the Supreme Court will take jurisdiction for final review.

3. APPEAL AND ERROR  $\S$ 877(6)—APPELLANT ENTITLED TO ALLEGE ERROR AS AGAINST CO-PARTY.

Where defendants were required to interplead, the subsequent proceedings were between them alone, so far as concerns the determination of their respective rights, and on a judgment being rendered in favor of either the other is entitled to appeal, and on appeal the rights of both are to be determined, so that the action is not divisible, and the judgment does not stand as to the one not appealing, as if no appeal had been taken.

4. LIFE ESTATES  $\S$ 12—LEASE BY LIFE TENANT TERMINABLE AT TENANT'S DEATH.

A life tenant as grantor of a mining lease could not burden the remainder with a lease without ratification by the remaindermen, although tenant could make a lease for any number of years, which would be valid during his life and would not affect the estate in remainder.

5. LIFE ESTATES  $\S$ 12—WIFE OF LIFE TENANT AS PARTY TO LEASE BY HIM.

Neither the joinder of life tenant's wife as a party to a mining lease nor his attempted bequest to her of the monthly rent could add anything to her claim to the rent after the life tenant's death, since she had no interest which she could convey.

6. LIFE ESTATES  $\S$ 12—RIGHT OF REMAINDERMAN TO RENT UNDER LEASE AFTER LIFE TENANT'S DEATH.

Where a life tenant granted a mining lease to plaintiff, on being invested with the fee the remainderman became entitled to the rent or royalty, which followed the ownership of the land, and not the life tenant's widow, where the remainderman had not assented to any other provision.

7. LIFE ESTATES  $\S$ 12—CONTINUATION OF LEASE AFTER DEATH OF LIFE TENANT BY ACQUIESCENCE OF REMAINDERMAN.

If a lease by a life tenant terminated upon lessor's death, and the remainderman acquiesced in the tenant's holding, there is no rule of law which would preclude its continuance, and it may, without affecting its validity, be regarded as a new contract between the remainderman and the tenant, and the reasonable rental value may be estimated at a fixed amount of royalty under the original lease.

8. LIFE ESTATES  $\S$ 12—RIGHT TO CHATS AND TAILINGS UNDER MINING LEASE ON DEATH OF LIFE TENANT.

On the death of a life tenant, lessor under a mining lease, continued with the acquiescence of remainderman, the accumulated chats and tailings may be classified as part of the ore taken and the proceeds from sale of those accumulated prior to the life tenant's death belong to lessee as per agreement with the life tenant, while 10 per cent. of the amount realized from sale of those subsequently accumulated belongs to the remainderman in accordance with the original lease.

9. INTERPLEADER  $\S$ 26—REPLY OFFENSIVE TO ONE DEFENDANT IMPROPER.

Where a petition in the nature of an interpleader shows plaintiff a mere stakeholder, with no interest in the subject-matter, a reply which assumes an offensively hostile attitude toward one of the interpleaded defendants, alleging that the latter is estopped from claim to any right to the stake, is improper.

Appeal from Circuit Court, Greene County; Guy D. Kirby, Judge.

Action in the nature of an interpleader by Sarah B. Matlack against Rowena Kline and Mary E. Smith. From a judgment in favor of the defendant Mary E. Smith, the defendant Kline appealed to the Springfield Court of Appeals, which reversed and remanded the judgment of the trial court, but for want of jurisdiction transferred case to this court. 190 S. W. 408. Judgment of the trial court reversed and remanded.

George Hubbert, of Neosho, and W. Cloud and Thos. Carlin, both of Pierce City, for appellant.

White, Hackney & Lyons, of Kansas City, for respondent Matlack.

Jas. T. Neville, of Springfield, and Norman A. Cox, and Hugh Dabbs, both of Joplin, for respondent Smith.

**WALKER, J.** This action, so far as its facts will admit of its classification, is in the nature of a bill of interpleader, in that the plaintiff (respondent here) seeks to have the defendants interplead, that it may be determined to whom plaintiff shall be required to pay rent or royalty on a tract of mining land, leased by the latter. A decree therein was rendered below, in favor of one of the defendants, Mary E. Smith. From this judgment the other defendant, Rowena Kline, appealed to the Springfield Court of Appeals, which reversed the judgment of the trial court, and directed that payment of the rent or royalty be made by the plaintiff to Rowena Kline. Farrington, J., dissented on the question of jurisdiction, and the case was transferred to this court. *Matlack v. Kline et al.*, 190 S. W. 408.

**Pleadings.**

*Petition.*—The petition alleges that the plaintiff is the owner by assignment of a mining lease on certain land in Lawrence county, describing it; that this lease was executed by Fred D. Smith and Mary E., his wife, to one A. B. Bowen, and was ratified by certain persons (naming them), among others the defendant, Rowena Kline; that said lease was for a term ending January 31, 1927, and under its conditions the lessee, or his assigns, was required to pay Fred D. Smith, or his heirs, 10 per cent. of the gross value of all minerals removed from said land by the lessee or his assigns during the lease; that said A. B. Bowen has assigned and transferred all of his right, title, and interest in said lease to plaintiff, and that she is now the legal owner and holder of same; that she has since exercised all of the rights of ownership to said land under said lease; and that the defendant Rowena Kline ratified said lease so made by Fred D. Smith to A. B. Bowen.

Plaintiff further states: That on the 7th day of September, 1910, Fred D. Smith and Mary E., his wife, by their written contract with plaintiff, agreed, in lieu of the 10 per cent. royalty provided for in the lease to A. B. Bowen, that plaintiff would pay Fred D. Smith \$1,000 in cash and a monthly rental of \$130 during the term of said lease. That in consideration of said cash payment then made, and the agreement as to the monthly payments to be made by plaintiff, Fred D. and Mary E. Smith conveyed and assigned

to plaintiff their claim for a royalty on a 10 per cent. basis. That the payment of the substituted or monthly rental was to commence November 3, 1910, and be made on the 3d day of each month thereafter during the term, so long as plaintiff or her successors or assigns should hold and enjoy the benefits of said lease. This contract, further provided, in the event of the death of Fred D. Smith during the lease, that the monthly payments should, for the remainder of the term, be paid to Mary E. Smith. That since the death of Fred D. Smith, who died June 20, 1915, the defendant Rowena Kline claims that she is the owner of said real estate, subject to said mining lease held and owned by plaintiff. That said Rowena Kline, under her alleged ownership, is claiming and demanding from plaintiff the payment of a royalty of 10 per cent. on all minerals taken from said land in lieu of the monthly payments subsequently agreed to be made by plaintiff to Fred D. Smith and wife. That upon the death of Fred D. Smith the said Mary E., his wife, claims that the plaintiff is required to pay her the monthly payments. That these conflicting claims are being made of plaintiff by said Rowena Kline and Mary E. Smith, respectively, and, unless determined, will vex and annoy plaintiff in the enjoyment of said lease. That plaintiff is ready and willing to pay the rental or royalty on said property, either on a royalty or monthly payment basis, as the court may direct, and to whomsoever may be found to be entitled to same.

Plaintiff also states that there is now on said land a large quantity of tailings or cherts, to which she claims title, and that defendants are denying her title to same, and are harassing and annoying her in the sale and management of same. She therefore asks affirmative relief, in that she may be authorized to sell and dispose of said material now on hand and that may subsequently be produced during said lease; that she has no adequate remedy at law.

She therefore prays that the court determine the validity of her contract with said Fred D. and Mary E. Smith, and adjudge who is entitled to receive said monthly payments of \$130 during the remainder of the term of said lease; and, if the court determine that said contract is invalid, and, since the death of Fred D. Smith, the royalty of 10 per cent. should be paid on all mineral obtained by plaintiff from said land, that the court adjudge and determine to whom the same shall be paid.

Plaintiff further alleges her willingness to comply with the court's judgment, and that defendants be restrained and enjoined from interfering with plaintiff's mining operations on said land under said lease, and for such other further orders, etc.



*Answer of Mary E. Smith.*—The defendant Mary E. Smith, so far as her answer is relevant to the matter at issue, alleges in substance, as stated in the petition, the execution of the mining lease by Fred D. Smith to A. B. Bowen; the ratification of same by several persons, among others, the defendant Rowena Kline; the assignment of said lease by Bowen to plaintiff; the subsequent contract of September 7, 1910, between plaintiff and Fred D. and Mary E. Smith, set forth as in plaintiff's petition; the death of Fred D. Smith and that he bequeathed the royalty provided for in said contract to the defendant Mary E. Smith. She then asks that if the latter contract between her husband and herself on the one part, and plaintiff on the other, be declared invalid, that she, and not Rowena Kline, is entitled to the royalty on a 10 per cent. basis on all minerals taken by plaintiff from said land. She also claims that she is entitled to the chats and tailings described in plaintiff's petition.

She therefore prays that the contract for the lease, the consent and ratification thereof, and the mining lease made thereunder, be declared to be valid and binding, and that same created a binding mining lease of said land; and that Fred D. Smith and his assigns were the owners of same for the full term, and that, since the death of Fred D. Smith, the defendant Mary E. Smith is the owner and entitled to said royalty or the monthly rental of \$130, under the contract of assignment, and to the chats and tailings described; and for other and proper relief.

*Answer of Rowena Kline.*—The answer of the other defendant, Rowena Kline, states her sole ownership in fee of the land in question, and the devolution of her title thereto by descent from her ancestor, David Caldwell; that Fred D. Smith was a life tenant of said land under the will of said Caldwell, with the provision that, upon Smith's death without issue, the land was to descend in fee to other devisees named in the will; that all of those so named predeceased Smith, except Rowena Kline, this defendant; that Smith died June 20, 1915, without issue, and that the land thereupon descended to this defendant in fee, and she has since been invested with same; that the defendant Mary E. Smith makes some claim to said land, and the rents and royalties therefrom, as defendant is informed, by reason of an alleged contract in relation thereto with the life tenant, Fred D. Smith; that plaintiff, who was allowed by Fred D. Smith to mine lead and zinc ores upon said premises during the lifetime of the latter, has continued and is continuing to remove minerals therefrom under said adverse claim of right, and for more than 10 days before this action was brought has appropriated, and continues to appropriate and convert to her own use, mineral in large quantities from said land, mining,

up to the date of the commencement of this action, 200 tons of ore, of the value of \$20,000, and has refused to pay this defendant the royalty thereon as stipulated in the lease. This lease, as made between Fred D. Smith and A. B. Bowen, is then described as in plaintiff's petition. It is further alleged that Bowen and plaintiff entered on said land under said lease and mined same during the lifetime of Smith, and that plaintiff, since the death of Smith, has continued mining thereon, removing from the land minerals amounting in value to \$20,000, to this defendant's damage in the sum of \$2,000, and has paid part of same to the defendant Mary E. Smith, who claims some interest in said premises under her deceased husband, Fred D. Smith.

Defendant prays that the court adjudge and determine the rights, interests, and demands of the parties hereto, and that an inquiry and accounting be adjudged to this defendant, and for damages to the date of this action, in the sum of \$2,000, and for such other and additional damages as may accrue to this defendant from plaintiff's operations in mining said land. This is followed with a description of the land by government subdivisions, as in plaintiff's petition.

There is also incorporated in this defendant's answer a copy of the will of said David Caldwell, setting forth the devise of his realty as before pleaded. The various contracts in regard to the leasing of this land, as pleaded in the petition, are then set forth in *hæc verba*. Defendant further alleges that plaintiff claims to have acquired all of the right, title, and interest of A. B. Bowen (the original lessor) in said land, and has taken possession of the premises, and has attorned and paid rent to Fred D. Smith as her landlord until his death, June 20, 1915, under the provisions of the lease; that plaintiff is taking out large quantities of mineral from said land, and is selling and disposing of same and distributing the proceeds, none of which are paid to this defendant; that Fred D. Smith died June 20, 1915, without issue, leaving as sole devisee under the will of said David Caldwell this defendant, Rowena Kline; that upon the death of Fred D. Smith all of the rights and interests of the defendant Mary E. Smith in said premises terminated. The removal of mineral from said land and the value of same as to gross amount and that of this defendant's royalty is again pleaded; and that plaintiff continues to so remove and dispose of said mineral to defendant's damage, and refuses to account to this defendant for the royalty due as prescribed in the lease.

The defendant thereupon prays that the court adjudge and determine the interests, estates, and liens of the parties hereto, and that this defendant be adjudged damages in the sum of \$2,000 to the date of this action, and for such further sum as shall accrue

from the continuance of the mining of said land and the removal and sale of the mineral therefrom, and for other and further relief.

*Reply.*—The plaintiff thereupon filed a reply to the defendant Rowena Kline's answer. After a general denial, it is in these words:

"Plaintiff, further replying to said answer of defendant Rowena Kline, states that the plaintiff, relying upon the validity of the mining lease bearing the date of January 31, 1907, executed by Fred D. Smith and Mary E. Smith, as lessors, and joined in and ratified and confirmed by defendant Rowena Kline, Charles B. Caldwell, and N. A. Caldwell, made to A. B. Bowen, his heirs and assigns, running for a period ending January 31, 1927, was induced to and did purchase all of the rights and privileges granted by said mining lease to the said A. B. Bowen, lessee, and was induced to and did pay out large sums of money therefor, believing that the same was binding upon said Fred D. Smith, Mary E. Smith, and upon defendant Rowena Kline, Charles B. Caldwell, and N. A. Caldwell; and believing said lease to be valid and binding in all of its terms and for a period therein designated, and having no notice or knowledge of any adverse claim, plaintiff expended large sums of money developing said mining lands, erecting machinery thereon for the cleaning and dressing of ores, and sinking shafts, at a cost to plaintiff of at least \$35,000; and plaintiff, relying upon the validity of said mining lease, sublet portions of said real estate to tenants for mining operations, and said tenants expended large sums of money in developing the property covered by said mining lease, in drilling and sinking shafts and opening up mines and erecting machinery thereon for the cleaning of ores, at a cost of at least \$25,000; and during all of said times said defendant knew that the plaintiff was expending large sums of money in the development of the mines on said real estate, and knew of the mining operations thereon by the subtenants, and of the large expenditures of money by the plaintiff and said subtenants, and the said defendant made no objections thereto, but, on the contrary, acquiesced in and encouraged the plaintiff and her subtenants to make said expenditures; and that the said defendant knew that the plaintiff, at and before the time plaintiff purchased said mining lease from A. B. Bowen, was contemplating the purchase and was about to purchase the same, and made no objections thereto, but, on the contrary, induced and encouraged the plaintiff to purchase the same; and the plaintiff alleges that the said defendant Rowena Kline is now estopped and debarred from claiming that said mining lease is not binding upon her for the full period named in said lease."

*Consent to Lease.*—The ratification of the lease from Fred D. Smith to A. B. Bowen by a number of possible remaindermen, none of whom now survive, except Rowena Kline, is as follows:

"For and in consideration of the sum of one dollar and other valuable considerations, the receipt of which we hereby acknowledge, we hereby consent to and ratify in full the foregoing mining lease."

This writing was made three years after the execution of the lease from Smith to Bowen, and the day before the making of the contract between plaintiff and Fred D. and Mary E. Smith.

#### The Facts.

[1] The foregoing pleadings, where limited to a statement of the facts, sufficiently present the matter at issue, except that the petition does not fairly and fully define the nature of the interests of the defendants, of which plaintiff had full knowledge, and which are material allegations in a proceeding of this character. *Robards v. Clayton*, 49 Mo. App. 608; *U. Ry. v. Connor*, 153 Mo. App. loc. cit. 143, 132 S. W. 262; *Conley v. Ala. Gold Life Ins. Co.*, 87 Ala. 472; *Augusta Bnk. v. Cotton Co.*, 99 Ga. 286, 25 S. E. 686. Further than this, the plaintiff's reply, except the general denial therein, has no place in this proceeding. Of this, more at length later.

A recapitulation of the relevant facts as they appear in the pleadings and the record may, however, aid in a clearer understanding of the case. They are as follows:

A mining lease to the land in question was executed by Fred D. Smith, a life tenant, January 31, 1907, to A. B. Bowen, for a term of 20 years, conditioned upon the payment by the latter to Smith or his heirs of 10 per cent. of the value of ores mined on said land. The will, which devised a life estate to Smith provided, if he died without issue, that the land should be divided equally among the testator's surviving heirs. The defendant Rowena Kline was the sole survivor when this suit was brought. On the 16th day of January, 1909, Bowen assigned the lease to plaintiff. On the 6th day of September, 1910, the then possible remaindermen, including Rowena Kline, ratified in the terms heretofore stated, the lease made by Smith to Bowen.

On the 7th day of September, 1910, the plaintiff, Fred D. Smith, the life tenant, and his wife, Mary E. Smith, one of the defendants here, entered into an agreement in regard to said land which, viewed from one vantage, is a lease, but from its subsequent terms simulates a warranty deed. This instrument, after recognizing and reciting the salient features of the lease from Smith to Bowen, provided that, instead of the royalty on a 10 per cent. basis to be paid by plaintiff for mining said land, she would, after the payment of \$1,000 in cash, thereafter pay Smith a rental of \$130 per month during the remainder of the term of the original lease, which terminates January 31, 1927. In the event of Smith's death before said date, this rental was to be paid to his wife, Mary E. Smith, during the remainder of the term. Other conditions as to forfeiture, etc., are contained therein, not pertinent to the matters at issue. The remaindermen were not

parties to the agreement or lease from Smith and wife to plaintiff. The latter has been mining the land since the assignment of the lease to her by Bowen, and has been paying the royalty and rental on same as provided.

In June, 1915, Fred D. Smith died. Conflicting claims have been made by defendants for the royalty or rent. The defendant Mary E. Smith claims that she was entitled to the stipulated monthly rent, or, if it be declared "invalid" since the death of Fred D. Smith, that it be decreed that she be paid a royalty by plaintiff of 10 per cent. on the ores mined. This she claims by reason of her joinder as a party to the lease between plaintiff and her husband and a bequest to her by the latter of said royalty.

The defendant Rowena Kline, conceding the validity and binding force of the lease, which she ratified, from Fred D. Smith to A. B. Bowen and assigned to plaintiff, claims, as the owner in fee of the land in question, that she is entitled, since Smith's death, to the royalty on all ores mined during the remainder of the term. Thus beset by contesting claimants, the plaintiff has sought refuge in the courts, that her duty may be defined.

[2] I. *Jurisdiction*.—An examination of the pleadings alone does not suffice to enable the pecuniary jurisdiction to be satisfactorily determined. Under such circumstances a review of the record is authorized. *Cable v. Duke*, 208 Mo. 557, 106 S. W. 643; *Pittsburgh Bridge Co. v. St. L. Tr. Co.*, 205 Mo. 176, 103 S. W. 546; *Vanderberg v. Gas Co.*, 199 Mo. 455, 97 S. W. 908; *Kitchell v. Manchester Rd. Elec. Ry. Co.*, 146 Mo. 455, 48 S. W. 448. An agreed statement of the facts fixes the royalty at something more than \$790 per month, estimated on a 10 per cent. basis. If, therefore, it be determined that the contract fixing the royalty at this rate is the valid and subsisting one, and a judgment is rendered in favor of either claimant for the amount of the royalty during the time that has elapsed since the death of the life tenant, it will far exceed the minimum amount necessary to bring the case within the jurisdiction of this court. Under our view of the law applicable hereto, as will be subsequently developed, the case is subject to a final review here.

[3] II. *Indivisibility of Action*.—It is contended, with some degree of plausibility, that the only matter submitted for our consideration is the contested difference between the plaintiff and the defendant Rowena Kline; that the defendant Mary E. Smith having recovered a judgment in the trial court, with which she is content, as is the plaintiff, who does not appeal, such judgment is a finality, and cannot be reviewed in this proceeding, because the defendant Rowena Kline alone appeals. This conclusion is due to a misconception of the nature of the action. While it lacks some of the essentials of a bill of interpleader, in that plaintiff does not appear

to be a wholly disinterested stakeholder, and the defendants do not claim identical amounts, although arising from the same fund, enough appears from the pleadings to authorize the classification of the action as a bill in the nature of a bill of interpleader, in which the plaintiff seeks some affirmative relief other than the mere right to compel the defendants to interplead, as in a case of interpleader proper. As further characterizing the nature of the proceeding, the defendants filed answers which may not inaptly be termed cross-bills, in order that they might bring their respective equities before the court. Incidentally, it may be remarked in this connection that wherever these pleadings are defective, and would, as a consequence, have been subject to demurrer, the parties having answered and proceeded to a hearing without formal objections, and enough appearing to show that a cause of action is stated, although inartificially and burdened with surplusage, objections which would otherwise have been held to be tenable are waived, and a disposition of the case upon the issues made is authorized. *Hollister v. Lefevre*, 35 Conn. 456; *Heath v. Hurlless*, 73 Ill. 323; *Bedell v. Hoffman*, 2 Paige [N. Y.] 199; 23 Cyc. p. 33; *Nat. Union v. Keefe*, 172 Ill. App. 101; 14 *Stand. Encyc. Pro.* p. 233, and notes.

Where, as here, the action is in the nature of a bill of interpleader, the purpose of same, as in the more strict proceeding, is that the defendants may be brought into court, that it may be determined to whom the amount admitted by plaintiff to be due should be paid. This having been done, by the issuance and service of process, upon the answers of the defendants having been filed, the controversy, except to settle the affirmative prayer of the plaintiff becomes one between the defendants; the plaintiff's presence being retained therein simply to finally determine the issue as to his right to the separate relief claimed, and to subject him to such orders as may be found necessary in the protection of defendants' rights. Upon the contest becoming one between the defendants, the judgment in favor of either below, is against the other, and the right to an appeal of such order for the final determination of the correctness of said judgment follows as a necessary consequence.

Apropos of this conclusion is the ruling of this court in *Roselle v. Farmers' Bank*, 119 Mo. loc. cit. 92, 24 S. W. 744, in which it is said, in substance, that an interpleading suit, or one in the nature of same, involves two successive litigations—one between the plaintiff and the defendants, as to whether the latter shall be required to interplead; and, upon this having been determined affirmatively, the other is between the defendants. The subjects of these litigations are distinct, requiring separate allegations and proofs. To

a like effect is the ruling of the Kansas City Court of Appeals in *Glasner v. Weisberg*, 43 Mo. App. loc. cit. 220, in which the court says, in effect, in defining the procedure, that, if the defendants do not deny the statements in the bill, the ordinary decree is that they be required to interplead; then the plaintiff's active participation in the suit ceases; but, if defendants deny the allegations of the bill, the plaintiff is required to reply to the answers and close the proof in the usual manner. At the hearing the plaintiff can only insist that defendants interplead (Story Eq. Pl. § 297), and they alone contest their conflicting claims. The course thus required to be pursued, which is definitive of the dual nature of the action, after the recognition by the court of the right of interpleader, is also affirmatively announced in *State ex rel. Mulvihill v. Kumpff*, 62 Mo. App. loc. cit. 335, in which, after recognizing the ruling authority of *Roselle v. Bank* and citing with approval the ruling announced in *Glasner v. Weisberg*, the court says:

"If the court should enter a decree dismissing the plaintiff's bill of interpleader, from that he could appeal; but with the decree determining the rights of the defendant interpleaders to the fund he would have no concern, and could not be heard to call it in question by motion for a rehearing. After the withdrawal of the plaintiff from the case, the controversy is then solely and exclusively carried on between the several interpleaders, who claim the fund. And whether the parties who claim the fund are defendants to a bill of interpleader, or are brought in under a rule according to the prayer contained in an answer (in the nature of a bill of interpleader), or are permitted on their own motion to interplead, can make no difference. The contest is between them, and them alone.

"When the finding and decree determining the rights of the various contestants are entered, that puts an end to the whole controversy, unless, as provided in our practice act, one of the contestants, who is dissatisfied therewith, moves for a new trial of the issues which have been so determined adversely to him. The claimants of the fund, whether they be plaintiffs, defendants, or interpleaders, who have come in on their own motion, are parties to the decree."

See, also, *Comm. Trust. Co. v. Du Montimer*, 193 Mo. App. 290, 183 S. W. 1139, as to right of review of entire case upon appeal of one of the parties.

Guided by the rule thus announced, concerning the correctness of which there is no contrariety of opinion here or elsewhere, we are authorized in concluding that, the defendants having been required to interplead, the subsequent proceedings were between them alone, so far as concerns the determination of their respective rights, and upon a judgment being rendered in favor of either, the other is entitled to an appeal. The recognition of a different doctrine would defeat the purpose

of an interpleader, and, instead of affording a method by which the rights of all of the parties could be disposed of in one action, would split it into piecemeal, and but continue plaintiff's double vexation in regard to one liability. *Funk v. Avery*, 84 Mo. App. 490; *Sullivan v. Knights*, 73 Mo. App. 44; *Conn. Mut. Life v. Tucker*, 28 R. I. 1, 49 Atl. 26, 91 Am. St. Rep. 590, and notes; *Monks v. Miller*, 13 Mo. App. 363; *Ireland v. Kelly*, 60 N. J. Eq. 308, 47 Atl. 51. The contention, therefore, as to the divisibility of the action, and the finality of the judgment of *Mary E. Smith*, is without foundation.

[4, 5] III. *Defendants' Claims.*—We come now to a consideration of the claims of the defendants. *Mary E. Smith*, the widow of the life tenant, claims the stipulated monthly rental on the land, under the contract made with the plaintiff by her and her husband on September 7, 1910. This claim is made alternatively in her answer, in which she asks, if the contract in regard to same be held invalid, by which we understand the pleader to mean nonexistent, since the death of the life tenant, *Fred D. Smith*, that defendant be adjudged to be entitled to the 10 per cent. royalty on the gross value of the minerals taken from the land during the term of the lease. Whether this contract of September 7, 1910, be construed to be a new lease, or a substitution of the original between *Fred D. Smith* and *A. B. Bowen*, not having been ratified by the remaindermen, was determined by the death of *Fred D. Smith*, the life tenant. Without this ratification he could not burden the body of the estate or affect the rights of the owner of the fee by an agreement or attempted transfer which was to continue beyond the limits of his tenure. *Coulson v. La Plant*, 196 S. W. 1144. The life tenant being thus restricted, neither the joinder of this defendant as a party to the lease, to which we will hereafter refer more at length, nor the attempted bequest to her of the monthly rent by the life tenant, adds anything to the force of her claim, which must derive any merit it may possess from some right or power of the life tenant. *Foote v. Sanders*, 72 Mo. 616; *Mo. Cent., etc., Ass'n v. Eveler*, 237 Mo. 679, 141 S. W. 877, *Ann. Cas.* 1913A, 486; *Edgill v. Mankey*, 79 Neb. 347, 112 N. W. 570, 11 L. R. A. (N. S.) 688; *Guthmann v. Vallery*, 51 Neb. 824, 71 N. W. 734, 66 Am. St. Rep. 475; *Hinton v. Bogart*, 78 Misc. Rep. 46, 137 N. Y. Supp. 697; *King v. Foscue*, 91 N. O. 116; *Wright v. Graves*, 80 Ala. 416; *Johnson v. Grantham*, 104 Ga. 558, 30 S. E. 781; *McIntyre v. Clark*, 6 Misc. Rep. 377, 26 N. Y. Supp. 744.

The unquestioned limitation of the estate of the life tenant does not preclude him from making a lease for any number of years, as it will be held valid only during his life, terminate at his death, and have no effect upon the estate of the remaindermen. *Preston v.*

Smith (C. C.) 26 Fed. 884, affirming (C. C.) 23 Fed. 737; Coakley v. Chamberlain, 8 Abb. Prac. N. S. (N. Y.) 37; Bergengren v. Aldrich, 139 Mass. 259, 29 N. E. 687; Miles v. Miles, 32 N. H. 147, 64 Am. Dec. 362; 16 Cyc. p. 640.

We have stated that the joinder of this defendant in the lease added nothing to her claim to the rent after the death of the life tenant. No consideration, actual or constructive, accompanied or arose out of her act; and she had no interest in the property, and could convey none, as in a case of inchoate dower or other interest of the wife, which cannot be aliened or assigned, unless she joins in the conveyance with her husband. *Vantage Mining Co. v. Baker*, 170 Mo. App. 457, 155 S. W. 466; *Lenfers v. Henke*, 73 Ill. 405, 24 Am. Rep. 263.

[6] It is somewhat dubiously contended that the ratification by the remaindermen of the making of the lease from Fred D. Smith to Bowen, and by the latter assigned to plaintiff, in some manner enlarges the claim of defendant Mary E. Smith. She claims primarily that her right to the rent arises out of the contract or lease made by herself and her husband to the plaintiff. When this ratification was made, the lease under which she now claims rent was not in existence. That the ratification was only intended to apply to the instrument on which it was indorsed is evident from its terms, to wit: "We hereby consent to and ratify the foregoing lease." Adjoining reasons in the face of this record to sustain a conclusion that these words mean other than that they were to apply only to the lease on which they were indorsed confuses rather than clarifies the issue. What is plain cannot be made more plain, however it may be decorated with words.

If it be claimed that the assignment of the original lease carried the ratification indorsed thereon with it, the contention can apply only in so far as said lease is in terms identical with that subsequently made between plaintiff, the life tenant, and this defendant. Other than in the description of the land and the duration of the terms, there is no identity between these two instruments. Not only are the parties different, in that this defendant is not named in the original as one of the lessors, although so named in the subsequent lease, but the amount of the rent and the manner of its payment are not the same in both leases. To neither of the changes noted, therefore, can the remaindermen be said to have assented. This being true, Rowena Kline, their sole survivor, is not bound thereby, and the operative force of the lease between plaintiff, the life tenant, and this defendant, so far as it may be claimed to affect Rowena Kline's interest, ceased with the death of the life tenant. Upon being invested with the fee, Rowena Kline became entitled to the rent or royalty, which follows the

ownership of the land. *Stevenson v. Hancock*, 72 Mo. loc. cit. 615; *Deffenbaugh v. Hess*, 225 Pa. 638, 74 Atl. 608, 36 L. R. A. (N. S.) 1009; *McFadden's Est.*, 224 Pa. 443, 73 Atl. 927; *Hinton v. Bogart*, 78 Misc. Rep. 46, 137 N. Y. Supp. 697.

[7] Whether, after her investiture, she continued bound by the terms of the lease, it is not necessary to discuss or determine, because she is satisfied with its terms and consents to its continuance. This is in harmony with the plaintiff's mental attitude, which, although alternatively pleaded in her petition, concedes the continuance of the lease, the defendant's consent and approval of same, and asks that it may be adjudged to whom the rent or royalty thus admitted to be due shall be paid. *Winfrey v. Work*, 75 Mo. loc. cit. 56; *Min. Co. v. Baker*, 170 Mo. App. 457, 155 S. W. 466; *Higgins v. Calif. Pet. Co.*, 109 Cal. 304, 41 Pac. 1087.

Under this state of facts, although it be held, as it has been in several jurisdictions, that the lease terminated upon the death of the lessor, if the remainderman, as is the case here, acquiesces in the holding by the tenant under the lease, there is no rule of law which will preclude its continuance; and it may, without affecting its validity, be regarded as a new contract between the remainderman and the tenant. *Hoagland v. Crum*, 113 Ill. 365, 55 Am. Rep. 424. In the *Hoagland Case* it was held that—

"Where the tenant elects to continue to occupy the premises after the determination of the lease by the death of his lessor, and the owner of the reversion acquiesces in such holding, there is no rule of law that would prevent the owner from recovering of the tenant the reasonable value for the use and occupation of the premises."

Such reasonable value cannot be better estimated in the instant case than by fixing it at the amount of the royalty agreed upon in the original lease. *Barson v. Mulligan*, 198 N. Y. 24, 90 N. E. 1127; *Siegel v. Neary*, 38 Misc. Rep. 297, 77 N. Y. Supp. 854; *Voorhies v. Cummings*, 42 App. Div. 260, 58 N. Y. Supp. 1120.

The lack of interest of the defendant Mary E. Smith in the land, either arising out of her former marital condition, under contract, or by devise, forecloses her claim to the rent or royalty in question. The nature of the title of Rowena Kline, which is absolute, coupled with her acquiescence and approval of the original lease, and her consent to its continuance, entitles her to the royalty of 10 per cent. of the ores mined on the land from the death of the life tenant, Fred D. Smith, to continue during the term of the lease.

[8] The chats or tailings which have accumulated on the land may be properly classified as a part of the ore taken therefrom, and the proceeds arising from their sale must be apportioned according to the rights

of the respective parties hereto. To those which accumulated prior to the death of the life tenant, the plaintiff is entitled. Of those which accumulated subsequently, the defendant Rowena Kline is entitled to 10 per cent. of the gross amount arising from the sale of same.

[9] *Improper Reply.*—In plaintiff's reply she assumes a contradictory position to that announced in her petition. In the latter she avers, among other essentials, the existence of the debt, her willingness to pay the same, that she is a mere stakeholder, and has no interest in the subject-matter, and is free from liability to either of the defendants. In her reply she assumes an offensively hostile attitude to the defendant Rowena Kline, and alleges that the latter is estopped from claiming rent or royalty from the plaintiff. This pleading has no place in a proceeding of this character. If regarded as other than surplusage, it would have authorized a dismissal of the action on the ground that it discloses such a hostility on the part of the plaintiff to one of the defendants as to preclude him from invoking interpleader. This case, however, has tarried in the courts for more than four years, to the unquestioned detriment of all parties concerned. By its chronic presence it clamors for final determination. That there may be an end of litigation, therefore, we treat the reply, other than the general denial, as surplusage, thus enabling the case to be determined upon its merits.

The judgment of the Court of Appeals rendered in this case was in the main correct. The difference of opinion of the judges, however, in regard to some of the matters at issue, has rendered it necessary that the entire case be reviewed here. This we have done, with the result, for the reasons stated, that the judgment of the trial court is reversed and remanded, to be proceeded with in a manner not inconsistent with the conclusions herein reached.

It is so ordered.

FARIS, J., concurs.

WILLIAMS, P. J., not sitting.

#### MCCORMICK v. WARMAN. (No. 13233.)

(Kansas City Court of Appeals. Missouri.  
Dec. 1, 1919.)

#### 1. APPEAL AND ERROR §549(1) — NECESSITY OF BILL OF EXCEPTION.

The appellate court has no means of knowing whether defendant appellant objected and excepted to the filing of the amended petition and also to the overruling of his motion to strike out, as he asserts, in the absence of a bill of exceptions.

#### 2. PLEADING §360(1) — MOTION TO STRIKE NOT ATTACKING DEFECT ON FACE OF PLEADINGS IS NOT DEMURRER.

A motion to strike out which did not attack the cause for anything appearing on the face of the amended petition, or for any defect appearing on the face of any pleading of record, does not fill the office of a demurrer.

#### 3. APPEAL AND ERROR §518(4) — ORIGINAL PLEADING AFTER AMENDMENT, AS PART OF RECORD.

On filing an amended petition the original became an abandoned pleading, and was no longer a part of the record, but only evidentiary matter for consideration upon defendant's motion to strike out amended petition for departure, the overruling of which motion cannot be reviewed, where the original petition is not brought up by bill of exceptions.

#### 4. PLEADING §248(3) — DEPARTURE OR CHANGE OF CAUSE OF ACTION IN AMENDED PETITION.

Where the gist of the action in both original and amended petitions was to recover commission due on the same sale of land, there could hardly be a departure or change of cause of action.

Appeal from Circuit Court, Jackson County; Willard P. Hall, Judge.

"Not to be officially published."

Action by B. W. McCormick against Sam Warman in the justice court, and upon appeal to the circuit court plaintiff obtained a judgment, and defendant appeals. Affirmed.

J. Allen Prewitt, of Independence, for appellant.

L. T. Dryden, of Independence, for respondent.

TRIMBLE, J. This is an action to recover plaintiff's portion of a real estate broker's commission due on the sale of land belonging to one Davis, and sold to Walter G. Pugh by plaintiff and defendant. It originated in a justice court, was taken thence on appeal to the circuit court, where judgment was rendered in plaintiff's favor for one-half of the full commission due on the sale and paid by Davis to defendant.

[1] When the case reached the circuit court, defendant demurred to the petition, which was overruled. Thereafter plaintiff filed an amended petition. The defendant filed a motion to strike out the amended petition and dismiss the cause upon the alleged ground of a departure. This was overruled. Defendant claims that he objected and excepted to the filing of the amended petition, and also excepted to the overruling of his motion to strike out, but since no bill of exceptions was filed we have no way of knowing whether he did or not. Hence, also, if a motion for new trial is necessary, to enable the court to have an opportunity to correct

its own errors, if any, we have no showing that any exception was saved to the overruling of said motion for new trial. Defendant deemed a motion for new trial necessary, and, it seems, is also of the opinion that exceptions were required to be saved since, it is stated in the brief, in arguing against the court's action, that the filing of the amended petition was excepted to.

Upon a trial of the case, the jury returned a verdict for plaintiff in the sum of \$187.50. Defendant has appealed, but, as stated, filed no bill of exceptions.

[2] The motion to strike out cannot in this case be treated as filling the office of a demurrer. The motion did not attack the cause for anything appearing on the face of the amended petition, nor indeed for any defect appearing on the face of any pleading or of the record.

[3] When plaintiff filed his amended petition the original became an abandoned pleading. Hence, when, thereafter, defendant filed his motion to strike out the amended petition, the original petition was not a part of the record, but was nothing more than mere evidentiary matter to be looked at in determining defendant's contention of departure. There being no bill of exceptions, the original petition is not before us, as it has no place in the record proper, and has not been preserved by a bill. *Meux v. Haller*, 179 Mo. App. 466, 471, 162 S. W. 688; *Campbell v. Boyers*, 241 Mo. 421, 145 S. W. 807; *Forrister v. Sullivan*, 231 Mo. 345, 351, 132 S. W. 722.

[4] However, if we could accept defendant's statement that the original petition is as he claims it to be, it is difficult to see how there could be a departure or change in the cause of action, since, under both petitions, the gist of the action was and is to recover the commission due on a sale of Davis's land to Pugh.

The judgment is affirmed.

All concur.

#### VAUGHN v. JACKSON. (No. 13378.)

(Kansas City Court of Appeals. Missouri.  
Dec. 1, 1919.)

#### ANIMALS § 22, 23(2)—BURDEN OF PROOF TO SHOW NEGLIGENCE OF AGISTER CAUSING LOSS OF CATTLE.

One pasturing stock at a price per head per month owes the owner the duty of an agister or bailee for hire, and plaintiff owner's burden of pleading and proving negligence on loss of cattle by theft never shifts, but after he has made a prima facie case, by proving delivery and failure to redeliver defendant has the burden of producing evidence to excuse failure to redeliver, such as escape or theft not resulting from his negligence, but such evidence need not preponderate.

Appeal from Circuit Court, Vernon County; B. G. Thurman, Judge.

"Not to be officially published."

Suit by C. E. Vaughn against J. H. Jackson. Verdict and judgment for defendant, plaintiff's motion for new trial sustained, and defendant appeals. Reversed and remanded, with directions to reinstate the verdict.

W. H. Hallett, of Nevada, Mo., for appellant.

Chas. E. Gilbert, of Nevada, Mo., for respondent.

BLAND, J. Defendant owned some pasture land near the city of Nevada, Mo. During the summer months a great many owners of milk cows pastured their cows in defendant's pasture at \$1.50 a month per head. Most of the owners of these cows put them into the pasture in the morning and took them out in the evening. Plaintiff, who lived 300 or 400 feet from the pasture gate, placed in the pasture a small heifer about 1½ years old, agreeing to pay defendant the usual price for the pasturage. The fence and the gate of the pasture were in a reasonably good condition, but defendant had had some trouble with boys, who drove the cows to and from his pasture, leaving the gate open. The gate was never locked. Just how plaintiff's animal escaped from the pasture is not shown; one or two other cows got out at the same time. The evidence shows that a cattle dealer in the city of Nevada bought the heifer from some stranger and shipped her to Kansas City. Plaintiff made demand on defendant for the payment of the reasonable market price for his heifer, which defendant refused, and plaintiff brought this suit, alleging the placing of the heifer in defendant's pasture, the payment of \$1.50 per month charges, failure of defendant to return the animal on demand, and praying judgment for \$75, her reasonable market value. There was a verdict and judgment for defendant, but the court sustained plaintiff's motion for a new trial, assigning as reason therefor that it erred in the giving and refusing of instructions.

Respondent has not favored us with a brief, but we find that there was no error in the giving and refusal of instructions. Appellant says that the court was of the opinion that plaintiff's refused instruction C should have been given. This instruction reads as follows:

"The court instructs the jury that if you believe from the evidence that plaintiff delivered the heifer in question into defendant's pasture, and has paid all charges he agreed to pay for pasturage, and that defendant has failed to return said heifer to plaintiff upon demand, the burden is upon the defendant to excuse his fail-

ure to so return said heifer by showing by a preponderance of the evidence—that is, the greater weight of the evidence—that the heifer escaped from or was taken from said pasture without the negligence of the defendant.”

We think there was no error in the refusal of this instruction. The duty the defendant owed plaintiff was that of an agister or bailee for hire. The cause of action is founded on the negligence of the bailee. While the burden of proof is upon plaintiff to show such negligence, and that burden never shifts, plaintiff sustained the burden upon him by merely pleading and proving the fact of bailment, and the failure or refusal of defendant to return the property on proper and timely demand. The burden of bringing forward evidence, but not the burden of proof, then shifted to the defendant, to excuse his failure to return the property by showing that the loss was due to a cause consistent with the exercise of reasonable care on his part. *Casey v. Donovan*, 65 Mo. App. 521; *Rayl v. Kerlich*, 74 Mo. App. 246; *Levi & Co. v. Rd.*, 157 Mo. App. 536, 138 S. W. 699; *Corbin v. Cleaning & Dyeing Co.*, 181 Mo. App. 151, 167 S. W. 1144; 3 C. J. p. 39. The first part of the instruction merely told the jury, in effect, that proof of the delivery of the heifer and failure to redeliver her on demand would make out a prima facie case for plaintiff. That part of the instruction was clearly proper under the authorities cited.

As to the latter part of the instruction, we need not say whether or not it casts the burden of proof on the defendant instead of the burden of evidence; for we think it is erroneous for the reason that, although the burden of evidence was on the defendant to show that he was not negligent, he was not required to show that fact “by the greater weight of the evidence.” As before stated, plaintiff made out a prima facie case by showing a delivery of his heifer and the failure of defendant to return it on demand. Defendant then introduced evidence tending to show that it was not his fault that the heifer escaped, but that the heifer was stolen from his pasture. If defendant’s evidence disproving negligence on his part and the proof of negligence arising in favor of plaintiff on his showing were equally balanced, then the verdict must have been for the defendant, as it was not the duty of the defendant to show by the preponderance of the evidence that he was not negligent. On the other hand, it was the duty of plaintiff to show by the preponderance of the evidence that the defendant was negligent.

The judgment is reversed, and the cause remanded, with directions to reinstate the verdict.

All concur.

STATE ex rel. LAMM et al. v. LAMM et al.  
(No. 13365.)

(Kansas City Court of Appeals. Missouri.  
Dec. 1, 1919.)

1. EXECUTORS AND ADMINISTRATORS §537(8)  
—PLEADING UNLAWFUL PAYMENT IN ACTION  
AGAINST EXECUTOR.

In the absence of an allegation that money paid out was not paid out on items allowed by the probate court in an action against an administratrix and her sureties, it will be presumed on demurrer that the money was lawfully paid out.

2. COURTS §39 — JURISDICTION OF ACTION  
AGAINST ADMINISTRATOR IN PROBATE COURT.

A petition in an action in the circuit court against an administratrix and her sureties held not one in conversion, but rather one whose purpose was to discover assets, a matter within the exclusive original jurisdiction of the probate court.

3. COURTS §472(4)—PROBATE COURT HAS EX-  
CLUSIVE ORIGINAL JURISDICTION OF ACTIONS  
TO DISCOVER ASSETS.

The probate court has exclusive jurisdiction in all cases involving the concealment or wrongful withholding of assets of an estate, except in instances of purely equitable cognizance, and the circuit court will not take original jurisdiction of cases which in reality involve the question of the proper administration and settlement of the estates of deceased persons, in view of Rev. St. 1909, §§ 70-74.

4. EXECUTORS AND ADMINISTRATORS §85(2)  
—PROCEEDINGS AGAINST ADMINISTRATOR FOR  
DISCOVERY OF ASSETS AUTHORIZED.

A proceeding under Rev. St. 1909, §§ 70-74, to discover assets of the estate of a deceased person, may be had as well against an administrator as against any other person.

Appeal from Circuit Court, Miller County; J. G. Slate, Judge.

“Not to be officially published.”

Proceeding by the State of Missouri, on the relation of Joseph R. Lamm and others, against Matilda C. Lamm, individually and as the administratrix of the estate of William R. Lamm, and others. Judgment for defendants, and plaintiff and relators appeal. Affirmed.

R. P. Stone, of Eldon, and Sid C. Roach, of Linn Creek, for appellants.

Barney Reed, of Ulman, and W. S. Stillwell, of Tuscumbia, for respondents.

TRIMBLE, J. Relators herein are the heirs of William R. Lamm, deceased. The defendant Matilda C. Lamm is his widow and the administratrix of his estate. She is sued as such administratrix, and also individually, together with the sureties on her bond. The



defendants filed a demurrer to the petition, which the court sustained. Plaintiff and relators stood upon the petition and appealed.

It is conceded in the briefs that the court sustained the demurrer on the ground of want of jurisdiction in the circuit court. There are, however, other grounds alleged in the demurrer and relied upon by defendant. The difference between the respective parties over the question of jurisdiction grows out of their divergent views as to the proper construction of the petition. Relators say it states purely and solely a suit on administratrix's bond; while defendants contend that the suit is, in effect, a proceeding to discover assets in the hands of the administratrix alleged to be wrongfully withheld by her. Of course, if the petition states a good cause of action on administratrix's bond, there is no question but that the circuit court has jurisdiction. If, however, it is, in reality and in legal effect, a proceeding to discover assets, authorized by sections 70 to 74, R. S. 1909, then exclusive original jurisdiction is in the probate court.

[1] The petition alleged the death and intestacy of decedent, the appointment and qualification of his administratrix, with the sureties on her bond, and that said decedent left an estate in personalty aggregating \$8,000. It is then charged that said administratrix has not made a true and correct inventory and appraisal of said personal estate, and has not faithfully accounted for the whole of the same as required by law; that she has unlawfully and wrongfully converted to her own use a large amount of said estate, to wit, the sum of \$4,000, and has failed and refused, and still fails and refuses, to account for the same to the probate court, but, on the contrary, appropriated it to her own use and is now wrongfully withholding the same. The petition further charged that said Matilda C. Lamm, as such administratrix, wrongfully paid out money belonging to said estate for items which were not proper or legal charges against said estate, but which were the individual debts of Matilda C. Lamm. Said payments so alleged to have been made were itemized, and aggregated the sum of \$750.85. The petition nowhere charged that the items aggregating said sum

had not been allowed by the probate court. In the absence of such allegation the presumption would be that administratrix was acting within her lawful authority in making these payments, or, at any rate, it would require an allegation that demands therefor had not been allowed, in order to constitute a good pleading that their payment was unlawful. So that, as to the specific items named in plaintiff's petition as a further breach of said bond, there is no cause of action stated on them, even if it could be thought that plaintiff and relators would desire to limit the suit to the specified items, and thereby run the risk of a charge of splitting their cause of action, when they sought to enforce their rights as to the other property.

[2, 3] With reference to the other matters alleged in the petition, it is manifest upon the face thereof that the object and purpose of the action is to discover assets. The probate court has exclusive jurisdiction in all cases involving the question of concealment or wrongful withholding of assets of an estate, except in instances of purely equitable cognizance; and the circuit court will not take original jurisdiction of cases which in reality involve the question of the proper administration and settlement of the estates of deceased persons. *Lemp Brewing Co. v. Steckman*, 180 Mo. App. 320, 168 S. W. 226; *Bank of Seneca v. Morrison*, 200 Mo. App. 169, 175, 204 S. W. 1119.

[4] It is nowhere claimed that the estate of William R. Lamm, deceased, has been settled or fully administered upon. Should the relators be allowed to prevail in this case, they would be recovering property rightfully subject to administration and the payment of debts. This is a matter committed to the jurisdiction of the probate court. The purpose of the statute is to expedite the administration of estates. *Clinton v. Clinton*, 223 Mo. 371, 384, 123 S. W. 1. And the proceeding to discover assets may be had as well against an administrator as against any other person. Section 74, R. S. 1909; *Tygard v. Falor*, 163 Mo. 234, 63 S. W. 672.

The trial court correctly ruled on the demurrer, and the judgment is affirmed.

All concur.

## STATE v. DOLAN. (No. 13374.)

(Kansas City Court of Appeals. Missouri.  
Dec. 1, 1919.)

1. CRIMINAL LAW ⇨1106(2)—NECESSITY OF  
FULL TRANSCRIPT ON APPEAL; "WITHOUT  
DELAY."

Under Rev. St. 1909, § 5308, requiring a full transcript of record in a criminal cause, including a bill of exceptions, to be filed "without delay," such filing is sufficient, if made within six months, and although section 5309 provides that the transcript be made out, certified, and returned "as in civil cases," and section 2048 provides civil appeals may be taken by short form of transcript, if the short form is used in a criminal cause, then within the six months for perfecting appeal a full transcript must be filed.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Without Delay.]

2. CRIMINAL LAW ⇨1106(2) — FULL TRAN-  
SCRIPT FILED TOO LATE.

Where a judgment of conviction was had March 6, 1918, motion for new trial was overruled April 4th following, and bill of exceptions signed February 25, 1919, a full transcript, filed October 4, 1919, was filed more than six months after proper time, whether counting from date of overruling motion for new trial or of filing bill of exceptions.

3. CRIMINAL LAW ⇨1110(5) — AMENDMENT  
OF TRANSCRIPT AFTER EXPIRATION OF TIME TO  
PERFECT APPEAL IMPROPER.

Where defendant has appealed from a conviction by using a short form transcript, he cannot, after lapse of the six months allowed for perfecting the appeal, and after the state's objection to the transcript amend or alter it to make a full transcript as required by Rev. St. 1909, § 5308.

4. CRIMINAL LAW ⇨1109(2)—INSUFFICIENCY  
OF TRANSCRIPT PROPERLY RAISED BY BRIEF.

The state's objection that defendant had used the short form of transcript, instead of the full transcript required by Rev. St. 1909, § 5308, is properly raised for the first time in the state's brief, and the state is not estopped because of not moving to dismiss appeal, and defendant's attempt to amend transcript and preparation for review on the merits.

Appeal from Circuit Court, Cass County;  
Ewing Cockrell, Judge.

"Not to be officially published."

Clyde Dolan was convicted of selling intoxicating liquor, in violation of the local option law, and he appeals. Affirmed.

W. D. Summers, of Harrisonville, for appellant.

J. R. Nicholson and J. S. Brierly, both of Harrisonville, for the State.

ELLISON, P. J. An information was filed against defendant in the circuit court for selling intoxicating liquor in violation of the local option law. He was convicted, and on filing his affidavit and bond appealed to this court. The state's attorney insists that on account of the record there is nothing before us for consideration, save the sufficiency of the judgment.

[1] It appears that on an appeal from the judgment in a criminal case the statute (section 5308, R. S. 1909) requires that a full transcript of the record in the cause, including the bill of exceptions, be filed in the appellate court. Though the statute reads that this shall be done "without delay," it doubtless will suffice if it is done during the time in which such appeal may be perfected. In this case that would be any time within six months. Laws 1913, p. 226. In all instances of appeals in criminal cases, including misdemeanors, even though there is a stay of execution, as in this case, the appellant must bring up a full transcript of the record, including bill of exceptions. The short form will not do. This subject was thoroughly examined by the Springfield Court of Appeals, through Judge Bradley, in *State v. Chilton*, 199 Mo. App. 220, 200 S. W. 745, in the light of *State v. Conners*, 258 Mo. 330, 167 S. W. 429, by Judge Walker. It is true that under the terms of section 5309, R. S. 1909, of the criminal procedure statute, the transcript is made out, certified, and returned "as in civil cases," and that under section 2048 of the statute of civil procedure an appeal may be taken in a civil case by the short form of transcript. But, construing sections 5308, 5309, and 2048 together, we find the meaning to be that in criminal appeals there must be a full transcript, and that the permission in section 5309, to proceed "as in civil cases" does not refer to the character of the transcript. But if the short form is used, and then, within the six months allowed for perfecting the appeal, a full transcript is filed, it would doubtless suffice; the short form serving no purpose. *State v. Chilton*, supra.

[2] In this case the judgment of conviction was had on the 6th of March, 1918, and motion for new trial overruled April 4th following. The signing of the bill of exceptions was delayed until the 25th of February, 1919; but what is said to be a full transcript was not filed until the 4th of October following, which is more than six months from the time it should have been, whether we count from the date of overruling the motion for new trial or the filing of the bill of exceptions.

[3, 4] Defendant insists that the state should be estopped, at this day, from objecting to a review of the case on its merits, on

the ground that he now has filed a full transcript, and has been put to the trouble and expense of preparing his case for hearing. This full transcript defendant claims to have filed originated in this way: He, as above stated, had first filed a short form certificate or transcript, and with this as a basis he made up and filed an abstract of the record, including the bill of exceptions. The state, then noticing that an abstract of the record could not take the place of a full transcript certified to by the clerk, made objection thereto in a brief which was served on defendant on the 27th of September, 1919, whereupon defendant then had the clerk of the trial court certify that such abstract contained the proceeding in full, including the bill of exceptions. In this way, after the point had been raised by the state, defendant undertook to perfect his appeal by thus amending or altering his abstract. It has been ruled a great number of times that this cannot be done. *Everett v. Butler*, 192 Mo.

564, 569, 91 S. W. 890; *Harding v. Bedoll*, 202 Mo. 625, 636, 100 S. W. 638; *State ex rel. v. Ellison* (Sup.) 196 S. W. 1103; *Mahaffey v. Cemetery Ass'n*, 253 Mo. 135, 142, 161 S. W. 701; *Barnham v. Shelton*, 221 Mo. 66, 69, 119 S. W. 1089.

Defendant further insists that the state should have made a motion to dismiss his appeal. We think this insistence should not be sustained. In many of the cases which we have cited, no motion was made, and the point was suggested for the first time in the brief; and the Supreme Court has expressly decided, in a case which we do not now recall, that the point is properly made, though raised for the first time in respondent's brief.

The result is that we have no bill of exceptions before us, and that we are left with nothing to consider save the record proper, and, finding no error therein, we affirm the judgment.

All concur,

**STATE HIGHWAY DEPARTMENT et al. v. MITCHELL'S HEIRS et al.**

(Supreme Court of Tennessee. Nov. 15, 1919.)

1. CONSTITUTIONAL LAW  $\S$  228, 281—EMINENT DOMAIN  $\S$  75—STATUTES  $\S$  75—TAKING POSSESSION UPON FILING CONDEMNATION PROCEEDINGS AS DUE PROCESS OF LAW.

Acts 1919, c. 149,  $\S$  9, empowering highway commission immediately upon filing of condemnation suit to take possession of the property designated, is not subject to the objection that it is a suspension of general law for the benefit of particular individuals inconsistent with the law of the land, and therefore in violation of Const. art. 11,  $\S$  8, art. 1,  $\S$  8, and Const. U. S. Amend. 14.

2. CONSTITUTIONAL LAW  $\S$  228, 281—EMINENT DOMAIN  $\S$  77—STATUTES  $\S$  75—CONDEMNATION PROCEEDINGS FOR HIGHWAY WITHOUT COST BOND.

Acts 1917, c. 74,  $\S$  5, authorizing condemnation suits for acquisition of right of way for highways to be prosecuted without cost bond, is not subject to objection that it is a suspension of general law, for the benefit of particular individuals, inconsistent with the law of the land, and therefore in violation of Const. art. 11,  $\S$  8, art. 1,  $\S$  8, and Const. U. S. Amend. 14.

3. EMINENT DOMAIN  $\S$  167(1)—PROCEDURE IN EMINENT DOMAIN PROCEEDING.

Since neither Acts 1917, c. 74,  $\S$  5, nor Acts 1919, c. 149,  $\S$  9, though conferring right of eminent domain, prescribe details of procedure to be followed by counties or highway commission in acquiring property for highway purposes, the acts will be held to have been passed "with reference to the established mode of procedure in such cases existing at the time," and the proper procedure, therefore, is according to Thomp. Shan. Code,  $\S$  1844 et seq., except as modified by said sections 5 and 9.

4. STATUTES  $\S$  233—CONSTRUCTION AS BINDING STATE.

Law is presumed to be made for the subject or citizen only, and the sovereign is not reached by a statute unless named therein, or unless by necessary implication.

5. STATUTES  $\S$  75—SPECIAL LAWS MAY BE PASSED AFFECTING AGENCIES OF STATE.

Conceding that general laws governing condemnation (Thomp. Shan. Code,  $\S\S$  1845-1859, 1861-1865), would otherwise apply, such laws may be repealed or modified in their application to the highway commission and the several counties acting under Acts 1917, c. 74, and Acts 1919, c. 149, and these agencies may be authorized to proceed in a different manner, since special laws may be passed affecting agencies of the state.

6. EMINENT DOMAIN  $\S$  75—ENTRY WITHOUT PAYMENT OR BOND.

Where the general funds of a county of the state are subject to satisfaction of the landowner's claim, the Legislature may with propriety permit entry upon the property designated without prepayment or bond.

7. EMINENT DOMAIN  $\S$  71—ADEQUATE PROVISION FOR JUST COMPENSATION.

Acts 1917, c. 74,  $\S$  5, and Acts 1919, c. 149,  $\S$  9, in view of said section 5 authorizing judgment against county in condemnation suit to appropriate land for highway purposes, make adequate provision for compensation under Const. art. 1,  $\S$  21, since Thomp. Shan. Code,  $\S\S$  681-684, authorize imposition of tax to pay judgment against county, and give owner of the judgment right to compel levy of tax.

8. HIGHWAYS  $\S$  71—HIGHWAY COMMISSION MAY ALTER COURSE OF AUTHORIZED ROAD.

Though Priv. Acts 1917, c. 25, and chapter 131, authorizing Washington county to issue bonds to provide a road system, required a particular road to pass a certain place and intersect with another road at about that place, and bonds were voted and the road constructed, held that the state highway commission had authority, under Acts 1919, c. 149,  $\S$  9, to alter the course of the road at said place by a deviation of about one-third of a mile; deviation being thought necessary to make road conform to federal requirements.

Appeal from Circuit Court, Washington County; J. Stanley Barlow, Special Judge.

Condemnation suit by the State Highway Department and another against Montgomery Mitchell's Heirs and others. Suit dismissed, and petitioners appeal. Reversed and remanded.

Sells & Simmonds, of Johnson City, and Frank M. Thompson, Atty. Gen., for State Highway Dept.

Cox & Taylor, of Johnson City, for Mitchell's Heirs.

GREEN, J. This is a condemnation suit brought by the State Highway Commission and Washington county to appropriate certain land in said county for highway purposes.

The proceedings were had under chapter 74 of the Acts of 1917 and chapter 149 of the Acts of 1919, providing for state highway commissioners, regulating the duties of the commissioners and the counties in the premises, providing for revenue, etc.

The trial judge was of opinion that the two statutes mentioned were unconstitutional in certain features, and, further, that the highway commission and Washington county were without authority to locate this particular highway as attempted for reasons hereafter appearing, and consequently without power to take the particular land herein sought. His honor accordingly dismissed the suit, and petitioners have appealed in error to this court.

Chapter 74 of the Acts of 1917 and chapter 149 of the Acts of 1919 are too elaborate to be set out in full here. The constitutional infirmities thought to exist are in section 5

of chapter 74 of the Acts of 1917 and section 9 of chapter 149 of the Acts of 1919.

Section 5 of chapter 74 of the Acts of 1917 is as follows:

"Be it further enacted, that the department shall have full power and authority, and it is hereby made its duty through its highway engineers or otherwise to designate a system of state highways to designate the road or roads to be constructed, repaired or maintained by the use of the funds mentioned in this act, and to lay out and locate all such roads. The department is hereby further authorized in its own name or in the name of the county to condemn all necessary rights of way, gravel beds, stone or other material necessary or useful in building or repairing the roads contemplated by this act, and in so doing may bring and prosecute all necessary condemnation suits. The state Attorney General and district Attorney General in each case shall act as attorneys for the department without additional compensation. All judgments rendered and other expenses necessarily incurred in such condemnation proceedings shall be paid out of the general funds of the county, in which the expenses are incurred and standing to the credit of the trustee, on the warrant or voucher of the county judge or chairman drawn under the direction of the secretary of the department.

"No cash bond shall be necessary in such suit. Injunction may be sought and obtained against all persons interfering in any way with the work of said department or of any of its assistants or employes engaged in locating, laying out, or constructing any of said roads.

"It shall be the duty of all the chancellors and trial judges in this state to grant such injunctions and make all such other orders as will facilitate the work of the department in locating and constructing roads hereunder, and they shall promptly hear all cases in which the department may be interested."

Section 9 of chapter 149 of the Acts of 1919 is in these words:

"Be it further enacted, that whenever the said state highway commission finds it necessary or advisable it shall have the power to alter the course or grade or otherwise improve any road selected, adopted, or accepted for federal or state aid and take over and improve as a state highway. The counties wherein such roads lie shall have and are given the authority to acquire for the benefit of the state rights of way therefor, either by donations by owners of the land through which said highways shall run, or by agreement between such owners and the county, or by the exercise of the power of eminent domain which is hereby expressly conferred upon such counties. Provided, however, if the county authorities through which said road is designated do not act immediately upon request of the said state highway commission for the procurement and furnishing of said rights of way, that there is hereby expressly given to said state highway commission the right to condemn by eminent domain all rights of way for said roads, all bluffs, gravel pits, and any and all other road material found necessary or advisable to be used by said state highway commission. Provided, further, that the said highway commission is authorized and empowered im-

mediately upon the filing of the petition for condemnation of said rights of way and road material to take possession of the said designated right of way, road material and other property sought to be condemned."

[1, 2] The trial judge thought that the provisions above quoted, empowering the highway commission, immediately upon the filing of the condemnation suit, to take possession of the property designated was a suspension of general law, for the benefit of particular individuals, inconsistent with the law of the land, and therefore in violation of section 8, article 11, and section 8, article 1, of the Constitution of Tennessee and the Fourteenth Amendment to the Constitution of the United States.

He entertained the same view as to the provision authorizing these suits to be prosecuted without a "cash bond," which language he properly said was intended to mean "cost bond," the word "cash" being obviously a misprint.

The trial court seemed likewise of opinion that the statutes authorized the application of property to a public use without adequate provision to insure "just compensation being made therefor," and thus contravened section 21, art. 1, of the Constitution of Tennessee.

We will consider these constitutional objections in the order in which they have just been mentioned.

[3] Neither of the acts before us undertake to prescribe the details of the procedure to be followed by the counties or highway commission in acquiring property for highway purposes. The right of eminent domain is conferred, and under such circumstances the acts will be held to have been passed "with reference to the established mode of procedure in such cases existing at the time." *Railroad v. Memphis*, 128 Tenn. 267, 290, 148 S. W. 662, 667 (41 L. R. A. [N. S.] 823, Ann. Cas. 1913E, 153). Therefore proper procedure herein is according to section 1844 et seq., Thompson's Shannon's Code, the general statutes regulating the taking of private property for works of internal improvement, except as such general practice is sought to be modified by the above-quoted sections of the Acts of 1917 and 1919.

The question to be now decided is whether these changes attempted to be made in the general statutes in favor of the counties and highway commission are permissible under the Constitution.

Our condemnation statutes provide for the filing of a petition in the circuit court, notice to the owner, writ of inquiry, jury of view to lay off the land and assess damages, and that the land be decreed to petitioner "upon payment to the defendants or to the clerk for their use, of the damages assessed with costs." Thompson's Shannon's Code, §§ 1845-1859.

Either party may appeal from the finding of the jury of view and have a trial anew in the usual way in the circuit court, and petitioner may enter and proceed with the work, pending appeal, upon giving a good bond. Thompson's Shannon's Code, §§ 1861-1863. Thompson's Shannon's Code, § 1865, is as follows:

*"Damages to be Prepaid, or Bond on Appeal.*

—No person or company shall, however, enter upon such land for the purpose of actually occupying the right of way, until the damages assessed by the jury of inquest and the costs have been actually paid; or, if an appeal has been taken, until the bond has been given to abide by the final judgment as before provided."

Is it permissible, in view of the general laws on the subject, to authorize the highway commission, "immediately upon the filing of the petition for condemnation," to enter and take possession of the property designated? We think so for several reasons.

[4] Law is presumed to be made for the subject or citizen only, and the sovereign is not reached by a statute unless therein named, or unless by necessary implication. *Railroad v. Mayor & Aldermen of Union City*, 137 Tenn. 491, 194 S. W. 572; *Mayor and Aldermen of Morristown v. Hamblen County*, 136 Tenn. 242, 188 S. W. 796.

The power of eminent domain may be exercised by the sovereign directly or it may be delegated. We think the statutes (Thompson's Shannon's Code, § 1844 et seq.) were intended primarily to regulate the taking of property by persons or corporations to whom the right of eminent domain had been delegated. However, it is doubtless true that in suits to condemn the sovereign should proceed in the same way, unless the Legislature otherwise directs.

There can be no question but that in taking property under the Acts of 1917 and 1919 for highway purposes the highway commission and the county act merely as arms or agents of the state. Property so acquired is for a state purpose. Rights of way so obtained form links in the state's highway system, to be supervised by the state, and to be maintained with a tax levied by the state.

[5] That is to say, the highway commission and the counties act as governmental agencies in the matter, and not in any corporate or individual capacity. So if it be conceded that the general laws governing condemnation proceedings would otherwise apply, nevertheless such laws may be repealed or modified in their application to the highway commission, and the several counties, acting under authority of the Acts of 1917 and 1919. These agencies may be authorized to proceed in a different way to accomplish such a purpose; for nothing is better settled than that special laws may be passed affecting counties, municipalities, school districts, and the like, as arms or agencies of the state.

*State v. Wilson*, 80 Tenn. (12 Lea) 246; *Balentine v. Pulaski*, 83 Tenn. (15 Lea) 633; *Williams v. Nashville*, 89 Tenn. 487, 15 S. W. 364; *Redistricting Cases*, 111 Tenn. 234, 80 S. W. 750; *Toddenhausen v. Knox County*, 132 Tenn. 169, 177 S. W. 487; *Quinn v. Hester*, 135 Tenn. 373, 186 S. W. 459.

Cases like *Fleming v. Memphis*, 126 Tenn. 331, 148 S. W. 1057, 42 L. R. A. (N. S.) 493, Ann. Cas. 1913D, 1306; *Malone v. Williams*, 118 Tenn. 390, 103 S. W. 798, 121 Am. St. Rep. 1002, and *Memphis v. Fisher*, 68 Tenn. (9 Baxt.) 239, where certain statutes affecting particular municipalities were held invalid, were cases in which the municipality was affected in its corporate rather than governmental character, and these statutes, moreover, made unlawful distinctions as between municipality and municipality. We think such authorities are not in point here.

In addition to the foregoing, and laying aside other considerations which incline us to sustain this so-called special legislation, we think it may very well be upheld as a legitimate exercise of legislative classification.

[6] In the case of a private corporation endowed with the right of eminent domain, no one on the outside can be sure of its true financial condition. The law wisely requires the landowner to be paid or secured for his property taken before entry is permitted. Where the general funds of a county of the state, however, are subjected to the satisfaction of the landowner's claim, he is perfectly certain to be paid, and the Legislature may with propriety permit an entry without prepayment or bond. We think such a discrimination is reasonable, and may be rested on a sound basis.

In 15 *Cyclopedia of Law*, p. 775, it is said:

"In the absence of any constitutional requirement it is not necessary for a state or municipal subdivision of the state to pay for private property taken for a public use in advance of the taking, if provision is made for its payment and a proper tribunal constituted so that the landowner may make his claim and receive damages, and the same is the case where the Constitution, although requiring prepayment, excepts from its operation a state or municipal corporation, or where the Constitution or statutes require compensation to be first paid or secured. It is sufficient that an adequate and safe fund is provided from which payment is to be made, as, for instance, making the amount payable a charge upon the public treasury either of the state or some municipal subdivision thereof, which is considered equivalent to actual compensation. As was said by an eminent text-writer, the property of the municipality or of the state is a fund to which the landowner can resort without risk of loss."

"There is a broad distinction between the taking of private property for public use by a town or municipal corporation and the taking of it by a private corporation, the responsibility of which may be very uncertain. Where the property is taken for public use by a town or municipal corporation which is made liable to

the owner for any damages sustained by reason thereof, the taxable property of such town or municipality constitutes a pledge or fund to which such owner may resort for payment in the manner so prescribed by the statute with absolute safety, and hence we must hold that the providing of such a method of enforcing payment in such a case, and out of such a pledge or fund, is the making of just compensation for the property taken within the meaning of the Constitution. *Smeaton v. Martin*, 57 Wis. 364, 15 N. W. 403."

As to the exemption from a cost bond, the whole subject of costs received an elaborate consideration in *Henley v. State*, 98 Tenn. 665, 41 S. W. 352, 1104, 39 L. R. A. 126, to which we could add nothing. Neither the state nor a county when acting as an arm or agency of the state is liable for costs in any case, unless the lawmaking power by statute has made them so. "As to what costs shall be allowed against the state and county is a matter which addresses itself solely to the wisdom and discretion of the General Assembly." *Henley v. State*, supra.

[7] The remaining constitutional question is whether these statutes make adequate provision for compensation to the landowner for the taking of his property.

Actual prepayment is not required by section 21 of article 1 of the Constitution. It is sufficient if the statute which authorizes the taking makes due provision for compensation, and a suitable remedy is open to the owner to have his damage assessed and to realize compensation for the same. *Simms v. Railroad*, 50 Tenn. (12 Heisk.) 621; *Parker v. Railroad*, 81 Tenn. (13 Lea) 669; *Saunders v. Railroad*, 101 Tenn. 206, 47 S. W. 155.

As before indicated, proceedings herein will be according to the general condemnation laws, except as they are modified by the Acts of 1917 and 1919. Compensation will be assessed and a judgment against the county then obtained, for such a judgment is plainly authorized by section 5 of chapter 74 of the Acts of 1917. The same section enacts that—

"All judgments rendered and other expenses necessarily incurred in such condemnation proceedings shall be paid out of the general funds of the county, in which the expenses are incurred and standing to the credit of the trustee, on the warrant or voucher of the county judge or chairman drawn under the direction of the secretary of the department."

We think this sufficiently secures to the landowner payment of his compensation. The authorities uniformly hold such a provision adequate. Without undertaking to review the cases, their result is well summarized thus:

"It is sufficient if the payment is made a charge on the public treasury of the government, general or local, which exercises the power, or on the fund raised by it by general taxation." 15 Cyc. 645.

And again:

"When the taking is made by the state or a municipal corporation, no special security is required, since the public faith is pledged, and in the case of a municipal corporation, the entire taxable property within its jurisdiction constitutes an adequate fund to which the owner may without risk of loss resort to compel payment." 10 R. C. L. p. 126.

If the general fund of any county should prove insufficient, the landowner, having a judgment against the county, may resort to sections 681-684 of Thompson's Shannon's Code, which direct the county court to impose a tax to pay any judgment against such county and which award to the person owning the judgment the right to a mandamus to compel the levy of a sufficient tax for his satisfaction. The county judge or chairman can, of course, be compelled to perform his duty in this matter by mandamus.

*Tuttle v. Knox County*, 89 Tenn. 157, 14 S. W. 486, is not in point. The act there under consideration was held invalid because, as said in the opinion, it nowhere provided for payment of damages to the landowner. "It leaves to speculation who is to be responsible, the public or the individuals who asked for the road; and there is no authority to any court to render a judgment."

The observations of this court in *Tennessee Central Railroad Co. v. Campbell*, 109 Tenn. 640, 75 S. W. 1012, repeated in *Cunningham v. Terminal Co.*, 126 Tenn. 343, 149 S. W. 103, Ann. Cas. 1913E, 1058, referred to by the defendants, were made in respect to proceedings under Thompson's Shannon's Code, § 1844 et seq. In neither case was there any question of the right of the Legislature to prescribe a different method of procedure in condemnation suits. Both cases, moreover, presented efforts of private corporations, to whom such power had been delegated, to exercise the right of eminent domain. The particular reasoning of the opinion in *T. C. R. Co. v. Campbell*, supra, here relied on, is without point as applied to a taking by the state for highway purposes. The sovereign's power in the premises and the public nature of such a purpose are things that have been beyond question for several centuries, and a provision in the statutes before us for litigating such matters as these would have been incongruous.

The conclusions here expressed are well supported by *Railroad v. Memphis*, 126 Tenn. 267, 148 S. W. 662, 41 L. R. A. (N. S.) 828, Ann. Cas. 1913E, 153, and *Anderson v. Turberville*, 46 Tenn. (6 Cold.) 150, and other cases.

We are therefore of opinion that the constitutional objections to chapter 74 of the Acts of 1917 and chapter 149 of the Acts of 1919, must be overruled.

[8] The remaining question in the case arises in this way: The particular land is

sought to be taken by the highway commission and Washington county in this case to straighten, and reduce the grade of, a road known as the Memphis to Bristol Highway. This highway had been laid out and graded through Washington county by the good roads commission of that county. The highway department proposed to take over this road heretofore laid out and graded, as it was authorized to do, and to alter it in the manner just mentioned. This alteration was thought necessary by the highway commission to make the road conform to federal requirements, and to obtain federal aid. The alteration amounted to a deviation in a short strip of the road of about one-third of a mile at a place known as Broylesville.

By chapter 25 of the Private Acts of 1917 and chapter 131 of the Private Acts of 1917, Washington county was authorized to issue \$750,000 of bonds to provide a road system for that county upon affirmative vote of the people. The roads to be built were particularly described in the statutes mentioned, with reference both to their termini and their routes. The statute required the road known as the Memphis and Bristol Highway at this point to pass Broylesville, and the statute also provided for another road to intersect said highway at about this point, and the deviation here attempted will cause the highway to miss Broylesville, and the said point of intersection with the other road, about one-fourth to one-third of a mile.

It is insisted for the defendants that, inasmuch as the statute fixed the route of the Memphis to Bristol Highway through Broylesville and this point of intersection, and upon the faith of the statute Washington county voted bonds, the route so designated cannot now be changed, at least by anything less than an act of the Legislature. The circuit court so held.

We think that *State ex rel. v. Cummings*, 130 Tenn. 566, 172 S. W. 290, L. R. A. 1915D, 274, is decisive of this contention. In that case Hamilton county was authorized to issue bonds upon an affirmative vote of the people for building a road from a point in the old fourth district of said county to a point in old seventeenth district of said county across Lookout Mountain above the line of the Nashville, Chattanooga & St. Louis Railway. The bonds were voted and sold, but for some reason the road was not built, and the proceeds of the bonds was held by the

county. By a subsequent act of the Legislature the proceeds of said bond issue was diverted to other roads in said county.

The validity of the latter act was challenged, but it was upheld by this court and by us declared that, inasmuch as the county was but an arm or agency of the state, the Legislature had full authority in the matter.

So manifestly the Legislature might by a particular act have directed that the route of the Memphis and Bristol Highway be changed, and that the funds raised by the bond issue be applied to the construction of the road as changed. No such special act has been passed, but by chapter 149 of the Acts of 1919, section 9, it was provided:

"That whenever the said state highway commission finds it necessary or advisable it shall have the power to alter the course or grade or otherwise improve any road selected, adopted, or accepted for federal or state aid and take over and improve as a state highway."

This seems to give the highway commission abundant authority "to alter the course" of this road as they have undertaken to do.

As shown in *State ex rel. v. Cummings*, supra, the state has full power over highways within its bounds, and may take them in charge at will.

We perceive no reason to prevent the state from acting in this matter through its highway commission. The state might either have changed the route by special act, or it may authorize the commission to change the route. The sovereign ordinarily acts in such matters through agents exercising delegated authority, and it appears from the expressions of the court in *State ex rel. v. Cummings*, supra, that this has been supposed to be the wiser method.

This result works no injustice to Washington county, nor does any violence to the sentiment of that county as expressed in the election for bonds authorized by the private Acts of 1917. In those very acts it was declared to be the duty of the good roads commission of Washington county to complete their system in such way as to entitle Washington county to receive its portion of state and federal aid.

A hardship may be worked upon these defendants and a few others, but their interests must yield to the public good.

It results that the judgment below will be reversed, and this case remanded for further proceedings.



## AMBROSE et al. v. REECE.

(Court of Appeals of Kentucky. Dec. 5, 1919.)

1. EVIDENCE  $\S$ 588—WORTHLESSNESS OF PREPARED TESTIMONY.

The testimony of witnesses who have been told the kind of testimony they are expected to give is deserving of the severest condemnation, and instead of strengthening, it tends strongly to weaken, the case of the side on whose behalf it is offered.

2. APPEAL AND ERROR  $\S$ 1009(3)—REVIEW OF CHANCELLOR'S FINDINGS ON CONFLICTING EVIDENCE.

Where the evidence is conflicting, and questions of fact on that account are difficult of solution, if, on consideration of the whole case, the mind is left in doubt as to the correctness of the judgment, the findings of the chancellor will not be disturbed.

3. HUSBAND AND WIFE  $\S$ 129(6)—CONSENT TO SALE OF SEPARATE PROPERTY.

In suit against husband and wife for specific performance of their contract to convey land, claimed by the wife to have been purchased by her for her separate estate with money given her by her father, and to have been deeded to her husband by mistake, *held*, that defendant wife, though insisting she never authorized or consented to the sale, was not entitled to relief; she having received the consideration and moved off the property.

Appeal from Circuit Court, Lee County.

Suit by F. M. Reece against Lucinda Ambrose and husband. From a judgment for plaintiff, defendants appeal. Affirmed.

Theo. B. Blakey, of Beattyville, for appellants.

H. S. McGuire, of Winchester, for appellee.

QUIN, J. Appellee instituted this suit seeking the specific performance of a contract executed in April, 1911, by the terms of which appellant agreed to convey to Lizzie Dameral, wife of Alfred Dameral, a tract of land of about 30 acres on Ross creek in Lee county. This contract or title bond was assigned and transferred to appellee in December, 1912. The consideration for the conveyance was a heifer and a secondhand sewing machine.

Appellants declined to execute a deed, and by way of defense to the suit denied the execution or delivery of the title bond—Lucinda Ambrose pleading affirmatively that the land was her separate estate purchased with money given her by her father; that by mistake of the draftsman the deed to the

property was made to her husband, and she had been in the actual possession of the land for more than five years, and appellee had abandoned any claim he may have had in or to same.

[1] The chancellor granted the prayer of the petition. The proof is unsatisfactory and conflicting, the material witnesses being the interested parties or members of their families, and there is no doubt they well knew for which side they were testifying. Two of the witnesses admit they were told the kind of testimony they were expected to give. Testimony of the latter kind is deserving of the severest condemnation; instead of strengthening, it tends strongly to weaken, the case of the side in whose behalf it is offered. It is unfortunate that litigants deem resort to such tactics necessary to bolster their causes. There is nothing to indicate that counsel had ought to do with this evidence.

Lucinda Ambrose testifies she neither signed nor authorized any one to affix her signature to the contract; three witnesses say she directed her husband to sign her name. While saying she opposed the transaction, she was present at the Dameral home when the trade was made, and later saw the contract drawn by her husband in her own home. They received the heifer and sewing machine; the latter she sold for \$4. She never listed the property for taxation until 1917, the year the petition was filed; on the other hand, appellee has exercised ownership and control over the property since 1912, and paid taxes thereon.

At the time of the execution of the contract George Ambrose delivered to Alfred Dameral the deed to the property, so that it could be recorded. The only reason George Ambrose assigns for his failure to execute the deed presented by appellee is that Alfred Dameral did not have the contract with him. Though insisting her signature was unauthorized, and she never consented to the deal, Lucinda Ambrose admits that after the trade she and her husband moved off the property, and Alfred Dameral took possession of it.

[2, 3] The record in this case renders peculiarly applicable the salutary rule that where the evidence is conflicting, and questions of fact by reason thereof difficult of solution, if upon a consideration of the whole case the mind is left in doubt as to the correctness of the judgment, the findings of the chancellor will not be disturbed.

This is the view we take of the case, and accordingly the judgment is affirmed.

$\S$ —For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

## CLIFTON LAND CO. v. REISTER.

(Court of Appeals of Kentucky. Dec. 7, 1919.)

## 1. APPEAL AND ERROR ¶882(12) — INVITED ERROR IN INSTRUCTIONS.

Where a party exercised the right given by Civ. Code Prac. § 317 by requesting an instruction, he cannot complain of error in the instruction requested and given, though he excepted to the giving of it.

## 2. TRIAL ¶261—DUTY OF COURT ON REFUSAL OF ERRONEOUS REQUEST.

Where party offers an instruction on a point of law, which the court refuses to give because of some defect in form or substance, it is the duty of the court to prepare and give a proper instruction on that point.

## 3. APPEAL AND ERROR ¶301—NECESSITY OF PRESERVATION OF ERROR IN MOTION FOR NEW TRIAL.

No error committed during the trial is available on appeal, unless relied on in the motion and grounds for new trial; and this is true, though an objection was made and an exception taken to the ruling at the proper time.

## 4. VENDOR AND PURCHASER ¶63—CONSTRUCTION OF CONTRACT FOR SALE OF LAND.

A contract for the sale of land with a building thereon, as well as the tendered deed, *held* to include the entire wall on the eastern side of the property.

## 5. SPECIFIC PERFORMANCE ¶64—RIGHT TO DEPENDENT ON EQUITY AND JUSTICE.

Specific performance of a contract for the sale of real estate does not go as a matter of course, but is withheld or granted according as equity and justice may seem to demand under the facts and circumstances in the case.

## 6. SPECIFIC PERFORMANCE ¶130 — DECREE ALLOWING DEFENDANT TO WITHHOLD PART OF PRICE.

Where a contract for the sale of a parcel of land on which was a building included the east wall of the building, and it appeared that the east wall was a party wall, in which the adjoining owner had an easement, *held* that, where the purchaser was anxious to consummate the contract with a deduction for the value of the easement, a decree of specific performance with a reasonable deduction was proper.

Appeal from Circuit Court, Harrison County.

Suit by the Clifton Land Company against J. H. Reister. From the judgment, plaintiff appeals. Affirmed.

W. S. Cason, W. H. Lall, and Daniel Durbin, all of Cynthiana, for appellant.

M. C. Swinford and T. E. King, both of Cynthiana, for appellee.

QUIN, J. By the terms of a contract entered into April 1, 1915, between the parties

to this appeal, appellant, the Clifton Land Company (plaintiff below), for a recited consideration agreed to convey to appellee what is known as the R. H. Wills livery stable property, fronting 53 feet on Pike street, in the city of Cynthiana, Ky. A deed of general warranty to be executed and delivered to appellee May 1, 1915, upon which date the contract provided for the payment of \$125 in cash, and the execution of a bond or note payable July 1, 1915, for the balance of the purchase price. Before May 1st appellee discovered that Joe Rigg, owner of the adjoining lot on the east, had or claimed an easement in part of the eastern wall of the property embraced in the contract. He demanded of the land company that it either relieve the wall of this easement or make a reduction in the purchase price. In a deed tendered appellee May 1, 1915, it was recited that appellant did not warrant the title to the property as against said easement. The frontage on Pike street was given in this deed as 53 feet 2 3/4 inches.

Appellee having declined to accept the tendered deed, the present suit was instituted to compel the specific performance of the contract. The court upon demurrer declined to compel an acceptance of the deed, because it did not comply with the contract. In a third amendment to the petition a deed conforming to the contract was tendered, there being no reservation as to warranty, the frontage on Pike street was given as 53 feet. A demurrer to the petition as thus amended was overruled, subsequent pleadings were filed, proof taken, and upon submission a judgment was rendered, requiring appellee to accept the last deed and pay the agreed consideration. Appellee in his answer set up a claim to damages of \$1,623.35 in the event he should be compelled to accept the property with the alleged incumbrance. The judgment provided that appellee might reserve and withhold the sum of \$1,623.35 until the further order of court. The issue as to damages having been completed, the case was transferred to the ordinary docket, and upon a trial by jury appellee was awarded damages in the sum of \$800. From a judgment in conformity to said verdict this appeal has been taken.

[1] It is appellant's contention that the wall is a party wall, and therefore whatever easements may exist in and upon it are mutual and subsisting easements, which create no incumbrance which can support a claim for damages by either party. Complaint is made of instruction No. 2 given by the court, in that it contained an incorrect definition of a party wall; but in making this argument counsel overlooks the fact that this instruction, as well as the five others given, were

all tendered by appellant. No others were given by the court.

[2] Either party may ask written instructions to the jury on point of law. Civil Code, § 317. It is not compulsory, but merely optional, with a party whether he will request the giving of instructions, and when he elects to tender instructions he will not be heard to complain because the court grants his request. *L. & N. R. R. Co. v. Woodford & Ireland*, 152 Ky. 398, 153 S. W. 722; *City of Paris v. Baldwin Bros.*, 160 Ky. 802, 185 S. W. 144. Where a party offers an instruction upon a point of law, and which the court refuses to give because of some defect in form or substance, it is the duty of the court to prepare, or have prepared, and give a proper instruction on that point. *L. & N. R. R. Co. v. Harrod*, 115 Ky. 877, 75 S. W. 233, 25 Ky. Law Rep. 250. But here the instruction was given as tendered and as to appellant the court did not err.

[3] It is true the record contains an agreed order to the effect that appellant excepted to the instructions given, but this objection cannot avail the party reserving the exception, the positions are inconsistent and after a verdict a party will not be allowed to say that, though he tendered an instruction, which he was not compelled to do, he saved an exception, and now, when it is to his advantage to do so, rely upon the exception. The verdict was rendered June 14th; the motion for new trial was not filed until June 21st; however, there is a notation that this date is not correctly stated, and no point is made in the briefs that it was not filed in time. Conceding it was in time (Civil Code, § 342), it contains no reference to the instructions given; it does claim the court erred in refusing to give certain other tendered instructions, but nowhere sets up as a ground for new trial that the court erred in the giving of instructions.

[4] No error committed during the trial is available upon appeal, unless relied upon in the motion and grounds for a new trial; and this is true, though an objection was made and exceptions taken to the ruling at the proper time. The error, if any, will be considered as waived, unless included in the grounds for new trial. *Hoskins' Adm'r v. Brown*, 84 S. W. 767, 27 Ky. Law Rep. 216; *Acme Mills & Ele. Co. v. Rives*, 141 Ky. 783, 133 S. W. 786; *Asher v. Metcalf et al.*, 152 Ky. 632, 153 S. W. 987; *Mann Bros. v. City of Henderson*, 154 Ky. 154, 156 S. W. 1063; *Nicholson v. Patrick*, 160 Ky. 874, 170 S. W. 20; *Ky. Live Stock Ins. Co. v. McWilliams*, 173 Ky. 96, 190 S. W. 697.

[5, 6] The contract of April 1, 1915, contains the following description:

"Said property fronts on Pike street 53 feet and extends north to the line of the Baptist Church property, a distance of 154 feet; thence

east with the line of the Baptist Church property about 147 feet, to the west line of a 16-foot strip of land, west of Clarence Le Bus' warehouse; thence south on a line between the property of Mrs. Josephus McMurtry, and the lot known as the Mullen lot, if extended north, for a distance of 50 feet; thence west about 96 or 97 feet to the east side of the brick livery stable; thence south to Pike street."

In the deed tendered with the original petition, the lines are reversed in the description, the first part of which is:

"Beginning at the intersection of Pike and Walnut streets, and southwest corner of the property hereby conveyed; thence in an eastern direction with Pike street 53 feet and 2¾ inches to the east side of the wall; thence in a northerly direction with the each side of said wall 104 feet to a stake."

It will thus be seen that in both the contract and the deed appellant agreed and undertook to convey the livery stable property fronting 53 feet on Pike street, including the wall on the eastern side of the property, because in both descriptions the lines run with the east or outside wall of the livery stable. To sustain appellant's theory the line should have been described as running with the center of the eastern wall of said building. In the corrected deed tendered with the third amended petition the description is practically a literal copy of that contained in the contract; the eastern line running with the east or outside wall of the livery stable. It is clear from the contract and both deeds that the grantor intended and endeavored to convey and the grantee expected to receive, the property including the entire eastern wall, with no thought or suggestion of an easement in the minds of either party.

According to the evidence the wall, 13 inches in width, is built on the dividing line between the property embraced in the contract and that of the adjoining lot owner; hence the appellee did not receive the property for which he contracted, as only one-half of the eastern wall is located on the property described, and furthermore it is burdened with an easement in favor of the adjoining owner. Appellee was compelled to erect a number of columns and build a retaining wall to support the third story of his new building, the wall, subject to the easement of Rigg, not being of sufficient strength to carry this third story. The columns and retaining wall cost more than the amount allowed by the jury. The presence of the columns and the retaining wall not only detract from the appearance of the basement, but deprive appellee of the use of this space, which otherwise could have been used for shelving or other purposes.

Appellant was not entitled to the specific performance of the contract; it did not execute or tender a deed conforming to the con-

tract of sale; on the other hand, appellee was willing and anxious to take the property according to the terms of the contract, or subject to a reduction in the purchase price by reason of the easement. Thus there was presented to the chancellor a question purely of equitable cognizance. Specific performance of a contract of sale of real estate does not go as a matter of course, but is withheld or granted according as equity and justice seem to demand under the facts and circumstances in the case. In ordering appellee to take the property and pay the purchase price, subject to the temporary retention of an amount sufficient to cover the question of damages, the court's decree was eminently fair and equitable. Appellant being unable to comply with its contract, and appellee, having been damaged through such failure, was justly entitled to damages or a reduction in the purchase price.

The amount found by the jury is supported by the proof, is not excessive, and, finding no reason to reverse the judgment, it is accordingly affirmed.

#### CALDWELL et al. v. PUCKETT.

(Court of Appeals of Kentucky. Dec. 2, 1919.)

##### 1. FRAUDULENT CONVEYANCES ¶278(1)—BURDEN OF PROOF ON GRANTEE TO SHOW IGNORANCE OF GRANTOR'S FRAUD.

In action under Civ. Code Prac. § 439, to enforce satisfaction of an unpaid judgment, petition attacking conveyance by judgment debtor to his son as fraudulent, and asking that it be set aside on the grounds specified by Ky. St. §§ 1906, 1910, the relationship cast upon the son the burden of showing his ignorance of the fraud shown to have been practiced by his father upon creditors in making the conveyance to the son.

##### 2. FRAUDULENT CONVEYANCES ¶168—INADEQUATE CONSIDERATION ALONE DOES NOT CONSTITUTE FRAUD.

Where the consideration was a valuable one, the good faith of son in purchasing land in question from his father is not affected by the fact that the value of the land may have been somewhat greater than the amount paid, unless it appears that the son had notice of the fraudulent intent of his father in making the conveyance.

##### 3. FRAUDULENT CONVEYANCES ¶187—RESTORATION OF CONSIDERATION PAID BY BONA FIDE PURCHASER.

If there is a valuable consideration paid by the grantee and he is without knowledge of the intent of the grantor to defraud his creditors, or in possession of no facts calculated to put him on inquiry, he will not upon the setting aside of the conveyance, be made to lose the consideration paid by him for the land.

Appeal from Circuit Court, Anderson County.

Action by Hiram Puckett against J. W. Caldwell, M. L. Caldwell, and others. Defendant J. W. Caldwell died, and the action was revived against his administrator and heirs at law. From so much of the judgment as set aside the deed from J. W. Caldwell to defendant M. L. Caldwell and subjected the land to plaintiff's debt, defendant M. L. Caldwell appeals, plaintiff taking a cross-appeal from that part of the judgment ordering the restoration to M. L. Caldwell of the consideration paid by him for the land, and subjecting the land to its payment. Affirmed on both original and cross-appeals.

L. W. McKee, of Lawrenceburg, and Edwards, Ogden & Peak, of Louisville, for appellant.

F. Feland, of Lawrenceburg, for appellee.

SETTLE, J. In this action brought in the court below September 12, 1918, by the appellee, Hiram Puckett, under section 439, Civil Code, to enforce satisfaction of an unpaid judgment for \$500, recovered in 1882 by him against J. W. Caldwell and others in the Washington circuit court, an attachment was issued and levied upon a 90-acre tract of land in Anderson county as the property of the defendant J. W. Caldwell, who had, by a deed executed shortly theretofore, conveyed it to his son, the appellant M. L. Caldwell, for a recited cash consideration of \$1,800. The petition attacked this conveyance as fraudulent, and asked that it be set aside on the grounds prescribed by section 1906 and also section 1910, Kentucky Statutes. M. L. Caldwell was joined with his father as a defendant to the action, and in due course filed an answer to the petition, traversing its allegations and alleging the good faith of the grantor in making the conveyance and that of the grantee in accepting it; also the adequateness of the consideration and its full payment. J. W. Caldwell failed to answer, as he became seriously ill soon after the execution of the deed, and died, intestate, five weeks later, after which the action was revived against his administrator and heirs at law.

On the hearing the circuit court rendered judgment, declaring that J. W. Caldwell in making the conveyance in question intended to thereby defraud the appellee as his creditor, but that the evidence failed to show such fraud on the part of the appellant M. L. Caldwell, or his knowledge of the fraud intended and practiced by the grantor, and held that he, being a bona fide purchaser, was entitled to the return of the consideration paid by him for the land and to a first lien on the land for its payment. Hence the deed was set aside, appellee's attachment sustained, and the land ordered to be sold, first, to pay

the amount due appellant, and next the judgment debt of appellee. The land was later sold for an amount sufficient to pay both demands in full and all costs of the action. By this appeal M. L. Caldwell seeks the reversal of so much of the judgment as set aside the deed from J. W. Caldwell to him and subjected the land to the appellee's debt, and the latter has taken a cross-appeal from that part of the judgment ordering the restoration to appellant of the consideration paid by him for the land and subjecting the land to its payment.

[1] We are unable to find any ground for reversing the judgment of the circuit court. We think the fraudulent intent of the grantor in making the conveyance established by the evidence as a whole. But while the close relationship existing between the grantor and grantee compelled the court to regard with suspicion the transaction between them, and cast upon the grantee the burden of showing his ignorance of the fraud practiced by the grantor upon his creditors, yet we think the evidence justified that court in giving the same faith and credit to the genuineness of this conveyance, in so far as the grantee was concerned, as if that relationship had not existed. In other words, the evidence in this case seems to bring it, as to the grantee, within the rule announced in *Pence v. Shackelford*, 142 Ky. 10, 188 S. W. 956.

[2, 3] It does not appear from the evidence that appellant at the time of the conveyance had any knowledge of the existence of the judgment debt in favor of appellee against his father. Appellant had resided for several years in Oklahoma, and it is hardly probable, in view of there having been no effort on the part of appellee, by the issuance of an execution or otherwise, to collect the debt of his father for eight years, that he on his occasional visits to Kentucky and his father, received information of the debt. The evidence leaves no doubt of appellant having paid his father the \$1,800, named in the deed as the consideration for the sale of the land, for the payment was made in the presence of the deputy clerk who took the grantor's acknowledgment to the deed, and some days later the grantor was seen by two witnesses in possession of the money. The consideration is not so inadequate as claimed by appellee when it is considered that this was third rate land, and the value of lands of all kinds was far lower in 1916 than that reached by such lands since the close of the European War. To say the least, the consideration was a valuable one, and, this being true, the good faith of appellee in purchasing the land is not affected by the fact that its value may have been somewhat greater than the amount he paid for it, unless it were made to appear that he had notice of the fraudulent intent of his father in making the conveyance. If there is a

valuable consideration paid by the grantee, and he is without knowledge of the intent of the grantor to defraud his creditors, or in possession of no facts calculated to put him on inquiry as to whether such fraud is intended by the grantor, he will not, upon the setting aside of the conveyance by the court, be made to lose the consideration paid by him for the land.

It appears from the evidence that upon the return of appellant from Oklahoma he found his aged father in feeble health and able to do little for his own support, and that in view of this situation he purchased of him the land at a price fixed by the father and paid him that price, and, in addition, assured him that he would be permitted to occupy the land the remainder of his life free of rent or other charge. These facts fail to show the fraud alleged in the transaction by appellee. We do not know what the father would have stated about the transaction, as his death occurred before his deposition could be taken. But as the record appears it fails to connect appellant with any fraud that may have been intended by his father in making the conveyance.

As our consideration of the entire evidence fails to convince us of error in the judgment, it should be, and is, affirmed both on the original and cross-appeal.

### CABBLE v. HAWKINS et al.

(Court of Appeals of Kentucky. Dec. 2, 1919.)

#### 1. EVIDENCE §586(3, 4)—AFFIRMATIVE AND NEGATIVE; RELATIVE WEIGHT.

Affirmative evidence is entitled to greater consideration than negative, other things being equal.

#### 2. SLAVES §14—SUFFICIENCY; LINEAGE OF CLAIMANT TO REMAINDER OF ESTATE.

Evidence held to show that the father of claimant of the remainder of testator's estate was the son of testator, a former slave, and his wife, born after they had entered into a customary marriage and were living together as husband and wife so as to entitle claimant to the property.

#### 3. MARRIAGE §16, 50(3)—VALIDITY OF SLAVE MARRIAGE.

A customary marriage among slaves was recognized by both white and black, so that where a man and a woman lived together as husband and wife had recognized each other as such, and were so recognized and acknowledged by people living in the same neighborhood, even though the rites of matrimony had not been publicly celebrated, evidence of a marriage certificate was not necessary to establish the validity of a marriage.

#### 4. SLAVES ~~Q~~25—LEGITIMACY OF CHILD OF SLAVE MARRIAGE; INHERITANCE.

Where a man and a woman being slaves were married according to the custom of the slaves, their son was a legitimate child entitled to inherit under Ky. St. § 1893, so that the son's son was entitled to inherit as a grandson.

Appeal from Circuit Court, Davless County.

Action between Herbert R. Cabbie and Nellie Hawkins and others. From a judgment therein, Herbert R. Cabbie appeals. Judgment reversed.

R. W. Slack and Little & Slack, all of Owensboro, for appellant.

W. T. Ellis and J. H. Payne, both of Owensboro, for appellees.

SAMPSON, J. An old negro named Thurston Cabbie died testate in Owensboro in 1905, leaving a small lot and house in that city which he devised for life to his wife Joanna, with remainder to his son John. The boy died before his father, but the widow survived the old man. He had been married several times, twice according to the custom of negro slaves previous to the Civil War. He left no child or descendant unless the appellant, Herbert Rouse Cabbie, is his grandson, which is disputed. Neither had he other kin, and his wife Joanna, under our statutes, § 1893, was entitled to inherit his real estate. The appellant is a young negro, the son of Ned Rouse, and Ned Rouse, now dead, is claimed to have been the son of old Thurston by a negro slave named Jennie. As there are no authentic records of negro marriages previous to February, 1866, when the Enabling Act was passed by our Legislature (Laws 1865-66, c. 556), giving to negroes who were living together as husband and wife, and who intended to so continue, the right to go before the clerk of the county court and declare such intention and have the same noted of record, and thus legitimize the issue of such customary marriage we must look to the testimony of persons who were acquainted with Thurston and Jennie while they were slaves to determine whether they were husband and wife, according to the manner of slaves in those days, and as such the father and mother of Ned, who was the father of appellant Herbert. On this question Mary Payne and Nancy Bibbs, two old colored women, testify relating facts which incline us to the opinion that Ned was not only the offspring of Thurston, but the result of his marriage with Jennie. Mary Payne says:

"I am 67.

"Q. Where do you live? A. In the city of Henderson, Ky.

"Q. Did you know Thurston Cabbie who died in Owensboro in 1905? A. Yes, sir.

"Q. How long did you know him? A. Been knowing him ever since in slave time.

"Q. When you first knew him in slave time, by what name did he go? A. Thurston Barrett. He belonged to Alex Barrett.

"Q. Did he marry during slave time? A. Yes, sir.

"Q. About what time did he marry? A. He married just about a year before the war.

"Q. Before the beginning of the war or the end of the war? A. Before the end of the war.

"Q. Did he marry before the war commenced? A. He was married to my mother before he went to the war. \* \* \*

"Q. Was the war over before he returned? A. Yes, sir.

"Q. You say he was married to your mother; what was her name? A. Jennie Rouse. \* \* \*

"Q. Who married her? A. Mr. Albert Weaver.

"Q. What was he? A. Methodist preacher.

"Q. White or colored? A. White man.

"Q. Whose house? A. Paul Cinnamond.

"Q. Where was he married, city of Henderson? A. Upper Main street. \* \* \*

"Q. How old were you at the time your mother married Thurston? A. I guess I was between 20—I was over 15, near 20.

"Q. Did they have any children by that marriage? A. Thurston—Ned afterwards.

"Q. Ned who? A. Ned Rouse Cabbie.

"Q. What name did Ned usually go by? A. Rouse, Ned Rouse. \* \* \*

"Q. How long was it after they were married before Ned was born? A. He was born while he (Thurston) was gone to war. She could not stand it alone, and he came back.

"Q. Was Thurston remarried to your mother after the war? A. Yes, sir.

"Q. How long after the war was it he remarried your mother? A. After licenses was granted that the colored people should marry like white folks. \* \* \*

"Q. Where were they married the second time? A. On the upper part of Main street on the place they call Brummett's hill.

"Q. Whose house? A. Nancy Bibbs.

"Q. Who is Nancy Bibbs? A. That lady over there.

"Q. Is she related to your mother? A. She is my mother's sister.

"Q. Who performed the marriage ceremony at that time? A. Preacher Anthony Bunch.

"Q. Was he colored or white man? A. Colored man. \* \* \*

"Q. Now, after Thurston married the second time, did he have any children by your mother? A. No, sir; excepting four."

She then says all four of the children of Thurston and Jennie are dead, leaving no descendants except appellant, who is the son of Ned; that all of the children of Thurston died before he died. She also testifies that Thurston Cabbie always recognized Ned as his son and provided for him as a father would for a child, for a number of years.

Nancy Bibbs testified that she lived in Henderson; that she does not know her age, but that she was born many years before the Civil War and was a slave. She says she knew Thurston Cabbie. She was asked:

"Q. Did you know of his having been married to Jennie Rouse? A. Yes, sir; he was married right in my room.

"Q. Is she any kin to you? A. Yes, sir.

"Q. When was it he was married to Jennie Rouse in your room? A. After the war.

"Q. Where did he live? A. On Brummett's hill.

"Q. In the city of Henderson? A. Yes, sir.

"Q. How many children did Thurston and Jennie have? A. Ned, Robert, Mattie, and an infant baby. \* \* \*

"Q. Who was the minister that married them in your house? A. Anthony Bunch."

She then names the witnesses who were present at the wedding and says that 11 persons present at the wedding are dead except she and Mary Payne. Further testifying, she says Ned, the son of Thurston, was married to Miss Tyson, and that the appellant Herbert is the only child of Ned.

An old gentleman named John Matthews, who had superintended a great deal of public work in the years gone by and had employed Thurston for many years, testifies in substance that Ned was the son of Thurston and Jennie under a customary slave marriage, and that Thurston recognized Ned as his son. Several other persons give evidence to the effect that Thurston recognized Ned as his son.

On the other side, a very old colored man named Nicholas Barrett testifies that he and Thurston were fellow slaves on the same farm for some years before the war, and that he was a chum and associate of Thurston, and that Thurston was married to a woman named Lydia Jordan with whom he lived up to the time he went to the army in 1864, which, if true, proves that Thurston was not wedded to Jennie, the mother of Ned, until some time after the war, and that Ned was not the child of Thurston. This old colored man was asked:

"Q. Did he (Thurston) live on the same farm you lived on? A. Yes, sir; on the same farm, up here above town (Henderson).

"Q. Did you know anything of him living with a negro woman by the name of Lydia Jordan? A. Yes, sir; that was his first wife.

"Q. Do you know about when he lived with her? A. He lived with her before he went to the army.

"Q. Did he live with Aunt Lydia up to the time he joined the Yankee army? A. Yes, sir.

"Q. Did they have any children, Lydia and Thurston Cable? A. Had three. \* \* \*

"Q. Now, I believe you have stated they lived together up to the time Thurston went to the army? A. Yes, sir.

"Q. Did you know a negro, who lived here until she died, by the name of Jennie Rouse? A. Yes, sir.

"Q. Did you know of any children she had? A. Yes, sir.

"Q. Did she have two children, one by the name of Ned Rouse? A. Yes, sir.

"Q. And the other two by the name of Robert Cable and Mattie? A. Yes, sir; Thurston's

children? A. Yes, sir.

"Q. That is, Robert and Mattie Cable? A. Yes, sir.

"Q. Then Ned is not the son of Thurston Cable? A. No, sir. \* \* \*

"Q. When was Ned Rouse born? A. I cannot tell you when he was born. I know his father and mother, but do not know when he was born.

"Q. Was he born before the Civil War, or after that war? A. He was born before the war. \* \* \*

"Q. How do you know what time he was born? How did you get your information? A. Thurston married his mother after freedom, after he came home out of the army.

"Q. Whose mother? A. Ned's mother. \* \* \*

"Q. Did you see him when he was married? A. Yes, sir.

"Q. To Jennie Rouse, you mean? A. Yes, sir.

"Q. Was that right after the Civil War? A. Yes, sir.

"Q. How old was Ned then? A. I could not tell you how old he was. I did not keep any record.

"Q. Was he a little boy? A. I was up above town on the Brummett farm. I used to see Jennie carrying him around.

"Q. You do not know anything about whether he was living with Jennie immediately before he went to the army? A. No, sir; I don't think he was living with Jennie when he went to the army. He did not marry Jennie until after he came back.

"Q. I am not asking about marrying her. A. He did not live with Jennie.

"Q. How could you tell anything about it if you were living in the country and Thurston in the city? A. We used to meet each other. \* \* \*

"Q. Had Ned been born at the time Thurston went to the army, or was he born afterwards, or do you know when he was born? A. He was born before Thurston married Jennie, you know.

"Q. Before Thurston married Jennie? A. Yes, sir.

"Q. Do you know how long before Thurston married Jennie? A. No, sir; I do not know. I could not tell you.

"Q. Was he not a baby at the time Thurston married Jennie? A. I am not certain about it, but I think he was a good size boy when Thurston married Jennie."

This witness, as well as several others who testified, is quite certain that Ned is not the son of Thurston and stated that Thurston did not recognize Ned as his son, but declared he was not his son.

[1,2] The evidence given by Mary Payne and Nancy Bibbs is of an affirmative nature, direct and positive, while that of the old colored man Nicholas Barrett is largely negative in its nature, rather indefinite and uncertain. Affirmative evidence is entitled to greater consideration than negative, everything else being equal; and, applying this rule to the evidence offered in this case, we have little trouble in concluding that the decided weight of the evidence is with the appellant against whom the chancellor found the facts. Without doubt, the weight of the

evidence supports the contention that Ned was the son of Thurston and Jennie, born after they had entered into a customary marriage and were living together as husband and wife. After they had so lived for some years and had three or more children, they again appeared before a minister of the Gospel, who for the second time solemnized the rights of matrimony between them.

[3] There is some evidence that they were awarded a marriage certificate, but this paper does not appear in the record. However, this was not necessary in order to legitimize the offspring of that marriage. A customary marriage among slaves was recognized by both white and black when a man and woman lived together as husband and wife, recognized each other as such, and were so recognized and acknowledged by people who lived in the same neighborhood, even though the rights of matrimony were not publicly celebrated. In the case of *Scott v. Laimore*, 32 S. W. 172, 17 Ky. Law Rep. 613, we said:

"Where a man and woman, while slaves, live together as husband and wife, and at the time recognize each other as husband and wife, a customary marriage was thereby established."

[4] Since Ned was born to Thurston and Jennie after they had been living together as husband and wife, recognizing each other as such and being so recognized by their associates, they were married according to the custom of the times among the negroes, and such marriages have been often recognized and upheld by this court. Ned was the legitimate son of Thurston and entitled to inherit from him. It therefore follows that Herbert, the son of Ned, being the only lineal descendant of Thurston, is entitled to inherit the property of his grandfather Thurston. The trial court erred to the prejudice of appellant in holding otherwise, and the judgment is therefore reversed, with directions to enter a judgment in conformity with this opinion.

Judgment reversed.

#### STAEBLER & GREGG v. TOWN OF ANCHORAGE.

(Court of Appeals of Kentucky. Dec. 2, 1919.)

#### 1. MUNICIPAL CORPORATIONS §244(1)—COMPLIANCE WITH STATUTE IN MAKING OF CONTRACT.

Power of board of trustees of a town of the sixth class to make contracts is derived from the statutes constituting the charters of such towns, and a contract on a subject over which the town has no statutory power to contract, or entered into in a manner other than that prescribed by such statutes, is void so far as concerns the town.

#### 2. WORK AND LABOR §10—RECOVERY FOR SERVICE UNDER VOID CONTRACT.

One who performs services for an individual or private corporation under a void contract may recover for services upon the ground that the law has raised a promise to pay reasonable value therefor.

#### 3. MUNICIPAL CORPORATIONS §249—IMPLIED CONTRACT FOR SERVICES.

There can be no recovery against a municipal corporation upon an implied contract to pay for services because of benefits received.

#### 4. MUNICIPAL CORPORATIONS §339(2)—STREET IMPROVEMENT CONTRACT NOT CONFORMING TO BID.

Contract for street improvement at cost of more than \$100, entered into with lowest bidder by chairman of board of trustees of a town of the sixth class, which was a material departure from the contract for which bids had been invited and from the contract the board had authorized its chairman to make, in that it permitted town to release contractor from use of "Tarvia X" binder, provided for by the ordinance and embraced in proposal, and to substitute asphalt binder to be furnished by city, was void under Ky. St. §§ 3706, 3707.

#### 5. MUNICIPAL CORPORATIONS §350 — CONVERSION OF MATERIAL ON REPUDIATION OF VOID IMPROVEMENT CONTRACT.

City, having refused to permit contractors to proceed with street improvement work under void contract, had no right to appropriate piping and tiles, which contractors had intended using in performance of contract and had left upon ground of street upon discontinuance of work, since city, having repudiated contract, could not rely thereon for purpose of keeping material which would have gone into improvement.

#### 6. TROVER AND CONVERSION §44—MEASURE OF DAMAGES.

Owner's measure of damages against one who appropriates to its use or sells or destroys his property is the reasonable value of the property when converted or sold or destroyed.

#### 7. REPLEVIN §9—POSSESSION WITHOUT CONVERSION.

Where one has taken possession of, but not converted to its use, property of another, owner may recover the specific articles or their value, with damages for detention.

Appeal from Circuit Court, Jefferson County.

Action by Staebler & Gregg against the Town of Anchorage. Judgment of dismissal, and plaintiffs appeal. Affirmed.

Burwell K. Marshall, of Louisville, for appellants.

Moorman & Woodward and Hardin H. Herr, all of Louisville, for appellee.

HURT, J. The appellants, Staebler & Gregg, under what we assume that they supposed to be a contract with the town of An-



chorage, a town of the sixth class, made certain improvements upon a street in the town, and furnished materials therefor, and thereafter, before the completion of the contract, according to its terms, the town repudiated the actions of its officials, or such of them, as purported to make the contract, and refused to permit the appellants to proceed further. The appellants instituted this action to recover of the town the value of the work and materials, to the extent that they had done work and furnished materials in the performance of the alleged contract, and also to recover certain personal property or its value, which they alleged that they were the owners of, and of which the town had taken possession.

A motion by the town to require appellants to make their petition more specific having been overruled, the appellee town filed an answer, the first paragraph of which was a traverse of the averments of the petition, and the second paragraph attempted to set up a counterclaim against the appellants. The appellants demurred generally to the second paragraph of the answer and counterclaim, and the court, upon consideration of same, adjudged that the demurrer relate back to the petition, and sustained the demurrer to both the petition and the second paragraph of the answer. The appellants then amended their petition, and the town insisted upon its demurrer to the petition as amended, which was sustained. The appellants, having been granted leave to again amend their petition, did so by filing an amended petition which purported to set out their cause of action completely and fully. The court then required the appellants to elect which cause of action they would rely upon for recovery, to which they objected, but elected to rely upon the matters as pleaded in the last amended petition, which consisted of two paragraphs. The appellee then demurred, generally, to each paragraph of the petition as amended. The demurrers were sustained, and, the appellants declining to further plead, a judgment was rendered, dismissing their petition, and, the appellee having failed to amend the second paragraph of its answer, setting up its counterclaim, it was also adjudged to be dismissed. From the judgment, dismissing their petition, the appellants have appealed.

It will be assumed that any averments in the original and first amended petition which are contradictory of those embraced in the last amended petition were abandoned by the appellants, as the last amended petition appears to contain a complete statement of their cause of action and a statement of the actual facts upon which their action is based, and for the purposes of decision it will be unnecessary to consider anything except the facts averred in their last amended petition and the relief there sought. From

it the facts upon which their cause of action is based, at least so far as the allegations of the pleadings extend, are substantially as follows: The appellee is a town of the sixth class. The appellants are partners. The board of trustees of appellant enacted an ordinance by which it ordained the improvement and reconstruction of Railroad Avenue between Thompson and Johnson avenues, and that the costs of such reconstruction should be paid out of the general funds of the town, and in accordance with the ordinance the appellee caused plans and specifications of the work to be done and materials to be used to be made and advertised, for the reception of bids to do the work and furnish the materials, and that the contract to do the same would be let to the lowest responsible bidder. The appellants made a bid to do the work and furnish the materials in accordance with the plans and specifications. The bid was in writing, and undertook, if the proposal embraced therein was accepted, that they would enter into a contract to provide themselves with the necessary machinery, tools, and means of construction, and to do the work and furnish the materials specified in the plans and specifications, according to the requirements of the engineer of the town, and would take, in full payment thereof, certain sums for the items of work and materials set out in their proposal. The written proposal is set out in full in the petition. It is then averred that their bid was the lowest and best bid, and that thereafter, at a regular adjourned meeting of the board held on April 28, 1916, the board of trustees, unanimously adopted a resolution by which it was provided that the proposal or bid of appellants for construction of the avenue be accepted, except that the proposal or bid for the construction of concrete sidewalks, provided for in the plans and specifications and embraced in the bid, be not accepted, but the remainder of their proposal, the costs of which it was estimated to amount to \$7,485.50, be accepted as recommended by the engineer, and that a contract to perform the work and furnish the materials as specified in the plans and specifications, as amended by eliminating that portion, relating to concrete sidewalks, be prepared and executed by appellants and by the appellee by the chairman of the board of trustees. That thereafter, on the 8th day of May, the appellants and the town, by the chairman of its board of trustees, entered into a contract, which was reduced to writing and signed by them. The contract is set out in full in the petition.

The writing, alleged to be a contract between appellants and appellee, recites that, whereas the appellee had advertised for bids for the construction of the street, in accordance with plans and specifications prepared by engineers, in the employ of appellee, and

whereas the appellants were the lowest and best bidders and had submitted their proposal or bid in writing, and the writing, containing the bid is attached to the contract and made a part of it, in accordance with the plans and specifications, which are also attached and made a part of the contract, and that the aggregate of the bid amounts to \$9,981.50, and whereas subsequent to the making of the bid, but before the execution of the contract, that appellants and appellee have agreed that the specifications and bid be modified to the extent that the sidewalk provided by the plans and specifications should not be constructed, and that the costs of its construction be eliminated from the specifications and bid, and, further, that the appellee should have the right, if it should so elect, to use an asphalt binder, instead of a tarvia binder, as provided in the plans and specifications, and, in the event the appellee elected to do so, the appellants would reduce the amount at which they had proposed to do the work by the sum of \$2,420.00, being the cost of 22,000 gallons of tarvia X binder, at 11 cents per gallon, provided, however, that the appellee would furnish the appellants at its costs the asphalt to be used as a binder in tank cars f. o. b. Anchorage, Ky., and should supply the appellants with two tank wagons and a sufficiency of cans for spreading the asphalt. This writing was subscribed by appellants and the Town of Anchorage, by its chairman of the board of trustees. It is then alleged that by a mutual mistake a covenant by the appellants to do the work and furnish the materials and a covenant by the appellee to pay for same, the prices specified in the bid, was left out of the writing, and the writing should be amended to include these covenants. The appellants further allege that they executed a bond, with surety approved by the appellee, for the performance of the contract. The work was to be performed before September 1, 1916, and that in pursuance of the contract they performed labor and furnished materials in the amounts sued for, but were not able to complete the work, under the contract, by the time stated, because of wrongful interference by appellee and its agents, and that on September 8, 1916, the appellee wrongfully compelled them to discontinue any attempt to perform the contract. It is further alleged that appellants and appellee made another contract on August 5, 1916, by which it was agreed between them that appellants were to pay appellee 84 cents per yard for the crushed stone or screenings, which was to be spread upon the street, under the contract relied upon for the improvement of the street. With what official this latter contract or modification of the former contract was negotiated does not appear, and it is not alleged that the board of trustees had any connection with it. Under this contract, as modified,

the appellants did work and furnished materials to the sum of \$3,567.10, and had received payments therefor in the aggregate sum of \$1,679.53. By a second paragraph the appellants alleged that they were the owners of certain specified pieces of pipe and tiles, etc., of the value of \$244.50, which they had on the streets of appellee for the purpose of using in the performance of their contract, but when appellee refused to permit them to perform the contract it took such pipe, tiles, etc., into its possession. The pleading concluded with a prayer for the recovery for work and materials furnished in the sum of \$3,567.50, to be credited by \$1,679.53, and for the recovery of \$244.50, for the pipe, tile, etc., which they alleged that appellee had taken into its possession.

[1-3] Several grounds are urged upon which it is contended that the petition as amended does not state a cause of action upon which appellants are entitled to recover, but it is not necessary to consider more than one. If the appellants did not have a contract with the town by which they legally were authorized to do the work and furnish the materials sued for, and which obligated the town to pay for same when performed and furnished, they have no right of recovery in any event. In the light of the fact that a municipal corporation is a creature of the law, and that the power of the board of trustees of a town of the sixth class to legislate or to make contracts is all derived from the provisions of the statute laws, which constitute the charters of municipalities of that class, it scarcely seems necessary to say that, in order for it or any of its officers to make a contract which will be binding upon the municipality, it must confine its attempts to contract to the subjects over which it has power by virtue of the statutes, and must proceed in the making of contracts in the manner prescribed by its charter provisions. Contracts made by boards of trustees of such towns which are in violation of their charter provisions, and which they do not make in the manner prescribed by same, and attempts at contracts made by the officers of such towns, when not authorized to do so, in the manner prescribed by law, are void so far as concerns the municipality. One performing services for a municipal corporation under a void contract is in the same condition as if he had performed the services without any pretense of a contract at all, in which state of case he would be compelled to rely for a recovery upon the ground that, the municipality having received the benefits of his services, the law has raised a promise upon its part to pay the reasonable value of the services. This would be a good ground for recovery if the services had been rendered for an individual or a private corporation, but the rule, firmly upheld in this jurisdiction is that there can be no recovery against

a municipal corporation upon an implied contract to pay for services because of benefits received. *City of Louisville v. Parsons*, 150 Ky. 420, 150 S. W. 498; *City of Princeton v. Princeton Electric Light Co.*, 166 Ky. 740, 179 S. W. 1074; *Worrell Mfg. Co. v. Ashland*, 159 Ky. 656, 187 S. W. 922, 52 L. R. A. (N. S.) 880; *Bellevue v. Hohn*, 82 Ky. 1; *Covington v. Hallam & Meyers*, 16 Ky. Law Rep. 128; *City of Newport v. Schoolfield*, 142 Ky. 287, 134 S. W. 503; *Owensboro v. Weir*, 95 Ky. 159, 24 S. W. 115, 15 Ky. Law Rep. 506; *District of Highlands v. Michie*, 107 S. W. 216, 32 Ky. Law Rep. 761.

Before one can claim with any show of reason that he has a contract with a municipal corporation it must appear that the contract was made with him by the governing body or officer of the corporation who is authorized to make a contract for the corporation, and that the express requirements of the statutes were adhered to in the manner of its making, if the statute requires that it be effected after a certain manner. Section 3706, Ky. Stats., empowers the board of trustees of towns of the sixth class to order street improvements to be made, and no other body or person is vested with such authority. Section 3707, Ky. Stats., relating to towns of the sixth class, provides as follows:

"In the erection, improvement and repair of all public buildings and works, in all streets and sewer work, and in all work in and about streams, bays, or water fronts, or in or about embankments or other works for protection against overflow, and in furnishing any supplies or materials for the same, when the expenditure required for the same exceeds the sum of one hundred dollars, the same shall be done by contract, and shall be let to the lowest responsible bidder, after due notice, under such regulations as may be prescribed by ordinance."

Hence it will be observed that when the board of trustees of a town of the sixth class proposes to improve or repair a street, and the expenditure for the same for work or materials exceeds the sum of \$100, it must enact an ordinance, providing for the improvement and for letting the work, or furnishing materials for the same, to the lowest bidder, and entering into a contract with such bidder, and there must be due notice of the letting, so that persons desiring to bid may have an opportunity to do so. A valid contract for such work cannot be entered into, unless these express requirements of the charter be observed, and neither the board of trustees nor other officer of the municipality can ignore these requirements, and make a contract which will be a contract of the municipality. The appellants do not set out the provisions of the ordinance in their pleadings, but, assuming that they were sufficient to legally ordain the work to be done, and the materials furnished for the improvement, and the notice of the letting was sufficient to

the persons desiring to bid, and that the bid of appellants was in accordance with the ordinance, and was the "lowest responsible" bid, and that the ordinance provided for the acceptance of the bid and authorization of the chairman of the board to execute the contract, yet the board of trustees did not accept the bid made in writing to the board under the ordinance which required the work and furnishing of the materials to be submitted to competitive bidding, but, changed the contract, which was proposed to be let to the lowest bidder "after due notice" under the ordinance, by eliminating from it the construction of the sidewalk and the costs of same, which they did without the enactment of any ordinance, and directed the chairman of the board to execute a contract for the work proposed, after eliminating the sidewalk. There is no allegation of the appellants' pleadings which avers that the provisions of the ordinance were such as to authorize the board of trustees to accept the appellants' bid for any less than the whole of the work and materials, which was submitted to competitive bidding.

[4] If it should be conceded, however, that the action of the board of trustees was within its authority, the contract which was entered into between appellants and the chairman of the board, and because of which the work was done and materials furnished which are sued for, was an essentially different contract from that which the board of trustees agreed to the making and authorized its chairman to enter into by its resolution. The contract actually entered into provided that the town might release the appellants from using in the work of construction of the street the "tarvia X" binder provided for by the ordinance and embraced in the proposal, which was let by the town to competitive bidding, and the appellants' bid to use which was accepted by the resolution and substitute for it an asphalt binder, and in that event the appellants were to reduce the amount to be paid them for the performance of the contract in the sum of \$2,420, but the town was to furnish the asphalt binder and two wagons and cans with which to spread it. As the appellants allege the use of asphalt binder, and no tarvia X binder, it is assumed that some one assuming to act for the town made an election to use the asphalt binder, but this seems to have been done without any attempt by the board of trustees to make an election. If the change made by the contract from the plans and specifications which constituted the proposal which was let to competitive bidding under the ordinance was an immaterial one, doubtless the validity of the contract would not be affected, but a departure so material as the one made in the contract here destroys its validity, as the chairman of the board makes a contract which has never been authorized in any way by the board of trus-

tees. The purpose of the requirement by the Legislature that proposals for improvements of the character in controversy should be let to the "lowest responsible bidder after due notice," is too apparent for discussion, and to permit a board of trustees, or other officers of a town, after a proposal for improvements has been submitted to competitive bidding "after due advertisement" and the bidders have exercised their privilege, then to change the plans and specifications of the work in a material way, and let contracts in accordance with such unauthorized changes, would defeat the entire purpose of the Legislature. Discussing the purposes of such legislation and the validity of contracts made in violation thereof, it is said in Dillon on Municipal Corporations, § 807 (5th Ed.):

"In keeping with the same general principle that all proceedings must be of such a nature as to secure competition, the bid must conform to the plans, specifications, and advertisement of the municipality, and the contract entered into must also conform to the plans, specifications, and advertisement. If a contract differing therefrom in terms be awarded or made, it cannot be said to have been the result of the competition which the statute requires, and it is invalid. The rule that the contract must conform to the plan, specifications, bid, and advertisement applies, although but one bid was made, and although there is no allegation or suggestion of fraud, and although the change made in the contract is to the advantage of the city."

The demurrer to the first paragraph of the petition as amended was properly sustained.

[5-7] As to the second paragraph of the petition, as amended, when the illegal contract sued on was repudiated and appellants required to discontinue operations under it, it is clear that the town was without right to seize or appropriate their personal property, which had not been appropriated by them to the invalid contract, and rely upon the contract to keep it, and at the same time deny the existence of the contract and resist its performance. The contract being invalid, it gave the town no right to the piping and tiles sued for, and which may have been left by appellants upon the ground in the street. If it seized such personal property of appellants without any more right than the invalid contract gave it, and appropriated same to its use, or sold or destroyed it, the appellants are entitled to recover the damages for such tortious act, the measure of which is the reasonable value of the property when converted or sold or destroyed. If the town has not converted the property to its use, but still has same in its possession, the appellants may recover the specific articles, or their value, with damages for their detention. The town is, however, responsible only for its acts, which are done in its corporate capacity, and through its properly authorized

agencies. The paragraph, however, fails to state a cause of action for tortious conversion, or a cause of action for a recovery of the articles or their value, as it neither alleges a wrongful conversion nor in fact any disposition of the property by the town, nor a wrongful detention of it. The averment of appellants being that the town took the personal property into its possession, and nothing more, and from which it cannot be inferred that the town has either converted the property to its use, or is wrongfully detaining it from appellants. The demurrer was therefore properly sustained to the second paragraph.

The judgment is therefore affirmed.

SLEET et al. v. ATWOOD et al.

ATWOODS' GUARDIAN v. ATWOOD et al.

(Court of Appeals of Kentucky. Dec. 12, 1919.)

WILLS  $\Leftrightarrow$  107—ERASURES AND INTERLINEATIONS CHANGING LIFE ESTATE TO FEE.

Two holographic wills held to pass a fee, as expressed in the second instrument, although the other, before being changed by erasures and interlineations with a lead pencil, gave only a life estate; it being apparent that the second instrument was written to put the changed clause in a more enduring form.

Appeals from Circuit Court, Boone County.

Suit by Mabel B. Atwood and husband against John W. Sleet and others, in which Leland Atwood and others were made parties defendant. Judgment for plaintiffs, and the first-named defendants, and the last-named defendants prosecuted separate appeals. Affirmed.

Tomlin & Vest, of Walton, for appellants Sleet and Johnson.

N. E. Riddell, of Burlington, guardian ad litem.

Charles Strother, of Walton, for appellees.

CLAY, C. These two appeals, which involve the same question and are prosecuted on the same record, will be considered in one opinion.

On September 13, 1917, Mabel B. Atwood and her husband, E. B. Atwood, entered into a written contract by which they sold to John W. Sleet and A. R. Johnson their farm of 222 acres in Boone county for \$62.50 an acre, and agreed to deliver to them a general warranty deed therefor on March 1, 1918. On that date they tendered a deed to the purchasers, who declined to comply with the contract, on the ground that the vendors could not convey a fee-simple title. This suit was brought by the vendors against

the purchasers for specific performance.

The defendants filed an answer and cross-petition, pleading in substance that plaintiff Mabel B. Atwood acquired title to the farm in question under and by virtue of the wills of her father, D. M. Bagby, and that she took thereunder only a life estate. The only children of Mabel Atwood, Leland and Elmer, who were infants under 14 years of age and who were nonresidents, were made parties defendant, and upon proper affidavit a corresponding attorney was appointed to notify them of the pendency of the action. Subsequently it was made to appear by proper affidavit that the infant defendants had no guardian, curator, or committee in this state, and another attorney was appointed their guardian ad litem. The guardian ad litem answered for the infant defendants, and pleaded in substance that they owned the land in remainder, subject to the life estate of their mother. The cause having been submitted on the pleadings and exhibits, the chancellor held that Mabel B. Atwood took a fee-simple title to the land under the will of her father, D. M. Bagby, and adjudged specific performance of the contract. The purchasers and the children of Mrs. Atwood appeal.

It appears that D. M. Bagby made two holographic wills, one dated July 14, 1908, and the other dated June 15, 1909. Both of these wills were probated by the Boone county court on May 7, 1917. The first will is as follows:

"Walton Ky July 14 1908

"Knowing that life is uncertain & that death is certain & feeling that it will be best for my family for meto make a distribution of my property now while I am in my natural mind & health.

"Now I D. M. Bagby of Walton Boone Co Kentucky do make this my last will & testament.

"1st. I desire that my son Clarence Bagby, who is so seriously afflicted & who has my deepest sympathy, to have & hold his natural life & to enjoy the full proceeds of my farm known as the John F. Allphin farm in Kenton & Boone Co consisting of about two hundred acres of land, at his death this land is to return to my estate according to the law of inheritance of real estate. I also desire that my wife Julia F. Bagby shal become his guardian without bond in connection with Walton Bank & Trust Co of Walton Ky

"2nd. I desire that my beloved daughter Mabel B. Atwood & her husband Elmer Atwood shal have & hold their natural life my farm known as the Elijah Green Jr farm consisting of about two hundred & twenty two acres of land lying & being in Kenton Co Ky with all that belongs to me on it such as crop & stock & at their death the land is to go to their heirs, Leland & Elmer Atwood & any other issue they may had at their death, equally child & child alike & may God bless them all.

"3rd. I father desire that all of the remainder of my property, after all my just debts are

paid be given to my dear wife Julia F Bagby who is & has always been my best friend, including the house & contence we now live in in Walton Ky. any other land I may own at my death. All bank stock & deposit I may have all Building Association Stock all Trust Co stock including Covington Trust Co & Peoples Trust Co of Covington Ky. also all J. D. Mayhugh Mft Co stock I may have, all Walton Brick Co stock, all notes or mortgages or any other evidence of debt or ownership I desire that my wife Julia F Bagby to have & hold as her own & to enjoy the proceeds as long as she lives. at her death to descend to my & her heirs according to the law of inheritance of the estate of Ky

"In God I trust

D. M. Bagby

"I desire to add to the above that I appoint Rev E B Atwood as executor of this will if convenient & if not suitable my wife Julia F. Bagby in connection with the Walton Bank & Trust Co to execute the terms of this will

"D. M. Bagby

"Walton Ky July 25 1916

"As I have traded the Allphin farm for the Rev L Johnson farm, I desire that my son Clarence Bagby shal have the John farm as he would have gotten the Allphin farm

"D. M. Bagby"

In clause 2 of the original will there is a pencil mark through the words "& her husband Elmer Atwood shal," and "their natural life," and the word "forever" is written in pencil over the words "their natural life." There is also a pencil mark through the words "& at their death the land is to go to their heirs, Leland & Elmer Atwood & any."

The second will is as follows:

"Walton Ky June 15 1909

"Knowing that life is uncertain & that death is certain & feeling that it will be better for my family for me to make a disposition of my property now while am in my natural mind & health

"Now I D M Bagby of Walton Boone Co Ky do make this my last will & testament.

"1st. I desire that my son Clarence Bagby who is so seriously afflicted & who has my deepest sympathy to have & hold his natural life & to enjoy the full proceeds of my farm known as the John F Allphin farm in Kenton & Boone Co containing about two hundred acres of land. At his death this land is to return to my estate & be distributed to all my legal heirs according to the inheritance law of Ky

"I also desire that my wife Julia F Bagby is living shal become his legal guardian without bond in connection with the Walton Bank & Trust Co of Walton Ky

"2nd. I desire that my beloved daughter Mabel B Atwood is to have & hold for ever my farm known as the Elijah Green Jr farm consisting of about two hundred & twenty two acres of land lying & being in the County of Kenton State of Ky with all that belongs to me on it such as stock or crops

"3rd. I father desire that all of the remainder of my property, after my just debts are

paid be given to my dear wife Julia F Bagby who is & always been my best friend, including the home & contents of same in which we now live, in Walton Ky. Any other land I may own at my death, all Bank stock & deposits I may have all Building Association stock, all Trust Co stock including The Covington Saving Bank & Trust Co & The Peoples Saving Bank & Trust Co of Covington Ky; also all J. D. Mayhugh Mft Co stock I may have. All notes & mortgages I may have or any other property of value I may own at my death including a life policy in The New York Life Ins Co of N Y for \$1000.

"I desire that my wife Julia F Bagby to have & hold as her own, to enjoy the proceeds of this property as long as she should live. At her death to my & her heirs according to the law of inheritance of Ky

"I do hereby appoint Rev E B Atwood as executor of this will, if convenient & near by & if not suitable my wife Julia F Bagby in connection with the Walton Bank & Trust Co will execute the terms of this will

"D M Bagby

"Walton Ky Jan 22 1912

"As I have exchanged the Allphin farm for the Rev L Johnson farm I desire that my son Clarence Bagby shal have the Johnson farm in place of the Allphin farm & on same conditions  
"D M Bagby"

It will be observed that the two wills as originally written are substantially the same with the exception of clause 2. Under clause 2 of the first will, Mabel B. Atwood and her husband, Elmer Atwood, took only a life estate in the 222 acres of land, with remainder to their children, Leland and Elmer, and any other issue they might have at their death, while under clause 2 of the last will, Mabel B. Atwood took the entire fee. It will also be observed that the testator on January 22, 1912, wrote a codicil to his last will, stating in substance that he had exchanged the Allphin farm for the Rev. L. Johnson farm, and desired his son, Clarence Bagby, to have the Johnson farm in the place of the Allphin farm and on the same conditions. However, on July 25, 1916, he executed the same codicil to the first will.

It is the contention of appellants that the testator thereby revived the whole of the first will, and that the chancellor should have adjudged that Mabel Atwood and her husband took only a life estate in the farm in question. Our statute provides that no will or codicil, or any part thereof, which shall be in any manner revoked, shall, after being revoked, be revived otherwise than by re-execution thereof or by a codicil executed in the manner hereinbefore required, and then only to the extent to which an intention to revive the same is shown thereby. Section 4834, Kentucky Statutes. Whether the addition of the codicil on July 25, 1916, to the first will, shows an intention to revive the

entire will it is unnecessary to determine. It is evident that the erasures and interlineation in clause 2 of the first will were made by the testator, and that the second will was written for the purpose of putting clause 2 in a more enduring form, and make it conform to clause 2 of the first will after the changes therein had been made. The result is that clause 2 in each will is substantially the same, and gives to Mabel Atwood the fee-simple title to the property in question. It is therefore immaterial which clause prevails. It follows that the decision of the chancellor was correct.

Judgment affirmed.

O'KAIN et al. v. DAVIS.

(Court of Appeals of Kentucky. Dec. 5, 1919.)

1. TRIAL ~~§~~251(4)—INSTRUCTIONS BASED ON FACTS PROVEN, BUT NOT PLEADED.

Where there was no plea of quantum meruit by plaintiff, the trial court erred in submitting the case to the jury on quantum meruit instructions over defendant's objections and exceptions, since plaintiff may not declare on an express contract, and recover on an implied contract, even though the evidence shows it.

2. CONTRACTS ~~§~~229(3)—OF ARCHITECTS IN PREPARATION OF PLANS.

Contract between architect and prospective builders held not open to construction, as covering only preliminary drawings by the architect, and payment therefor by the builders; it providing as plainly as possible for completed plans, and payment for them on one basis if a contract was awarded for construction of the building, and on a different basis if the building was not erected within two years.

3. CONTRACTS ~~§~~229(3)—RECOVERY BY ARCHITECT FOR PREPARING PLANS.

Where an architect contracted to prepare plans for a building, to receive only \$250 for all services if the building was not erected, but a larger amount if it was, and the contract for the building was never awarded, and it was not constructed within the specified time, or at all, the architect is limited in his recovery for preparation of plans to \$250.

4. NOVATION ~~§~~7—SILENCE ON ASSIGNMENT NOT RELEASE OF CONTRACTEE.

Where an architect prepared plans for an individual, who, in his presence, transferred the contract to a hotel company, which assumed it, there was no release of the individual by the architect, as something more than mere silence on his part was necessary to prevent him from insisting upon the individual's compliance with his contract.

Appeal from Circuit Court, Jefferson County, Common Pleas Branch, Second Division.

Action by Brinton B. Davis against H. G. O'Kain and another. From a judgment for plaintiff, defendants appeal. Reversed.

Garnett & Van Winkle, of Louisville, and O. S. Hogan, of Frankfort, for appellants.

Dallam, Farnsley & Means, of Louisville, for appellee.

CLARKE, J. Appellee, who was plaintiff below, sued appellants to recover the sum of \$9,264.86, alleged to be due for services rendered by him upon contract entered into on or about August 4, 1915, with O'Kain, and that on February 1, 1916, appellant Dawson Springs Hotel & Sanatorium Company "assumed the payment of said fee" and accepted his services.

The defendants, answering separately, set up a written contract executed by O'Kain and Davis on August 4, 1915, and which they alleged was transferred by O'Kain to the hotel company on February 1, 1916; that this was the only contract either had with plaintiff, and that under its terms only \$250 was due plaintiff, since a contract for the construction of the hotel was never awarded or the hotel built, for which amount the hotel company offered to confess judgment. The defendant O'Kain claimed that he was released by consent of plaintiff when the contract was assumed by the hotel company.

In reply plaintiff admitted the execution of the written contract, but denied he had released O'Kain from his obligations thereunder, and in addition pleaded that upon the same day the written contract was executed he entered into an oral contract with O'Kain to perform the same services, except the preparation of preliminary plans, for the same compensation as provided for in the written contract, without reference, however, to whether the hotel was ever built or not. The affirmative allegations of the reply were denied by a rejoinder.

The written contract is as follows:

"This contract, made and entered into this 4th day of August, 1915, by and between H. G. O'Kain, of Nashville, Tennessee, party of the first part, and Brinton B. Davis, architect, of Louisville, Kentucky, party of the second part, witnesseth:

"That for and in consideration of the sum of five (5%) per cent. of the contract price, the said party of the second part agrees to prepare preliminary plans, working drawings, details, and specifications of a building to be used as a sanatorium, to be erected in Dawson Springs, Kentucky, and to cost approximately two hundred thousand (\$200,000.00) dollars, and to furnish architectural services during the erection of said building, and to do everything that might be properly required of a competent architect, in connection therewith.

"The said party of the second part shall receive his fee in installments as follows: Three and one-half (3½%) per cent. to be paid on completion and acceptance of full plans, specifications, and details, and awarding of con-

tract for building and the balance, one and one-half (1½) per cent. to be paid on completion and acceptance of the building.

"It is further agreed that in the event the said party of the first part fails to erect the building within two years from the date of this contract, said party of the second part shall receive the sum of two hundred and fifty (\$250.00) dollars for preliminary services rendered in connection with this contract, and should this building be erected within five (5) years from the date of this contract, the party of the second part shall under the terms of this contract be architect thereof and prepare the plans and specifications therefor.

"In testimony whereof, we have hereunto set our hands and names this fourth day of August, 1915, in duplicate.

H. G. O'Kain.

"Brinton B. Davis.

"Witness: J. M. Wright."

The only evidence offered by plaintiff to sustain his plea of an oral contract executed on the same day as the written one was the direction by O'Kain some time thereafter to prepare complete working plans for the construction of the hotel. This evidence manifestly was inadequate to sustain the plea, but the trial court, denying the defendants' motion for a directed verdict, submitted the case to the jury upon quantum meruit instructions over defendants' objections and exceptions. The jury returned a verdict against both defendants for \$1,750, in addition to the \$250 which the court directed them to find against each. The defendants then entered a motion for a judgment notwithstanding the verdict, which the court overruled, and entered a judgment in accordance therewith.

[1] As there was no plea of quantum meruit, the court erred in the instructions given, since a party may not declare on an express contract, and recover on an implied contract, even upon evidence in support thereof. *Price v. Price's Ex'r*, 39 S. W. 429, 19 Ky. Law Rep. 211; *Newton's Ex'r v. Field*, 98 Ky. 186, 32 S. W. 623, 17 Ky. Law Rep. 769; *Paducah Ice Co. v. Hall*, 113 S. W. 105; *Northrip's Adm'r v. Williams*, 100 S. W. 1192, 30 Ky. Law Rep. 1280.

In this case, however, there was not only no plea of an implied contract, there was no evidence in support thereof. Nor was there proof of an oral contract or extension or modification of the written contract, since everything that plaintiff did or was requested to do was covered by that contract. Hence the court erred in overruling defendants' motion for a directed verdict on all claims based on an oral or implied contract.

Plaintiff's whole case is based upon an erroneous construction of the written contract, which plainly provides for his performance of every service he did perform, and for his payment therefor on one basis in the event a contract was awarded for the construction of the building, but upon a very different basis in the event the building was not erect-

ed within two years. That such was the intention of the parties is emphasized by the fact that O'Kain refused to sign the contract prepared by plaintiff until he inserted therein the provision that payment on the commission basis, which plaintiff now seeks to enforce, should depend upon the "awarding of the contract for building."

[2] The contract cannot possibly be construed, as plaintiff seeks to construe it, into covering only preliminary drawings and payment therefor, since it in the plainest terms possible provides for completed plans and payment for same. The preliminary services for which he was to receive \$250 in the event the building was not constructed in two years necessarily means all services enumerated in the contract to be performed previous to the awarding of a contract.

[3] Since it is admitted the contract was never awarded, and that the building was not constructed in two years, or at all, it follows plaintiff, by the very terms of his admitted written contract, was limited to \$250 for all services he performed thereunder, and he performed no other services whatever. That his services may have been worth much more than he agreed to accept for same is, of course, entirely irrelevant.

[4] O'Kain also complains of the judgment against him for \$250, claiming to have been released from the contract by plaintiff, when it was in his presence transferred to and assumed by the hotel company; but we do not think this fact sufficient to constitute a release, as something more than mere silence upon the part of plaintiff after he had performed the services required of him would be necessary to prevent him from insisting upon O'Kain's compliance with his contract.

For the reasons indicated, the judgment is reversed, for proceedings consistent herewith.

#### COLLETT'S GUARDIAN v. STANDARD OIL CO.

(Court of Appeals of Kentucky. Dec. 2, 1919.)

##### 1. TRIAL ⚡143—RIGHT TO DIRECTED VERDICT ON CONTRADICTORY EVIDENCE.

Where the existence of a fact necessary to a cause of action depends on contradictory evidence, a question is presented for the jury, and it is only where, after admitting plaintiff's testimony and every fair inference from it to be true, he still has failed to make out his case, that the court should direct a verdict against him.

##### 2. HIGHWAYS ⚡173(2)—FAILURE TO SIGNAL APPROACH OF AUTOMOBILES AS NEGLIGENCE; "DANGEROUS INSTRUMENTALITY."

A motor vehicle is a "dangerous instrumentality," and one in charge should exercise care

commensurate with the dangers attending its operation upon a highway to travelers thereon, including reasonable warning of approach; and Ky. St. § 2739, subsec. 15, makes it negligence per se as to a pedestrian injured, where the injury is the proximate result of the driver's failure to signal its approach.

[Ed. Note.—For other definitions, see Words and Phrases, Second Series, Dangerous Instrumentality.]

##### 3. HIGHWAYS ⚡184(2)—EVIDENCE IN ACTION FOR INJURY TO PEDESTRIAN BY AUTOMOBILE.

In an action for personal injury received by a boy, colliding with a motor truck upon a public highway, uncontradicted evidence *held* not to show that the boy was in a place of safety off the highway, so that the defendant, owner of the truck, was under no obligation to signal the truck's approach until the instant of the collision, when the boy came upon the highway and it was too late to avert the accident.

##### 4. HIGHWAYS ⚡184(3)—COLLISION; CONFLICTING EVIDENCE ON INJURY BY AUTOMOBILE PRESENTING QUESTION FOR JURY.

In an action for injury to a boy pedestrian by collision with an automobile on a highway, whether positive testimony that signals were given outweighs negative testimony that they did not hear the signal of approach was for the jury, so that it was error to direct a verdict for defendant on the ground that there was no testimony tending to prove negligence.

##### 5. HIGHWAYS ⚡184(2)—CONTRIBUTORY NEGLIGENCE ON INJURY TO PEDESTRIAN BY AUTOMOBILE.

In action for personal injury to minor, from collision with automobile truck on a highway, evidence showing that boy was playing with another, running and looking backward, and failed to see the approach of the truck, when his attention was attracted by an automobile giving warning signal coming from another direction and also by a passing train, *held* not to show that the boy failed to exercise the degree of care expected of one of his age under similar circumstances.

##### 6. NEGLIGENCE ⚡85(2)—CONTRIBUTORY NEGLIGENCE OF CHILD.

A child is held to that degree of care for his own safety which is ordinarily exercised by children of his own age under similar circumstances.

Appeal from Circuit Court, Oldham County.

Action by Cecil Collett's guardian against the Standard Oil Company. Judgment for defendant, and plaintiff appeals. Reversed and remanded, with directions to award a new trial.

J. Ballard Clark, of La Grange, and H. F. Telford, of Louisville, for appellant.

Willis, Todd & Bond, of Shelbyville, for appellee.

HURT, J. Cecil Collett, a small boy 13 years of age, was attending a school near



the village of Crestwood. The school was kept in a building near the turnpike, which leads from Crestwood to La Grange, and is about 210 yards northeast of the crossing of the Floyd'sburg turnpike, over the pike from Crestwood to La Grange. From the crossing, in the direction of the schoolhouse, it is slightly up grade. Along the side of the pike, and paralleling it from the schoolhouse, in the direction of Crestwood, is the track of the Louisville & Nashville Railroad Company. In the afternoon of November 17, 1917, when the school was dismissed, from 20 to 40 children, of various ages, came from the grounds of the schoolhouse, and the greater number of them, at least, proceeded for a short distance along and upon the tracks of the railroad, in the direction of Crestwood; but at that time a train, approaching upon the tracks of the railroad from the south, required them to leave the tracks of the railroad and return to the pike.

About the same time, a motor truck, used by the Standard Oil Company in distributing oil, approached from the direction of Crestwood and proceeded along the pike toward La Grange, and when it crossed the Floyd'sburg pike was moving at a speed of from 8 to 12 miles per hour; but, as it proceeded, the speed of the truck was reduced very much, and it was moving very slowly along and upon the side of the pike opposite to the side upon which the approaching children were walking, when the boy Collett, who was engaged in a romp with another small boy, pushed the other to the ground, and then fled from him, as though he expected the other lad to pursue him, and in so doing, he came immediately toward the moving truck, but, with his face turned backward, and looking in the direction opposite from the direction from which the truck was moving, and as a result he collided with the front end of the truck. The collision was so forceful that the boy was rendered unconscious, and fell upon the pike, in front of the machine, with his head in the direction the machine was moving; but the machine was proceeding so slowly, and so well under control, that one of its front wheels ran between the boy's legs, but was stopped before the wheel reached his body. Just about the time the above circumstances were transpiring an automobile was approaching the point of collision between the truck and the boy, from the direction of La Grange. There was evidence which tended to prove that the boy did not regain consciousness until the following day, and suffered very severe injuries, as the result of the collision, though these facts were not undisputed.

There was no evidence which tended to prove that the ones operating the truck were guilty of any acts of either commission or omission from which it might be inferred that they failed to use any reasonable precaution

to insure the safety of the appellant, except that he testified that the operators of the truck did not give any signal or warning of its approach by the sounding of a horn, or the ringing of a bell, or by other device for giving a warning, and that he never saw the truck which injured him, nor was he aware of its presence. The appellant is corroborated, in the statement that the truck's drivers did not give any warning of its approach, by several witnesses, who testify that they did not hear any signal or warning given by it, although they were in a position, and under circumstances from which it could reasonably be inferred, that they would have heard the signals, if given. The evidence, by the driver of the truck and his assistant, was to the effect that the warning was given by repeatedly sounding the Claxon horn, which was attached to the truck for that purpose.

At the close of all the evidence offered by either party the court sustained a motion for a directed verdict in appellee's favor, and of such ruling of the court the appellant complains.

[1] It is elementary that where a fact is necessary to give one a cause of action, and the existence of such fact depends upon contradictory evidence, whether such fact exists or does not exist is a question for the jury, and that it is only where the uncontradicted evidence presents a state of facts which shows that a party has no cause of complaint, or no defense to the complaint made against him, that the court is authorized to take the case from the jury. Hence it is only where, after admitting the testimony of a plaintiff, and every fair inference from it, to be true, and he still has failed to make out his case, that the court should take his case from the jury, by directing a verdict against him. *Dallam v. Handley*, 2 A. K. Marsh. 418; *Thompson v. Thompson*, 17 B. Mon. 23; *Baumelster v. Markham*, 101 Ky. 122, 39 S. W. 844, 41 S. W. 816, 19 Ky. Law Rep. 308, 72 Am. St. Rep. 397; *L. & N. R. R. Co. v. Howard*, 82 Ky. 212; *United Shakers v. Underwood*, 11 Bush, 265, 21 Am. Rep. 214; *Shay v. R. & L. T. P. Co.*, 1 Bush, 108; *L. & N. R. R. Co. v. Johnson*, 161 Ky. 887, 171 S. W. 847.

[2] It is conceded on all hands that a motor vehicle is a dangerous instrumentality, and that its operation upon a public highway must be attended with great caution and prudence, especially with reference to pedestrians, as a collision between a motor vehicle and a pedestrian would not endanger the vehicle, but in all probability be destructive of the life or limbs of the pedestrian. Hence, if there were no statutory provisions relating to their operation, the common law would require that, in their operation upon the highways, those in charge of their operation should exercise the care commensurate with the dangers attending their operation

to persons traveling upon the highways, and such care would, in all cases, require a reasonable warning of their approach to persons upon the highway, if such was necessary to insure their safety. *Moore v. Hart*, 171 Ky. 734, 188 S. W. 861; *Weidner v. Otter*, 171 Ky. 167, 188 S. W. 335.

Aside from the above, the statute (subsection 15, section 2739, Ky. Stats.) expressly provides that a person operating a motor vehicle, and approaching a person who is walking in the roadway of a public highway, shall give warning of its approach "by signaling with a horn, bell, or other device." The statute is as follows:

"Upon approaching a person walking in the roadway of a public highway, or a horse or other draft animal being ridden or driven thereon, a person operating a motor vehicle shall give warning of its approach by signaling with a horn, bell or other device not calculated to frighten such animal, and use every reasonable precaution to insure the safety of such person or animal. P \* \* "

The failure to signal the approach of a motor vehicle to a pedestrian in the roadway of a public highway is thus made by statute negligence per se as to such pedestrian, and if the pedestrian receives an injury which is the proximate result of such failure, the operator of the vehicle is liable for the damages.

[3] In the instant case however, it is insisted that the appellant was not walking in the roadway of the public highway, but was upon the space intervening between the roadway of the highway and the railroad tracks, and hence the appellee was under no duty, under the statute, to give him any warning of the approach of the vehicle, and, having the movements of the vehicle so well under control, that in the exercise of ordinary care for the safety of appellant it was not necessary, in order to his safety, to give a warning when he was not upon the road, but in a place of safety, until suddenly and unexpectedly he dashed out from behind the other children and came upon and across the roadway and ran against the truck, and that the operator had no opportunity, in the exercise of ordinary care, after discovering the peril of appellant, to give him a warning, nor to stop the truck before it collided with him. Such, however, does not appear from the uncontradicted evidence. The uncontradicted evidence does prove that, at some time after leaving the schoolhouse, the appellant was on the track of the railroad, and left that track because of the approach of a train upon it; but his testimony is, however, that, at the time he was struck by the truck, he was then running toward it, which it must be inferred was along the road, as the truck was then proceeding in an opposite direction upon the road.

Earl Collett testified that, at the time the

truck and appellant collided, all the children, including appellant, were going along the road toward Crestwood, and had covered about one-half of the distance from the schoolhouse to Crestwood, and that at the time of the collision the appellant was running down the road. Cassady testified that the children were coming down the road toward Crestwood, and the truck was proceeding toward the meeting point with them. These statements tend to prove that appellant was traveling the roadway, and it cannot be inferred that he had just gotten upon the roadway, when he collided with the truck. There is no witness who stated that the appellant was upon the intervening space between the roadway of the pike and the railroad right of way until just immediately before he was hit by the truck. The two men who were upon the truck, and the boy Potts, who was a witness for appellee, testified that appellant came from behind the other children, and ran diagonally toward the truck; but neither of them say that appellant was not in the roadway when he started, or that the other children were not then in the roadway of the pike.

If there had been evidence to the effect that appellant was not in the roadway of the pike, but in a place of safety, and where it could not be reasonably apprehended by appellee's servants that he was in any danger from the truck, and that he left such place of safety and came into the roadway and against the truck so suddenly and unexpectedly that by the exercise of ordinary care on their part, after discovering his peril, they could not avert the danger, it could not be said that such evidence was entirely uncontradicted, in the light of the testimony of appellant, his brother, and Cassady, that when struck he was proceeding along the road.

[4] It is also insisted that the evidence, which proved that the operator of the truck gave warning signals with the horn as it approached appellant, was positive in statements to that effect and that the evidence which was offered to prove the contrary was negative, and consisted of declarations to the effect that the witnesses did not hear the signals, and for such reason the court was justified in holding that the proof of the giving of the signals was uncontradicted. Such, however, has never been the rule, as adhered to by this court. In *C. & O. Ry. Co. v. Hawkins*, 124 S. W. 838, it was held that whether positive testimony that signals for a crossing were given outweighs negative testimony of witnesses that they were not given, the witnesses deposing that they did not hear them, was a question for the jury, as, after all, the truth of the matter depends upon the credibility of the witnesses and their means of knowledge. The same conclusion was reached in *L. & N. R. R. Co. v.*

Brown, 113 S. W. 466, L. & N. R. R. Co. v. O'Nan, 119 S. W. 1192, and C. & O. Ry. Co. v. Brashear, 124 S. W. 277.

There is no reason why the same rule should not prevail in regard to proving or disproving the giving of signals by those operating a motor vehicle. The appellant deposed that no signal or warning was given from the truck, and that he did not see it, nor know of its presence; and in this statement he is corroborated by all the evidence, as it must be inferred that, if he had known of its presence, he would have avoided a collision with it. It cannot be surmised that, if the warning signal had been given, the appellant would not have heard it, and, having heard it, failed to avail himself of the knowledge of the presence of the truck, and kept out of its way. Hence we conclude that the court was in error in holding that upon the uncontradicted evidence there was a failure of evidence tending to prove any negligence upon the part of the appellee, which was the proximate cause of the injury.

[5, 6] The uncontradicted evidence does not prove that appellant so contributed to his injury by his own negligence that, without which, the injury would not have occurred. Of course, if he had seen the truck approaching upon the highway, the failure to give a warning would not have been the proximate cause of his injury; or if he was guilty of such negligence in failing to know of its approach and keep out of its way, but for which he would not have come in contact with it, his action must necessarily fail. It appears that an approaching automobile was giving out a warning in his rear, and he deposed that such was the cause of his looking backward and failing to see the approach of the truck; a railroad train was passing or had just passed, going in the direction of La Grange; and while the uncontradicted evidence shows that he was engaged in a romp with another boy, and at the time he was struck by the truck he was running away from the boy and looking backward as he went, having heard no signal of the approach of the truck, and no reason to apprehend that any obstacle was in front of him, it could not be said as a matter of law that he was failing to exercise that degree of care to be expected of one of his age under similar circumstances. A child is not held to that degree of care and prudence which persons, who have arrived at years of discretion, must be required to exercise, but is held to only that degree of care for his own safety as is ordinarily exercised by children of his age under similar circumstances. *Davis' Adm'r v. Ohio Valley Banking & Trust Co.*, 127 Ky. 800, 106 S. W. 843, 32 Ky. Law Rep. 627, 15 L. R. A. (N. S.) 402; *Ky. Hotel Co. v. Camp*, 97 Ky. 425, 30 S. W. 1010, 17 Ky. Law Rep. 297; *Owensboro v. York*, 117 Ky.

294, 77 S. W. 1130, 25 Ky. Law Rep. 1397, 1439; *P. & M. R. R. Co. v. Hoehle*, 75 Ky. (12 Bush) 41; *Ky. Central R. R. Co. v. Gastineau*, 83 Ky. 119; *Macon v. P. St. R. Co.*, 110 Ky. 680, 62 S. W. 496, 23 Ky. Law Rep. 46.

The judgment is therefore reversed, and cause remanded, with directions to award a new trial, and for other proper proceedings, not inconsistent with this opinion.

### OSBORN et al. v. ROBERTS et ux.

(Court of Appeals of Kentucky. Dec. 5, 1919.)

#### 1. ADVERSE POSSESSION §114(1)—EVIDENCE SHOWING TITLE AND POSSESSION IN PLAINTIFFS.

In suit under Ky. St. § 11, to quiet title to two adjoining tracts of land, defendants asserting title by adverse possession to portions of each tract, *held*, under the evidence, that plaintiffs were owners of and in possession of the land in controversy when the suit was filed and thereafter, and that defendants had neither title to nor possession of any portion thereof.

#### 2. QUIETING TITLE §12(7) — POSSESSION OF PLAINTIFFS.

Where plaintiffs proved their title to the whole of each of the two tracts of land, and their actual possession of parts of each, they were in actual possession of all, unless portions in controversy were, at the time suit was filed, in actual adverse possession of defendants.

#### 3. EVIDENCE §6—QUIETING TITLE §44(5)—EVIDENCE OF POSSESSION; JUDICIAL NOTICE.

That defendants, while plaintiffs were temporarily out of the state, entered upon a portion of the land without plaintiffs' knowledge or consent, and grew crops of corn thereon in 1914 and 1915, was no evidence that they were in possession on December 14, 1915, when suit was brought, since it is a matter of common knowledge that December 14th is not necessarily within the cropping season.

#### 4. ADVERSE POSSESSION §43(6) — RELINQUISHED CLAIM OF TITLE AND POSSESSION CANNOT BE TACKED.

Where defendants' father's possession and claim of title was by written agreement relinquished by him to plaintiffs' vendor about seven years before suit was filed, and following the relinquishment the land was not inclosed, and grew up in bushes and second growth timber, defendants cannot tack the father's possession, even if adverse, to any possession of their own, because of the break in continuity within the statutory period.

Appeal from Circuit Court, Pike County.

Action by W. J. Roberts and wife against William Osborn and others. Judgment for plaintiffs, and defendants appeal. Affirmed.

E. J. Picklesimer, of Pikeville, and J. M. York, of Catlettsburg, for appellants.

Cline & Steele, of Pikeville, for appellees.

CLARKE, J. The appellees, W. J. Roberts and wife, who were plaintiffs below, instituted this action under section 11, Kentucky Statutes, to quiet their title to two adjoining tracts of land. The appellants by their answer denied the alleged title and possession of plaintiffs, and asserted title in themselves by adverse possession for more than the statutory period to a described boundary of about 14 acres, about one-half of which lies in each of the two larger tracts claimed by plaintiffs.

[1, 2] The evidence for the plaintiffs shows title in them to the two larger tracts claimed by them, including the land in controversy, derived through several mesne conveyances from the commonwealth. Their actual possession at the time of the institution of the action of portions of each of the two larger tracts is proven, and not denied; but it is also proven without contradiction that in each of the two years next before the filing of the suit the defendants raised crops of corn upon part of the land in controversy. Upon this proof appellants insist that it was established that the plaintiffs were not in possession of the land in controversy when the suit was filed, and that therefore the chancellor erred in quieting their title to same, since, in order to sustain an action to quiet title under section 11 of the statute, it is necessary to allege and prove possession as well as title. This is unquestionably the settled rule; but, since plaintiffs proved their title to the whole of each of the two tracts of land and their actual possession of parts of each, they were in the actual possession of all of same when the suit was filed, unless portions thereof in controversy were at the time in the actual adverse possession of the defendants.

[3] The suit was filed on December 14, 1915, and the fact that the defendants, while the plaintiffs were temporarily out of the state, had entered upon a portion of the land without the plaintiffs' knowledge or consent, and grown crops of corn thereon in 1914 and again in 1915, was no evidence that they were in possession of same on December 14, 1915, when the suit was brought, since it is a matter of common knowledge that December 14th is not necessarily within the cropping season. It therefore follows that plaintiffs proved, not only their title to the land,

but that they were on December 14, 1915, in the actual possession of the whole of the same, while defendants only proved that they had actual possession of the portion claimed by them during the cropping season, which it was not shown and cannot be presumed extended to the date the suit was filed.

[4] The adverse possession for the statutory period, which the defendants assert in themselves and those under whom they claim, covers the period when they attempt to prove their father had possession of the land in controversy; but it is conclusively shown that whatever possession and claim of title the father had of the land were by written agreement relinquished by him to the plaintiffs' vendor about seven years before the suit was filed, and that following this relinquishment by their father the land was not inclosed and grew up in bushes and second growth timber. They cannot, therefore, tack his possession, even if adverse, to any possession of their own, whatever its character, because of the break in continuity within the statutory period, and they did not manifest title by adverse possession.

It is also contended by the appellants that plaintiffs did not have title to the land in controversy at the time the suit was instituted, because of the execution theretofore of a deed of trust to J. S. Cline. This contention cannot be sustained for two reasons. In the first place, it is rather conclusively established that the deed of trust to Cline did not cover the land in controversy. But, even if it did, there is no contradiction of positive proof for plaintiffs that the deed did not convey to Cline any beneficial interest in the land, or do more than empower him, as agent for the plaintiffs, to manage and sell the land during their absence from the state. This deed was not introduced in evidence, and before the trial Cline reconveyed the land to the plaintiffs by a deed which is in the evidence and recites that it was executed in compliance with a written contract obligating him so to do, which he had executed and delivered to the plaintiffs simultaneously with their execution of the deed of trust to him.

We are therefore of the opinion that it was established by the evidence that plaintiffs were the owners of and in possession of the land in controversy when the suit was filed and thereafter, and that the defendants had neither title to nor possession of any portion thereof.

Wherefore the judgment is affirmed.

## ALTHOFF v. CULL et al.

(Court of Appeals of Kentucky. Dec. 2, 1919.)

## 1. EVIDENCE ¶183(15) — SECONDARY EVIDENCE OF CONTENTS OF DEED.

Defendant claiming under deed last seen in his possession could not prove contents by parol evidence, in absence of showing that it was lost or destroyed, and evidence merely tending to show that deed was outside of state was insufficient to warrant admission of secondary evidence.

## 2. LIFE ESTATES ¶8—ADVERSE POSSESSION AGAINST REMAINDERMEN.

Possession of one claiming under deed from life tenant does not become adverse as to remaindermen until death of life tenant.

## 3. APPEAL AND ERROR ¶1003 — REVIEW OF VERDICT.

Court of Appeals never overturns a verdict of a jury unless it is flagrantly and palpably against the weight of the evidence.

Appeal from Circuit Court, Trimble County.

Action by Abell C. Cull and others against H. W. Althoff. Judgment for plaintiffs, and defendant appeals. Affirmed.

Claude B. Gerrill, of Bedford, W. B. Moody, of New Castle, and J. A. Donaldson & Son, of Carrollton, for appellant.

S. E. De Haven and G. W. Peak, both of La Grange, and R. F. Peak and Edwards, Ogden & Peak, all of Louisville, for appellees.

**SAMPSON, J.** In 1864, Chatham conveyed by deed of general warranty 89 acres of land to Mary E. Cull and her husband, John Cull, with the following proviso:

"The said John Cull to have his part lying between the buckeye and running a southwesterly course, a straight line intersecting the line up the creek, so as to include one hundred dollars worth, at the average price paid for the land, and the remaining portion of sixteen hundred and twenty-five dollars worth to Mary E. Cull during her natural life, and after her decease to all of her now living children, or any that she may have, and giving unto the said Mary E. Cull the right to sell and convey the same, where in her judgment it would be for the benefit of the family by vesting the money again in land elsewhere for the use and benefit of the family as provided in this deed."

By this deed the husband, John Cull, took the fee-simple title to about 5 acres of the land, while the balance, 84 acres, passed to Mary E. Cull for life with remainder to her children then living or any she might thereafter have, with power in her to sell and convey the land whenever in her judgment it would be for the benefit of the family. In 1872 or 1873, the Culls transferred the land either in fee or the life estate of the wife to Dr. Meade, who immediately took possession.

At that time the land was under mortgage, and this mortgage was foreclosed, and the life estate of the wife and the interest of the husband sold, and the proceeds applied to the satisfaction of the mortgage. This did not interfere with the remainder interest of the children of Mary E. Cull. In the meantime, the Culls had moved to a tract of land situated in Grayson county which they had obtained from Dr. Meade in consideration of a transfer to him of the 89 acres in Trimble county. Meade and his successors in title have held and claimed the 89 acres of land since 1872 or 1873. It has been subdivided, sold, and conveyed several different times until 80 acres thereof are now held and claimed by appellant, Althoff. The balance of the 89 acres is claimed by other persons, and other actions are pending for its recovery, and are to be determined by the result of this case, according to a stipulation found in the record.

The life tenant, Mary E. Cull, died in 1910, and this action was instituted in 1914 by her children and grandchildren claiming to be the owners in fee and entitled to the possession of the lands from and after the death of the life tenant. Althoff is defending upon two grounds: (1) That the land was sold and conveyed by the Culls to Dr. Meade by deed duly executed in 1872 or 1873, under the power granted in the deed from Chatham to the Culls and from which we above quoted, and which deed was delivered to and held by Dr. Meade until he sold and transferred the property to others, and that the Cull-Meade deed, which is not of record, has been lost; (2) the uninterrupted adverse possession of the land for the statutory period.

The principal part or the evidence for appellant, Althoff, is directed to the establishment of the due execution and delivery of the deed from the Culls to Dr. Meade, while the evidence for appellees is largely confined to disproving the execution or existence of such a deed or title bond. Appellant admits that, if such a deed had in fact existed, it was never recorded, and it was not produced upon the trial or made a part of the record, although its existence was put in issue by appellees. Two or three witnesses testify to having seen and read such an instrument between the Culls and Dr. Meade; but no one of them gave any summary of the contents of the instrument, and all are hazy as to its date, contents, signatures, and certificate, although at least one of the witnesses claims to have seen the paper within the last eight or ten years. The paper was last seen, according to the evidence in this record, by Mary Pryor, who says she wrote to Joe Pryor at Indianapolis, and asked that the paper be sent to her for examination, and that in due course the paper referred to was received by her and exhibited to her lawyer, and after a time was returned to Joe Pryor

at Indianapolis, Ind., through the mail, and later on she received a letter acknowledging its receipt. Whether Joe Pryor at Indianapolis now has and holds the paper is not disclosed, although there is slight intimation in the record that the paper was destroyed by a flood. The evidence on this point is a mere surmise or passing intimation, entirely too vague and uncertain to disturb a land title. Where the deed or bond relied on by appellant was at the time of the trial, or is now, is wholly undisclosed by this record, although appellant and his associates in title confess that they have handled the deed on different occasions since it passed from the Culls. In fact, it was in their possession the last time it was in Kentucky, and we may infer from the statements of the witnesses is now in the hands of their privy at Indianapolis, and could have well been introduced upon the trial in the circuit court had it borne out the contention of appellant, or in fact existed. The existence of the writing is very doubtful. If it ever existed, it was perhaps canceled by agreement of the parties about 1873 or 1874. Whether it existed or not is the principal question upon which the determination of this action depends. If the Culls executed a deed to Dr. Meade under the power granted by the Chatham deed, then the title passed to Dr. Meade, and his successors in title should not be disturbed; but if no such writing ever existed, was canceled by the parties shortly after it was made, or if it only conveyed or attempted to convey the life estate of Mary Cull, then Dr. Meade and his successors in title did not take the fee, but only a right to use and keep the place in the same way and manner that the life tenant could have employed the farm had she remained on it. This was the big question of fact in the case, and it was submitted to the jury, who determined it against appellant. If the deed or title bond is a mere myth, or if, as contended by appellees, the title paper made by the Culls to Dr. Meade was subsequently destroyed after a compromise or cancellation of their trade, then Dr. Meade had only the life estate of Mrs. Cull and the five-acre interest of her husband; the remainder in fee belonging to the children of Mary E. Cull who are now appellees.

[1] Until it was proven that the deed which was last seen in the possession of the grantor of appellant was lost or could not be produced, parol evidence of the contents of the instrument was not admissible. Evidence which only tended to show that the deed was outside of the state was insufficient to warrant the trial court in allowing evidence concerning the contents of the writing. To justify the admission of such secondary evidence, the deed must be shown to have been lost or destroyed; until that is done, the deed, being the best evidence of its contents, alone will be competent.

[2] So long as the life tenant of Mary E. Cull lived, Dr. Meade and his successors in title were entitled to the peaceful possession of the lands. Appellees had no cause of action until the death of Mary E. Cull in 1910, nor did the statutes of limitation begin to run against them until that time. Appellant could not have therefore advantageously pleaded adverse possession, because the statutory period had not lapsed at the time of the commencement of this action; hence the court did not err to the prejudice of appellant in declining to give an instruction upon adverse possession.

This record is not free from errors, but those appearing are of slight importance.

[3] Three juries have sat in the consideration of this case; the first two failing to agree upon a verdict. This is no small wonder, when we consider the conflicting though vague and uncertain testimony which makes up the largest part of the record. In finding for the plaintiffs, appellees here, the jury must have concluded from the evidence that the deed upon which appellant relied had no existence in fact, because it was told to find for the Culls unless it believed from the evidence that appellees' ancestors had executed and delivered the deed in question, in which event it was to find for the defendant, Althoff. Whereupon the jury returned a verdict for the plaintiff, which was to say that they did not believe that such a deed had been executed and delivered. This court never overturns a verdict of a jury unless it is flagrantly and palpably against the weight of the evidence. This not appearing, the judgment must be affirmed.

Judgment affirmed.

MARTIN et al. v. PRICE'S ADM'R et al.

(Court of Appeals of Kentucky. Nov. 28, 1919.)

DEEDS  $\S$  8—LIFE ESTATE WITH POWER OF SALE.

Under deed reading, "In consideration of debt of gratitude due F., \* \* \* I hereby deed to her" described land, "to be legally hers and her descendants," and containing provision that, "should she at any time see proper to sell the place and invest the proceeds for the benefit of herself, her children or husband M., who is so broken down in health as to be of but little service in supporting family," held F.'s deed conveyed the fee, whether her title was in fee simple, or only a life estate coupled with a power of sale.

Appeal from Circuit Court, Lincoln County.

Suit for specific performance by Garner Price's administrator and others against W.

O. Martin and others. Judgment for plaintiffs, and defendants appeal. Affirmed.

K. S. Alcorn, of Stanford, for appellants.

Joseph Briggs Paxton, of Stanford, for appellees.

CLARKE, J. The only question, on this appeal from a judgment enforcing against appellants specific performance of a written contract to purchase of appellees a tract of land, is whether one of appellees' remote grantors, Mrs. Fannie Graham, owned the fee-simple title to the land which she had attempted to convey. Whatever title she had was derived from the following deed:

"In consideration of debt of gratitude due Mrs. Fannie Graham, wife of my son Montrose Graham, I hereby deed to her the following tract of land on which she now lives in Lincoln county, Kentucky, about a half mile from Crab Orchard and bounded by the Lancaster and Stanford turnpike, the survey being as follows:

"The land here described the survey of which is laid down I bought of Dr. Welch and hereby deed said ground to Mrs. Fannie Graham to be legally hers and her descendants together with all, the stock, farming utensils and household furniture that no claim against myself or debt of her husband can deprive her of any increase of stock or animal production shall be held sacredly as hers and be exempt from any debt contracted by her husband.

"Should she at any time see proper to sell the place and invest the proceeds for the benefit of herself her children or husband Montrose who is so broken down in health as to be of but little service in supporting a family. She is entitled to what has been here granted for reforming my son from his prodigal habits and in being to him a faithful wife and a loving mother to their children.

"There is this exception only to this deed that should my son Joseph B. Graham see proper to build a sanatorium he will be entitled to the east half of the yard including the big oak tree on the Lancaster pike with the full privilege of and free access to and from all fresh water and medical springs on the said place.

"To all of which free grants I hereto subscribe my hand and seal Oct. 10th, 1882.

"Christopher Columbus Graham. [Seal.]"

It is conceded that the privilege given to Joseph B. Graham of building a sanatorium on a portion of the land was never exercised, and that he afterwards conveyed all right he had in the land to appellees' remote grantor. Hence this provision of the deed is now immaterial, unless, as contended by appellees, it is evidence of grantor's purpose and intention to convey the entire fee to Mrs. Fannie Graham with "this exception only." We do not, however, see any such evidence in

this provision of the deed, since it was equally a limitation upon the fee whether conferred upon Mrs. Fannie Graham or her descendants, and it may be dismissed from further consideration.

It will be noticed that in the granting clause there is no mention of Mrs. Graham's descendants, and she alone is named as grantee. Moreover, in this clause the consideration for making the deed is stated to be grantor's debt of gratitude to her, and it is further stated in a subsequent clause that she is entitled to what has been granted for reforming the grantor's son from his prodigal habits and in being to him a faithful wife and a loving mother to their children. However, the grantor states in what doubtless should be considered the habendum clause, "I hereby deed said ground to Mrs. Fannie Graham to be legally hers and her descendants." Appellants contend the word "descendants" is here used as a word of purchase, and that therefore, under a well-known rule of construction, Mrs. Graham took only a life estate in the land.

Considering these several clauses together, we would feel sure that the word "descendants" was used in the sense of "heirs" and as a word or limitation and not of purchase, if it were not for the fact that in another clause the grantor plainly attempted to confer upon his daughter-in-law the power to sell the place and reinvest the proceeds, which, to say the least, is somewhat inconsistent with the idea that the grantor thought he had vested in his daughter-in-law the fee, or that he intended to do so. This clause is obviously incomplete; but, if sufficient importance is to be attached to it to destroy the otherwise established fee in the daughter-in-law, its purpose and effect must be interpreted to confer upon her the power to sell the place and reinvest the proceeds, for unless so construed it is entirely meaningless and wholly ineffective to destroy the fee in his daughter-in-law, or for any purpose whatever; and, if so construed, the daughter-in-law was given not only a life estate in the land, and in addition thereto the power was conferred upon her, "should she at any time see proper, to sell the place and invest the proceeds for the benefit of herself, her children or her husband."

It is therefore immaterial to the appellants whether Mrs. Graham took under the above deed a fee-simple title, or only a life estate coupled with a power of sale, since in either event they get a fee-simple title to the land under the deed tendered them by appellees.

Wherefore the judgment is affirmed.

## GROVES et al. v. BRYANT.

(Court of Appeals of Kentucky. Dec. 2, 1919.)

1. EXECUTION  $\S$  344—WEIGHT OF SHERIFF'S RETURN UPON QUESTION OF OWNERSHIP OF LAND.

In action involving question of whether ownership of property at time of wife's death was in husband or wife, evidence of sheriff's return of "no property found" upon execution against husband shortly before wife's death held of little value upon question of ownership, in absence of proof that husband had denied ownership to sheriff.

2. HUSBAND AND WIFE  $\S$  133(1)—EVIDENCE OF OWNERSHIP OF LAND IN HUSBAND.

In action involving question of whether ownership of land at time of wife's death was in husband or in wife, where deed and record thereof had been destroyed by fire, circumstantial evidence held to give at least colorable support to finding of ownership in husband.

3. APPEAL AND ERROR  $\S$  1009(1)—REVIEW OF CHANCELLOR'S FINDINGS.

On appeal in an equitable action, a mere doubt in the minds of the appellate court of the correctness of the chancellor's findings is not sufficient to authorize a reversal.

## Appeal from Circuit Court, Simpson County.

Action by Eli Bryant against Isaac Groves, revived, following death of parties, by making Sue Bryant, as executrix and sole devisee under Eli Bryant's will, a party plaintiff and Billy Groves and others, as heirs at law of Isaac Groves, parties defendants to the action. Judgment for plaintiff Sue Bryant, and defendants Billy Groves and others appeal. Affirmed.

G. W. Roark, of Franklin, and Sims, Rodes & Sims, of Bowling Green, for appellants.

C. B. Moore and G. T. Finn, both of Franklin, for appellee.

**SETTLE, J.** This is an appeal from a judgment of the Simpson circuit court, rendered in an action quia timet, declaring the appellee, Sue Bryant, as sole devisee under the will of Eli Bryant, deceased, the owner of a house and lot in the city of Franklin, and quieting her title to same as against the appellants, Billy Groves and others, who asserted claim to the property as heirs at law of Isaac Groves, deceased.

The single question presented for decision by the appeal will readily be understood from the following brief statement of the facts out of which the litigation arose: The action was originally instituted by Eli Bryant, in whom the petition alleged title to and possession of the house and lot in question, acquired through its purchase by him in 1874 of, and conveyance by deed from, the trustee in bankruptcy of a partnership known as Knapp,

Smithson & Horn and the several members thereof, at a sale made by him of same and other property of the bankrupt firm and its members; that he paid the trustee in bankruptcy for the house and lot, and upon receiving the deed from the latter caused it to be duly recorded in the office of the clerk of the Simpson county court, but after it was recorded neglected to obtain from the county clerk's office the original deed, which, together with the record made of it in the office of the county clerk, all other records of that office, and others in the courthouse of Simpson county, was consumed in a fire by which that building was burned and entirely destroyed in 1882. It was also alleged in the petition that by the deed mentioned he (Eli Bryant) was invested with the fee-simple title to the house and lot in controversy, the possession of which he held at the time of the institution of this action and had continuously enjoyed without interruption, adversely to all others, for more than 30 years and, in fact, ever since its purchase by him in 1874; and that one Isaac Groves, the defendant originally named in the petition, had, by wrongfully claiming to be the owner of the house and lot and threatening to sue for the possession of same, cast a cloud upon the plaintiff's title to the property, and interfered with his peaceable possession thereof. The prayer of the petition asked that the plaintiff be adjudged the owner of the house and lot, and that his title thereto be quieted.

The answer of Isaac Groves denied Bryant's title to the house and lot, alleged that the property was purchased by Mary Bryant, his first wife, a daughter of Isaac Groves; that it was paid for by her with money furnished her by the father, and the title conveyed her, instead of her husband, by the deed from the trustee in bankruptcy of Knapp, Smithson & Horn; and that by her death in 1895, intestate and childless, he as her father and only heir at law, under the statute of descent and distribution of this state, at once took the title to the property, and also the right of the possession thereof. By the prayer of the answer the court was asked to quiet Isaac Groves' title to the house and lot and compel the immediate delivery to him of the possession thereof.

After giving their depositions, and following the taking of those of substantially all the other witnesses in the case, both Bryant and Groves died, the former testate and childless. By his will the appellee, Sue Bryant, his second and surviving wife, was made executrix thereof and the sole devisee of his estate. Isaac Groves died intestate, survived by the several children whose names appear as appellants in the record brought to this court on the present appeal. Pursuant to an agreement of the parties and the entering of the necessary orders, the action was duly revived in the court below by making the ap-



pellee, Sue Bryant, as the executrix of and sole devisee under Eli Bryant's will, a party plaintiff, and the appellants, Billy Groves and others, as heirs at law of Isaac Groves, parties defendant to the action.

We have rarely found evidence more conflicting than that contained in the record of this case. That of appellants strongly conduces to sustain their contention that the deed conveying the lot in controversy was made to the first wife of Eli Bryant, while that of appellee is equally strong to the effect that it conveyed the lot to the latter. Isaac Groves, the father of the first wife of Bryant, testified that he let Bryant have the money to pay for the property with the understanding that it was purchased for and was to be conveyed to his daughter, the wife of Bryant. The latter testified with equal positiveness that this was not true, but that the money paid for the property was furnished by him alone, and the deed made to him. There was also an abundance of evidence to the effect that Isaac Groves was insolvent at the time he claims to have furnished the money to buy the lot for his daughter, and by reason thereof without ability or means to give or advance her the \$1,800, required to pay for the lot. On the other hand, it seems apparent from the evidence that Eli Bryant was then able to pay for it. Two or three witnesses claimed to have seen in the possession of the first Mrs. Bryant the original deed by which she was conveyed the lot, but it will be found, with perhaps one exception, that these witnesses were defendants to the action or related to the defendants. On the other hand, Eli Bryant and others testified that the deed was made to him, and not to his wife, and that it was never in her possession, but was destroyed with the courthouse. It was also testified, in substance, by Isaac Groves, and other members of the Groves family, that Eli Bryant admitted to him or them that the title to the lot had been in his wife's name, and that at his death it would go to the Groves family, but this was all denied by Bryant and contradicted by other witnesses.

It is claimed for appellants that Geo. B. Knapp's testimony shows the first Mrs. Bryant to have been the purchaser of the lot, and that the deed was made to her. We fail to find that Knapp's testimony conclusively sustains this contention. On the contrary, it shows that Eli Bryant was the bidder for the property, that it was knocked down to him, and that the witness was unwilling to positively state that Mrs. Bryant was the purchaser. It is true he said he believed he wrote the deed and notes, and that "to the best of his recollection" the deed was made to Mrs. Bryant, but he did not positively say that this was so, and his deposition, as a whole, leaves the impression that his mind was not entirely free of doubt as to the identity of the person named as grantee in the deed. It is not to the discredit of the

witness that he would not be positive in his statements as to this matter, in view of his age and blindness and the long time intervening between the sale of the property and the taking of his deposition.

Without going into further details regarding the evidence contained in the numerous depositions found in the record, it is sufficient to say that it was as conflicting as the nearly equal number of opposing witnesses giving the depositions could make it; so conflicting, indeed, as to render it a difficult task for the chancellor to determine from the depositions alone how the issues of fact made by the pleadings should be decided. The record furnishes, however, in the way of circumstantial evidence certain acts, both of Eli Bryant and Isaac Groves, with respect to the property in question, that doubtless had weight with the chancellor in arriving at the conclusions expressed in the judgment appealed from.

Some of the circumstances will briefly be stated: Although it was claimed by Isaac Groves, and is now insisted by appellants, that the title to the real estate in controversy was in Mary Bryant, the former's daughter, at the time of her death in 1895, and that by reason thereof and the fact that no issue was born alive of her marriage with Eli Bryant the title to the property at once descended to him (Isaac Groves), yet it appears from the evidence that he did not then claim or demand possession of it, nor did he do so until 1914, or 19 years later, and shortly before the bringing of this action by Bryant to quiet his title.

It is hardly believable that Isaac Groves in 1874 advanced his daughter, Mary Bryant, \$1,800, to pay for this property, in view of the conclusive showing made by the evidence of his insolvency at that time; and, in view of the same showing of the continuance of his insolvency down to the institution of this action by Bryant, and consequent need, it is difficult to understand why he did not earlier demand the surrender to him of the property he claimed to have inherited from her. As it appears from the evidence that Groves had other children more dependent upon him in 1874 and since than was Mrs. Bryant, it is strange that in his then embarrassed financial condition he should have singled her out, to the exclusion of his other children, as an object of his bounty.

[1] It is, however, insisted for appellants that Eli Bryant's lack of title to the property and his wife's evidence of title to it is shown by a return of "no property found," made by the sheriff upon an execution against Bryant placed in his hands for collection shortly before the death of the latter's wife. There would be much force in this contention if it were shown by the evidence that the return upon the execution was based upon a statement or assurance of Bryant that he was not the owner of this or any other property.

But there was no proof of any such representation by Bryant. Bryant himself, then, had no written evidence of his title to the property, and the same would have been true if the title had been conveyed to his wife, because the original deed and record made thereof were both burned in the fire which destroyed the courthouse in 1882. It does, however, appear from the evidence that there was, at the time the execution referred to was in the hands of the sheriff, a mortgage on the property, which had been executed by Bryant to secure a fee of \$900 he was owing a firm of lawyers for services they had rendered him. This mortgage had been duly recorded, but his wife, Mary Bryant, who was then living, was not a party to the instrument, nor had she united with him in executing it. As the mortgage appeared of record in the office of the county court clerk, and its existence was therefore presumably known to the sheriff, it cannot be told whether his return of the execution with its indorsement "no property found" was made because of his belief that a sale of the property, following a levy on it of the execution, would leave nothing of its proceeds to go on the execution after paying the mortgage debt and the value of Bryant's homestead or whether it was returned for some other reasons. At any rate, under the circumstances shown the execution and return thereon are of little value as tending to establish the identity of the owner of the property in question.

[2] On the other hand, the facts shown by the evidence respecting the execution of the mortgage by Bryant alone and its acceptance by the attorneys to whom it was made, without objecting to his wife's failure to join in it, would seem to authorize the presumption that they were satisfied of his ownership of the mortgaged premises, and also that the value of the property, after deducting the value of the homestead and that of the wife's potential right of dower, would afford ample security for the mortgage debt. But, conceding that the presumption of title in the husband thus arising is so remote as to be entitled to little weight, the other circumstances previously mentioned, together with the claim of title to and possession of the property asserted and held by Eli Bryant, both before and after the death of Mary Bryant, in fact ever since its purchase, and covering altogether a period of more than 40 years, during the whole of which time it was year by year listed by him for taxation as his property and the taxes paid thereon by him, present as a whole a chain of circumstantial evidence giving at least colorable support to the findings of fact arrived at by the circuit court.

[3] While the evidence before us is conflicting, parts of it incompetent, and much of it unsatisfactory, yet, viewing it from every reasonable standpoint, we find ourselves un-

willing to say that the chancellor has so erred in his findings of fact as to authorize a reversal of the judgment. On appeal in an equitable action, a mere doubt in the minds of the appellate court of the correctness of the chancellor's findings is not sufficient to authorize a reversal. Perhaps the most recent elaborate statement of the rule here applicable will be found in *Meeke v. Ward*, 184 Ky. 30, 211 S. W. 200:

"In an action at law tried by the circuit court, its findings of fact will be given the legal effect accorded the verdict of a properly instructed jury. In an action in equity, while the circuit court's findings of fact will not, on appeal, be treated as the verdict of a properly instructed jury, they will be entitled to some weight; and though the Court of Appeals will and does examine and weigh the evidence for itself, it will not disturb the judgment unless it is found to be unsupported by the weight of the evidence; and, if left in doubt, from its examination of the evidence, whether it supports the judgment, it will in such state of case affirm the judgment." *Hollingsworth v. Alvey*, 182 Ky. 384, 206 S. W. 493; *Fields v. Couch*, 169 Ky. 554, 184 S. W. 894; *Herzog v. Gipeon*, 170 Ky. 825, 185 S. W. 1119.

Judgment affirmed.

#### VANOVER v. W. M. RITTER LUMBER CO. et al.

(Court of Appeals of Kentucky. Dec. 12, 1919.)

#### 1. LIBEL AND SLANDER §9(1)—PREJUDICE IN PROFESSION OR TRADE.

Any words, whether oral or written, which prejudice one in his profession or trade, are actionable per se.

#### 2. LIBEL AND SLANDER §9(3)—IMPUTATIONS AGAINST ATTORNEY.

Words which impute to an attorney the want of the requisite qualifications to practice law, or with having been guilty of dishonest or improper practices in the performance of his duties as an attorney, are actionable per se.

#### 3. LIBEL AND SLANDER §9(3)—STATEMENT NOT IMPUGNING HONESTY OF ATTORNEY.

Defendant's statement to the father of its injured employé, that, if he did not compromise the case for \$400, defendant would go over and buy out the injured employé's attorney for \$100 or \$200, held not actionable by plaintiff attorney, as meaning nothing more than that defendant would make an effort to buy him out.

Appeal from Circuit Court, Pike County.

Suit by Roscoe Vanover against the W. M. Ritter Lumber Company and another. From a judgment dismissing the petition on defendant Lumber Company's demurrer thereto, plaintiff appeals. Affirmed.

El. J. Pickeslmer, of Pikeville, for appellant.

Auxier, Harmon & Francis, of Pikeville, for appellee.

CLAY, O. Plaintiff, Roscoe Vanover, brought this suit against the W. N. Rotter Lumber Company and J. B. Holbrook to recover damages for slander. The lumber company's demurrer to the petition as amended was sustained, and the petition dismissed. Plaintiff appeals.

After alleging that plaintiff was a regularly licensed and practicing attorney at law, and that the lumber company was a corporation, the petition is as follows:

"Plaintiff says that on the 22d day of March, 1918, as attorney for David Shortridge, who sued by his father and next friend, James F. Shortridge, he filed suit in the Pike circuit court for the said David Shortridge against defendant, W. M. Ritter Lumber Company, for personal injury alleged to have been done the said David Shortridge by alleged negligence of the defendant W. M. Ritter Lumber Company, and placing the damages at \$3,000. An attested copy of said petition is filed herewith and made a part of this petition and is marked Exhibit No. 1 for identity.

"Plaintiff says that the defendant W. M. Ritter Lumber Company became very anxious to settle and compromise said suit with the said David Shortridge and his father, James F. Shortridge, and both defendants herein entertained malice and ill feeling towards this plaintiff, because he was of counsel for the said David Shortridge against the said W. M. Ritter Lumber Company, and because this plaintiff, as attorney, had represented a number of clients against the defendant W. M. Ritter Lumber Company. Plaintiff says that at all times mentioned in this petition the defendant J. B. Holbrook was yard superintendent for defendant W. M. Ritter Lumber Company at its said lumber mill at the mouth of Lower Elk creek in Pike county, Ky., where the said David Shortridge was injured, and for which he sued, with this plaintiff as his attorney in said suit.

"Plaintiff says that on the — day of April, 1918, and in Pike county, Ky., the defendant J. B. Holbrook, while acting for the defendant W. M. Ritter Lumber Company in trying to make a compromise of said suit of David Shortridge, by, etc., v. W. M. Ritter Lumber Company, and while acting for and on behalf of defendant W. M. Ritter Lumber Company in attempting to compromise said suit of Shortridge, by, etc., v. W. M. Ritter Lumber Company, and after offering said James F. Shortridge, father of the infant plaintiff, David Shortridge, \$400 to compromise said suit, and when it was that the said offer of compromise was refused by the said Shortridges, then it was that the defendant J. B. Holbrook, still acting for defendant W. M. Ritter Lumber Company in trying to effect said compromise, and with malice towards plaintiff, which was held and entertained by both defendants against this plaintiff, the defendant J. B. Holbrook falsely, maliciously, and with the wicked design of injuring plaintiff in his calling and

profession of a lawyer, and injuring his good name and character, as well as to also effect a compromise of said suit, said to the said James F. Shortridge: 'If you don't compromise this for the \$400, the company (meaning the defendant W. M. Ritter Lumber Company) will go over to Pikeville and buy your attorney out for \$100 or \$200.'

"Plaintiff says that he was the only attorney for David Shortridge in said suit, and that the defendant J. B. Holbrook, in speaking the false and slanderous words above set out about buying out said Shortridges' attorney, was speaking directly about this plaintiff, and about no other person, and thereby falsely charged this plaintiff of unprofessional conduct, and of the crime of selling out his clients' interests, and of being untrue to his clients and by these false and slanderous lies did effect a compromise of said suit, all to plaintiff's damage in the sum of \$50,000."

The amended petition is as follows:

"That at the time of the speaking of the slanderous words set out in plaintiff's petition that the said J. B. Holbrook was then superintendent of the defendant W. M. Ritter Lumber Company's work at Lower Elk, Pike county, Ky., and in making said settlement of said suit of David Shortridge, etc., v. W. M. Ritter Lumber Company was then acting for said company in making said settlement, and at the time of speaking slanderous words set out in plaintiff's petition, and by the use of said slanderous words and lies, did effect and procure a settlement of said case, and that the defendant W. M. Ritter Company approved of said settlement and accepted the benefit of said lies and slanderous words as spoken by its superintendent in effecting said settlement, and still ratifies same by accepting and holding onto the benefits derived by the use of said words so spoken by its said superintendent in effecting said settlement."

[1-3] It will be observed that the alleged slander consisted of the following words: —

"If you don't compromise this for the \$400, the company will go over to Pikeville and buy your attorney out for \$100 or \$200."

The only question we deem it necessary to consider is whether the words are actionable. It may be conceded that any words, whether oral or written, which prejudice one in his profession or trade, are actionable per se. *Spears v. McCoy*, 155 Ky. 1, 159 S. W. 610, 49 L. R. A. (N. S.) 1033; *Williams v. Riddle*, 145 Ky. 459, 140 S. W. 661, 36 L. R. A. (N. S.) 974, *Ann. Cas.* 1913B, 1151. Hence words which impute to an attorney the want of the requisite qualifications to practice law, or with having been guilty of dishonest or improper practices in the performance of his duties as an attorney, are actionable per se. 17 R. C. L. § 47, p. 307. Following this rule, it has been held that it is slanderous to say of an attorney that he is a disgrace to his profession as a lawyer, or that he is smooth, tricky, and dishonest (*Ingalls v. Morrissey*, 154 Wis. 632, 143 N. W. 681, *Ann.*

Cas. 1915D, 809); or that he was disloyal to his clients' interests (*Hetherington v. Sterry*, 28 Kan. 426, 42 Am. Rep. 169); or that he has made extortionate charges, or that he is a drunkard (*Sanderson v. Caldwell*, 45 N. Y. 398, 6 Am. Rep. 105); and in the case of *Chipman v. Cook* (Vt.) 2 Tyler, 456, the words, "Darius Chipman is a man not to be trusted in his business as an attorney; he will take fees on both sides," were held to be actionable. It will be observed that in all these cases the words were spoken about the attorney himself, and there was a direct charge or a clear imputation that he was unfit to be an attorney, because of his moral obliquity or his infidelity to his clients.

In the case at hand, the words consisted of a threat that, if the litigant did not compromise the case, the company would buy out his attorney for \$100 or \$200. Giving full force and effect to this language, it meant nothing more than that the company would make an effort to buy the attorney out. It contained no charge as to what the attorney would do, but left that matter undetermined. We therefore conclude that the language was not sufficient to charge that the attorney was a man who would sell out his client. It follows that the demurrer to the petition as amended was properly sustained.

Judgment affirmed.

#### THOMAS, Ins. Com'r, v. HURST HOME INS. CO.

(Court of Appeals of Kentucky. Dec. 5, 1919.)

##### 1. STATUTES $\S$ 161(1)—REPEAL BY IMPLICATION NOT FAVORED.

Repeals by implication are not favored and will not be declared except it be impossible to permit both statutes to stand, and if both acts can be reasonably construed together so as to harmonize them, both will be sustained, and if that cannot be done without violence to some part of the language employed in one or both, they should be so construed that as much as possible of each will remain.

##### 2. TAXATION $\S$ 113—TAX ON FIRE INSURANCE COMPANY FOR BENEFIT OF FIRE MARSHAL'S OFFICE INVALID.

While the act of March 15, 1916 (chapter 19), requires the payment by fire insurance companies of a per centum tax on the gross premium receipts to defray the expenses of the fire marshal's office, the act of March 22d, 1916 (chapter 28), provides that the provision of any other act relating to insurance companies passed at that session shall not apply to domestic co-operative or assessment fire insurance companies, and to the extent of any repugnancy or inconsistency the latter act must prevail so that such an insurance company is not subject to the tax.

##### 3. CONSTITUTIONAL LAW $\S$ 70(3) — EXEMPTION OF CERTAIN INSURANCE COMPANIES LEGISLATIVE QUESTION.

The legal policy of exempting domestic co-operative or assessment fire insurance companies from the payment of the tax levied upon other companies is a matter for the Legislature, and not for the courts.

##### Appeal from Circuit Court, Franklin County.

Suit by the Hurst Home Insurance Company against C. F. Thomas, Insurance Commissioner, to enjoin the collection of a tax. Judgment for plaintiff, and defendant appeals. Affirmed.

Chas. H. Morris, Atty. Gen., and Clarence E. Thomas, of Louisville, for appellant.

David D. Cline, of Paris, for appellee.

QUIN, J. March 21, 1906, the Legislature passed an act entitled:

"An act to provide for the investigation of fires in this commonwealth, and to provide for the appointment of a deputy insurance commissioner to be designated fire marshal of the state of Kentucky; also to provide for the payment of his salary and the payment of expenses incurred in the investigation of fires in this commonwealth." Ky. Stats. 1915, § 762a.

Of similar import, but greater amplification, is an act of March 11, 1912 (Ky. Stats. § 762b). In the latter act provision is made for assistants to the fire marshal, their powers and duties fixed, and the salaries of the fire marshal and his assistants provided for.

Section 2 of the 1912 act was amended in 1914 (chapter 71, p. 205, Acts 1914). See Ky. Stats. 1918, § 762f12.

In an act of March 15, 1916 (chapter 19), pertaining to the state insurance board, provision is made "for the prevention of fire waste and for the establishment of the office of state fire marshal, fixing salaries and expenditures and prescribing duties." Section 49 of this act repeals section 762a, Carroll's Statutes 1915 (the act of 1906), and all conflicting laws.

In the act of 1906 a tax of one-third of 1 per cent. of the gross premium receipts of fire insurance companies doing business in this state was levied to defray the expenses of the fire marshal's office. This tax was fixed at one-half of 1 per cent. of the gross premiums by the 1912 and 1916 acts.

The appellee, a domestic assessment or co-operative insurance company, together with six other similar companies, brought this suit against the insurance commissioner seeking to enjoin him from collecting this tax; it being alleged that the 1906 and 1912 acts had been repealed by section 49 of the 1916 act, and that co-operative or assessment companies were exempt from the payment of the tax under the provisions of an act passed March 22, 1916 (Ky. Stats. 1916, § 722a6), to

regulate the organization and operation of assessment or co-operative fire insurance companies, section 29 of which reads as follows:

"The provisions of any other act relating to insurance or insurance companies passed at the present session of the General Assembly shall not apply to co-operative or assessment fire insurance companies organized under the laws of this state."

Appellee alleged further that the March 22, 1916, act provided what sums co-operative and assessment companies should pay, and there was no provision for the tax of one-half of 1 per cent. of the gross premium receipts.

From a judgment adverse to his contentions the insurance commissioner has appealed.

[1] The act of March 15, 1916, expressly repeals section 762a, Ky. Stats. (act of 1906), and all inconsistent acts or parts of acts, and if section 5 of the act of 1912 or the entire act (Ky. Stats. 762b) was repealed, as claimed by appellee, it would be by implication only.

A statute may be repealed by the express provision of a subsequent statute or by implication when the provisions of the earlier and later statutes are repugnant to each other and irreconcilable, or when the subsequent statute covers the whole subject-matter of the former and is manifestly intended as a substitute for it. *Exall v. Holland*, 166 Ky. 315, 179 S. W. 241.

It is a well-settled principle of statutory construction that repeals by implication are not favored and will not be declared except it be impossible to permit both statutes to stand. *L. & N. R. R. Co. v. Jarvis*, 87 S. W. 759, 27 Ky. Law Rep. 986.

If both acts by any reasonable construction can be construed together, both will be sustained. 36 Cyc. 1087. If they cannot be harmonized so as to allow the two to stand without violence to some part of the language employed in one or both statutes, they should be construed so that as much as possible of each will remain. *Commonwealth v. International Harvester Co.*, 131 Ky. 551, 115 S. W. 703, 133 Am. St. Rep. 256.

The rule is thus stated in 36 Cyc. pp. 1077, 1078:

"Where, however, a later act covers the whole subject of earlier acts and embraces new provisions, and plainly shows that it was intended, not only as a substitute for the earlier acts, but to cover the whole subject then considered by the Legislature, and to prescribe the only rules in respect thereto, it operates as a repeal of all former statutes relating to such subject-matter, even if the former acts are not in all respects repugnant to the new act."

By the express language of section 29 of the March 22, 1916, act no provision of the earlier act (March 15, 1916) is applicable to domestic co-operative or assessment fire insurance companies. If, therefore, Ky. Stats. § 762b (act of 1912), or section 5 thereof, was repealed by the

March 15, 1916, act, appellee is not subject to the tax.

A careful comparison of the acts of March 15, 1916, and March 11, 1912, the latter as amended in 1914, conclusively shows that the later act was intended to be a revision of and substitute for the earlier one; each provision of the 1912 act is incorporated in the subsequent statute, but with greater elaboration.

As expressed in *Grant v. B. & O. Ry. Co.*, 66 W. Va. 175, 66 S. E. 709:

"A later statute, covering the whole subject-matter of an earlier one, not purporting to amend it, and plainly showing it was intended to be a substitute for the earlier act, works a repeal of such earlier act by implication, even though the two are not repugnant in the usual sense of the term."

See, also, *U. S. v. Tynen*, 11 Wall. 88, 20 L. Ed. 153; *Murphy v. Utter*, 186 U. S. 95, 22 Sup. Ct. 776, 46 L. Ed. 1070; *State of Washington v. Carbon Hill Coal Co.*, 4 Wash. 422, 30 Pac. 728; *Cunningham v. Cokely*, 79 W. Va. 60, 90 S. E. 546, L. R. A. 1917B, 718; 25 R. C. L. 915.

In *Gorham v. Luckett*, 6 B. Mon. 146, is found an analogous case. A statute of 1799 directed the appointment of jailers and fixed their term of office during the pleasure of the court by whom appointed. By a statute of 1802 power was given to the county courts to remove jailers whenever it should appear to them that they had been guilty of neglect of duty, thus raising the question whether the provisions of the earlier act were expressly or impliedly repealed by the later one. In speaking on the question the court says:

"But if a subsequent statute requires the same, and also more than a former statute had made sufficient, this is in effect a repeal of so much of the former statute as declares the sufficiency of what it prescribes. And if the last act professes or manifestly intends to regulate the whole subject to which it relates, it necessarily supersedes and repeals all former acts, so far as it differs from them in its prescriptions. The great object then is to ascertain the true interpretation of the last act. That being ascertained, the necessary consequence is that the legislative intention thus deduced from it must prevail over any prior inconsistent intention to be deduced from a previous act."

To the same effect is *Head v. Commonwealth*, 165 Ky. 603, 177 S. W. 731.

Unexplained, the direct repeal of Ky. Stats. § 762a, with no express reference to section 762b, would be strongly persuasive of the legislative intent not to repeal the latter. But, paralleling section 762b and the 1916 act, we find the latter covers precisely the same ground and was intended to embrace the same objects and general purposes as the earlier act, with the exception only of a part of section 2 as amended by the act of 1914, relating to the right of appeal on the part of the

owner or occupant of property from an order of the fire marshal or his assistants requiring the correction of any unsafe conditions tending to increase the fire hazard.

In commenting upon the effect of these two statutes the editor of volume 3, Ky. Stats. 1918, in a note to section 762f12, states (parenthetical clause omitted):

"The act of March 15, 1916, clearly seems to cover all parts of the act of 1912 as amended in 1914 (section 762b, Kentucky Statutes, 1915 Edition), except that part of section 2 as given above. The act of 1916 makes no provision whatever for the review by the courts of the orders of the state fire marshal. Neither does said act of 1916 expressly repeal or amend said acts of 1912 and 1914. For this reason \* \* \* I have compiled so much of the acts of 1912 and 1914 as do not seem necessarily in conflict with the act of 1916, as section 762f12. This right of appeal to the courts seems to have been the only subject included in the old law which was not legislated upon in the act of 1916, nor such right of appeal given under the old law expressly denied."

The Legislature unquestionably intended the later act as a substitute for the earlier one, and it will be so treated to the extent of the duplication, and we hold that the act of 1916 (March 15th) operated as a repeal of all of section 762b, excepting only that part of the 1914 amendment above referred to and which is now section 762f12 of 3 Ky. Stats. 1918.

[2] The effect of this ruling will be to exempt appellee from the payment of one-half of 1 per cent. of its gross premium receipts. While the act of March 15, 1916, requires the payment of the tax, the act of March 22, 1916, provides that the provision of any other act relating to insurance or insurance companies, passed at that session of the General Assembly shall not apply to domestic co-operative or assessment fire insurance companies, and to the extent of any repugnancy or inconsistency the later act must prevail.

As to statutes adopted at the same session we find this statement in 36 Cyc. 1151:

"The rule that statutes in pari materia should be construed together applies with peculiar force to statutes passed at the same session of the Legislature; it is to be presumed that such acts are imbued with the same spirit and actuated by the same policy, and they are to be construed together as if parts of the same act. They should be so construed, if possible, as to harmonize, and force and effect should be given to the provisions of each; if, however, they are necessarily inconsistent, a statute which deals with the common subject-matter in a minute and particular way will prevail over one of a more general nature; and of two inconsistent statutes enacted at the same session, that will prevail which takes effect at the later date.

"Where there is one statute dealing with a subject in general and comprehensive terms and

another dealing with a part of the same subject in a more minute and definite way, the two should be read together and harmonized, if possible, with a view to giving effect to a consistent legislative policy; but to the extent of any necessary repugnancy between them the special will prevail over the general statute. Where the special statute is later, it will be regarded as an exception to, or qualification of, the prior general one. \* \* \*

See, also, Endlich on Interp. of Stats. §§ 45 and 188; Peyton v. Moseley, 8 T. B. Mon. 77; Nazareth Lit. & Ben. Inst. v. Commonwealth, 14 B. Mon. 266; Willson v. Hahn, 131 Ky. 444, 115 S. W. 231; Lambert v. Board of Trustees Public Library, 151 Ky. 725, 152 S. W. 802, Ann. Cas. 1915A, 180; State v. Marion County, 170 Ind. 595, 85 N. E. 513.

[3] It is not for the courts to question the reason, the justice, nor the wisdom of the lawmaking power in the enactment of laws. It is the court's duty to interpret, not make, the laws. Why the Legislature should exempt companies such as appellee from this tax is a matter that must address itself to the legislative branch of the government. As said in Endlich on Interp. of Stats. § 4:

"Where the words of a statute are plainly expressive of an intent not rendered dubious by the context, the interpretation must conform to and carry out the intent. It matters not in such a case what the consequence may be."

Finding no error in the judgment appealed from, same is accordingly affirmed.

## TOWN OF HIGHLAND PARK v. WILSON.

(Court of Appeals of Kentucky. Dec. 12, 1919.)

### 1. APPEAL AND ERROR — 220—NECESSITY OF OBJECTIONS TO REPORT OF MASTER.

Objections to the report of the referee, commissioner, or master cannot be raised for the first time on appeal.

### 2. REFERENCE — 100(4)—NECESSITY OF SPECIFIC OBJECTIONS TO REPORT OF MASTER.

A party dissatisfied with the report of the referee must make specific exceptions to the report, and findings not so excepted to will be treated as approved, though unreasonable particularity is not required.

### 3. APPEAL AND ERROR — 52—AMOUNT IN CONTROVERSY.

Where consolidated actions were referred to a master, who found that defendant was entitled to the sum of \$511, and plaintiff specifically excepted only to that part of the report allowing defendant \$130, that was the only amount in controversy, and hence, under Ky. St. § 950, fixing the jurisdictional amounts for appeal, no appeal could be taken; the amount in controversy being less even than \$200, in which case the appellate court may in its discretion allow an appeal.

Appeal from Circuit Court, Jefferson County, Chancery Branch, Second Division.

Action by the Town of Highland Park against George W. Wilson, consolidated with an action by defendant against plaintiff. From a judgment for defendant, plaintiff appeals. Appeal dismissed.

Lawrence F. Speckman, of Louisville, for appellant.

Perry, Savage & Duffy, of Louisville, for appellee.

CARROLL, C. J. On this appeal the contentions of counsel for the appellant town, which an inspection of the record shows to be lacking in merit, will not be considered, because, for reasons to be stated, this court has no jurisdiction of the appeal.

A suit in equity was brought by the town of Highland Park against Wilson, who had been town marshal, asking that the disputed accounts of the parties be settled and the case be referred to the master for that purpose. Subsequently a common-law suit was brought by Wilson against the town, seeking to recover certain sums alleged to be due him. Afterwards this common-law suit was transferred to the equity court and consolidated with the suit of the town against Wilson for an accounting.

When the suits were consolidated, by agreement of parties the case was referred to the commissioner "for the purpose of auditing the accounts between plaintiff and defendant and for all other purposes that may be necessary." Pursuant to this order the commissioner made a report finding that—

"Wilson, on a settlement of accounts between himself and the town, was entitled to \$511.51, made up of \$130.88, the 10 per cent. commission for collecting the sidewalk assessments for 1910 and 1911; \$344.17, for collecting taxes in 1912; \$23.40, for collecting sidewalk assessments in 1912; and advertising delinquent tax bills, \$13."

To this report the town filed the following exception:

"Comes the plaintiff, town of Highland Park, by counsel, and excepts to the commissioner's report filed herein on June 22, 1918, as a whole, and specifically as follows: (1) Allowing defendant the sum of \$130.88 as commissions on collecting sidewalk money, as same was barred by the ruling of Judge Field and by the statute of limitations."

When the exception filed came to be heard by the lower court, it was overruled in an order reciting that—

"This action having been heard and submitted and the court being sufficiently advised overrules the exception of the town of Highland Park to that part of the commissioner's report embracing the item of sidewalk assessments for 1910 and 1911, amounting to \$130.88; it further appearing that no other exceptions to said commissioner's report were filed."

Accordingly judgment went against the town for the amount found due Wilson by the commissioner.

It is provided in section 950 of the Kentucky Statutes that "no appeal shall be taken to the Court of Appeals as a matter of right from a judgment for the recovery of money, \* \* \* if the value in controversy be less than five hundred dollars, exclusive of interest and costs," and further provided that "when the amount in controversy is as much as two hundred dollars, exclusive of interest and costs, and less than five hundred dollars, a party desiring to prosecute an appeal may do so, \* \* \*" and the court may in its discretion grant an appeal. It therefore appears that, if there is a judgment for the recovery of money and the amount in controversy is less than "two hundred dollars exclusive of interest and costs," this court has no jurisdiction of an appeal from the judgment.

As this was a judgment for the recovery of money the question is: What is the amount in controversy on this appeal? The solution of this question depends on whether the amount in controversy is the full amount of the judgment, \$511.51, or \$130.88. It will be observed that the matters in dispute between the parties were by consent referred to the commissioner of the court, to state the accounts and report the amount, if any, due by either to the other; that the commissioner found that the town was indebted to Wilson on account of four separate and distinct claims asserted by him, representing in the aggregate \$511.51; and that the town excepted to the report as a whole, and specifically to the item allowing him \$130.88.

[1-3] In 8 Encyc. of Pl. & Pr. p. 283, the rule is laid down and supported by numerous authorities that—

"Objections to the report of a referee, commissioner, or master in chancery cannot be raised for the first time on appeal. Exceptions are necessary to authorize a review thereof, and a failure to take them is equivalent to an admission of the correctness of the report. Thus exceptions are necessary to preserve for review any error in the findings of fact, as that they were not supported by the evidence, or that they fail to include all the issues. Where a party is dissatisfied with the findings, he should make distinct exceptions, so that the court can readily understand what matters are at issue between the parties. \* \* \* Exceptions to a report should be precise and raise well-defined issues, and should point out the particular error or defect complained of. \* \* \* It cannot be objected for the first time on appeal that the judgment is in excess of the amount claimed in the complaint, or that it is in excess of the amount actually due."

In *Magruder v. Ericson*, 146 Ky. 89, 141 S. W. 1195, the court approved the following rule found in *Henderson's Chancery Practice*, § 456:

"Proper practice in equity requires that exceptions to the report of a master should point out specifically the errors upon which the party relies, not only that the opposite party may be apprised of what he has to meet, but that the master may know in what particular his report is objectionable, and may have an opportunity of correcting his errors or reconsidering his opinions. Cases are referred to a master, not on account of his assumed superior wisdom, but to economize the time and labor of the court, and as exceptions are usually filed to his report, if they are so general as to require a rehearing of the entire case, there is really nothing saved by a reference. A party complaining of the finding of a master 'must put his finger on the point of which he complains.' If he does not do so, no court of review can regard it. The rules upon this subject are tending rather to increased strictness, and not at all to relaxation. They have their foundation in a just regard to the fair administration of justice, which requires that, when an error is supposed to have been committed, there should be an opportunity to correct it at once, before it has had any consequences, and does not permit a party to lie by without making his objection, and take the chances of success on the grounds on which the judge has placed the cause, and then, if he fails to succeed, avail himself of an objection which, if it had been stated, might have been removed."

An exception to the rule that exceptions filed to the report of the master commissioner must point out specifically the errors complained of was made in *Slaughter's Adm'r's v. Slaughter's Heirs*, 8 B. Mon. 482, where the court said:

"But, besides, no exceptions were taken in the court below, by either of the complainants, now plaintiffs in error, to the report of the master commissioner, and it is too late to take them in this court. In case of a palpable mistake or error upon the face of the report, this court might be inclined to correct it, although no exception had been taken in the circuit court; but no such mistake or error, to the prejudice of the plaintiffs, is apparent in this record."

The question here, however, does not fall within the exception pointed out in the *Slaughter Case*, because there is no palpable mistake or error upon the face of the report. The commissioner had before him certain facts in dispute, and on these facts he came to the conclusion set forth in his report. In circumstances like these we will not, under the settled practice, disturb the finding of the commissioner, although it might be made to appear in briefs of counsel that the commissioner had fallen into error. Obviously any other procedure would result in the destruction or serious impairment of the practice requiring specific exceptions to the findings of the commissioner. The very purpose of exceptions is to bring to the attention of the court alleged errors in the report of the commissioner that may have resulted from his misunderstanding or misapplication of the facts considered by him in making his report.

Looking, now, again to the exception filed by counsel for the town, it is apparent that he only pointed out specifically one error in the report of the commissioner. The general exception to the report "as a whole" did not comply with the letter or the spirit of the practice in regard to the sufficiency of exceptions, and will be disregarded. An exception to the report "as a whole" does not call the attention of the court to any particular error, and if such an exception was allowed to be sufficient, it would put on the court the duty of examining the entire case, and plainly such an exception would be of no help to the court in ascertaining the particular matter counsel excepting complained of.

A rule analogous to the one requiring that exceptions shall specify the matter complained of is found in the decisions construing section 340 of the Civil Code of Practice, which, after pointing out several specific errors for which a new trial may be granted, further provides that a new trial may be granted "for error of law occurring at the trial," or if the "verdict or decision \* \* \* is contrary to law."

In considering the sufficiency of grounds for a new trial, this court in many cases has held that a motion for a new trial, merely stating that the "verdict or decision is contrary to law," or that "errors of law" occurred at the trial, is not sufficient to be available on appeal. In *McLain v. Dibble*, 18 Bush, 297, the court in discussing this question said:

"This court has in several unpublished opinions held that, in order to take advantage of the errors intended to be embraced by this subsection, the party must specify the particular error complained of. The lawmakers generalized, in order to cover all errors to which exceptions might be taken, not embraced by some one of the preceding seven subsections; but they did not intend that the entire trial and every step taken in it should be opened, and the circuit court compelled to review each and every ruling excepted to, in order to discover whether or not any of them had prejudiced the unsuccessful party, by the mere act upon his part of adopting their language. The ground for the new trial must be specified; otherwise the party excepting will be regarded as having waived the supposed error."

And again in *Louisville & Nashville Railroad Co. v. McCoy*, 81 Ky. 403, the court said, in speaking of the *McLain Case*:

"That case holds correctly that the language of the eighth subsection, which authorizes a new trial for 'error of law occurring at the trial, and excepted to by the party making the application,' was the generalization of the lawmakers, and not sufficiently specific to point out the particular error which might be intended by the written grounds. That subdivision makes every error of law which may be committed, and properly excepted to during the trial, a cause for a new trial. Hence, when the cause for new trial is embraced by it, the particular ground



or cause must be named in the written grounds with such a degree of certainty that a person of good understanding may know what is meant.

\* \* \* The object of the motion and grounds for new trial is to call the attention of the trial court to any error that may have been committed at the trial, and to allow an opportunity, without the expense and delay of an appeal, of correcting it. This being so, all that is necessary in any case is to use such plain and intelligible language in the grounds for new trial as indicates, points out, or shows to the court, with reasonable and ordinary certainty, the particular errors which are complained of, so as to enable the court, by the exercise of proper attention, to understand what errors are meant, and to reconsider the facts or law out of which they are alleged to have grown. Unreasonable particularity or technical accuracy in the description of the errors is not required or practicable, either in the grounds for new trial or the assignment of errors. To describe each error, with every particularity belonging to it, would swell the grounds for new trial and the assignment of errors beyond their necessary or proper compass. The law does not mean that the grounds for new trial shall contain a particular description of the errors relied on, but that the particular errors shall be simply pointed out or indicated in a common-sense way."

In *Meaux v. Meaux*, 81 Ky. 475, the court, in commenting on the insufficiency of a ground for a new trial, "because of errors of law occurring at the trial," said:

"Such a ground brings up for revision before the trial court and this court the entire record, and requires an examination of every step taken, for the purpose of ascertaining whether any error exists to the prejudice of the party complaining. It is too general, and will be disregarded."

The propriety of requiring that an exception to a commissioner's report shall point out as definitely as a ground for a new trial the error complained of is apparent when it is considered for a moment how much time and labor is saved to the court by a specific exception. An attorney who is familiar with his case is presumed to understand the parts of a report that he desires to complain of or take exception to, and only those errors in the findings that are pointed out by him in the exceptions need be considered by the lower court, or this court, subject to the exception found in the *Slaughter Case*, *supra*.

As to the findings not specifically excepted to, the lower court, and this court, will treat them as approved by the parties. The failure of a party to except to any one or more findings is in effect saying to the court that the findings not excepted to are correct, and you may enter judgment accordingly. Nor will it make any difference that issues have been formed in the pleadings as to matters in the commissioner's report not excepted to, because the parties will be taken as

having consented that judgment may go as to such parts of the report as are not specifically excepted to, although they may have made an issue concerning the parts not excepted to in their pleadings. It results, from what we have said, that the only finding of the commissioner complained of in the lower court or that is available as error on this appeal is the one relating to the item of \$130.88.

Therefore, as the amount in controversy in this court is only \$130.88, the appeal must be dismissed for want of jurisdiction.

## CITY OF LANCASTER v. BROADDUS.

(Court of Appeals of Kentucky. Dec. 12, 1919.)

### 1. MUNICIPAL CORPORATIONS §763(1)—DUTY TO KEEP STREETS IN SAFE CONDITION FOR TRAVEL.

Cities have duty of exercising ordinary care to keep their streets in reasonably safe condition for public travel, such duty ordinarily extending to whole of street no matter how wide it is or what part of it is used by the public.

### 2. EVIDENCE §25(2)—JUDICIAL NOTICE.

It is a matter of common knowledge that streets in towns with a population of from 200 to 1,000 are often wider than it is necessary for the safe and convenient use of the traveling public, and that the area of these municipalities is much greater than their business necessities require.

### 3. MUNICIPAL CORPORATIONS §763(1)—DUTY OF KEEPING STREET IN SAFE CONDITION.

Town or city, no matter how small its population, is required to exercise ordinary care to keep, not only that part of the street that has been set apart for and is customarily used by the traveling public in a reasonably safe condition, but must also exercise the same degree of care with respect to such parts of its streets as lie immediately adjacent to or in the margin of the traveled part.

### 4. MUNICIPAL CORPORATIONS §807(2)—CONTRIBUTORY NEGLIGENCE OF AUTOMOBILE DRIVER.

Automobile driver who in passing wagon on street left traveled part of street and drove into portion not used by traveling public, and was injured by reason of excavation so concealed by weeds that it could not be seen from automobile, held not contributorily negligent, though it would not have been necessary to have left traveled portion of street.

Appeal from Circuit Court, Garrard County.

Action by Hubert Broaddus, by, etc., against City of Lancaster. Judgment for plaintiff, and defendant appeals. Affirmed.

R. H. Tomlinson, of Lancaster, for appellant.

Louis L. Walker, of Lancaster, for appellee.

CARROLL, C. J. Hubert Broadus, a young boy, received serious injuries when an automobile in which he was riding in company with other people on one of the streets of the city of Lancaster, turned over, and in a suit to recover damages there was a judgment in his favor, and the city appeals.

The machine in which the boy was riding was being driven by Joe Turner, an experienced and careful driver. When the machine was going at a speed of about 10 miles an hour—not exceeding 12—Turner discovered an approaching wagon, and for the purpose of avoiding it turned his machine to his right, according to the law of the road, so that he might pass the wagon. About the time Turner turned his machine to the right the driver of the wagon also properly turned his team to his right, so that each could pass the other with safety.

The traveled part of the street at and near the point where both vehicles were turned by the drivers to the right, and at the place where they passed each other, was covered for about 15 feet in width with rock. Within a few feet of the place where the two vehicles passed each other there was a culvert under the street, covered with rock for the same width and in the same manner as the other part of the street.

On the side of the street to which the automobile turned to pass the wagon there was an opening in the culvert, into which the water passed under the street, and at this opening, or mouth, of the culvert an excavation had been made between 2 and 3 feet deep and about 3 feet wide. This excavation was immediately at the edge or in the margin of the macadam and traveled part of the street, so that if the wheels of a vehicle should leave the macadam or traveled part of the street at this point as much as two or three inches they would drop into the excavation that had been made at the mouth of the culvert.

The street was about 22 feet wide, although only about 15 feet of it was covered, as we have said, with metal; outside of the metal part of the street the surface of the ground for some distance from the excavation was level with the surface of the macadam part of the street, or so nearly so that the wheels on one side of a vehicle could run on the metal and the wheels on the other side on the ground outside of it with safety. When the driver of the automobile turned it to the right for the purpose stated, the wheels on the right side of it left the metal part of the street a few inches, with the result that when the excavation was reached one of the wheels on the right of the machine fell into it, causing the machine to turn over

after it had passed the excavation some 10 feet.

It further appears by practically undisputed evidence that outside of the part of the street covered with metal the ground was covered with grass and weeds, which had also been allowed to grow up in the excavation to such an extent that the excavation could not be discovered by the exercise of ordinary care by a traveler on the street. In other words, the excavation was completely hidden from view by the weeds and grass, and presented the same appearance as did the remainder of the street outside of the metal covered part. It is further shown without dispute that there was no barrier or other object to give notice of the presence of this excavation, and that it had been in the same condition it was when the accident happened for several years, certainly more than one year.

The macadam and traveled part of the street at this point was, as we have said, about 15 feet wide, and the vehicles, without either leaving the macadam or traveled part of the street, could have passed each other with entire safety, and so if the driver of the automobile had not left the traveled part of the street the accident would not have happened.

On these facts it is earnestly insisted by counsel for the city that the accident and resulted injury to the boy was entirely due to the negligence of the driver of the machine in leaving that part of the street covered with metal, because, as argued, he could have safely passed the other vehicles without leaving the traveled portion of the street, and therefore the city was not guilty of any negligence in leaving this unprotected excavation immediately by the side of and in the margin of the metal covered part of the street.

For the boy, the argument is that the city was negligent in failing to have a barrier or other reasonably sufficient object to give warning of the fact that it would be dangerous to leave the macadam part of the street at this point, and the driver of the machine was not negligent in leaving for the space he did the traveled part of the street.

We may also here say that there is no dispute about the fact that the city had notice of the location and condition of the excavation a sufficient length of time before the accident to have taken such steps as might be necessary to give warning of its presence.

[1] It is the settled law in this state, and for that matter everywhere, that cities are under a duty to exercise ordinary care to keep their streets in reasonably safe condition for public travel; and it is not to be doubted that if this excavation had been in the metal covered and traveled part of the street the negligence of the city would be clearly established.

Therefore the only material question is, Is

a city under a duty to exercise ordinary care to keep its streets reasonably safe for public travel outside of that part that is covered with metal and usually traveled when the metal covered and safe part of the street is wide enough to accommodate the traffic and permit two vehicles to pass each other with safety.

As a general rule, cities and towns are under a duty to exercise ordinary care to keep the whole of the street, no matter how wide it is or what part of it is used by the public, in reasonably safe condition for travel. But whether this rule should be applied in all its strictness to the whole of the street in small cities and towns is a question that admits of considerable doubt. *Perkins v. Inhabitants, of Fayette*, 68 Me. 152, 28 Am. Rep. 84; *McArthur v. City of Saginaw*, 58 Mich. 357, 25 N. W. 313, 55 Am. Rep. 687; *Monongahela City v. Fischer*, 111 Pa. 9, 2 Atl. 87, 56 Am. Rep. 241.

[2] Of course if the population and business of the city and the reasonable needs of the traffic require the whole of the street, then the whole of it must be kept in condition to accommodate the traffic. But we have in this state a great many small cities and towns with a population ranging from 200 to 1,000 people, and it is a matter of common knowledge that the streets in these municipalities are often wider than is necessary for the safe and convenient use of the traveling public, and that the area of these municipalities is much greater than their business necessities require.

As a result of this condition it is a custom in many of these smaller cities and towns to set apart and keep in a reasonably safe condition for public travel a strip from 15 to 30 feet wide, covered with metal in the center of the street, while the remainder of the street outside of the macadam is seldom used by travelers, and not often maintained in as good condition as the traveled part.

In view of this almost universal custom existing in so many small cities and towns in the state, including Lancaster, and the great expense that would attend the improvement of the whole of all the streets, we do not feel like laying down an arbitrary rule that would require all these small cities and towns to keep in the same safe condition the whole width of all their streets as they do that portion that has been set apart for the use of the traveling public, and that is sufficient to accommodate it.

Cases illustrating the difference in the measure of duty a city is under in respect to the safety of streets that are in the populous and much-traveled part of the city and the streets that are in the outlying and sparsely settled territory are: *City of Henderson v. Sandefur*, 11 Bush, 550; *Neff v. Covington Stone & Sand Co.*, 108 Ky. 457, 55 S. W. 697, 56 S. W. 723; *Sundell v. Village of Tin-*

*tah*, 117 Minn. 170, 134 N. W. 639, 38 L. R. A. (N. S.) 1127, Ann. Cas. 1913C, 1311, and note; *Smith v. City of Rexburg*, 24 Idaho, 176, 132 Pac. 1153, Ann. Cas. 1915B, 276; *Carlin v. City of Chicago*, 262 Ill. 564, 104 N. E. 905, Ann. Cas. 1915B, 213. See, also, *Thompson on Negligence*, vol. 5, § 6008.

[3] But, passing the question as to the duty of small cities and towns to keep whole of all the streets in reasonably safe condition for travel, we are quite sure that, however small the population of the town or city may be, it is under a duty to exercise ordinary care to keep, not only that part of its streets that has been set apart for and is customarily used by the traveling public in a reasonably safe condition, but that it must also exercise the same degree of care with respect to such parts of its streets as lie immediately adjacent to or in the margin of the traveled part.

It often happens that the driver of a vehicle in an emergency, or in passing other vehicles, and while exercising ordinary care for his own safety, leaves for a short distance the usually traveled part of the street, and when he does so, if there is no warning of the danger and the physical appearance outside of the traveled part does not give notice that it is unsafe, he cannot be said to be guilty of such contributory negligence as would defeat a recovery if he is injured by dropping into an excavation or coming in contact with a dangerous obstruction in the margin of the beaten path that could not be discovered by the exercise of ordinary care on his part. We need not in this case say how close to the traveled road the dangerous excavation or obstruction must be to fix liability on the city. Each case must stand on its own facts.

As said in *Warner v. Holyoke*, 112 Mass. 362:

"The law has nowhere undertaken to define at what distance in feet or inches a dangerous place must be from the highway, in order to cease to be in close proximity to it. It must necessarily be a practical question, to be decided by the good sense and experience of the jury."

In commenting on this Vermont court said, in *Drew v. Town of Sutton*, 55 Vt. 586, 45 Am. Rep. 644, that—

"It seems to us that this is the only practical rule that can be adopted, and that, as a general rule, it is for the jury to say, in the concrete case, whether the place is sufficiently near the highway to render traveling upon it unsafe unless guarded against. \* \* \*"

[4] Here the driver of the automobile, who was proceeding at a reasonable rate of speed, thought it prudent and safe in passing the wagon to leave for a few inches the traveled part of the street, although it was not necessary that he should have done so, and when he did the wheels of his vehicle drop-

ped into an excavation, the presence of which was so concealed by weeds and grass as that it could not be discovered by a person using ordinary care as was the driver of this automobile.

A traveler under circumstances like these is not guilty of negligence as a matter of law. The most prudent drivers of machines and other vehicles are likely at times to deviate slightly, even when there is no occasion, from the beaten path of travel, and, if they do, the question whether they are negligent or not is one for the jury.

We have examined the authorities relied on by counsel for the city, but they do not present facts so similar to those appearing in this case as to make them controlling.

The rule generally followed by the courts is laid down in *Thompson on Negligence*, vol. 5, § 6055, as follows:

"Another exception to the rule which limits the obligation of the municipality to repair to the traveled path, and one resting not only on sound principle, but on authority, arises where there are excavations, chasms, precipices, or obstructions outside the traveled path, and so near thereto that, combining with the ordinary accidents of travel, they are liable to result in injury to the traveler, especially in the nighttime. Here reason and justice demand that the corporation shall remove the obstruction, or protect the traveler from it by suitable barriers or signals, or pay any resulting damages. To make a distinction between cases where the excavation is within the true line of the highway or exactly upon it, and cases where it is beyond it, but close to it, presents an unworthy refinement and a judicial trifling with human life. The existence of such dangerous places, although outside the traveled portion of the highway, or even outside the highway itself, may so endanger public travel, unless suitable guards or barriers are erected, as to raise a duty on the part of the municipality to erect such guards or barriers along the margin of the traveled portion of the highway, or even along the external portion of the highway as laid out, so that if a traveler is injured in consequence of a want of such barriers, he may have an action for damages against the municipality, although the injury in fact took place outside the limits of the traveled path. \* \* \*"

Supporting this text are the following cases: *Biggs v. Huntington*, 32 W. Va. 55, 9 S. E. 51; *James v. Trustees of Wellston*, 18 Okl. 58, 90 Pac. 100, 13 L. R. A. (N. S.) 1219, 11 Ann. Cas. 938; *Blankenship v. King County*, 68 Wash. 84, 122 Pac. 616, 40 L. R. A. (N. S.) 182; *Johnson v. Paducah Laundry Co.*, 122 Ky. 369, 92 S. W. 330, 5 L. R. A. (N. S.) 733; *Braatz v. City of Fargo*, 19 N. D. 538, 125 N. W. 1042 (1910), 27 L. R. A. (N. S.) 1169; *Elam v. City of Mt. Sterling*, 132 Ky. 657, 117 S. W. 250, 20 L. R. A. (N. S.) 512; *St. Louis R. R. Co. v. Ray* (Okl.) 165 Pac. 129, L. R. A. 1918A, 843.

The instructions are criticized, but we think they presented fairly the law of the case.

The judgment is affirmed.

#### TACKITT v. NEWSOM (two cases).

(Court of Appeals of Kentucky. Dec. 5, 1919.)

##### 1. APPEAL AND ERROR ⇐242(4)—REVIEW OF ANSWER OF WITNESS WHERE OBJECTION IS WAIVED.

Court on appeal will not consider alleged error in admission of evidence, where objection to answer of witness was waived by not requiring court to rule upon it.

##### 2. APPEAL AND ERROR ⇐882(9)—REVIEW OF TESTIMONY CALLED FOR ON COMPLAINING PARTY'S CROSS-EXAMINATION.

A party cannot complain on appeal of testimony which his counsel voluntarily called for in his cross-examination of witness.

##### 3. APPEAL AND ERROR ⇐1058(1)—CURING OF ERROR IN EXCLUDING TESTIMONY.

Error in exclusion of testimony offered by defendant was cured by subsequent admission of same testimony.

##### 4. APPEAL AND ERROR ⇐1068(5) — REFUSAL OF INSTRUCTION HARMLESS ERROR.

Refusal to give defendant's requested instruction on champerty was harmless, where plaintiff by the verdict did not recover any of the land to which the instruction on champerty was intended to refer.

##### 5. WATERS AND WATER COURSES ⇐179(4)—OBSTRUCTION OF FLOW OF WATER; INSUFFICIENT TO JUSTIFY MANDATORY INJUNCTION.

In action for mandatory injunction to require adjoining owner to remove obstruction of flow of water in stream, where evidence showed that natural location of stream was on plaintiff's side of line, and that defendant had merely placed five or six rocks on bank of stream, where it was cutting into his land, to prevent it from further encroaching upon him, and failed to show that defendant's act caused additional water to flow on plaintiff's land, judgment granting injunction held against the great preponderance of the evidence.

##### 6. APPEAL AND ERROR ⇐1009(3)—REVIEW OF CHANCELLOR'S FINDINGS.

If the conflict in the testimony produced only a doubt in the minds of the Court of Appeals, it would be court's duty to resolve the doubt in favor of chancellor's finding, but if the finding is clearly against the preponderance of the testimony, it is the court's duty to determine the matter according to their convictions as to the facts which the testimony as an entirety establishes.

Appeals from Circuit Court, Pike County.

Suits by William Newsom against Harvey Tackitt. Judgment for plaintiff, and defend-

ant appeals, the two appeals being heard together. Judgment in first case affirmed, and that in second case reversed, with directions.

Roscoe Vanover, of Pikeville, for appellant.  
J. J. Moore, of Pikeville, for appellee.

THOMAS, J. These two suits furnish a strong example of the perversity in human nature, and emphasize the influence of selfishness and greed as factors in controlling human conduct. These litigants not only display an utter disregard of the good fellowship which should exist between neighbors, but they likewise exhibit a contempt for the preservation of family ties, since the appellant Newsom, who was plaintiff below, is the son-in-law of the appellee Tackitt, who was the defendant below. It is to be regretted that petty disputes like those here involved could not be settled amicably without consuming the time of courts and disturbing an entire neighborhood for a period of more than a year, and leaving scars which naught but death will efface. The transcripts in the two cases contain about 640 pages, while the matter involved is only a fraction of an acre of mountain agricultural land and alleged damages thereto, all of the total value of less than one-fourth of the cost of the transcripts alone.

The first suit involves a controversy over the division line between the plaintiff and defendant and damages to less than a fourth of an acre of plaintiff's land, because of an alleged wrongful diversion of a stream by defendant, causing the water to collect on that portion of plaintiff's land.

The answer contained a denial of the allegations of the petition and a paragraph relying on adverse possession, which was denied by reply, and upon trial there was a verdict in favor of plaintiff for only a portion of the land sued for, and one also in his favor for the sum of \$25 because of the matters complained of in the second paragraph of his petition. Defendant's motion for a new trial having been overruled, he prosecutes an appeal.

About four months after the rendition of the judgment in that case the second suit was filed to obtain a mandatory injunction against defendant, requiring him to remove the alleged obstruction which plaintiff claimed produced the damage for which he asked compensation in the second paragraph of the first suit. Defendant's answer denied the allegations of the petition in that suit, and after extensive and protracted preparation the court upon submission granted the prayer of the petition, and ordered the obstructions complained of removed, and to review that judgment the defendant prosecutes the second appeal above. Upon motion made in this court the two appeals are heard together, though sustaining no relation the one to the other further than that they are between the same parties.

The two tracts of land owned respectively by plaintiff and defendant were once owned as one tract by William Tackitt, who sold the portion now owned by defendant to his remote vendor in 1886, while the remainder of the tract was sold to defendant's remote vendor in 1893.

The grounds urged for a reversal of the judgment in the first appeal are that the court erred in the admission and rejection of evidence, in the giving and refusing of instructions, and that the verdict of the jury is not sustained by the evidence. The only complaint of incompetent evidence to which our attention is called in brief of counsel is that given upon cross-examination of the county surveyor of Pike county, who was introduced as a witness in behalf of plaintiff. This witness had made a survey of the lines contended by each litigant as the true one, and had testified in substance in his examination in chief that the calls of defendant's deed (which was the older one) located the true line at the points contended by plaintiff. One call in the deed reads, "running down said point to the butt or base of the  $\frac{1}{2}$  point." On cross-examination the surveyor testified that he construed this to mean as running with the center of the point. His first answer, giving his construction of the call, was objected to, but the objection was not acted upon, and then defendant's attorney asked him this question, "It means that whether it says it or not?" to which the witness answered, "Yes, unless it calls for something down on the side of the point or certain degree off to a certain object." Counsel then moved to exclude that answer, which was overruled.

[1, 2] It will at once be seen that the first answer of the witness, of which complaint is made, cannot be considered, because the objection to it was waived by not requiring the court to rule upon it, and his second answer, which was asked to be excluded, was in direct response to a question propounded by defendant's counsel, and we know of no rule of practice permitting a litigant to complain of testimony which his counsel voluntarily called for in his examination of the witness. We do not mean to hold that, if the answer of a witness is not responsive to the question, and is not one which the question was designed to elicit, the party would be barred from complaining of it if erroneous, but we have no such case before us. So, if the testimony of the surveyor was erroneous (which we do not determine), defendant under the condition of the record cannot complain of it.

[3] The wrongfully excluded evidence complained of is that offered by two of defendant's witnesses, to whom it is alleged William Tackitt, about the time or just after he sold the land now owned by defendant, pointed out a certain poplar tree as being the poplar tree mentioned in defendant's deed, but this error, if one, was cured by the statements of witnesses who testified for

defendant later upon the trial, and who said that William Tackitt pointed out to them the line between plaintiff and defendant, and that the line so pointed out ran by the poplar tree, where defendant claims the true line to be.

Defendant offered an instruction directing the jury to find for him if it believed that the land in controversy was included in the boundary given in defendant's deed, which is the same boundary as that contained in the deed to the same tract which William Tackitt executed in 1886. This phase of the case, however, was submitted in another instruction given by the court, and which told the jury to find for the defendant if it believed the description in his deed covered the land to the green line on the map used on the trial, and the green line referred to in the instruction is shown, not only by the defendant himself, but by all his witnesses, to be at the point where he claims the true line is and as contained in his deed.

[4] Further complaint is made that the court refused to give an instruction on champerty offered by defendant, but the error, if any, in refusing this instruction is not prejudicial, since plaintiff by the verdict of the jury did not recover any of the land to which the instruction on champerty was intended to refer.

The last contention, that the verdict is not sustained by the evidence, is without merit. We deem it unnecessary to relate even in substance the testimony offered by the respective parties, since it would serve no useful purpose, and would unnecessarily lengthen this opinion. While the testimony in its entirety is conflicting, still that given by plaintiff and his witnesses, including the county surveyor, is abundantly sufficient to sustain the verdict. We therefore conclude that none of the errors relied on are sufficient to authorize a reversal of the judgment in the first case appealed from.

[5] Upon the trial of the second case above, which sought the mandatory injunction referred to, the stenographer's transcript of the testimony heard upon the trial of the first case was read, and in addition thereto the defendant introduced and read the depositions of 11 witnesses. The testimony as a whole upon the trial of that case showed that a small stream known as Big branch, ran out of the mountains and emptied into Long fork of Shelby creek, and that at a point about 200 yards from where it emptied into that stream it made a sudden turn around the base of the point; that from there on to the place of emptying it ran through a low, swampy territory and in the general direction of the line between plaintiff and defendant, and the great preponderance of the testimony is to the effect that the

natural location of the stream is on plaintiff's side of the line as located by the verdict of the jury. As far back as the memory of the oldest inhabitant extends there was a natural pond on plaintiff's side of the line, covering one-eighth or one-fourth of an acre, and in times of heavy freshets the water from the stream would spread out over the land of both plaintiff and defendant. Some years ago a tenant of defendant's vendor dug a small ditch in an effort to take care of the overflow water on defendant's land. Afterward that ditch was dammed up at its mouth, but whether this was done by some owner of the land, or by deposits from the flow of the water, is not made clear by the testimony. It does appear, however, that defendant, where the stream makes a turn around the base of the point, placed five or six rocks on the bank of the creek where it was cutting into his land, to prevent it from further encroaching upon him, and it is these obstructions of which the plaintiff complains. The testimony shows that the natural pond, which was originally upon plaintiff's land, has gradually filled, and that it is now tillable land, this change being brought about by sudden freshets, called by the witnesses "run-outs from the mountains," and causing the stream to fill up and the water to spread out over the adjacent territory. We do not gather from the testimony that defendant placed any rocks across the stream so as to interfere with the flow of the water, but that he placed them only on the bank of the stream, to prevent the water from encroaching upon him, and the testimony in the record fails to convince us that this act of his caused any additional water to flow on plaintiff's land. We therefore conclude that the judgment of the court granting the injunction in the second suit was against the great preponderance of the testimony.

[6] Under the well-known rule of practice prevailing in this court, if the conflict in the testimony produced only a doubt in our mind as to the truth of the issue, it would be our duty to resolve that doubt in favor of the finding of the chancellor, but if his finding is clearly against the preponderance of the testimony, we not only have the right, but it is our duty, to determine the matter according to our convictions as to the facts which the testimony as an entirety establish. Following this rule, we are constrained to hold that the petition in the second case should have been dismissed.

It is therefore ordered that the judgment in the first case be affirmed, and that the one in the second case be reversed, with directions to dismiss the petition, with a judgment against plaintiff for costs and for proceedings not inconsistent herewith.

## BROOKSHIRE et al. v. HARP et al.

(Court of Appeals of Kentucky. Dec. 12, 1919.)

## 1. EASEMENTS ¶86(1) — PRESUMPTION OF GRANT.

After a continuous, uninterrupted use of a passway for 15 years, there is a presumption, requiring evidence to overcome it, that the right is exercised under a grant.

## 2. EASEMENTS ¶8(2, 3)—PERMISSIVE USE.

Permissive use, however long, of a passway, cannot ripen into a right.

## 3. EASEMENTS ¶8(2, 3)—GATES ACROSS PASSWAY NOT CONCLUSIVE OF PERMISSIVE USE.

That during all the years a passway was used gates were across it is not conclusive that its use was permissive; but their erection and maintenance by the owner of the servient estate is merely a circumstance indicating the use was permissive.

## 4. EASEMENTS ¶5—ACQUIRING BURDENED EASEMENT.

It is as competent for one to acquire a prescriptive easement of passway burdened with gates as to acquire one unburdened.

## 5. EASEMENTS ¶9(1)—CLAIM OF RIGHT CONSISTENT WITH PERMISSIVE USE.

That a tenant on the dominant estate repaired the passway under arrangement with the owner of the servient estate is as consistent with the use of the passway being under a claim of right as it is evidence of a permissive use only.

## 6. EASEMENTS ¶18(1)—IMPLIED GRANT OF PASSWAY.

The owner of two adjoining tracts, conveying one of them, impliedly grants the use of the passway over the other, an apparent easement then and for a long time before used for the benefit of the tract conveyed, and reasonably, if not absolutely, necessary for the use of it.

## 7. EASEMENTS ¶82—DESTRUCTION BY ADVERSE USER.

To destroy an easement of passway by an alleged adverse user, such user must be of the same character required to obtain title to real estate; and an occasional locking of gates across it during wet seasons is not enough.

## 8. EASEMENTS ¶26(3)—LOSS BY CEASING OF NECESSITY.

An easement of passway by implied grant is not lost by the owner of the dominant estate acquiring other lands furnishing an outlet.

Appeal from Circuit Court, Spencer County.

Action by F. M. Brookshire and others against Ben Harp and another. Petition dismissed, and plaintiffs appeal. Reversed, with directions.

John S. Kelley, of Bardstown, S. K. Baird, of Shelbyville, and Kelly & Baird, of Bardstown, and J. W. Crume, of Taylorsville, for appellants.

L. W. Ross, of Taylorsville, for appellees.

THOMAS, J. This suit involves the right of appellants and plaintiffs below, F. M. Brookshire and wife, to the use of a passway across the farm of appellees and defendants below, Ben Harp and wife. Both farms of plaintiffs and defendants are situated in Spencer county. The land owned by plaintiffs, and to which the passway is alleged to be appurtenant, contains 65 acres, while that owned by defendants contains 154 acres. Between the latter and the Bloomfield and Taylorsville pike there is a narrow strip of land belonging to J. W. Wakefield, across which the passway in controversy runs, and in which plaintiffs also claim an easement. But that portion of the passway crossing the land of Wakefield is not in controversy in this litigation.

Some time in March, 1917, the defendants, who had owned the servient estate but a short while, locked the gates which had been erected across the passway, and which gates had been in use as far back as the testimony goes, and to compel them to unlock the gates and keep them unlocked the plaintiffs filed this suit.

The petition claims the right to the easement by prescription, and also as being appurtenant to plaintiffs' land, and made so by the remote common vendor of both plaintiffs and defendants. Both of these claims were resisted by the answer, which alleged that the passway had always been only a permissive use by the owner of the servient estate, and it was further alleged that plaintiffs owned other lands adjoining the 65 acres along the lines of which ran a public road, to which they had access over their own lands, and that defendants should not be required to furnish an easement over their land for the benefit of the 65 acres. Appropriate pleadings made the issues, and upon trial the court dismissed the petition, and from that judgment plaintiffs prosecute this appeal.

The record discloses the following undisputed facts: That long prior to the year 1851 the passway ran from the pike across defendants' land to the residence on plaintiffs' land, practically upon the same ground as now located. In that year J. H. Wakefield became the owner by purchase of the 65 acres, and the following year he purchased the 154 acres now owned by the defendants. He used the two tracts as one farm until 1878, when he sold to his son, J. R. Wakefield, the 65 acres, and the latter, together with those occupying the premises, continued to use the passway without let or hindrance throughout the life of J. R. Wakefield, who died many years thereafter.

Subsequent owners of that tract continued to use the passway in the same manner, and during all of the time people living beyond that tract also used it as a necessary neigh-

borhood route to and from their homes to the public pike. No owner of the land now owned by defendants ever questioned or interposed the slightest objection to the use of the passway in the manner indicated until about the year 1900, when one Heady, who had become the owner of it, expressed dissatisfaction with the use of the passway for hauling heavy loads at certain seasons of the year, but he took no steps, in court or otherwise, to close it up, further than at one time to lock one of the gates for a very short while. Similar action was occasionally taken by subsequent owners of the servient estate, but notwithstanding these temporary objections the use of the passway by those occupying plaintiffs' farm, and those living beyond it, continued practically the same as it had theretofore existed.

Defendants became the owners of their land on February 26, 1917, and they permanently obstructed the use of the passway within less than 30 days thereafter. For many years (but just how long does not appear) a neighborhood road known as Och's lane ran within a mile of plaintiffs' tract, and that road connected with the Bloomfield and Taylorsville pike at a point much further from plaintiffs' residence than does the passway in question, and to travel that route would increase the distance to plaintiffs' post office and school about  $2\frac{3}{4}$  miles. For a long while those occupying the land of plaintiffs, to get to Och's lane would be compelled to travel over other lands if they could obtain permission so to do. That lane has since been converted into a public road which defendants claim is now accessible to plaintiffs, and that because thereof their right to the passway should be denied. The present undisputed right to enter the Och's lane from the 65 acres grows out of the fact that the intervening land has since been purchased by the owner of that tract. This condition did not exist when J. R. Wakefield obtained his deed from his father in 1878, and his only outlet at that time was over the remaining 154 acres belonging to his father, and which outlet is the passway now in question.

[1-4] The law is well settled in this state that after a continuous, uninterrupted use of a passway for as much as 15 years, it will be presumed that the right is exercised under a grant, and the burden is upon the owner of the servient estate to show that such use was permissive, which he may do and defeat the right, although it had been exercised under a permissive use from time immemorial, since no length of time of such use can ripen into a right. *Salmon v. Martin*, 156 Ky. 309, 160 S. W. 1058; *Bales v. Rafferty*, 161 Ky. 511, 170 S. W. 1184; *L. & N. Railroad Co. v. Cornellius*, 165 Ky. 132, 176 S. W. 964; *Mitchell v. Pratt*, 177 Ky. 438, 197 S. W. 961, and cases referred to. That the use of the passway in

question by the owners of the dominant estate in this case, as well as by other members of the public, was under a claim of right for a period of as much as 40 years prior to 1900 is indisputably established by the testimony in the record. It is true that during all that time gates were across the passway, but this fact is not conclusive that its use was permissive only. *Skaggs v. Carr*, 178 Ky. 849, 200 S. W. 27. Nor does the opinion in the case of *Mitchell v. Pratt*, supra, hold to the contrary. That opinion, and other cases referred to therein, went only to the extent of holding that the erection of gates by the owner of the servient estate, and their maintenance by him, was a circumstance indicating that the use of the passway was permissive only, and not that it was conclusive of the character of the use. The record here does not disclose who erected or who maintains the gates, but if we concede that they were erected and maintained by the defendants and their predecessors in title, plaintiffs would not be concluded by this fact. It is as competent for one to acquire a burdened easement as it is to acquire an unburdened one.

[5, 6] In their effort to show that the use of the passway was permissive only, the defendants introduced witnesses, who stated in a general way that they regarded the use as permissive, but they mentioned no fact indicating that the use was of that character, nor did they give any circumstance as forming a basis for their conclusion, except perhaps the occasional objections which the owners of the servient estate made of the nature above set out. One fact relied on by defendants as establishing a permissive use only is that at one time a tenant on the dominant estate repaired the passway, under an arrangement with the owner of the servient estate, by placing gravel or rock thereon, and it is insisted that this was clearly indicative that the use was permissive only. But we do not so construe the circumstance. According to our view, the fact is as consistent with the use of the passway under a claim of right as it is evidence of a permissive use only. Moreover, we think the facts of this case come within the principle announced in the cases of *Damron v. Damron*, 119 Ky. 806, 84 S. W. 747, 27 Ky. Law Rep. 272, *Bentley v. Hampton*, 91 S. W. 266, 28 Ky. Law Rep. 1083, *Irvine v. McCreary*, 103 Ky. 495, 56 S. W. 966, 22 Ky. Law Rep. 169, 49 L. R. A. 417, *Muir v. Cox*, 110 Ky. 564, 62 S. W. 723, 23 Ky. Law Rep. 6, and *Stone v. Burkhead*, 160 Ky. 47, 169 S. W. 489. That principle is that—

"Where one conveys a part of his estate, he impliedly grants all those apparent or visible easements upon the part retained which were at the time used by the grantor for the benefit of the part conveyed, and which are reasonably necessary for the use of that part." *Stone v. Burkhead*, supra.



It is stated thus in the McCreary Case:

"It may be considered as settled in the United States that, on the conveyance of one of several parcels of land belonging to the same owner, there is an implied grant or reservation, as the case may be, of all apparent and continuous easements or incidents or property which have been created or used by him during the unity of possession, though they could then have had no legal existence apart from his general ownership."

Excerpts from the other cases referred to are unnecessary.

When James H. Wakefield in 1878 conveyed to his son, J. R. Wakefield, the land now owned by plaintiffs, the passway over defendants' land now in contest was apparent, and its use had been continuous for more than 30 years. It was not only reasonably necessary for the use of the tract conveyed, but under the proof it was absolutely necessary for the use of it. An implied grant to the use of the passway over the remaining tract (that now owned by defendants) of J. H. Wakefield necessarily resulted.

[7, 8] The only remaining question is, Have the defendants and those under whom they claim destroyed the right to the easement? They claim to have done so by what they term an adverse user since 1900, a period of more than 15 years before the bring-

ing of this suit. To accomplish such a result the alleged adverse user must be of the same character as is required to obtain title to real estate; i. e., it must be notorious, continuous, adverse, and exclusive for the statutory period. *Clay v. Kennedy*, 72 S. W. 815, 24 Ky. Law Rep. 2034, and 14 Cyc. 1195.

The occasional locking of the gates during wet seasons of the year, as testified to by witnesses for the defendants, does not constitute an obstruction by adverse occupation within the rule referred to so as to defeat plaintiffs' right to the use of the easement. Such obstructions were temporary only, and did not in any sense constitute an appropriation of plaintiffs' property in the easement, nor was it such an adverse holding as to eventually bar the right to the easement. Neither is there merit in defendants' contention that plaintiffs now have other means of egress and ingress by traveling over their land to Och's lane, for the passway having become appurtenant to defendants' 65 acres of land, the right to it was not lost by the acquisition of adjoining land which might furnish him another outlet.

It results, therefore, that the court committed error in dismissing the petition, and the judgment is reversed, with directions to sustain the prayer of the petition, and to enter a judgment in conformity with this opinion.

**LEONARD v. BENFORD LUMBER CO.**  
et al. (No. 2908.)

(Supreme Court of Texas. Nov. 12, 1918.)

**1. PUBLIC LANDS §178(3)—DONATION CERTIFICATE; "CONVEYANCE" OF INTEREST IN REAL ESTATE.**

The legal effect of the conveyance of a donation certificate was to invest purchaser with title to land afterward located and to make the patent when issued inure to the purchaser's benefit, although the certificate was personalty when conveyed; "conveyance" denoting an instrument which carries from one person to another an interest in land.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Conveyance.]

**2. RECORDS §6—CONVEYANCE OF DONATION CERTIFICATE MAY BE RECORDED.**

A conveyance of a donation certificate before location thereunder was properly recorded after location of the land, under Rev. St. 1911, art. 6823.

**3. RECORDS §1—POLICY OF REGISTRATION LAWS.**

The policy of the registration laws requires that the public records disclose all matters affecting land titles.

**4. VENDOR AND PURCHASER §231(16)—RECORDS OF CONVEYANCES; NOTICE.**

Patentees of land or their assignees cannot ignore a recorded conveyance of a donation certificate executed before the location of the land; such instrument having the legal effect to determine in whole or in part to whose benefit the patent itself inures.

**5. VENDOR AND PURCHASER §231(9)—RECORDED CONVEYANCES; CHANGE OF COUNTY BOUNDARIES.**

In view of Rev. St. 1911, arts. 6824, 6842, 6857, a purchaser of land must take notice of conveyances of such land recorded in a county from which a new county in which the land is situated was taken.

**6. VENDOR AND PURCHASER §231(4)—PERSONS BOUND BY RECORDS.**

Although the literal terms of Rev. St. 1911, arts. 6842, 6857, would require that all persons be held to know what appears on the face of a duly recorded instrument, registration of an instrument thereunder only carries notice of its contents to those bound to search for it, among whom are subsequent purchasers under the grantor in a recorded instrument.

**7. VENDOR AND PURCHASER §231(4)—NOTICE TO SUBSEQUENT PURCHASER OF LAND.**

A purchaser of land from heirs, whom purchaser believed to have only an undivided interest, must take notice of statements in prior recorded conveyance from an ancestor of the heirs setting forth facts showing the true ownership of the land.

Error to Court of Civil Appeals of Ninth Supreme Judicial District.

Trespass to try title by R. L. Leonard against the Benford Lumber Company and others. There was a judgment of the Court of Civil Appeals (181 S. W. 797), affirming a judgment in favor of defendants, and plaintiff brings error. Reversed and rendered.

R. E. Minton, of Groveton, for plaintiff in error.

Hill & Hill, of Livingston, Dean, Humphrey & Powell, of Huntsville, and Baker, Botts, Parker & Garwood, of Houston, for defendants in error.

**GREENWOOD, J.** This was an action of trespass to try title, brought by plaintiff in error, R. L. Leonard, against defendants in error, Benford Lumber Company et al.

The land in controversy was 221 acres in Trinity county, which was originally located, on May 6, 1860, by virtue of a donation certificate issued to Lewis Cox.

By a decree of partition of the district court of Walker county, between the heirs to the estate of Lewis Cox, in 1856, the certificate was allotted to Minerva I. Roe.

On July 15, 1857, Minerva I. Roe and husband conveyed to James C. Dunlap the donation certificate; it being shown on the face of the conveyance that the certificate was a part of the distributive share of the estate of Lewis Cox, which had been assigned, by commissioners, in partition, to Minerva I. Roe as one of the heirs to the estate, as appeared on the records of the district court of Walker county.

On March 17, 1860, James O. Dunlap conveyed the certificate to William R. Leonard, and, after the death of William R. Leonard, his heirs conveyed the land in controversy to plaintiff in error, R. L. Leonard.

The conveyances from Minerva I. Roe and husband to James C. Dunlap, and from James C. Dunlap to William R. Leonard, were duly acknowledged and were recorded, on May 7, 1860, in Trinity county. The records of Trinity county having been burned in 1872, these conveyances were again recorded, in 1874, in Trinity county. In 1875, that portion of Trinity county which included the land in controversy was detached from Trinity county and made a part of Polk county.

On April 15, 1908, the state of Texas patented the 221 acres of land to the heirs of Lewis Cox, their heirs or assigns.

On July 13, 1908, all the heirs of Lewis Cox, including the descendants of Minerva I. Roe, then deceased, conveyed the 221 acres to the Davidson-Ingram Lumber Company, Incorporated, whose name was afterwards changed to Benford Lumber Company.

The conveyance to defendant in error, by its former corporate name, was by general warranty deed, for a consideration of \$1326 in cash, which was paid by defendant in error, in good faith, without actual knowledge

of any defect in the title which it acquired under said conveyance.

Unless the Benford Lumber Company was an innocent purchaser, it is apparent from the above statement that plaintiff in error is the owner of the superior title to the land in controversy.

The acquisition by Minerva I. Roe, in 1856, of the entire certificate, in the partition of the estate of Lewis Cox, is shown in her recorded conveyance to James O. Dunlap; but it is denied that defendant in error should be charged with notice of the contents of this conveyance for three reasons: First, that the conveyance was of a personal chattel and hence its registration was unauthorized; second, that the title acquired by defendant in error had its origin in the patent and defendant in error was not required to take notice of defects, though disclosed by the records, back of the patent; third, that constructive notice is confined to one's chain of title, and the conveyance by Minerva I. Roe is not a link in defendant in error's chain of title, or at least is not a link in said chain of title, save with relation to the interest in the land, which Minerva I. Roe acquired by inheritance from Lewis Cox, without aid from the partition.

[1, 2] Notwithstanding the certificate was conveyed when it was personalty, yet the conveyance concerned land after the location of the certificate in Trinity county; for the legal effect of the conveyance of the certificate was to invest the purchaser with a title to the land, when located, and to make the patent, when issued, inure to the purchaser's benefit. *Merrillweather v. Kennard*, 41 Tex. 281; *Humphreys v. Edwards*, 89 Tex. 516, 519, 36 S. W. 833, 434; *Cagle v. Timber & Lumber Co.*, 202 S. W. 942. The transfer of the land certificate came within Lord Cairn's definition of a "conveyance," when he stated:

"There is no magical meaning in the word 'conveyance'; it denotes an instrument which carries from one person to another an interest in land." *Credland v. Potter*, L. R. 10 Ch. 8, 12.

However, our statute not only authorized the record of conveyances but of all other instruments concerning land. Article 6823, R. S.

This court said, per Justice Gaines, in *Shifflet v. Morelle*, 68 Tex. 390, 4 S. W. 846:

"When the location is made, antecedent transfers of the certificate, or of the right, being evidence of title to the specific land located, may be lawfully registered in the county where the property is situated."

The same construction is given the statute in *Lewis v. Johnson*, 68 Tex. 450, 4 S. W. 644, *Tevis v. Collier*, 84 Tex. 641, 642, 19 S. W. 801, *Ranney v. Hogan*, 1 Posey, Unrep. Cas. 257, *Peterson v. Lowry*, 48 Tex. 411, and *West v. Loeb*, 16 Tex. Civ. App. 402, 403, 42 S. W. 612.

[3] To hold that a transfer of a land certificate could not be lawfully recorded in the county wherein it was subsequently located would be inconsistent with the often repeated declaration that the policy of our registration laws requires that our public records disclose all matters affecting our land titles. *Henderson v. Pilgrim*, 22 Tex. 476; *Moran v. Wheeler*, 87 Tex. 184, 27 S. W. 54.

[4] It cannot be said that patentees, or their assignees, may ignore an instrument, when duly recorded, by reason of their connection with the patent, when the instrument has the legal effect to determine, in whole or in part, to whose benefit the patent itself inures.

It was held in *Robertson v. Du Bose*, 76 Tex. 12, 13 S. W. 300, that an agreement that a patent to Caleb Holloway was common source of title did not prevent a party to the agreement from proving a conveyance, before patent, from Caleb Holloway, grantee of the certificate on which the patent issued, and a chain of title to the party from the vendee in such conveyance; because the proof merely showed who really owned the land under the patent.

There is no conflict between our holding and *Breen v. Morehead*, 104 Tex. 254, 136 S. W. 1047, Ann. Cas. 1914A, 1285, or *Wimberly v. Pabst*, 55 Tex. 587, relied on by defendant in error.

*Breen v. Morehead* determined that a purchaser need not look beyond the origin of the title under which he purchased, which was held to be the date of the application to buy the land from the state. 104 Tex. 257, 258, 136 S. W. 1047, Ann. Cas. 1914A, 1285. But the title to the 221 acres in controversy originated in the donation certificate, which entitled Lewis Cox, his heirs and assigns, to 640 acres of land, by reason of the participation of Lewis Cox in the battle of San Jacinto. *Manchaca v. Field*, 62 Tex. 135; *Welder v. Lambert*, 91 Tex. 520, 44 S. W. 281; *Creamer v. Briscoe*, 101 Tex. 493, 109 S. W. 911, 17 L. R. A. (N. S.) 154, 130 Am. St. Rep. 869; *McClintic v. Dry Goods Co.*, 106 Tex. 36, 154 S. W. 1157.

The case of *Dickerson v. Bridges*, 147 Mo. 235, 48 S. W. 827, involved a conflict between claimants of rights acquired under a homesteader, to whom land was subsequently patented. One claimant held a recorded deed of trust, given before patent but after the homesteader's entry on the land, on which the patent issued. The other held a deed of trust given after the patent. Notwithstanding the elder deed of trust antedated the patent, in speaking of the subsequent lienholder's duty, the court said:

"His inquiry for incumbrances should not have stopped with the date of the patent or its registry, but obviously it should have been carried back to the date of the original entry by the homesteader, as that marks the date and

source of the title indicated by the patent." 147 Mo. 245, 48 S. W. 827.

The opinion in *Wimberly v. Pabst*, 55 Tex. 592, recognizes that actual or constructive notice of defects in the title to a land certificate of one to whom patent subsequently issued, on the certificate, would prevent a purchaser under the patentee from being protected as a bona fide purchaser; for the court says:

"When, therefore, a subsequent purchase is made upon the faith of a patent, regular upon its face, public policy requires that it should constitute an important element in the question of the good faith of the transaction, and should turn the scale in its favor, except in cases of actual notice, or when the law would impute constructive notice of some defect sufficient to defeat it."

[5] Article 6842, R. S., provides that the record, in the proper county of an instrument of writing, duly proven or acknowledged, shall be taken and held as notice to all persons of its existence. Article 6857, R. S., declares that where an instrument in writing has been duly registered in the proper county, and the property conveyed by it afterwards falls within another county, such registration shall continue to be equivalent to actual notice of its contents to all persons whomsoever. Article 6824, R. S., declares that all conveyances of land shall be void as to all creditors and subsequent purchasers, for valuable consideration, without notice, unless acknowledged or proved and filed for record as required by law.

The above articles were in effect when the lumber company purchased the land in controversy; and the registration in Trinity county of the conveyances by and under *Minerva I. Roe*, through which plaintiff in error, Leonard, derails his title, was just as effective as though such conveyances had been of record in Polk county at the date of the Lumber Company's purchase. *Lumpkin v. Muncey*, 66 Tex. 311, 17 S. W. 732.

[6] The literal terms of articles 6842 and 6857 would require that all persons be held to know what appears on the face of a duly recorded instrument. However, our statutes bear a settled construction, under which registration of an instrument carries notice of its contents only to those bound to search for it, among whom are subsequent purchasers under the grantor in the recorded instrument.

Thus it is declared in *Houston Oil Co. of Texas v. Kimball*, 103 Tex. 108, 122 S. W. 540, that "a purchaser is required to look only for conveyances made prior to his purchase by his immediate vendor, or by a remote vendor through whom he derives his title," citing *White v. McGregor*, 92 Tex. 558, 50 S. W. 565, 71 Am. St. Rep. 875, wherein the court quote with approval the following language in *Stuyvesant v. Hall*, 2 Barb. Ch. 151, viz.:

"The recording of a deed or mortgage, therefore, is constructive notice only to those who have subsequently acquired some interest in or right in the property under the grantor or mortgagor."

To the same effect are *Carlisle & Co. v. King*, 103 Tex. 624, 626, 133 S. W. 241, *Jenkins v. Adams*, 71 Tex. 5, 8 S. W. 603, *Taylor v. Harrison*, 47 Tex. 456, 457, 26 Am. Rep. 304, *Throckmorton v. Price*, 28 Tex. 609, 91 Am. Dec. 334, and *Carnes v. Swift*, 50 S. W. 87.

[7] The opinion of Chief Justice Stayton in *King v. Haley*, 75 Tex. 170, 12 S. W. 1112, is decisive that whether the Benford Lumber Company be treated as a purchaser of the 221 acres of land, or of an undivided interest therein, from the heirs of *Minerva I. Roe*, it was a subsequent purchaser, charged with the duty to search for a prior recorded deed from *Minerva I. Roe*, and hence affected with notice thereof. Such notice extended to all that was actually exhibited on the face of the prior recorded deed. *Wiseman v. Waters*, 107 Tex. 96, 174 S. W. 816. Enough was exhibited there to show that *Minerva I. Roe* had acquired full title to the certificate and had conveyed such title to *Dunlap*.

It seems to us that when it is determined that the law imposed on the Lumber Company the duty to investigate the records, for a certain registered instrument, there can be no doubt that its defense of innocent purchaser failed, in so far as such defense rested on lack of knowledge of facts apparent on the face of the registered instrument; for the very purpose of the registration statutes forbids the holding that one be treated as innocent of the contents of a record, made for his benefit and open to his examination. *Kennard v. Mabry*, 78 Tex. 156, 14 S. W. 272. As said by the Supreme Court of the United States in *Neslin v. Wells*, 104 U. S. 433, 26 L. Ed. 802:

"The provisions of the law in reference to these records either have no purpose at all—which we have no right to assume—or their purpose was that the public might have knowledge of the titles to real estate of which they are the registers. It would utterly defeat that purpose not to presume with conclusive force that the notice which it was their office to communicate had reached the party interested to receive it; for, if every man was at liberty to say he had failed to acquire the knowledge it was important for him to have, because he had not taken the trouble to search the record which the law had provided for the express purpose of giving it to him, then the ignorance which it was the public interest and policy to prevent would become universal, and the law would fail because it refused to make itself respected."

Because it was the duty of the Lumber Company to have acquainted itself with the contents of the conveyance of *Minerva I. Roe*, as it appeared upon the records of Trinity coun-

ty, it was legally chargeable with notice of such contents and hence the defense of innocent purchaser failed.

It is therefore ordered that the judgments of the district court and of the Court of Civil Appeals be reversed, and that judgment be here rendered for plaintiff in error for the 221 acres of land in controversy.

DECKER v. KIRLICKS et al. (No. 3189.)

(Supreme Court of Texas. Nov. 12, 1919.)

**1. APPEAL AND ERROR  212—EVIDENCE; DIRECTION OF VERDICT.**

The peremptory direction of a verdict was subject to challenge on appeal, though not objected to in the trial court before read to the jury.

**2. MINES AND MINERALS  77—FORFEITURE OF OIL LEASE; FAILURE TO DRILL WELLS.**

An oil lease, providing that if oil is found in paying quantities in the first well the lessee will in 30 days begin boring a second well on some other acre of the tract and continue to bore as developments may justify, until at least five or six wells had been completed, or the acre on which lessee has failed to drill a well reverts to lessor, is ambiguous, and will not sustain a forfeiture because of failure to bore all of five wells upon different acres.

**3. CONTRACTS  818—FORFEITURE; AMBIGUOUS PROVISION.**

An ambiguous and uncertain forfeiture provision in a contract will not be enforced.

**4. APPEAL AND ERROR  43—JURISDICTION OF SUPREME COURT; REVIEW OF JUDGMENT OF COURT OF CIVIL APPEALS.**

Ruling of Court of Civil Appeals that issues both of an entire forfeiture and a partial forfeiture of oil lease should have been submitted to jury *held*, even if erroneous, not so clearly wrong as to bring it properly within the Supreme Court's jurisdiction under Rev. St. 1911, art. 1521, subd. 6, as amended by Acts 1917, c. 75, § 1 (Vernon's Ann. Civ. St. Supp. 1918, art. 1521, subd. 6).

**5. APPEAL AND ERROR  48 — JURISDICTION OF SUPREME COURT; REVIEW OF JUDGMENT OF COURT OF CIVIL APPEALS.**

A ruling of the Court of Civil Appeals in a particular case that there was some evidence warranting the submission of a given issue to the jury, or that there was no evidence justifying its submission, is not within Rev. St. 1911, art. 1521, subd. 6, as amended by Acts 1917, c. 75, § 1 (Vernon's Ann. Civ. St. Supp. 1918, art. 1521, subd. 6), as to appellate jurisdiction of the Supreme Court, unless it can be fairly regarded as so flagrantly wrong as to amount to a virtual denial and abrogation of established rules of law.

Hawkins, J., dissenting in part.

Error to Court of Civil Appeals of First Supreme Judicial District.

Action by H. R. Decker against John A. Kirlicks and others. The trial court directed a verdict for plaintiff, and the Court of Civil Appeals reversed and remanded the cause (Kirlicks v. Texas Co., 201 S. W. 687), and plaintiff brings error. Affirmed with directions.

Carothers & Brown, of Houston, for plaintiff in error.

McMeans, Garrison & Pollard, of Houston, for defendants in error.

PHILLIPS, C. J. The suit was by H. R. Decker against John A. Kirlicks to quiet the rights of Decker under an oil lease granted by Kirlicks and others, and to recover from the Texas Company the purchase price of certain oil from wells developed under the lease to which Kirlicks and others were asserting an adverse claim. The Texas Company declared its willingness to pay the amount due for the oil to the rightful owner, and impleaded other parties. Some of these joined with Kirlicks in a plea that Decker had forfeited his rights under the lease. Upon the trial a verdict for Decker was directed. The honorable Court of Civil Appeals reversed the judgment and remanded the cause.

[1] The ruling of the Court of Civil Appeals that under the Act of 1913 the peremptory direction of the verdict was subject to challenge on the appeal though not objected to in the trial court before read to the jury, presented a conflict with decisions of other Courts of Civil Appeals, and we granted a writ of error in order to settle the question. We decided it at the last term in Walker v. Haley which involved a similar conflict. 109 Tex. —, 214 S. W. 295. That decision sustains the holding of the Court of Civil Appeals in the present case.

[2] The oil lease contained this provision:

"It is further agreed that in the event oil is found in paying quantities in said first well, then the lessee agrees and covenants that within thirty days from the completion of such successful well he will begin the boring of a second well on some other acre of said tract herein leased, and continue to bore additional wells with due diligence in such order as to additional wells on the tract herein leased as developments may justify, until at least five or six wells have been completed, or the acre upon which said second party has failed to drill a well reverts to the first party by written notice to that effect being served upon said second party by said first party."

The tract of land leased embraced about 20 acres and was laid off in acre blocks. Decker bored his first two wells upon different acres. He completed five wells with due diligence, but four of them were upon the same acre.

Upon the question as to whether this provision in the lease would sustain a forfeiture because of a failure to bore all of the five wells upon different acres, the Court of Civil Appeals held that the provision was ambiguous and that its meaning should have been submitted to the jury for decision.

[3] If the provision is ambiguous, that alone condemns it as a forfeiture provision. A forfeiture should rest upon surer ground. Where a contract is so vague in its terms that a court cannot determine its meaning, it would be unjust to enforce a forfeiture under it against one whose only fault has been to possibly mistake its meaning. Forfeitures are harsh and punitive in their operation. They are not favored by the law, and ought not to be. The authority to forfeit a vested right or estate should not rest in provisions whose meaning is uncertain and obscure. It should be found only in language which is plain and clear, whose unequivocal character may render its exercise fair and rightful.

It is not necessary that we determine whether this clause in the lease requires the boring of the five wells upon five different acres, or sanctions their location upon but two different acres. If it be conceded that it admits of the first construction, it is not certain that such is its true construction. It does not plainly say that each of the wells shall be upon a different acre. It is only by inference, at best, that such meaning can be gained from the language. A provision so indefinite as to the obligation imposed, is incapable of supporting a forfeiture. *Benavides v. Hunt*, 79 Tex. 383, 15 S. W. 396.

Another clause in the lease was as follows:

"It is further mutually agreed that in case lessee abandons said property; or in case he fails to operate any particular well which is in actual operation on said tract, which is producing either oil or gas, for the period of thirty days, and fails to operate same for said period, unless such failure is unavoidable and is because of broken machinery that cannot by proper care and diligence be sooner replaced or put in order, or because of the wells clogging so as to reasonably require a longer time to clean and put them in order, then this lease and such producing well and the land hereinabove provided to operate it, shall revert to the lessors, and the lessors shall in such event have the right to take possession of said premises and such well, together with all of its equipments, and operate same, or have same operated for their own benefit without further proceedings, or any legal proceedings, of any kind or character but in such event the lessee shall have the right to remove his equipments and machinery from such well so forfeited, and from said land herein leased on which said well is directly located, and not to exceed one acre in area, but in no event to so operate as to interfere with other wells operated by lessee or with other drilling by him for other wells unless the lessors shall within thirty days after such forfeiture elect to pay and do pay to the lessee fifty per cent. of the market price

for the piping in such well or wells, and the market value of all equipments retained, and should lessors fail to make such payment within thirty days after such forfeiture on the part of lessee and the taking over of said well by lessors, the lessee shall have the right to remove said pipe and equipment from such well and from such land."

A further ruling of the Court of Civil Appeals, complained of here by Decker, was that in the state of the proof an issue of fact was presented as to whether under this clause Decker had forfeited the lease in whole or in part.

The clause provides two different conditions as grounds for forfeiture, and different measures of forfeiture as the consequence: (1) an abandonment of the property, whereon the entire lease should terminate; and (2) a failure to operate a producing well for thirty days unless due to an excepted cause, whereon such well and the immediate land upon which it was located in extent sufficient for its operation but not to exceed one acre, should revert to the lessors. In the event of the latter happening, the lessee is given the right to remove his machinery and equipment from such forfeited well and land unless within 30 days after such forfeiture the lessors shall pay him therefor as stipulated.

[4] As we understand its opinion the Court of Civil Appeals did not construe the clause as authorizing a forfeiture of the entire lease upon a failure to operate one of the producing wells. It held that there was evidence tending to establish an entire abandonment of the land by the lessee, and also evidence of his failure to operate producing wells for 30 days and longer. Its ruling simply was that such being the record the issues both of an entire forfeiture and a partial forfeiture should have been submitted to the jury.

If we have jurisdiction to review this holding of the Court of Civil Appeals, it is in virtue of subdivision 6 of article 1521 as amended by the Act of 1917 (chapter 75), by which the appellate jurisdiction of the Supreme Court is now governed. That is, it must appear that the ruling constitutes "an error of law \* \* \* of such importance to the jurisprudence of the State, as in the opinion of the Supreme Court requires correction." The amendment of this subdivision by the Act of 1917 was plainly intended to further limit the jurisdiction of the Supreme Court as conferred by the Act of 1913. Whether the Court of Civil Appeals "has erroneously declared the substantive law of the case" is no longer the test as applied to cases falling within the subdivision. The amendment declares, in effect, that it is not enough that the error of law be obvious, in the opinion of the Supreme Court; nor that it be of importance to the aggrieved party; nor

that its correction be necessary in the view of the Supreme Court to prevent an injustice in the immediate case; nor even that it be "of importance" to the jurisprudence of the State. For the Supreme Court to be invested with the power to revise the ruling, it is required that it amount to an error of law "of such importance" to the jurisprudence of the State as in the opinion of the court requires correction. This clearly presupposes a ruling of such erroneous consequence as, if permitted to stand, would constitute a serious departure from the established law or introduce a doctrine violative of fundamental principles.

Whatever may be the difficulties of its administration, this is the theory and plain meaning of the amendment. It is the written law, and our duty is to give it effect.

[5] We do not consider a ruling of the Court of Civil Appeals in a particular case either that there was some evidence warranting the submission of a given issue to the jury, or that there was no evidence justifying its submission, as within the purview of the amendment unless it can be fairly regarded as so flagrantly wrong as to amount to a virtual denial and abrogation of the established rules of law which, in the one instance, enjoin upon the trial court the exercise of its essential function, and in the other preserve the right of jury trial. Where these questions are presented, our practice is to examine the record; but unless it discloses that the ruling is of the character stated, we do not regard it as one within the court's power to revise.

We have examined the record here under the assignment challenging the ruling of the Court of Civil Appeals above noted. If erroneous at all, the ruling was not so clearly wrong as to bring it properly within the Supreme Court's jurisdiction.

Other questions are presented, but they are equally without our jurisdiction.

The judgment of the Court of Civil of Appeals reversing that of the District Court is affirmed, but with the direction that the further trial of the case be in accordance with this opinion.

**HAWKINS, J.** In so much of the foregoing majority opinion by our Chief Justice as deals with issues of which this court has entertained jurisdiction I concur; but I do not concur entirely in the application made, in that opinion, of amended subdivision 6, R. S. art. 1521, Acts of 1917.

It is my opinion that whenever it is shown here, to the satisfaction of this court, that a Court of Civil Appeals has held erroneously that a given issue is or is not supported by some evidence, thereby determining whether such issue is or is not properly referable to

the jury, such error should be treated by this court as being, in and of itself, of such importance to the jurisprudence of the state as to require correction.

I believe that the requirements of this jurisdictional statute are met in every such instance, and that intrinsically such error is of the stated importance, even though such error may have been committed in treating an issue which is not of frequently recurring nature or of general interest, and even though such erroneous ruling may not have been intended as an assertion of a general principle or a general rule of practice.

I think that a holding by the Court of Civil Appeals, approving or directing the submission by the district court to the jury of a given issue when in the opinion of the Supreme Court there is no evidence to support it, or approving or directing refusal of a district court to submit to the jury a given issue when in the opinion of the Supreme Court there is evidence to support it, constitutes inevitably in every instance "a serious departure from the established law," and introduces into our jurisprudence "a doctrine violative of fundamental principles." Instances of the former character involve refusal of the trial court to perform an "essential function"—to discharge a legal duty which ought not to be shifted to the jury; and instances of the latter character involve a practical denial of the right of trial by jury, in plain contravention of our state Constitution.

Such errors very naturally will occur occasionally, and that is bad enough, even though all such errors be subject to correction by our Supreme Court; but for any such error to be recognized by this court and yet not be subject to correction by it, for lack of jurisdiction in this court, is, I think, a very serious reproach to our jurisprudence. In view of the phraseology of said amended subdivision 6 I cannot concur in a construction of it which entails that deplorable result.

I think that the practice of this court, under said statute, should be to examine the record whenever such a question is duly presented here, and, if such error be found, to correct it in every instance, upon the theory that such error is of vital importance to our jurisprudence.

As to the construction properly attributable to said statute I refer to "In re Subdivision 6 of Supreme Court, Jurisdiction Act of 1917," 201 S. W. 390 et seq. In so doing it is not my purpose to reopen or deal with any question concerning the constitutionality of said statute further than such question may be involved in the construction placed upon it by the majority opinion of this court in this present case.

**TEXAS MIDLAND R. R. v. MONROE.**  
(No. 2575.)

(Supreme Court of Texas. Nov. 19, 1919.)

**1. PRINCIPAL AND AGENT ⇐150(1)—NO LIABILITY FOR UNAUTHORIZED ACT.**

Generally, for the act of an agent outside of the scope of his delegated authority, the principal is not answerable.

**2. CARRIERS ⇐283(2)—LIABILITY FOR INJURIES TO PASSENGER BY SERVANTS.**

A carrier is liable for its servant's violation of its duty to protect a passenger in all cases, and also in cases where the servant's own act, even though beyond the scope of his authority, as a conductor's act in exhibiting an automatic pistol, injures the passenger.

**3. CARRIERS ⇐347(1) — CONTRIBUTORY NEGLIGENCE OF PASSENGER A JURY QUESTION.**

In an action against a railroad for injuries to a passenger when its conductor exhibited an automatic pistol, issue of contributory negligence held for the jury, under evidence tending to show that the conductor's action was induced by plaintiff passenger's request.

Error to Court of Civil Appeals of Fifth Supreme Judicial District.

Action by J. H. Monroe against the Texas Midland Railroad. Judgment for plaintiff was affirmed by the Court of Civil Appeals (155 S. W. 973), and defendant brings error. Judgments of the Court of Civil Appeals and the trial court reversed, and cause remanded.

Dashiell, Crumbaugh & Coon, of Terrell, and Henry C. Coke and S. W. Marshall, both of Dallas, for plaintiff in error.

L. A. Clark, of Greenville, and C. A. Leddy, of Houston, for defendant in error.

PHILLIPS, C. J. The case grows out of what was charged as the negligent shooting of the plaintiff, J. H. Monroe, by the conductor of the train of the railroad company upon which the plaintiff was a passenger.

Another passenger was E. N. Riley. Both were apparently well acquainted with the conductor. At Riley's request the conductor permitted the two to enter an empty chair-car, not in use in the train, in order that they might privately hold a business conversation. Later, the conductor came through the car. He had in his pocket a small caliber automatic pistol. The plaintiff had seen the pistol in his possession upon a previous occasion. The plaintiff's version of the occurrence was: That the conductor asked him if he had bought "that pistol"—referring to some former conversation between them; Riley asked to see the conductor's pistol and the latter handed it to him; he inspected it and returned it to the conductor; the conductor then took the clip of cartridges out of the handle and said: "Here's the way she

works," and the pistol fired, wounding the plaintiff in the leg.

The conductor's testimony put a different phase upon the happening. In the main, he was corroborated by Riley. According to his statement it was the plaintiff who brought up the subject of the pistol and it was at his request that the pistol was produced and an attempted demonstration made by himself as to the operation of the safety clutch upon it. His version was: That the plaintiff opened the immediate conversation by asking him if he had the little automatic pistol he used to have, and he replied that it was in his pocket; the plaintiff asked to see it, whereupon he removed the clip of cartridges and, thinking he had wholly unloaded it, handed the clip to Riley and the pistol to the plaintiff; the latter took the pistol, looked at it, and passed it to Riley; Riley looked at it and handed it back to the conductor; the plaintiff then asked "how it worked" or "how the safety worked" (the conductor's testimony giving, at different places, the plaintiff's request in both forms); that he attempted to show the plaintiff the operation of the safety device in response to his request and was engaged in that attempt when the pistol fired. According to Riley, just before the firing of the pistol, which could only have happened with the safety down, the conductor had demonstrated the impossibility of snapping it with the safety up.

The conductor admitted his intention to pull the trigger with the safety down. That, he claimed, was a way of showing how the safety worked. The shooting was clearly unintentional. The conductor did not inspect the barrel after the clip of cartridges was removed. It is evident, however, that with the clip removed he believed the pistol to be empty.

The jury found that the act of the conductor was negligent, returning a verdict for the plaintiff. The trial court refused the request of the railroad company to submit to the jury, the issues as to whether the conductor was acting within the scope of his employment, and whether the plaintiff was chargeable with contributory negligence. Its right to have had both issues determined by the jury is asserted here by the railroad company.

[1] The display of pistols and demonstration of their mechanism for the instruction of passengers are no part of the ordinary duties of conductors of passenger trains. Experimenting with fire-arms has nothing to do with the management of a train. The general rule, that for the act of an agent outside the scope of his delegated authority the principal is not answerable, is but a rule of reason and fairness. The responsibility of the principal, founded upon an ex-



istence of the agency, ought to cease when the agency is thus repudiated and abandoned, and in the eyes of the law it does cease. In the broad sense, the relationship between a carrier and his conductor is simply that of principal and agent. Otherwise, there could be no just ground for holding the carrier liable for the conductor's acts and omissions. Upon what theory, therefore, is the carrier chargeable in a case like this, where an injury to a passenger was inflicted by the conductor, negligently, according to the jury's decision, but while engaged in an act foreign to his ordinary duties? Different courts have dealt with the general question as related to assaults upon passengers by servants of the carrier—acts equally of an unauthorized nature, as has this court; but it has not before been presented here under a state of facts similar to these. Hence, we have given it some examination.

The responsibility of the carrier for any conduct of his servants entrusted with the carriage of a passenger which results either in his wanton or negligent injury at their hands, regardless of the authority for the particular act, is clear, once the reason for it is correctly apprehended and defined. It can be rendered doubtful in a case like this only by mistaking the ground upon which it rests.

The foundation of the relation of carrier and passenger is a contract. It is in virtue of the contract, supported by an adequate consideration, that the obligation of the carrier to transport the passenger exists. To benefit from the contract the passenger must accept the mode of conveyance provided. He must largely surrender himself into the carrier's hands. He entrusts the carrier with his safety. These considerations as enlarged by the hazards of travel, are the source of the doctrine which imposes upon the carrier that high degree of care in the performance of his obligation deemed necessary by the law for the protection of passengers. The passenger contracts not merely for his carriage. He engages for safe carriage and proper treatment. To afford him both is the purpose of the law in requiring of the carrier more than ordinary care in the execution of the contract.

All men are under the obligation of justice and humanity not to wrongfully injure others. A carrier rests under that obligation both as to passengers and strangers. With respect to passengers, however, that general duty is increased by the added duty arising from the carrier's special undertaking. It is in the fulfillment of this added duty, created by his contract, that the carrier is required to furnish the passenger that full measure of protection afforded by the exercise of the high degree of care prescribed by the law. This duty of protection extends to violence and insults at the hands of stran-

gers and other passengers. For a stronger reason it applies to the acts of the carrier's own servants charged with the passenger's safety.

The duty of the carrier under his contract does not introduce a new rule for the government of the carrier's liability where there is a breach of the contract by a servant to whom its performance has been delegated. The rule of *respondent superior* is still the rule which determines his liability. It is the rule which must govern the liability of any principal when it is sought to hold him responsible for the wrongs or negligence of an agent. Some courts, in affirming the liability of the carrier for injury to a passenger from acts of a servant entrusted with the performance of the carrier's contract which the carrier had in no way authorized—such as wanton assaults, have treated this question as though the rule of *respondent superior* were not the one to be applied. It is the only just rule that can be applied. The ground of the carrier's liability in all such cases,—the only ground upon which it can be rested,—is the violation of a duty primarily that of the carrier by one who, as respects that duty, stands in the carrier's place, clothed with all the carrier's authority, imposed with the carrier's obligation, and hence with the duty commanded of him as essentially a duty of his own. If the violated duty be not a delegated duty, if it be one not enjoined upon the servant as the carrier's representative, and which, therefore, as standing in the carrier's place, he is under no requirement to heed, it is difficult to perceive upon what theory the carrier is answerable for the servant's breach of it.

[2] The carrier is liable for the servant's violation of the duty in all such cases, and in cases of this character as well, because by confiding to the servant's hands the performance of his contract with the passenger, he equally transfers to him the duty of protecting the passenger. To conserve the passenger's safety as far as it may be done by the exercise of the high degree of care exacted by the law, becomes the servant's duty. Its discharge is commanded of him as fully as primarily required of the carrier. It is a continuing duty. He is at no time absolved from it while he stands in the carrier's stead in the carrying out of the carrier's contract. It exists to protect the passenger from injury at his hands, as well as that inflicted by others. It is of no importance that the specific act occasioning the injury was not authorized by the carrier. That is not the test of the carrier's liability. The act may not have been authorized. But that does not permit an evasion or breach of the duty. The infliction of the wrong by the servant while acting in his own interest is none the less a violation of the carrier's duty to the passenger and his own duty as the carrier's

representative. It is of no moment to the injured passenger that the particular wrong was committed by the servant only in his personal interest. Nor is it of moment to the law. The concern of the law in all such cases is simply whether the duty of protection owing the passenger by all servants of the carrier delegated with the execution of the carrier's contract, has been violated. If so, the carrier is liable and justly so, regardless of the nature of the act constituting the violation.

If the carrier is to be relieved of all responsibility for a breach of this important duty by a servant selected by him for its performance, because in its violation the servant disregards his obligation to the carrier, by delegating the duty to an unfaithful servant the carrier may exempt himself from its observance. Such a result cannot be sanctioned.

[3] The issue of contributory negligence was in our opinion raised by the evidence and the jury should have been permitted to determine it. The issue is presented in any case where from the proof reasonable minds may conclude that both parties were at fault. According to the testimony adduced by the defendant, the conductor's action which resulted in the firing of the pistol was at least induced by the plaintiff's request that he show him how the safety device operated. The conductor testified that he was attempting to comply with the request when the pistol fired. The request could reasonably have been interpreted by him as he stated he understood it, that is, as to how the safety worked in respect to firing the pistol. If the conductor and the witness Riley were to be believed, and that was for the jury, the plaintiff asked that a demonstration of the operation of a supposedly unloaded pistol be made in his immediate proximity. It is common knowledge that the handling of fire-arms believed to be unloaded, is attended with danger. Where a plaintiff requests the defendant to do that which may put him in peril and which does actually injure him, an issue is presented as to whether he did not invite the danger and should not be regarded as chargeable with some of the blame. In view of another trial we will not further advert to the evidence.

The judgments of the Court of Civil Appeals and District Court are reversed and the cause remanded to the District Court.

GALVESTON, H. & S. A. RY. CO. v. BELL  
et al. (No. 2703.)

(Supreme Court of Texas. Nov. 19, 1919.)

1. NEGLIGENCE  $\S$  56(1)—PROXIMATE CAUSE.

The test as to whether a given act of negligence may be deemed the proximate cause of

an injury is simply whether, in the light of the attending circumstances, the injury was such as should reasonably have been anticipated as a consequence of the act.

2. CARRIERS  $\S$  320(30)—PROXIMATE CAUSE OF INJURIES TO PASSENGER; JURY QUESTION.

In an action against a railroad for injuries to a woman passenger shot during an altercation between two other negro passengers, whether any negligence of the railroad, in failing to eject from the car the aggressor of such other passengers, was the proximate cause of injury to plaintiff from a shot fired in self-defense by the attacked one of the fighting passengers, held a question for the jury.

Error to Court of Civil Appeals of Fourth Supreme Judicial District.

Action by Billie Bell and others against the Galveston, Harrisburg & San Antonio Railway Company. Judgment for plaintiff was affirmed by the Court of Civil Appeals (165 S. W. 1), and defendant brings error. Affirmed.

Baker, Botts, Parker & Garwood, of Houston, and Emile Mosheim, of Seguin, for plaintiffs in error.

Greenwood & Short, of Seguin, for defendant in error.

PHILLIPS, C. J. Eliza Bell, while a passenger in a coach for negroes upon a train of the railway company, was injured by being shot during an altercation between Louis Willis and Willie Banks, two other negro passengers in the same coach. The suit was for damages on account of the injury.

Willis was drunk and had been making trouble in the car, cursing, and generally conducting himself in a way offensive to the other passengers. He became insulting toward Willie Dibrell, a negress, a friend of Banks, and finally sat down in her lap. Banks remonstrated with him and requested him to desist from annoying Willie Dibrell. He presently informed the conductor of Willis' conduct and the conductor ordered Willis to another part of the car. In a short time Willis resumed his offensive conduct and retook a seat on the arm of the seat occupied by Willie Dibrell. The conductor was again appealed to, and he threatened Willis with arrest. He did not eject him from the car. After the conductor left the car, Willis turned his attention to Banks. He cursed him for having caused the conductor's ordering him to move to another part of the car, told him he was going to kill him, struck at him and made an apparent reach for a pistol. Banks thereupon shot him in his own defense and killed him. Banks was not indicted. When the conductor went out of the car he left Willis in close proximity to Banks, and according to Eliza Bell's testimony, standing near her. Eliza Bell was wounded by a stray shot from Banks' pistol. The car was badly

crowded with negro passengers. A judgment was rendered in favor of Eliza Bell and her husband.

It is urged by the railway company that if, the failure of its servants to eject Willis from the car, or to resort to other means of protecting passengers from him, was negligent, as a matter of law it is not to be regarded as the proximate cause of the injury to Eliza Bell.

[1] The test as to whether a given act may be deemed the proximate cause of an injury, is simply whether in the light of all the attending circumstances the injury was such as ought reasonably to have been anticipated as a consequence of the act.

[2] The question of proximate cause here was one for the jury.

With a drunken negro of Willis' manifest character in the car, with his conduct known to the conductor, it did not require much foresight to see that some kind of a fight at his initiative was probable and would not long be postponed. It was not necessary that the conductor be able to anticipate the exact kind of a fight or just how it would occur. There is ample warrant in the proof for concluding that he was reasonably bound to anticipate Willis' having a fight with somebody. If so, he ought reasonably to have also foreseen that some innocent passenger might be injured in the course of the fight. That would not be an improbable consequence in a car crowded with passengers and with a drunken negro of Willis' sort a prime actor in the *melée*.

The judgment of the Court of Civil Appeals is affirmed.

# ST. LOUIS SOUTHWESTERN RY. CO. OF TEXAS v. WATTS et al. (No. 2819.)

(Supreme Court of Texas. Nov. 19, 1919.)

## 1. CARRIERS ⇐304(3)—CARE AS TO PASSENGER'S ESCORT ALIGHTING FROM MOVING TRAIN.

A railroad company's duty to a passenger's escort alighting from a moving train and falling on its track used by a switch engine does not arise from its license to pedestrians to use a foot path in crossing its track, but its operatives owe him the duty to use ordinary care to discover his presence and to avoid injuring him, and failure to do so is negligence.

## 2. CARRIERS ⇐347(9)—CONTRIBUTORY NEGLIGENCE OF PASSENGER'S ESCORT ALIGHTING FROM TRAIN; QUESTION FOR JURY.

Contributory negligence of one run over by a switch engine while on the track on which he had fallen in alighting from a train which he had boarded as a passenger's escort *held* a question for the jury.

## 3. RAILROADS ⇐387—INJURY TO PERSON ON TRACK; CONTRIBUTORY NEGLIGENCE DEFENSE.

Contributory negligence is a defense in an action for injuries through failure of trainmen to use ordinary care to discover the person injured on the track, and to avoid infliction of injury.

## Error to Court of Civil Appeals of Sixth Supreme Judicial District.

Action by Mrs. Nannie Watts and others against the St. Louis Southwestern Railway Company of Texas. A judgment for plaintiff was affirmed by the Court of Civil Appeals (173 S. W. 909), and defendant brings error. Judgment of the district court and Court of Civil Appeals reversed, and cause remanded for another trial.

E. B. Perkins, of Dallas, Dan Upthegrove, of St. Louis, Mo., and Glass, Estes, King & Burford, of Texarkana, for plaintiff in error; Smelser & Vaughan, of Texarkana, R. M. Hubbard, of New Boston, and J. I. Mahaffey and Joe Hughes, both of Texarkana, for defendant in error.

GREENWOOD, J. This action was brought by defendants in error, who are the widow and children of Jno. C. Watts, against plaintiff in error, St. Louis Southwestern Railway Company of Texas, to recover damages arising from the death of Jno. C. Watts, who was run over by a switch engine of plaintiff in error, while he was lying on its track at Texarkana, where he had been thrown or had fallen, in alighting from a moving train of the Texas & Pacific Railway Company, which he had boarded as an escort of his daughter, who was a passenger.

The questions presented here require us to determine: First, what duty, with respect to the deceased, devolved on plaintiff in error; and, second, whether the defense of contributory negligence was available to plaintiff in error.

The charge of the trial court authorized the jury to find for defendants in error if they found, in substance, that Jno. C. Watts was making a use of the track, which came within plaintiff in error's implied permission, and if they found that the servants of plaintiff in error operating the switch engine, by the exercise of ordinary care, could have discovered the presence of Jno. C. Watts on the track, and could have avoided striking him, and that plaintiff in error's servants failed to exercise such care, and that such failure was negligence, and that the death of Jno. C. Watts was caused by such negligence, and that Jno. C. Watts, on account of injuries previously received, was unable to remove himself from the track or did not realize the danger of remaining thereon.

The trial court refused to instruct the jury to find for plaintiff in error if its employes

used such care to discover the presence of Jno. C. Watts on the track and to avoid injuring him, as an ordinarily prudent person would have used under like circumstances at a place not used by licenses; and also refused to submit the defense of contributory negligence, and rendered judgment, on the jury's findings, for defendants in error, which was affirmed by the Court of Civil Appeals.

[1] We do not think that plaintiff in error's duty to the deceased arose from its license to pedestrians to use the footpath in crossing its track. As said by the Supreme Court of Maryland, in *Western Md. v. Kehoe*, 83 Md. 434, 35 Atl. 90:

"His right to use it as a crossing gave to him no right to use it for a totally different purpose, and his right to use it at all was obviously qualified by an obligation on his part to exercise proper care himself in using it, and hence his right to use it with due care gave him no right to use it recklessly. His right was a right of transit along the highway and across the tracks, and to that extent the duty of the company to use due care not to abridge or invade that right was imperative, and carried with it the obligation to exercise that degree of diligence which might be necessary to avoid an injury to him while he was in the lawful enjoyment or pursuit of that right. This obligation of the company did not go further, or require the company to anticipate, either that the plaintiff would be guilty of negligence in using the highway, or that he would use it, or attempt to use it, for a purpose not within the limits of his admitted right."

In *T. & P. Ry. Co. v. Watkins*, 88 Tex. 24, 29 S. W. 233, the duty of railway companies, in operating engines and trains, towards persons on their tracks, regardless of the rights of such persons as licensees, was carefully expressed in the following language:

"The true rule is that it is the duty of the servants of the railroad company operating its trains to use reasonable care and caution to discover persons on its track, and a failure to use such care and caution is negligence on the part of such company, for which it is liable in damages for an injury resulting from such negligence, unless such liability is defeated by the contributory negligence of the person injured, or of the person seeking to recover for such injury, and the circumstances under which the party injured went upon the track are merely evidence upon the issue of contributory negligence. If such circumstances show that the party injured was a wrongdoer or trespasser at the time of the injury, the issue of contributory negligence is, as a general rule, established as a matter of law; but not so in all cases. It results from the above, that it was the duty of the railroad to use ordinary or reasonable care to discover and warn defendant in error, whether she be considered a trespasser or a mere licensee, and a failure to use such care was negligence, rendering the railroad liable for such damages as resulted therefrom, unless under all the circumstances defendant in error was guilty of negligence contributing proximately to her injury."

The rule stated is supported by the opinions in *Railway v. Sympkins*, 54 Tex. 618, 38 Am. Rep. 632, and *Railway v. Hewitt*, 67 Tex. 479, 3 S. W. 705, 60 Am. Rep. 32, and in many subsequent cases. We regard the rule as wise and salutary. It should control in the disposition of this case.

[2] The opinion in *M., K. & T. Ry. Co. of Texas v. Malone*, 102 Tex. 273, 115 S. W. 1158, should not be regarded as changing the rule. It was held in that case that Malone was not making such use of the railroad track and bridge as came within the railroad company's implied permission. It was therefore determined that the verdict and judgment were erroneous, which were predicated on such use and the breach of a consequent duty. It was further decided that Malone's evidence showed that he was guilty of contributory negligence as a matter of law. Since contributory negligence defeats a recovery under the rule stated in the *Watkins* Case, it was quite unnecessary to consider the duty which the railroad company owed to Malone independent of implied permission to him to be on the track and bridge; and the citation of the *Watkins* Case shows a recognition of the principles there laid down, and is quite inconsistent with an intent to overrule it.

[3] The facts in this record require that the issue of contributory negligence on the part of the deceased be submitted to the jury.

It cannot be rightly said that the act of alighting from the passenger train had culminated when the deceased first became unconscious. While his act must have been a proximate cause of his injury, in order to defeat a recovery herein, it cannot be said to conclusively appear that one, under all the circumstances, might not reasonably have anticipated injury from a subsequent passing train, as well as precedent immediate injury, as a natural and probable consequence of alighting from the moving train on or near a railroad track.

The law which makes contributory negligence available as a defense in an action for an injury sustained through failure on the part of railway employes, in operating an engine or cars, to exercise ordinary care to discover the person injured and to avoid the infliction of injury, is too well settled in this state to warrant us in departing therefrom.

In *T. & P. Ry. Co. v. Staggs*, 90 Tex. 461, 39 S. W. 296, it was said:

"If deceased was guilty of contributory negligence, his widow and children could not recover for failure to see him upon the track, or to discover his danger, because in such case their right of action would rest upon the negligence of the defendant, to which contributory negligence of the deceased would constitute a good defense."

At the term preceding that in which the *Staggs* Case was decided, the court had carefully pointed out that it was only in cases of discovered peril that the defense of contrib-

utory negligence was not permissible, Judge Dennman saying that the principle depriving the party inflicting an injury of that defense "has no application in the absence of actual knowledge, on the part of the person inflicting the injury, of the peril of the party injured, in time to avoid the injury by the use of the means and agencies then at hand. If he had no such knowledge, the new duty was not imposed, though it be clear that by the exercise of reasonable care he might have acquired same." *T. & P. Ry. Co. v. Breadow*, 90 Tex. 31, 36 S. W. 412.

Again it is said in *Morgan & Bros. v. M., K. & T. Ry. Co. of Texas*, 108 Tex. 334, 193 S. W. 134, referring to the doctrine of discovered peril:

"With us, the doctrine defeats contributory negligence on the part of the plaintiff only when the danger arising therefrom is imminent, is actually discovered by the defendant, and may be averted by the means at the latter's command. *Texas & P. Ry. Co. v. Breadow*, 90 Tex. 26, 36 S. W. 410."

It is ordered that the judgments of the district court and of the Court of Civil Appeals be reversed, and that this cause be remanded for another trial.

# GALVESTON, H. & S. A. RY. CO. v. STATE (No. 3113.)

(Supreme Court of Texas. Nov. 19, 1919.)

## 1. RAILROADS $\S$ 254(6)—FAILURE TO PROVIDE WATER-CLOSETS; QUESTION FOR JURY.

In an action for penalties for failure to comply with Vernon's Sayles' Ann. Civ. St. 1914, art. 6592, whether water-closets 524 feet from a depot in a town without sewers were within a reasonable and convenient distance *held* for the jury.

## 2. APPEAL AND ERROR $\S$ 1064(2)—TRIAL $\S$ 194(9) — PREJUDICIAL ERROR IN INSTRUCTIONS; INVADING PROVINCE OF JURY.

In action by state against railroad for penalties for failure to comply with Vernon's Sayles' Ann. Civ. St. 1914, art. 6592, an instruction to find for the state, if the railway company failed to maintain at its station or within its passenger depot suitable and separate water-closets, or if they found that the railroad company failed to maintain such closets within a reasonable and convenient distance from the depot, was erroneous and prejudicial, where the real issue was whether the closets were in a reasonable distance from the station, and the uncontradicted evidence showed that the railway did not have any closets within its passenger depot; the first part of the charge being virtually an instruction to find for the state, regardless of how the real issue in the case might be determined.

## 3. TRIAL $\S$ 296(2)—INSTRUCTIONS; CURE OF ERROR BY OTHER INSTRUCTION.

In action to recover penalties for failure of railway to comply with Vernon's Sayles' Ann. Civ. St. 1914, art. 6592, an instruction to find for the state if defendant failed and neglected to maintain at its station or depot, or within its passenger depot, suitable and separate water-closets, or if they found that the railroad company failed to maintain such closets within a reasonable and convenient distance from the depot, was not cured by a contradictory instruction to find for defendant if the closets were within a reasonable and convenient distance from the station.

## 4. RAILROADS $\S$ 254(6) — WATER-CLOSETS; VERDICT AS TO FAILURE TO PROVIDE.

In an action for penalties for failure to comply with Vernon's Sayles' Ann. Civ. St. 1914, art. 6592, a verdict that defendant was guilty of not having their water-closets at a convenient place at the town named, which was without sewers, did not find the facts essential to support the imposition of penalties.

Error to Court of Civil Appeals of First Supreme Judicial District.

Action by the State against the Galveston, Harrisburg & San Antonio Railway Company. There was a judgment for the State, which was affirmed in the Court of Civil Appeals (194 S. W. 462), and defendant brings error. Reversed and remanded.

C. D. Krause, of La Grange, and Lane, Wolters & Storey and Baker, Botts, Parker & Garwood, all of Houston, for plaintiff in error.

E. H. Moss, of La Grange, for the State.

GREENWOOD, J. In this action the state recovered of plaintiff in error penalties of \$5,000 for failure to comply, at Flatonia, with article 6592, Vernon's Sayles' Texas Civil Statutes. The facts were not such as to authorize the court to instruct a verdict for plaintiff in error.

[1] With a right of way 150 feet wide on each side of the track, and a distance of some 225 feet from the passenger depot to Penn avenue, which is 80 feet wide, and a distance of some 219 feet from Penn avenue to the water-closets, making an aggregate distance of some 524 feet between the depot and the closets, it cannot be found, as a conclusion of law, that the closets were within a reasonable and convenient distance of the depot. It was for the jury to say, under the above-recited facts and all others in the record, whether the closets were within a reasonable and convenient distance.

[2, 3] The case presented no other issue of fact. Nevertheless the court instructed the jury to find a verdict for the state if they found that the railway company failed and neglected to maintain at its station, or depot,

\*  $\S$ For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

or within its passenger depot, suitable and separate water-closets, or if they found that the railway company failed and neglected to maintain such closets within a reasonable and convenient distance from the depot. Since the uncontradicted evidence showed that the railway company had failed and neglected to maintain any closets within its passenger depot, the first part of this charge was virtually an instruction to find for the state, regardless of how the real issue in the case might be determined. This error was not cured by the contradictory instruction to find for defendant, if the closets were within a reasonable and convenient distance from the station. *Baker v. Ashe*, 80 Tex. 361, 16 S. W. 36; *M., K. & T. Ry. Co. v. Rodgers*, 89 Tex. 680, 36 S. W. 243.

[4] The difference is patent between what is a convenient place at Flatonia and what is a reasonable and convenient distance from the passenger depot at Flatonia. As applied to water-closets for persons at a railroad station, a convenient place for same would be within the passenger depot, giving to the word "convenient" its common meaning of "easy of access." In comparison with closets within the depot, those without same would not be at a convenient place. But the statute's requirements are met by closets without the depot and within a reasonable and convenient distance therefrom. However convenient the location within the depot, such location would be neither reasonable nor sanitary in a town like Flatonia, without a sewer system. Hence the jury's verdict that the railroad company was found "guilty for the sum of \$5,000 for not having their closets at a convenient place at Flatonia, Texas," does not find the facts essential to support the imposition of penalties on plaintiff in error, under the statute and under the true and single issue in this case.

It follows that the judgments of the district court and of the Court of Civil Appeals should be reversed, and the cause remanded to the district court for a new trial, and it is so ordered.

#### AXTELL v. STATE. (No. 5582.)

(Court of Criminal Appeals of Texas. Nov. 26, 1919.)

#### LICENSES §42(2)—OPERATION OF MOTOR VEHICLE WITHOUT DISPLAY OF LICENSE.

In a prosecution under Acts 35th Leg. c. 207, as amended, against the president and general manager of a corporation, based on the operation by the corporation of a motor car on which the seal assigned by the highway department was not displayed, it is a defense that defendant procured a seal for such car, as he did for all the others, and gave orders for its attachment, which orders were not carried

out through a change in the personnel of the corporation's servants, and that defendant was ignorant that the car was operated without seal.

Appeal from Tarrant County Court; Hugh L. Small, Judge.

F. W. Axtell, was convicted of violating Acts 35th Leg. c. 207, as amended, by operating a motor vehicle without having displayed on the front end the seal for the current year assigned by the Highway Department, and he appeals. Reversed and remanded.

C. R. Bowlin, of Ft. Worth, for appellant.  
Alvin M. Owsley, Asst. Atty. Gen., for the State.

MORROW, J. The statute under which the prosecution was established provides:

"No person shall operate or drive a motor vehicle on the public highways of this state unless such vehicle shall have at all times conspicuously displayed on the front end thereof the seal for the current year assigned to said motor vehicle by the highway department." Acts 35th Leg. c. 207, amended by same Legislature, 1st Called Session, c. 31, and of 3d Called Session, c. 13 (Pen. Code Supp. 1918, arts. 820yy, 820z).

The evidence in the case is not controverted. Appellant is president and general manager of a corporation in the conduct of whose business 16 automobiles were used. The business of the corporation was supervised in the main by the son of appellant, and the conduct of the automobiles was in charge of a foreman. It was shown that one of these cars was driven by one of the employes of the company upon the highway without a seal, and an arrest resulted. It was also shown that the appellant's son, in pursuance of his management of the business, had obtained a license and seals for 16 cars, including the car in question; that the son undertook to see to having the seals attached to the cars, and he gave directions to his employes to attach them, and they were attached at the time to all of the automobiles except one, which at that time was out on a trip somewhere in the country; that the foreman to whom was committed the service left the employ of the company, and neither the appellant nor his son was aware of the fact that the order to have the seal placed upon the car in question had not been complied with until the time of the arrest.

The appellant requested an instruction to the effect that the payment of the tax and securing of the seal with the intent on the part of the appellant to attach it to the car in connection with his orders to the employe to do so would constitute a defense to the prosecution, provided the seal was not left unattached with the knowledge of the appellant, but that its absence was due to accident

or mistake. We think that these facts would constitute a defense, and that the jury should have been so instructed. The absence of the seal from the car would be prima facie proof of the guilt of the person operating the car, but we believe he should not be held guilty of a criminal offense where he was able to show he had paid the tax and obtained the seal, and exercised all reasonable means and care to have it attached to the car, and that the operation of the car without it was contrary to his intent and without his knowledge.

The judgment is reversed, and the cause remanded.

### LUMAN v. STATE. (No. 5577.)

(Court of Criminal Appeals of Texas. Nov. 26, 1919.)

#### CRIMINAL LAW §857(2) — MISCONDUCT OF JURY.

In homicide prosecution, juror's discussion of fact that accused had been indicted for another killing, and of fact that a codefendant had been previously tried and convicted, held misconduct justifying reversal, where such facts were not in evidence and were unknown to some of the jurors before such discussion, and where, on first ballot cast before such discussion, jurors were evenly divided for and against conviction.

Appeal from District Court, Haskell County; W. R. Chapman, Judge.

Will Luman was convicted of manslaughter, and he appeals. Reversed.

W. H. Murchison, of Haskell, and Cunningham & Oliver, of Abilene, for appellant.

Alvin M. Owsley, Asst. Atty. Gen., for the State.

DAVIDSON, P. J. Appellant was convicted of manslaughter, and allotted five years in the penitentiary.

It is unnecessary to make a statement of the case in reference to the facts. The questions presented for revision involve misconduct of the jury and argument of one of state's counsel. With reference to the argument of the prosecuting officer, it may be sufficient to say for this appeal that it is disposed of upon the statement that such argument should not occur upon another trial. This is said in view of the fact that the case will be reversed upon the misconduct of the jury. Portions of the argument of the prosecuting attorney it seems led to some of the alleged misconduct on the part of the jury.

The bill of exceptions shows, in substance, that after the jury retired and before arriving at their verdict matters were men-

tioned, and more or less discussed, which were not introduced in evidence. Appellant was convicted for killing a man by the name of Bostick. The bill, in brief, recites that the jury mentioned and discussed the fact that appellant had been indicted for the killing of Judge C. C. Higgins, and also the fact that Raspberry, a codefendant of this appellant, had been previously tried in Jones county, and allotted a term of 10 years in the penitentiary. Neither of these questions was before the jury in admitted testimony. It occurred after the retirement of the jury and before reaching their verdict. Upon the first ballot after the jury retired they stood six for conviction and six for acquittal. It was stated by one or more of the jurors in the jury room that appellant was under indictment for killing Judge Higgins, and that Raspberry, appellant's codefendant, had been convicted in Jones county, and was then serving a term of 10 years in the penitentiary, and it was also stated that Raspberry had not fired a shot, but had been given 10 years, while appellant who did the shooting ought to have 20 or 25 years. It is shown that the facts stated by the jurors were unknown to a number of the jurors until it was mentioned in the jury room. A number of the jurors were introduced as witnesses on the trial of the motion for new trial setting up these matters. The testimony is not much in contradiction as to what occurred from the testimony of these jurors. One or two of them did not hear much about it, and seem to have paid but little attention to it, and one of them, perhaps the foreman, stated to the jury, at the time they were discussing these matters, it should not be considered by them. They all testified substantially that these matters did not influence them in finding their verdict. One of them, however, did state it may have affected his action in assessing punishment. Four of the jurors did not testify in this regard, and were not placed upon the stand. After deliberating on this matter and after hearing this testimony, the jury returned a verdict for manslaughter, and gave appellant 5 years without suspended sentence, which he had requested them to do. We are of opinion that this is such misconduct as will require a reversal of this judgment. The matter has been discussed frequently and elaborately, and so much so that the writer does not feel called upon to elaborate the questions. The Horn Case, 50 Tex. Cr. R. 404, 97 S. W. 822, seems to be very much in point. The questions involved are very similar. See, also, McDougal v. State, 81 Tex. Cr. R. 179, 194 S. W. 944, L. R. A. 1917E, 930; Mitchell v. State, 36 Tex. Cr. R. 278, 33 S. W. 367, 36 S. W. 456; Weber v. State, 78 Tex. Cr. R. 253, 181 S. W. 459; Weaver v.

State, 210 S. W. 699; *Mills v. State*, 74 Tex. Cr. R. 137, 168 S. W. 88; *Mizell v. State*, 197 S. W. 303; *Chenault v. State*, 201 S. W. 658. Judge Henderson, in the *Horn Case*, supra, discussed these matters at length, as did Judge Morrow in the *Weaver Case*, supra, and Judge Hurt in the *Mitchell Case*, supra. Judge Morrow discussed the matter at some length in the *McDougal Case*, supra. See, also, *Gilbert Case*, 215 S. W. 103.

We are of opinion that this misconduct of the jury was such as to require a reversal of this judgment; and it is accordingly so ordered.

### LUCAS v. STATE. (No. 5476.)

(Court of Criminal Appeals of Texas. Nov. 5, 1919. On Motion for Rehearing, Dec. 17, 1919.)

#### 1. CRIMINAL LAW §1120(4) — SUFFICIENCY OF BILL OF EXCEPTIONS.

A bill of exceptions, complaining that prosecutrix in statutory rape case was allowed to answer questions as to the relations between herself and defendant at a previous time, held insufficient to present the complaint that the state was allowed to introduce evidence of criminal acts barred by limitations not showing what was the answer of the prosecutrix.

#### 2. CRIMINAL LAW §507(7)—PROSECUTRIX IN STATUTORY RAPE NOT ACCOMPLICE.

Prosecutrix in statutory rape case is not an accomplice, so conviction may be had on her uncorroborated testimony.

Appeal from District Court, Galveston County; H. C. Hughes, Judge.

J. C. Lucas was convicted of statutory rape, and he appeals. Affirmed.

See, also, 215 S. W. 299.

John T. Wheeler, of Galveston, for appellant.

**LATTIMORE, J.** In the above case, the appellant was convicted of statutory rape upon a female under the age of 15 years, in the district court of Galveston county, Tex., and his punishment was fixed at confinement in the penitentiary for a period of 25 years.

[1] There appears to be only one bill of exceptions in the record, which is as follows:

"Be it remembered that on the trial of the above-entitled cause, the state offered to prove a series of acts of sexual intercourse between the defendant, J. C. Lucas, and the prosecutrix, antedating, prior to, and beyond the period of limitation of the act alleged to have been committed on the date set forth in the indictment,

indicating their intention by the following question, directed to Elsie Allen Nelson, the prosecutrix, who was a witness on the stand at the time: 'On or about the 19th day of November, 1918, or within a year prior thereto, tell the jury what were the relations between you and the defendant, J. C. Lucas.' To which counsel for the defendant, J. C. Lucas, objected and continued to renew his objections each time such evidence was sought to be introduced as appears from the statement of the statement of facts, assigning as the grounds for his objections the following reasons that the matter sought to be introduced was not at a date mentioned in the indictment; That it was an attempt to prove a separate, independent, and distinct offense from the one on trial; that it was no part of the res gestae; no part of any system shown to have been used by the defendant; nor was it an attempt to identify him, but that it was an attempt to prejudice him before the jury by showing a course of events which would necessarily have the effect of injuring his reputation before the jury, and the court overruled said objections, to which the defendant, through his counsel, excepted to said ruling and herewith tenders his bill of exceptions, and asks that the same be signed and made a part of the record in said cause, which is accordingly done."

It is manifest that this bill is not sufficient. There is no statement therein of what the witness testified in answer to the questions set forth. The question is not objectionable on its face, and, in the absence of a showing in the bill itself that a witness gave an objectionable answer, the bill will not be considered.

[2] The motion for a new trial complains of the insufficiency of the evidence to corroborate the prosecutrix, the ground of said complaint being that she is an accomplice and not corroborated. The prosecutrix testified fully to facts showing the guilt of accused, and under numerous holdings of this court is not an accomplice. *Hamilton v. State*, 36 Tex. Cr. R. 372, 37 S. W. 431; *Donley v. State*, 44 Tex. Cr. R. 428, 71 S. W. 959.

No complaint is made to us of the charge of the court, nor of any matter with regard to the introduction of evidence, except as above stated.

There being no error in the record, the judgment of the trial court is affirmed.

#### On Motion for Rehearing.

The appellant has filed a formal motion for rehearing, without citation of authorities, or reasons stated why same should be granted.

We are unable to find error in the original opinion of this court, and the motion for rehearing is overruled.



## CHADWICK v. STATE. (No. 5505.)

(Court of Criminal Appeals of Texas. Nov. 26, 1919.)

## 1. CRIMINAL LAW §295, 1149—REVIEW OF RULING ON PLEA OF FORMER JEOPARDY.

A plea of former jeopardy, setting out that after a trial had begun, defendant's plea, entered, and evidence heard, the jury were wrongfully dismissed, raised a question of fact; and, while the burden was on defendant to show an abuse of the court's discretion in discharging the jury, he had the right to show that the court erred therein, if possible, and, if not satisfied with the ruling, to bring the matter up for review.

## 2. DISORDERLY HOUSE §20 — QUESTION OF CONTROL OF PREMISES USED FOR BAWDY-HOUSE FOR THE JURY.

In a prosecution for keeping or permitting to be kept a bawdyhouse on premises leased and controlled by defendant, the charge of the court should submit to the jury the question whether or not defendant in fact occupied that relation to said premises.

Appeal from Grayson County Court; Dayton B. Steed, Judge.

W. E. Chadwick was convicted of keeping and permitting to be kept a bawdyhouse on premises leased and controlled by him, and he appeals. Reversed and cause remanded.

C. M. Cureton, Atty. Gen., and John Maxwell, Asst. Atty. Gen., for the State.

LATTIMORE, J. In this case appellant was convicted in the county court of Grayson county of the offense of keeping and permitting to be kept a bawdyhouse in the premises leased and controlled by him, and his punishment fixed at a fine of \$200, and 20 days in the county jail.

There is but one error assigned, which we deem it necessary to discuss.

[1] Appellant filed a plea of former jeopardy, setting up that at a former time he was placed upon trial on this same charge, and that after the trial had begun, and his plea entered and evidence heard, one of the jurors failed to appear upon the assembling of the court, and that a deputy sheriff was sent for said juror; that said deputy sheriff came back, bringing word that said juror was sick and could not come, whereupon the court swore said deputy sheriff, who stated, over the objection of appellant, based upon his lack of qualification, that said juror had a fever, and could not come to court. Said plea further states that thereupon, and over the objection of appellant, the jury were discharged, to which action the appellant then excepted. Subsequently, when said case was called for trial, appellant duly presented to the court his plea of former jeopardy, setting up the above facts. Upon motion of the

county attorney, said plea of jeopardy was stricken out, and no evidence heard in support thereof, to which action the appellant objected, the same being also set up as a ground of the motion for a new trial.

Under the authority of *Bland v. State*, 42 Tex. Cr. R. 286, 59 S. W. 1119, this action of the trial court was erroneous. The plea raised a question of fact; and, while the burden was on appellant to show an abuse of the court's discretion in the original discharge of the jury, still he had the right to assume said burden in a case of this kind, and to show by facts, if possible, that the court erred originally in discharging the jury, and, if he was not satisfied with the court's ruling upon the facts presented in support of his plea of jeopardy, he had the right to bring the matter to this court for review. The *Bland* Case is almost identically upon a similar state of facts, except that we think the instant case presents a stronger state of facts in favor of appellant's right to be heard. In the *Bland* Case, the illness of the juror occurred in the presence of the court, who thereupon excused him, and when the plea of former jeopardy was later presented, the court sustained the motion to strike it out, stating that of his own knowledge he knew the juror was sick. For the error mentioned, the judgment of the trial court will have to be reversed.

[2] We observe that, inasmuch as the state's pleading alleges that appellant was the lessee and tenant of the premises under investigation, the charge of the court should submit to the jury the question as to whether or not appellant in fact occupied that relation to said premises.

The judgment of the trial court is reversed, and the cause remanded.

HAVERBEKKEN et al. v. STATE.  
(No. 5569.)

(Court of Criminal Appeals of Texas. Nov. 19, 1919.)

## ASSAULT AND BATTERY §91 — EVIDENCE OF "ASSAULT."

In a prosecution for assault, evidence that defendants ordered prosecuting witness to desist in working upon a public road, one having in his possession a large rock and the other a stick, and threatening him with injury if he failed, *held* to show an offense, under Pen. Code 1911, art. 1008, providing that any attempt to commit a battery, or any threatening gesture showing in itself, or by words accompanying it, an immediate intention coupled with ability to commit a battery, is an "assault."

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Assault.]

Appeal from Bosque County Court; W. A. York, Judge.

Criss and Martin Haverbekken were convicted of assault, and they appeal. Affirmed.

B. J. Word and P. S. Hale, both of Meridian, for appellants.

Alvin M. Owsley, Asst. Atty. Gen., for the State.

MORROW, J. The appellants were convicted of assault. From the standpoint of the state, the evidence disclosed that the alleged injured party was engaged in working upon a public road, and that the appellants ordered him to desist, and threatened to injure him if he failed, and that at the time one of them had in his possession a large rock, and the other had a stick. While only a few steps from the injured party, they approached him, with a rock and stick drawn in a striking attitude, and using threatening language, in consequence of which the alleged injured party did desist from the work he was doing.

The record suggests no question for review save the sufficiency of the evidence, and this, we think, must be determined against the appellants. The statute (article 1008, Penal Code) says:

"Any attempt to commit a battery, or any threatening gesture showing, in itself or by words accompanying it, an immediate intention, coupled with ability to commit a battery, is an assault."

The evidence shows an offense under this statute. See Higginbotham v. State, 23 Tex. 574; Johnson v. State, 14 Tex. App. 306; McKay v. State, 44 Tex. 48; Bodeman v. State, 40 S. W. 981; Brister v. State, 40 Tex. Cr. R. 505, 51 S. W. 393; Yawn v. State, 37 Tex. Cr. R. 205, 38 S. W. 785, 39 S. W. 105.

The judgment is affirmed.

#### HAVERBEKKEN et al. v. STATE. (No. 5568.)

(Court of Criminal Appeals of Texas. Nov. 26, 1919.)

Appeal from Bosque County Court; W. A. York, Judge.

Criss and Martin Haverbekken were convicted of assault, and they appeal. Affirmed.

B. J. Word and P. S. Hale, both of Meridian, for appellants.

Alvin M. Owsley, Asst. Atty. Gen., for the State.

DAVIDSON, P. J. Appellants were convicted of assault and allotted a fine of \$15 each.

It is deemed unnecessary to discuss this

case. It is a companion case to that between the same parties, recently decided by this court. 216 S. W. 397. The questions are the same. Upon the authority of that case, this judgment will be affirmed.

#### MCGREGOR & HENGER v. ESCAJEDA et al. (No. 1013.)

(Court of Civil Appeals of Texas. El Paso. Nov. 20, 1919.)

##### 1. CONTRACTS §147(1)—PARTIES' INTENTION CONTROLS CONSTRUCTION.

In construing a contract, the expressed intention of the parties must control.

##### 2. PRINCIPAL AND SURETY §59—SURETY'S LIABILITY NOT TO BE EXTENDED BY IMPLICATION.

Surety's liability is not to be extended by implication beyond the terms of his contract.

##### 3. PRINCIPAL AND SURETY §82(2)—SURETY'S LIABILITY ON BUILDING SUBCONTRACTOR'S BOND.

Where a contractor agreed to pay a subcontractor certain specified prices for building work by providing funds necessary to meet the subcontractor's weekly pay roll with final payment of the balance within 30 days after acceptance of the work, etc., and the subcontractor duly completed his contract but the weekly advancements exceeded the total sum due, held, that the contractor could not recover such excess from the subcontractor's sureties on a bond guaranteeing the subcontractor's faithful completion of his contract, since to do so would extend the sureties' liability beyond the terms of their bond.

Appeal from El Paso County Court at Law; W. P. Brady, Judge.

Action by McGregor & Henger against J. A. Escajeda and another. Judgment for defendants, and plaintiffs appeal. Affirmed.

Jackson & Isaacs, of El Paso, for appellants.  
O. L. Vowell, of El Paso, for appellees.

HIGGINS, J. Appellants had contracted to erect a building for the Young Women's Christian Association in the city of El Paso. By written contract dated August 20, 1917, appellants subcontracted a part of the work to S. C. Maese. The material portions of this contract pertinent to this appeal are as follows:

Maese agreed to furnish all labor and lay the brick and hollow clay tile in the building.

"Section 4. The contractor agrees to pay the subcontractor for the performance of his work the following prices:

"Face brick, \$13.00 per thousand brick laid in the wall.

"Common brick \$7.00 per thousand brick laid in the wall.

"8" hollow tile, 4 cents per square foot of wall.

"3" hollow tile, 8 cents per square foot of wall.

"Settlement to be based on the actual quantities of brick and tile laid as evidenced by the invoices to the contractor. \* \* \*

"Section 6. Payments: Contractor agrees to provide funds to meet subcontractors payroll each week. Final payment of the remainder to be made within thirty days after acceptance of the work by the architect, and the furnishing of evidence that there are no claims of any kind against him by the subcontractor.

"Section 7. Immediately after signing subcontractor agrees to furnish bond in the sum of \$900.00 guaranteeing the faithful execution and completion of this contract."

Maese gave bond as required by section 7 of the contract with J. A. Escajeda and Frank Alderete, appellees, as sureties. This bond recited that Maese had entered into the aforesaid contract with appellants, a copy of which was attached, and was conditioned that Maese should faithfully perform, execute, and carry out his contract according to its terms, covenants, and conditions and in accordance with the agreements therein contained.

Maese furnished all labor and set in place the brick and tile work in the building, and, under the schedule of prices set forth in the fourth section of the contract, the compensation due him for his work was \$1,655.33. Maese's pay rolls, as presented by him, for his laborers employed in doing the work, amounted to \$2,088.20. Appellants provided funds each week to meet the pay rolls for laborers employed on the work, and in the aggregate thus paid the sum of \$2,088.20, which exceeded the amount rightly due Maese by \$432.87. The pay rolls were checked up by appellants' foreman. This suit was brought by appellants against Escajeda and Alderete to recover said sum of \$432.87. Maese was not joined in the suit, it being alleged that he was notoriously insolvent and his whereabouts unknown.

From an adverse judgment McGregor & Henger appeal.

#### Opinion.

[1, 2] Upon the facts stated it appears that Maese has fully performed the service which he undertook to do in his subcontract. He has discharged every obligation which he therein expressly assumed. In like manner appellants did what they agreed to do. The payments to meet the weekly pay rolls of Maese were made in accordance with the contract. The first and main rule in construing contracts is that the intention of the parties as expressed in the words used must control. And it is well settled that the liability of a surety is not to be extended by implication beyond the terms of his contract.

[3] The manifest intention of the parties to the bond was to guaranty the faithful execution and completion of the service and

obligations assumed by Maese in the contract of August 20, 1917. This is shown upon the face of the bond as well as by the seventh section of the subcontract. A copy of the subcontract being attached to the bond and reference thereto made, it may properly be considered in ascertaining the intention of the parties and in determining the liability assumed by the sureties. Of course, Maese is legally bound to repay to appellants the overpayments which they have made to him; but there is no express provision therefor in the subcontract or the bond. His obligation to make such repayment thus arises upon an implied contract. Since Maese has performed the service which he undertook to perform and has discharged every obligation which he expressly assumed, we are of the opinion that the condition of the bond was thereby fulfilled and the liability of the sureties ceased. To hold the sureties liable upon the present demand would impose a liability which neither they nor Maese had expressly assumed. It would impose a suretyship liability upon an implied and collateral contract of the principal, Maese. It would by implication extend their liability beyond the terms of their contract. This is not permissible. The proper judgment was rendered.

Affirmed.

PAXTON et al. v. TRABUE. (No. 8281.)

(Court of Civil Appeals of Texas. Dallas.  
Nov. 8, 1919. Rehearing Denied  
Dec. 6, 1919.)

#### 1. ATTACHMENT $\S$ 10 — BASED ON CONTINGENT DEMAND IMPROPERLY ABATED.

Where contingency was to take place at the expiration of the contract, and plaintiff set forth the contract, which showed that defendant had breached contract and rendered it terminated, *held*, that court erred in abating attachment on grounds that it was levied on a contingency, while affidavit stated that defendant was justly indebted.

#### 2. ATTACHMENT $\S$ 126 — AFFIDAVIT IS CONTROLLING ON MOTION TO ABATE.

On motion to abate attachment on ground that demand at date of institution of suit was only a contingent one, allegation of affidavit for attachment that debt was due and owing is controlling.

#### 3. ATTACHMENT $\S$ 254 — ABATEMENT FOR UNTRUE ALLEGATIONS IN AFFIDAVIT.

A writ of attachment cannot be abated because allegations of affidavit therefor falsely state causes for the attachment.

Appeal from Dallas County Court; W. L. Thornton, Judge.

Suit by J. H. Paxton and others against R. E. Trabue. Judgment was rendered against plaintiffs in justice court. On appeal to the county court, judgment was rendered

for plaintiffs for the amount sued for, but writ of attachment was abated, and they appeal. Reformed and affirmed.

Brooks, Worsham & Graham, of Dallas, for appellants.

Leake & Henry, of Dallas, for appellee.

RAINEY, C. J. Appellants sued the appellee to recover the sum of \$150, claimed to be due and owing, and sued out a writ of attachment, which was levied on an automobile. Judgment was rendered against appellants in the justice court, and appellants appealed the case to the county court. When the case reached the county court the appellee filed a motion to abate the writ of attachment on the ground:

"That plaintiffs' said demand at the date of the institution of this suit was only a contingent one, that defendant at said time was only contingently liable to plaintiffs for said sum sued for, and that said affidavit in attachment wrongfully stated that defendant was justly indebted to plaintiffs; that said demand was insufficient under the statute upon which to base an attachment, for that said contingency continued to exist for six months after the institution of said suit; and that said attachment was therefore without authority of law."

Which motion was sustained, whereupon the appellee admitted in open court that appellant was entitled to judgment for the amount sued for. In the judgment was recited:

"Thereupon counsel for defendant admitted in open court that plaintiffs were entitled to judgment for the amount sued for, and agreed that judgment might be rendered in favor of plaintiffs, and upon such agreement made in open court the court is of the opinion that plaintiffs are entitled to recover against the defendant the sum of \$150, with interest after judgment."

And judgment was so rendered.

[1] We think the court erred in abating the writ of attachment on the ground that the attachment was levied on a contingency. The contingency was, according to contract, to take place at the expiration of the contract, which was to be on the 31st day of July, 1918. The attachment was abated by the court, and on the same day the judgment was entered.

[2, 3] The affidavit stating that the debt was due and owing does not depend upon the fact that it is not due, but that the allegations in the affidavit are controlling, and the writ will be enforced, and, if it is wrongful, the defendant will be entitled to a recovery on the attachment bond. Nor can a writ of attachment be abated because its allegations falsely state causes for the attachment. *Gimbel v. Gomprecht*, 89 Tex. 497, 35 S. W. 470; *Dwyer v. Testard*, 65 Tex. 432; *Green v. Hoppe*, 175 S. W. 1117. In the case of *Dwyer v. Testard*, supra, the court held:

"There was error in the refusal of the court to foreclose the attachment lien. It was held in *Cloud v. Smith*, 1 Tex. 611, that the affidavit could not be traversed in the abatement of the writ. The writ is authorized, not upon a given state of facts, but upon an affidavit to certain facts. The validity of the writ depends, not upon the truth of the facts stated in the affidavit, but upon the fact that they are so stated. The bond protects the defendant. The injury done him is compensated in the damage he recovers. The plaintiff, in the terms prescribed by law, in the bond, has contracted with the defendant for his remedy. He expiates in advance the possible wrong he may do the defendant. Ever since the decision of *Cloud v. Smith*, it has been the practice to give the plaintiff the benefit of his lien, and leave the defendant to his remedy on the bond. The defendant in this case has recovered his damages in a credit on the plaintiff's demand, and the plaintiff was entitled to a foreclosure of his attachment lien."

The appellant set forth the contract, which showed that appellee had breached the contract, and rendered it terminated, and made the sum deposited become due; and it further showed that it was due by appellee's counsel appearing in open court and admitting that said amount was due, and that appellant was entitled to judgment for said amount. Being entitled to judgment for said amount, the court should have refused to abate the attachment and foreclosed the lien.

Judgment will be rendered, reversing the judgment abating the attachment, and in accordance with said holding the judgment will be so reformed for appellant as to give him judgment for the sum sued for and the foreclosure of the attachment lien.

Reformed and affirmed.

#### DODGE et al. v. LACEY. (No. 9137.)

(Court of Civil Appeals of Texas. Ft. Worth. June 28, 1919. On Motion for Rehearing, Oct. 25, 1919.)

#### 1. BROKERS §49(2) — No COMMISSION FOR PROCUREMENT OF OPTION TRANSACTION.

A mere option to buy was not a contract of purchase, procurement of which of itself entitled the broker to his commission, even though the vendor failed to enforce it.

#### 2. EXECUTORS AND ADMINISTRATORS §221(4) — EVIDENCE INSUFFICIENT TO SHOW EMPLOYMENT OF BROKER BY COEXECUTORS.

Evidence held insufficient to support finding that the estate of decedent was bound by the contract of only one of three executors and trustees employing plaintiff broker to sell the land on commission.

#### 3. PRINCIPAL AND AGENT §23(2) — CIRCUMSTANTIAL EVIDENCE OF RELATION.

Proof of agency may be made by circumstantial evidence.

## On Motion for Rehearing.

4. TENANCY IN COMMON  $\Leftrightarrow$  43—ONE OF JOINT TENANTS CANNOT SELL WHOLE TITLE.

One of two joint tenants cannot make a valid contract of sale of the entire title to the joint property without the consent of the other.

5. TRUSTS  $\Leftrightarrow$  239—NO SALE BY SINGLE TRUSTEE.

One of several trustees in whom confidence has been reposed jointly, with no power given him, either expressly or by implication, to act singly, cannot sell the entire title to the trust property without the consent of the others.

Appeal from District Court, Howard County; W. W. Beall, Judge.

Suit by O. T. Lacey against N. P. Dodge, Jr., and others. From judgment for plaintiff, defendant appeals. Reversed, and cause remanded.

L. W. Sandusky, of Colorado, Tex., for appellants.

Morrison & Morrison, of Big Springs, for appellee.

DUNKLIN, J. N. P. Dodge, Jr., F. S. Pusey, and Grenville D. Montgomery, who were named as executors and trustees in the last will and testament of G. M. Dodge, deceased, have appealed from a judgment rendered against them as such, in favor of O. T. Lacey for a broker's commission, which Lacey alleged he, as the duly employed agent of defendants, had earned by finding a purchaser for 3,840 acres of land belonging to the estate of said G. M. Dodge, deceased, at the price and upon the terms authorized by the defendants.

The case was tried before the court without a jury, and findings of fact and conclusions of law filed by the trial judge appear in the record.

The will of G. M. Dodge, deceased, was introduced in evidence, and contained the following provisions:

"I give, devise and bequeath the remainder of my residuary estate, both real and personal, of which I may be seised and possessed or to which I may be in any way entitled at the time of my death, to my nephew, Nathan P. Dodge, Jr., and my son-in-law, Frank S. Pusey, as joint tenants and not as tenants in common and to their successors and assigns to their own use for the purposes herein expressed, but in trust, nevertheless, to collect, receive, convert and get in my residuary personal estate and at their discretion to sell and convert my residuary, real estate, and out of the proceeds to pay all my just debts and my funeral and testamentary expenses and the many legacies hereinbefore given and to invest and reinvest the balance of said proceeds in income-bearing real estate or in bonds or in mortgages or in some other equally safe paying securities and generally manage my residuary estate and to do all things necessary and proper for the main-

tenance and preservation thereof and out of the net income thereof to pay, first. \* \* \*

Then follows specific directions for the payment of certain legacies. The will also contained the following:

"I hereby revoke, cancel and annul any and all former wills and codicils by me at any time made and I nominate and appoint my nephew, Nathan P. Dodge, Jr., and my son-in-law, Frank S. Pusey, to be the executors of this, my will, and trustees as herein stated, and I hereby request and direct in the event that either of the above named executors or trustees shall cease to be executors or trustees, then my grandson, Grenville D. Montgomery, is to be executor and trustee."

The proof showed that N. P. Dodge, Jr., acting as executor and trustee under the will, employed plaintiff to negotiate a sale of the land. Plaintiff lived in Big Springs, Tex., and Dodge lived in Council Bluffs, Iowa, and practically all the communications between them were by letters and telegrams, which were introduced in evidence. Following correspondence preliminary thereto, Dodge in a letter authorized a sale for \$10.50 per acre, the consideration to be partly in cash. Acting upon that letter, plaintiff procured a prospective purchaser in James Dorward; and he, as agent for the three executors and trustees and for the estate of G. M. Dodge, deceased, named as first party, entered into a written contract with Dorward, named as second party, who also signed the instrument, the terms of which purported to bind the three executors and trustees and also the estate, to sell the land to Dorward for the price and upon the terms named by N. P. Dodge, and Dorward bound himself to buy the land at that price and upon those terms, and at the time he executed the contract he placed \$1,000 in the bank as a forfeit to insure performance of his contract. The contract contained this further stipulation, relative to the sum so deposited, in the event Dorward should breach his contract to buy the land:

"But upon his (second party's) failure to perform, after such tender of performance by first party, said sum will thereby be forfeited to and will become the funds and property of first party, absolutely and will be and constitute the damages and all the damages first party shall have sustained or may recover by reason of second party's default."

[1] In view of the stipulation just quoted, the contract of Dorward amounted to no more than an option to buy, and was not a contract of purchase which could be specifically enforced, and the procurement of which would of itself entitle the broker to his commission, even though the vendor should fail to enforce it. Moss & Raley v.

Wren, 102 Tex. 567, 113 S. W. 739, 120 S. W. 847.

[2] But there was evidence sufficient to support the finding by the trial judge that Dorward was willing to waive the right given him by the clause in the contract quoted above, and was ready, willing, and able to buy the land for the price and upon the terms authorized. But appellant insists that the evidence was insufficient to support the further finding that the estate of G. M. Dodge, deceased, was bound by the contract of N. P. Dodge, Jr., as executor and trustee, employing plaintiff to sell the land and agreeing to pay a commission for such sale. And after a careful consideration of all the evidence bearing upon that issue we have reached the conclusion that the contention so made should be sustained.

The evidence shows that N. P. Dodge, Jr., alone conducted the entire negotiations for the sale, and, as noted already, all his negotiations were evidenced by telegrams and letters. All such communications were signed by him as executor and trustee of the estate of G. M. Dodge, deceased, as though he was sole executor and trustee having full power to bind the estate. Under the terms of the will, the contract of employment would have been binding upon the estate if it had been made with the consent of F. S. Pusey as the other executor and trustee also, but there was no evidence to show that he in any manner acted with N. P. Dodge, Jr., in the negotiations, or authorized him to act for Pusey, or that Pusey knew of such transactions on the part of Dodge and acquiesced in or in any manner ratified them. Appellee cites the fact that the letters written by N. P. Dodge, Jr., were upon letter heads, with the names of all three of the executors printed at the top, but that would, at best, amount to no more than a mere scintilla of evidence wholly insufficient of itself to sustain the finding of fact now under discussion. And the same observation applies to the circumstance that a letter written to plaintiff during the initial negotiations, declining the first offer of Dorward to buy the land for \$9 per acre, was signed by both Dodge and Pusey. Indeed, the fact that after he signed that letter he failed to sign any further letter to plaintiff would tend to support the inference that he desired to act in conjunction with Dodge in selling the land, as the will made it his duty to do, and that he was in no manner a party to the further negotiations conducted by Dodge alone with plaintiff and his customer Dorward. *Joske v. Irvine*, 91 Tex. 574, 44 S. W. 1059.

[3] In reaching this conclusion, we are not unmindful of the familiar rule that proof of agency may be made by circumstantial evidence. *Daugherty v. Wiles* (Com. App.) 207 S. W. 900. But the circumstances in evi-

dence in this suit are wholly insufficient to support the finding in question.

Accordingly, the judgment of the trial court is reversed, and the cause remanded.

#### On Motion for Rehearing.

Article 3356, Vernon's Sayles' Texas Civil Statutes, reads as follows:

"Should there be more than one executor or administrator of the same estate at the same time, the acts of one of them as such executor or administrator shall be as valid as if all had acted jointly; and, in case of the death, resignation or removal of an executor or administrator, if there be a coexecutor or coadministrator of such estate, he shall proceed with the administration as if no such death, resignation or removal had occurred."

In the case of *Armstrong v. O'Brien*, 83 Tex. 639, 19 S. W. 269, it was held that by virtue of that statute certain letters written by one alone of two joint executors were admissible against both as joint executors of the estate. That was a suit against the two executors for commissions claimed by plaintiffs for negotiating the sale of land belonging to the estate. The opinion does not disclose the contents of the letters held to be admissible. It does not appear whether they were introduced to prove the alleged contract of both executors employing the plaintiff to sell the land, or relates merely to some issue incidental to that issue. It is significant that the opinion, after referring to the provisions of the statute above, added, "But this provision, however, does not apply to the conveyance of real estate, in which all who are acting must join. Art. 1937," which latter article is now No. 3357.

[4, 5] As shown in our original opinion, the estate of the decedent was devised to N. P. Dodge, Jr., and F. S. Pusey, "as joint tenants," in trust for the purposes stated in the will, and the power to sell the property was conferred upon them as joint tenants and trustees and not as executors. It is an elementary general rule that one of two joint tenants cannot make a valid contract of sale of the entire title to the joint property without the consent of the other. 23 Cyc. 494. And the same general rule applies to trustees in whom confidence has been reposed jointly, with no power given them, either expressly or by implication, to act singly. 1 Perry on Trusts, § 411. If the will be construed as authorizing the sale of the land by Dodge and Pusey in their offices as executors and not as joint tenants and trustees, and if N. P. Dodge, acting alone as executor, could make a valid contract of employment of Lacey as agent for the estate to sell the land, then Lacey, as such agent, could bind the estate by his contract of sale, and thus convey an equitable title to the land, contrary to the provisions of article 3357 of the

Statutes, requiring both executors to join in the conveyance.' And it would be clearly contrary to the general rules of common law and equity, mentioned above with respect to the powers of joint tenants and joint trustees, for N. P. Dodge by such a course to dispose of the land in controversy without the consent and concurrence of his joint tenant and cotrustee, Pusey. In the absence of a clear showing to the contrary, we cannot believe that in disposing of the case of Armstrong v. O'Brien, supra, our Supreme Court intended to hold that one of two joint executors, acting alone, can confer upon his agent authority to bind the estate to sell land notwithstanding the fact that the statute referred to in the opinion expressly provides that both executors must join in such a conveyance.

The motion for rehearing is overruled.

SOUTHWESTERN TELEGRAPH & TELEPHONE CO. v. RIGGS. (No. 7652.)

(Court of Civil Appeals of Texas. Galveston. Feb. 14, 1919. Dissenting Opinion Filed and Rehearing Denied Oct. 30, 1919.)

1. TELEGRAPHS AND TELEPHONES §66(4) — SUFFICIENCY OF EVIDENCE TO AUTHORIZE RECOVERY FOR DISCONNECTING PHONE.

Evidence held to support verdict of \$250 for vexation, annoyance, and inconvenience caused plaintiff subscriber by reason of his telephone being wrongfully disconnected by defendant company.

2. TELEGRAPHS AND TELEPHONES §71—EXCESSIVE RECOVERY FOR DISCONNECTING PHONE.

Verdict of \$250 for vexation, annoyance, and inconvenience caused plaintiff subscriber by reason of his telephone being wrongfully disconnected by defendant company held not so excessive as to show passion or prejudice.

3. APPEAL AND ERROR §688(2)—ASSIGNMENT AS TO ARGUMENT NOT SHOWN BY RECORD OVERRULED.

Assignment with reference to argument of counsel will be overruled, where there is nothing in the record to show any such argument as complained of, though there is a statement in motion for new trial that such argument was made.

Pleasants, C. J., dissenting.

Appeal from District Court, Harris County; Charles E. Ashe, Judge.

Suit by H. P. Riggs against the Southwestern Telegraph & Telephone Company. Judgment for plaintiff, and defendant appeals. Affirmed.

John Charles Harris, of Houston, for appellant.

Ellis P. Collins, of Houston, for appellee.

LANE, J. This suit was brought by appellee, H. P. Riggs, against appellant, the Southwestern Telegraph & Telephone Company, to recover damages in the sum of \$1,500.20.

Among many other things, appellee, Riggs, in substance alleges that on the 12th day of July, 1917, for the consideration of the sum of \$4 paid by him to the telephone company, said company contracted with him to place a telephone in his residence and to give him local telephone service for the term of two months from said 12th day of July, 1917; that notwithstanding said contract, and payment made by him, the telephone company negligently, wantonly, maliciously, and oppressively had his telephone disconnected from its telephone line and discontinued giving him service for a term of three days just prior to August 8, 1917; that at such time he was the creditman for a large business firm in the city of Houston; that on the 8th day of August he had arranged to go to Madisonville, Tex., on a business trip; that about one hour before his train was to leave for Madisonville he tried to talk to his wife over the telephone so as to inform her that he was going to Madisonville; that by reason of said act of appellant in cutting off his phone he was unable to talk to his wife, and therefore did not make his trip to Madisonville, as he had intended to do; that, when he undertook to talk to his wife, he was told that his service had been discontinued because he had not paid his phone bill; and that others were informed that he had not paid his bill. He also alleged that by reason of the negligent, wanton, and malicious act of appellant aforesaid, its refusal to reconnect his phone, and the mistreatment of him by appellant company, he suffered humiliation, annoyance, and inconvenience to his damage as follows:

"(1) For remission of contract price, 20 cents. (2) Humiliation, annoyance, and inconvenience, and mental distress to plaintiff, \$250. (3) Humiliation, annoyance, and inconvenience, and mental distress to wife of plaintiff, \$250. (4) Damage to plaintiff's reputation, and his distress because of same, \$500. (5) Exemplary damages, \$500."

For all of which he prayed judgment.

The defendant telephone company answered by general denial, and specially averred that—

"When the plaintiff, Riggs, made his cash payment of \$4 to defendant company on July 12, 1917, such cash payment was promptly noted by the cashier's office on a stub it placed on a spindle file in such a manner that accidentally the needle of the spindle ran through the figure 8 of plaintiff's telephone number, which was 'Capitol 1928,' making the figure 8 very much resemble the figure 3, and that thereupon plaintiff's cash payment was accidentally credited to telephone under 'Capitol 1923'; that this de-

defendant sincerely regrets the occurrence of such accident, and now here tenders to plaintiff, in open court, the 20 cents rebate claimed by plaintiff."

It further alleged that the plaintiff was guilty of contributory negligence in not notifying defendant that his phone had been discontinued until the lapse of three days after such disconnection was made; at which time he, for the first time, made complaint to defendant.

The contract payment for two months service, from the 12th day of July, by plaintiff, and the disconnection of his phone and discontinuance of his phone service, is admitted by appellant.

Plaintiff, Riggs, testified as follows:

"My name is H. P. Riggs. I am credit manager of the Deutser Furniture Company. I have charge of all the allowances of credit for that company. I am married. I have a telephone in my residence here in Houston. The number is Capitol 1928. The phone was installed on July 12, 1917, and the amount represented by the receipt that has been introduced was paid on the day said phone was installed.

"After the phone was installed, I got proper service from the defendant company for a time. On August 8, 1917, I was at my place of business, the Deutser Furniture Company, and I attempted to call my wife. I called her at Capitol 1928. She was at that number, and I was at the store. When I tried to get that number, Central told me that the phone had been temporarily disconnected. In reply to that I asked her why. She says: 'I will refer you to the cashier.' I said: 'All right. Let me talk to him.' Then the cashier, of course, answered the phone, stating that that was the cashier's office. I told the cashier that I had been informed by the operator that my phone had been disconnected, and I wanted to ascertain why such was the case. He asked me if I had paid my phone bill. I told him: 'You ought to know. You keep a record of such matters, don't you?' He said: 'Well, let me see.' He went and referred to his books and said that their records showed that I owed \$3.25. I told him that that was wrong, that I had a receipt, that the phone had only been installed less than a month, and that I paid for two months in advance. He says: 'Will you bring that receipt down here?' I told him that I was very busy; I could not bring it down, and that it was imperative that I talk at once. He said: 'Well, we cannot do anything for you until you bring the receipt down here.' I was actually busy at the time. That was about 9 o'clock in the morning; I would not say positively the time. The cashier told me that I would have to bring the receipt down there, and I told him that I did not have time to come down there, and that I was very busy, and that they should know whether I paid the bill or not, and if he wanted to see the receipt I had it, but I did not have time to come down there, and he said I would have to show him the receipt before he would connect my phone. The cashier seemed not to want to give me the service, so I told him it was very important business that I had to talk on, and must talk at once. I wanted to talk to my wife. He

said: 'Well, you cannot talk until you get your phone paid.' I said: 'Well, I can talk, too, because I have said to you that I have paid it, and I am going to talk, or I am going to find out why I cannot talk.' I said: 'Now, look here; if you don't connect my phone up in three minutes, there is going to be something doing down at the courthouse, because I have paid my bill as I have stated to you before, and I am entitled to this service.' When I said that, he said, 'Is that so?' and gave me the horse laugh. He laughed at me. Then I hung up the receiver.

"I then called my phone again within three to five minutes, somewhere along there, and asked for that number. Central told me the same thing as before; that it had been temporarily disconnected, and she would refer me to the cashier. I had already talked to him and told her I did not want to talk to the cashier, and that I wanted to talk to that number. She said: 'You cannot talk to the number. It is disconnected.' So it made me hot. I said I did not want to talk to the cashier, and she said 'I will refer you to the manager's office.' I said: 'All right, let me talk to the manager.' Then I got connection with the manager's office and talked to a young lady. I do not suppose she is the manager. I suppose she is a clerk in the manager's office. She asked me first: 'Why are you referred to the manager's office?' I told her that my phone had been disconnected, and I wanted to know why such was the case. I repeated the words that it had been temporarily disconnected, and she said: 'You should have been referred to the cashier's office, instead of being referred to my office.' I said: 'I have already been referred to the cashier's office, and I could not get any satisfaction out of it. He positively refused to connect my phone.' She said: 'Well, you would not expect it to be connected if you had not paid your bill, would you?' I said: 'But I have paid my bill, and told the cashier that I had.' And she made the same statement that he did, for me to come down and bring my bill down there. I told her I did not have time.

"After I had that conversation with the manager's office, I waited about 30 minutes, and called from another number, and they reported the same thing, and I did not go any further with it. That was my residence phone I was calling. I was so angry at the time they disconnected my phone I just wanted to find out if they were still doing that, and who else they might be telling that I had not paid my bill. I did not try any more that morning. After central and the cashier and the manager's office had refused to connect my phone, I came over to see Mr. Collins, my attorney, and took steps to file suit.

"The effect on me, when they treated me in the way I have described, was to make me angry. I was running around there like a chicken with his head cut off, and I used some language that I would not like to use before these ladies. The biggest effect that it had on me at the time was from this standpoint: That I have always had an ambition to be a man of unquestioned integrity and unimpaired fidelity. I wanted to have that with every one. I have wanted each and every one to know that I had a soundness of moral principle and char-



acter, and the fact that I had not paid, or that they told me I had not paid the bill, was an insult to me at that time; and not only an insult. There may have been a ruffling of feelings, but, as I just said, I wanted a record which was scrupulously clean. I have not the words to express it, but I did not want anything that would hurt my reputation or name. I felt considerably hurt over the fact that they might be telling any and every one that called my place that I had not paid my bill. It certainly did ruffle my feelings; the cashier spoke so sarcastic and cold-blooded. I did not have a chance. He would not listen to any argument or reason, so to speak, just the cold-blooded way that they sometimes do when they know they have you where they can do you as they please. I think I have a good standing in the community. I know a good many people for the time I have been here. I have been in Houston a little over a year. I have been in business all that time. We came from Beaumont and opened up the house in Houston. I pay my bills. I quite frequently get business calls over the telephone, over my residence phone, quite frequently at night and Sundays."

Mrs. Retzer testified as follows:

"I have had occasion to call Capitol 1928. It was early in the morning. It was in the month of August. I was trying to get Mr. Riggs's phone. I did not really pay any attention to the time, but it was the early part of August, 1917, and it was early in the morning, between, I should imagine, 9 and 10. When I tried to get this telephone number, I got an answer that the phone was temporarily disconnected. That was all Central told me."

G. B. Bell testified that he was the cashier and head bookkeeper for appellant, and in charge of its records; that appellee Riggs had paid \$4 to the company on the 18th day of July, 1917, for the rent of his residence phone and for local service for two months; that this \$4 was inadvertently credited to local phone No. 1923, instead of to appellee's phone No. 1928; that it is a general rule of the company that, where a subscriber calls up and claims that his bill is paid, they turn the service on and investigate afterwards, even if the books of the company do show that the bill is not paid; that this was the verbal instruction of the manager at Houston and that such instruction had been generally followed; that it takes 20 or 30 minutes to make such connection; that it might be done in 10 minutes. He testified that the company's telephone line was the only telephone line in Houston, and that appellee could only get telephone service from this company; that none of the employes complained of have been discharged; that the company approved of the acts of said employes in this matter. Testifying further, he said:

"I am acquainted with practically all of the facts of this case. I first learned that this telephone was cut off about 8 o'clock on the morning of August 8th. I learned it that morning just as soon as the gentleman got through talking to Mr. Arnim, the assistant in my

office. Mr. Arnim talked to me about it right away. Mr. Arnim talked to me and I talked to him. Mr. Arnim simply said that he had a telephone connected up, and that was correct. I talked with Mr. Arnim that very morning."

He testified further that, when Central tells one that the phone of a subscriber is temporarily disconnected, that means the subscriber's bill is unpaid; that they do not tell people that the phone has been temporarily disconnected under any other circumstances; that those circumstances are only when the company claims the bill is not paid. Testifying further, he said:

"The paper that counsel for the defendant now hands me is a receipt stub, what is called a cash stub. It shows that Mr. Riggs paid his \$4, just like the receipt that he introduced shows. The slip that is now shown me shows that this amount of \$4 was credited to Capitol 1923, and said slip is the bookkeeper's transfer, debiting the number that this amount was credited to, and crediting the number that it should have gone to, which was Capitol 1928. It shows the credit was applied wrong, and we corrected it by debiting the wrong number and crediting the right number. The bookkeeper made these entries. This slip is one of the regular records of my office, and I am the head bookkeeper, and am in charge of the records."

Continuing, he said:

"About 9 o'clock in the morning of August 8th, I went to look up this credit. Mr. Riggs said that he had paid the account, and we went over to our accounting department to look up this cash credit, and found that they did not have any credit on that date. He said he had paid it on July 11th or 12th. So we went back to that day's cash, and got the original stubs out of that day's cash, and showed it was posted to 1923 instead of 1928. When the clerk collected this account, she put this slip on a spindle, and after it was taken off the spindle it goes from my office to the bookkeeper to post on his credit ledger. I did not find it on the spindle; it was in a file. I do not know who has had it since the time I found it in the file; but I expect Mr. Harris, our attorney, has had it. The paper which is now shown me is the bill rendered against Mr. Riggs on August 1, 1917, for phone Capitol 1928, for exchange service for August, 1917, \$2, and for service from July 12, 1917, to August 1, 1917, \$1.25, a total of \$3.25, showing that the account had not received credit for the \$4. Said account was sent out on August 1st."

The foregoing facts are relied upon by appellee for a recovery.

The cause was tried before a jury upon special issues submitted by the court as follows:

"Special Issue No. 1. Did the plaintiff by reason of his telephone being disconnected suffer any annoyance or inconvenience? Answer yes or no.

"Special Issue No. 2. If you have answered the foregoing issue in the affirmative, and only in that event, you will answer this question: What amount of money do you find would

reasonably compensate plaintiff for the annoyance and inconvenience suffered, if any?"

The verdict of the jury was as follows:

"We, the jury, answer the special issues submitted to us herein as follows:

"Answer to special issue No. 1: Yes.

"Answer to special issue No. 2: \$250.00."

Upon the evidence and verdict of the jury, the court rendered judgment in favor of appellee against appellant for the sum of \$250.20. From this judgment the telephone company has appealed.

[1] By appellant's assignment No. 1, it is insisted that the only damage shown by the evidence was for the 20 cents sued for, and that there was no evidence to support a recovery of \$250 for annoyance and inconvenience, and that the verdict of the jury is contrary to the evidence and against the weight of the evidence.

While laboring under some doubt as to the correctness of our conclusions, the majority of this court feels constrained to hold that the assignment should be overruled. The evidence shows that on the 12th day of July, 1917, appellee paid appellant \$4 for rent of his residence phone and for service for two months from that date, and that appellant had on said date made a written contract with appellee to furnish such service for the sum paid. It shows further that, within less than one month after the phone was placed in appellee's residence under his contract, appellant cut it out and discontinued his service, and, when appellee complained of his reckless and wrongful treatment and requested to be given service, he was told that his account or bill was unpaid and that his phone would not be reconnected until he paid his account, although he told them he had paid his bill. The fact that appellee had paid for two months' service was well known to appellant, or with the slightest thought would have been known to it, because it was known to appellant by the contract in its possession that appellee's phone had been installed on the 12th day of July, less than one month, and it was well known to appellant that such phone would not have been so installed unless appellee had paid a certain sum in advance, still with this knowledge, as evidenced by the account rendered, it in violation of its rules had his phone disconnected, and he and those who desired to talk to his residence were in effect told that his service had been temporarily discontinued because he would not pay his phone bill, and, after being told by appellee that he had paid his bill, he was refused reconnection until he had been vexed, annoyed, and inconvenienced, and until he had threatened to sue to recover his rights. It is also shown that appellee, by reason of such treatment, was very much vexed and annoyed, and, believing that he could not get his rights without

resort to law, employed an attorney to force appellant to perform its contract.

Appellant's head bookkeeper, G. B. Bell, testified that about 9 o'clock, about 30 minutes after appellee had been refused service (and after appellee had intimated that he would sue the company), he went to look up the credit of appellee and in a very short time found the error. Why, may we ask, did not he, with all the data in his possession, look up this credit before the phone of appellee was cut out and he was refused the service for which he had paid? Does not the conduct of appellant's employés in this matter show a reckless disregard of the feelings and rights of appellee? We can conceive of no sound reason why compensation for injuries which cannot be accurately estimated, such as mental distress, vexation, and annoyance, or such as are commonly spoken of as offenses to the feelings, insults, and indignities, should not be allowed. It is a legal maxim that every legal wrong entitled the party injured to recover damages sufficient to compensate him for the injury inflicted.

In the case of *Cumberland Telegraph & Telephone Co. v. Hobart*, 89 Miss. 252, 42 South. 349, 119 Am. St. Rep. 702, the Supreme Court of Mississippi used the following language:

"When the telephone company undertakes to cut out their subscribers for debts which they claim to be due them, they may do so if the subscriber actually owes them, but if the subscriber is not indebted to them they are liable in damages to the subscriber for such actual damage, inconvenience, and annoyance as is occasioned him by wrongfully cutting out his telephone.

"The damage sustained by the loss of a telephone in its very nature is largely composed of inconvenience and annoyance. That a person deprived of the use of a telephone is materially damaged, all will concede. What is the amount of damage in dollars and cents cannot be accurately stated by the party suing for the reason that his damage consists not only in pecuniary losses, but it consists in inconvenience, discomfort, and annoyance, and it must be left to the jury to determine what is the damage sustained, taking into consideration the discomfort, the annoyance and inconvenience suffered, together with actual pecuniary losses. Would it be contended if one's gas is wrongfully cut off that compensatory damage would be only what it would cost to buy tallow candles? To so hold, and to hold that annoyance, discomfort, and inconvenience was not a proper element of damage to be considered by a jury when the service of a telephone has been wrongfully discontinued, would be to place the public at the mercy of the telephone company, and force them to yield to many unjust demands rather than contest, for fear of a discontinuance of the service. Such coercive powers cannot be sanctioned.

"We would unhesitatingly set aside a verdict of the jury where the amount allowed was grossly excessive or unreasonable, but we shall be slow to interfere with their judgment when

it is not so. The telephone may be considered a necessary household utility, so much so that the thought of losing it will coerce almost any one into payment of any debt claimed within reason rather than have it cut out. It is a public service corporation without competition, monopolistic in nature, and the patrons have no choice but to accept its service, and they have not the privilege of selecting to do business with a competitor because there is no competitor, and for this reason the rights of the public should be carefully guarded against oppressive methods used for the purpose of collecting unjust demands. The necessities of the law must meet modern conditions."

We can see no good reason why appellee should not be compensated for the vexation, annoyance, and inconvenience suffered by him by reason of the wrongful acts of appellant.

[2] By the second assignment insistence is made that the verdict of the jury and judgment of the court is so excessive as to indicate prejudice on the part of the jury against appellant.

In *Ruling Case Law*, vol. 8, § 215, p. 673, the following rule is announced:

"In actions sounding in damages merely, where the law furnishes no legal rule for measuring them, the amount to be awarded rests largely in the discretion of the jury, and unless so large as to indicate that it was the result of passion, prejudice, or corruption, or that the evidence has been disregarded, their verdict is conclusive and will not be set aside as excessive, either by the trial court or on appeal. Full compensation is impossible in the abstract, and different individuals will vary in their estimate of the sum which will be a just pecuniary compensation, and so all that the court can do is to see that the jury approximates a sane estimate, or, as it is sometimes said, that the results attained do not shock the judicial conscience. The courts will of course interfere with the verdicts of juries when it is manifest that they are the result of corruption, prejudice, or passion; and so it is the province of the court to set a verdict aside where it clearly appears to be excessive, or where the jury in rendering it appear to have disregarded the testimony. The amount awarded must bear some reasonable proportion to the injury sustained. However, since it is for the jury and not for the court to fix the amount, a verdict will not be set aside merely because it is large, or because the reviewing court would have awarded less."

The reasoning in the case of *Cumberland Telegraph & Telephone Co. v. Hobart*, supra, here copied, is applicable to the question here presented, to wit:

"The damage sustained by the loss of a telephone in its very nature is largely composed of inconvenience and annoyance. That a person deprived of the use of a telephone is materially damaged, all will concede. What is the amount of damage in dollars and cents cannot be accurately stated by the party suing for the reason that his damage consists not only in pecuniary losses, but it consists in inconvenience,

discomfort, and annoyance, and it must be left to the jury to determine what is the damage sustained, taking into consideration the discomfort, the annoyance, and inconvenience suffered, together with actual pecuniary losses."

[3] The fourth assignment is overruled. There is nothing in the record to show that any such argument as complained of was made by counsel for appellee. We are asked to consider the assignment upon the mere statement made in the motion for new trial that such argument in fact was made, without anything in the entire record to support the same.

What has been said disposes of all of appellant's assignments, and it is apparent therefrom that the majority of this court have reached the conclusion that the judgment of the trial court should be affirmed, and it is so ordered.

Affirmed.

PLEASANTS, C. J. (dissenting). The holding of the majority of the court that appellee, upon the facts of this case, is entitled to recover damages from appellant for "annoyance and inconvenience" caused by reason of his telephone having been wrongfully "temporarily disconnected" by appellant, is in my opinion an unreasonable extension of the scope of the law of damages, and is without support in the authorities.

All of the material evidence in the case is correctly copied in the opinion of the majority. The facts established by this evidence may be briefly stated as follows:

Appellant, thinking that appellee had not paid his residence phone rent for the previous month, disconnected his phone on the 5th day of August, 1917. A bill for this rent and also for the rent for the month of August was sent to appellee on August 1st. Appellee had in fact paid the rent for the phone for two months in advance when he had it installed in his residence in July. The clerk or employé of appellant who received the money from appellee and issued the receipt therefor placed the duplicate or memoranda of the receipt on a file book in the office. Appellee's phone was No. 1928 and the receipt given him was for that number. In placing the duplicate or memorandum on the file, the hook pierced the center of the figure 8, and when the bookkeeper entered the item in his book he mistook the mutilated 8 for a 3 and credited the amount to phone No. 1923.

Appellee did not discover that his telephone was disconnected until the morning of the 8th of August, when, desiring to talk with his wife from his place of business, he called up the central telephone office and asked to be connected with his residence phone, and was informed that the phone was disconnected because the books of the company showed that he had not paid rent due for the phone. A detailed statement of the dis-

pute that then occurred between appellee and the employé of appellant is set out in full in the opinion of the majority and will not be repeated. After this dispute had ended, the telephone company made an investigation of its records, discovered the mistake, and reconnected the telephone. The exact length of time the phone remained disconnected after appellee informed the company that he had paid his bill is not shown, but the evidence warrants the conclusion that it was less than one hour.

Appellee, having paid his rent, was entitled under his contract to the use of the phone, and appellant should be held liable for any actual damage he may have sustained by being deprived of its use, and the fact that the wrongful act of appellant in disconnecting appellee's phone was due to an honest mistake that might easily occur in the keeping and rendition of accounts in any large business cannot affect this liability. But in the absence of malice, damages for breach of contract are only recoverable in law as compensation for actual or substantial loss or injury.

The \$250 damages awarded appellee by the verdict and judgment in this case was for "annoyance and inconvenience" suffered by him "by reason of his telephone having been disconnected." There is nothing in the evidence tending to show that appellee sustained any loss or damage by reason of his failure to talk with his wife. The petition alleges that he wanted to tell his wife that he was going out of the city for the day, and that because of his inability to talk with her over the phone, he abandoned his trip. We are not informed as to the importance or purpose of his proposed trip, and the annoyance and inconvenience caused him by its abandonment must have been of no consequence because the matter is not referred to in his testimony.

Appellee does not claim in his testimony that he was annoyed or inconvenienced by not being able to talk with his wife over the telephone during the hour or less that the phone remained disconnected after he asked for the connection. He says he was made very angry by the treatment he received from the telephone employé and their refusal to accept his statement that the rent had been paid and reconnect the phone without requiring him to show his receipt; that, "he was running around like a chicken with his head cut off, and used language that he did not like to use before those ladies." There was nothing insulting in the language used by any of the employés in discussing the matter with appellee. He says that, when he told the cashier that if he was not given the connection in three minutes there would be something doing at the courthouse, the cashier laughed at him. The only bad temper that seems to have been shown in the entire controversy was displayed by appellee.

Any self-respecting man dislikes to have his statements of fact questioned, but it would hardly be contended that the feelings of resentment which might reasonably result therefrom is an injury for which damages are recoverable, and no such element of damage was submitted to the jury in this case. There was no evidence of malice on the part of appellant's employé, nor of such gross negligence as would amount to a willful wrong, and the issue of exemplary damages is not in the case.

Such being the evidence, it is not surprising that the majority of the court are "laboring under some doubt of the correctness of their conclusion" that appellee is entitled to recover of appellant \$250 damages for having his phone disconnected for not exceeding one hour. While the phone was disconnected for three days, appellee did not know that it was disconnected until he attempted to talk with his wife on the morning of August 8th, and there can be no claim that he suffered any annoyance or inconvenience because of the phone being disconnected prior to the time that he attempted to talk with his wife. He could not suffer annoyance or inconvenience from being unable to use the phone, when he had no occasion to use it and did not know that it was disconnected. He claimed a remission of the rent of the phone for three days, and this sum appellant admitted was due him and paid the amount into court. This, in my opinion, is all that appellee is entitled to recover.

The case of *Telephone Co. v. Hobart*, 89 Miss. 252, 42 South. 349, 119 Am. St. Rep. 702, cited in the opinion of the majority, falls far short of sustaining the conclusion reached in that opinion. In that case the plaintiff Hobart was wrongfully deprived by the defendant for three or four months of the use of the telephone which it had contracted to furnish him. The evidence showed that Hobart suffered much annoyance and inconvenience by being deprived of the use of the phone. The evidence showing the annoyance and inconvenience suffered by him, as set out in the opinion, is as follows:

"Mr. Hobart claims to have been damaged in many ways by the removal of the telephone, but that it is difficult to enumerate the exact amount, and the ways in which he was damaged; that he lived out in the country, and that it was an almost indispensable adjunct to his household, and yet difficult to enumerate in dollars and cents; that when he was in town and wanted anything he could telephone; when he wanted to send things home, he was in the habit of putting them on the car and telephoning some one at the house to meet the car and get the things; after the telephone was cut out he could not do this, but had to send a boy; that he suffered inconvenience and annoyance in ways too numerous to name, and too difficult to put in dollars and cents and that the telephone was a necessity to him. He used the telephone on his place in Louisiana, and he

used it as a matter of convenience to talk home. While he was without the telephone, he was taken sick, and suffered great annoyance and inconvenience in not having a telephone in his house; that, to his recollection, he spent \$25 to \$30 for messengers to send things home; that, when he had long-distance calls several times, he would have to go out at night to his neighbor's house to talk, and, when his family was sick, he was put to much inconvenience, and deprived of the protection which the telephone gave him at his house."

Upon these facts the Supreme Court of Mississippi held that a verdict for the plaintiff for \$150 was not so excessive as to authorize the court to set it aside.

I have no doubt that a telephone company that wrongfully denies a subscriber the use of a phone to which he is entitled can be made to respond in damages for the annoyance and inconvenience suffered by the subscriber by being deprived of use of the phone, but I do not think the evidence in this case shows that appellee was caused annoyance or inconvenience by being unable to talk with his wife on the occasion of which he testified. As before stated, he does not say in his testimony that he was inconvenienced or annoyed by not being able to talk with his wife. His only complaint is that he felt insulted and humiliated by the refusal of the telephone company to reconnect his phone when he informed it that the rent was paid.

I think the judgment of the court below should be reformed and affirmed, allowing appellee to recover only the rents paid by him for the phone for the three days it was disconnected.

# GOLDSTEIN v. UNION NAT. BANK OF DALLAS et al. (No. 6839.)

(Court of Civil Appeals of Texas. Dallas.  
Nov. 15, 1919.)

## 1. EVIDENCE ⇨443(1)—PAROL PROOF OF COLLATERAL AGREEMENT AS TO NOTE.

Where a national bank loaned money to the statutory limit to a company, and, that the company might have further funds, agreed with defendants, its vice president and a controlling stockholder of the company, to discount their notes, paying the proceeds to the company, and to apply in extinguishment of the notes deposits subsequently received from the company, the agreement was collateral to the promise in the note sued on, executed pursuant to it, and was not merged in the note, being provable by parol and valid as a defense, whether made orally or in writing.

## 2. BANKS AND BANKING ⇨266—AGREEMENT TO APPLY SPECIAL DEPOSITS ON ACCOMMODATION NOTE.

Where a national bank agreed with defendants, its vice president, and another controlling stockholder in a company, to which the

bank already had lent the legal limit, that deposits made by the company after the bank had discounted defendants' paper, executed for the accommodation of the company, would be applied only in payment of such paper, deposits made pursuant to the agreement were special deposits for a particular purpose, not creating the relation of debtor and creditor between the bank and the company.

## 3. BANKS AND BANKING ⇨261(2) — OVER-LOAN BY NATIONAL BANK NO DEFENSE TO SUIT ON NOTE.

That a national bank, through the device of discounting accommodation paper of controlling stockholders of a company, exceeded its legal loaning capacity to such company is no defense to the makers of the accommodation paper when sued on one of their notes, the matter of overloan being solely between national government and bank.

## 4. BANKS AND BANKING ⇨280 — PLEADING MATTER OF INDUCEMENT IN ACTION ON ACCOMMODATION NOTE.

In suit by a national bank on a note executed for accommodation purposes by controlling stockholders in a company to which the bank had already loaned the legal limit, allegations as to the fact of overloan to the company and the device adopted to enable the bank by discounting defendants' paper to exceed the legal limit *held* properly pleaded as matter of inducement leading up to the agreement of the bank to apply deposits by the company solely to any accommodation paper.

## 5. BANKS AND BANKING ⇨269—NATIONAL BANK'S AGREEMENT FOR APPLICATION ON ACCOMMODATION PAPER OF DEPOSITS OF ACCOMMODATED PARTY.

Where a company solicited its controlling stockholders to execute a demand note to be discounted for its benefit with a national bank, agreeing to make deposits with the bank to be applied solely to payment of the note, to which the bank agreed, and subsequently sufficient deposits were made to pay off the note, though the bank wrongfully applied them to another debt, the bank cannot recover against the accommodation makers on the note, which, in legal contemplation, has been paid.

## 6. BANKS AND BANKING ⇨269—PLEADING IN ANSWER PRIOR PERFORMANCE OF COLLATERAL AGREEMENT AS TO ACCOMMODATION NOTE.

In suit on an accommodation note executed by the controlling stockholders of a company and discounted by a national bank, which paid the proceeds to the company, defendants pleading an agreement whereby subsequent deposits of the company should be applied by the bank solely to extinguishment of the note, it was proper also to plead that a prior note, executed under the same agreement, had been discharged in such manner.

## 7. BANKS AND BANKING ⇨280 — DISCOUNTED NOTE; PLEA OF PAYMENT; EVIDENCE.

In an action by a national bank on paper executed for the accommodation of a company by two controlling stockholders, defendants, under

the allegations of defendants' answer, pleading payment and setting up the agreement of the bank to apply subsequent deposits by the company solely to payment of the note, defendants were entitled to introduce in evidence entries made in the bank book of the company by the receiving teller of the bank.

Appeal from District Court, Dallas County; Kenneth Force, Judge.

Suit by the Union National Bank of Dallas against A. Goldstein and I. B. Walker, wherein the Commonwealth National Bank of Dallas intervened as plaintiff. From judgment for plaintiff intervener against defendants, defendant Goldstein appeals. Reversed, and cause remanded in partial conformity to answers to questions certified to the Supreme Court (213 S. W. 584).

Victor H. Hexter and Etheridge & McCormick, all of Dallas, for appellant.

D. E. Upthegrove, of St. Louis, Mo., and T. L. Camp and Walter Nold, both of Dallas, for appellees.

TALBOT, J. This suit was instituted by the Union National Bank of Dallas against appellant and I. B. Walker on a promissory note for the sum of \$5,000, dated August 30, 1909, payable to said bank or order on demand, and providing for interest from maturity at the rate of 8 per cent. per annum, and for 10 per cent. attorney's fees. On May 20, 1911, the appellee Commonwealth National Bank of Dallas intervened in the suit, alleging that it had purchased the note sued on since the institution of the suit, and it was agreed by all parties in open court that these allegations were true, and that the said Commonwealth National Bank had acquired all the right, title, and interest of the Union National Bank in and to said note, and entitled to the relief prayed for herein by the said last-named bank. The Union National Bank and the intervener Commonwealth National Bank are both alleged to be national banks, incorporated under and by virtue of the national banking laws, with their respective places of business in the city of Dallas, Tex. It is alleged that the note sued upon was executed by the defendants, A. Goldstein and I. B. Walker, made payable to the Union National Bank or order on demand, and delivered to said bank; that at this time the said I. B. Walker was active vice president and general manager of said Union National Bank and was, in connection with the defendant A. Goldstein and one L. Wenar, a controlling stockholder and director of L. Wenar Millinery Company, a corporation engaged in business in the city of Dallas, and that said L. Wenar Millinery Company was a depositor and customer of the Union National Bank. The defendants Walker and Goldstein both answered, but Walker made no defense in the trial court. The case was

tried before the court without a jury, and the trial resulted in a judgment in favor of intervener against the appellant and I. B. Walker for the amount sued for, and the defendant Goldstein alone appealed.

After demurrers and a general denial, the defendant Goldstein pleaded in the fourth paragraph of his answer as follows:

"And for special answer herein to all the pleadings against him herein, this defendant comes by attorneys, and says that heretofore, to wit, on or about August 30, 1909, and for some time prior thereto, L. Wenar Millinery Company, a corporation engaged in business in the city of Dallas, was largely indebted to the Union National Bank of Dallas in a sum approximating \$20,000, which was the full loaning capacity of said Union National Bank of Dallas to any one person, firm, or association; that this indebtedness was carried in said bank to the extent of \$15,000 in the form of notes of the said L. Wenar Millinery Company, which when they came due from time to time were renewed and extended by said bank, and a part of the indebtedness was carried in said bank as an overdraft; that the loaning power of said Union National Bank was not sufficient to enable said Union National Bank of Dallas without violating the law to furnish to the said L. Wenar Millinery Company all of the money that the said L. Wenar Millinery Company sometimes required; that prior to the 30th day of August, 1909, the said L. Wenar Millinery Company and the said Union National Bank of Dallas, acting through its vice president and general manager, I. B. Walker, and this defendant entered into an agreement, by the terms of which this defendant agreed to execute to the Union National Bank and in conjunction with his codefendant, I. B. Walker, and for the accommodation of the said L. Wenar Millinery Company, to a limited extent and as occasion should arise, notes to be discounted by said Union National Bank, and the proceeds to be used by said L. Wenar Millinery Company in transacting its business in some way other than paying any part of its indebtedness to said Union National Bank, which was within the loaning power of said bank to lend the said millinery company, and in consideration of this defendant executing paper as aforesaid for the accommodation of said L. Wenar Millinery Company the said L. Wenar Millinery Company agreed with this defendant to make deposits in the Union National Bank of Dallas from time to time in the usual course of business, and that said deposits when so made should be applied at once to the extinguishing pro tanto of any note made by this defendant under the said agreement until the same was fully liquidated and extinguished, and that no part of said deposits should be applied to the liquidation or extinguishment of any debt or demand existing in favor of the Union National Bank of Dallas against said L. Wenar Millinery Company or be checked out for any other purposes of the said L. Wenar Millinery Company, and the said Union National Bank of Dallas agreed to discount said paper as it might be made by this defendant, and to receive the deposits of the said L. Wenar Millinery Company as they were made from time

to time, and to apply the same exclusively to the liquidation and discharge of the notes which should be made by this defendant under said agreement until the same at any time outstanding should be fully paid off and discharged. This defendant further represents that the note sued on by the plaintiff herein, and now claimed by the intervenor herein, was executed by himself and his codefendant, I. B. Walker, under the agreement and undertaking aforesaid, as another note theretofore made by them had been also executed under said agreement, which other note for, to wit, \$2,500 had been also paid off in accordance with said agreement prior to the execution of the note herein sued on; that this defendant received no consideration whatever for said note, the sole consideration therefor moving to the said L. Wenar Millinery Company, which received the total proceeds of the discount of said note by the plaintiff bank; that after the discount of the note herein sued on, which was on, to wit, the 7th day of November, 1911, the said L. Wenar Millinery Company deposited sums of money in the said Union National Bank of Dallas daily or frequently, and to the approximate extent of \$4,000 per month during the months of November, December, January, February, and March next ensuing after execution of said note, which said deposits amounted to largely more than the principal, interest, and attorney's fees of the note herein sued on, and which deposits, so far as necessary to fully pay off and discharge the note herein sued on, belonged in equity to this defendant as a fund set aside by the said L. Wenar Millinery Company under an agreement with this defendant and with said Union National Bank of Dallas for the discharge and retirement of the note herein sued on, and if this defendant was not in equity the owner of said fund, then the said fund constituted an equitable security to this defendant to indemnify him against liability because of the execution by him of the note herein sued on, and this defendant became entitled to have the said deposits applied as they were made immediately to the liquidation pro tanto and to the ultimate entire liquidation of the note herein sued on, and it became the duty of the said Union National Bank of Dallas to so apply said deposits, but the Union National Bank of Dallas failed so to apply them, and, on the contrary, in violation of its agreement, applied said deposits in part to the extinguishment of indebtedness due by the said L. Wenar Millinery Company to it and in part the said Union National Bank of Dallas permitted said L. Wenar Millinery Company to check out said deposits without leaving them a sufficient amount to pay off and discharge the obligation herein sued on; that the agreement hereinbefore mentioned was made by and with the full knowledge of said Union National Bank of Dallas, and only by virtue of said agreement and because of the making thereof did the said Union National Bank secure from this defendant the note sued on herein, which was afterwards taken over by the Commonwealth National Bank of Dallas after maturity, and it was charged with the full knowledge of this defendant's defense thereto."

By supplemental petition the intervenor, Commonwealth National Bank, demurred

generally and specially to the foregoing paragraph of appellant's answer, the third special exception thereto being as follows:

"This intervenor specially excepts to that part of defendant Goldstein's said answer, beginning with the words 'that prior to the 30th day of August, 1909,' and ending with the words, 'should be fully paid off and discharged,' as contained on pages 2 and 3 of said defendant's amended original answer, for the following reasons, to wit:

"(a) Because said agreement, if any such was entered into, was made long prior to the execution and delivery of the notes herein sued upon, and if said agreement did exist it was merged into the written contract herein sued upon, and cannot now be urged as a defense.

"(b) Because it is not alleged whether said agreement was oral or in writing, and if said agreement is in writing the terms and conditions are not fully and specifically set out so as to enable this intervenor to know the terms and conditions thereof; and, if oral, it is an attempt to vary and contradict the express terms of the written contract herein sued upon.

"(d) If it may be construed that such an agreement was made with I. B. Walker, and that he was an officer of the Union National Bank, then it appears that I. B. Walker was adversely interested to [the] bank of which he was an officer, and such contract, if made by the said I. B. Walker, would not be binding upon the bank unless notice was brought to the bank through some other and proper source and unless said contract was ratified by said bank.

"(e) Because it is not alleged that the Union National Bank had any power or authority to force the L. Wenar Millinery Company to apply such deposits as it might make to the payment of the note herein sued upon; it is alleged that such deposits as L. Wenar Millinery Company would make were placed in the Union National Bank for the payment of said note, and it is not shown by any proper pleading that the Union National Bank had any control whatever over the deposits of the L. Wenar Millinery Company after the execution of the note herein sued upon, and unless that be true the Union National Bank could not force the application of the L. Wenar Millinery Company's money to any specified account, and was wholly without authority so to do.

"(f) Because it would appear that such agreement, if any, in reference to the depositing of moneys of the L. Wenar Millinery Company in the said Union National Bank, and the application of same to the payment of the note herein sued upon, was made by and between the defendants A. Goldstein and I. B. Walker and the L. Wenar Millinery Company, and it was alleged that said deposits were so made in the usual course of business, and it would not, as a matter of law, extinguish any debt pro tanto, but would create the relation of debtor and creditor between said bank and L. Wenar Millinery Company."

This special demurrer was by the court sustained, and that part of the defendant's answer beginning with the words, "that prior to the 30th day of August, 1909," and ending with the words, "should be fully paid off

and discharged," was stricken out, and all of the balance of the paragraph of the answer quoted, was held to be obnoxious to other special exceptions urged by the appellee, and was stricken out, except the following portion thereof, namely:

"That the agreement hereinbefore mentioned was made by and with the full knowledge of said Union National Bank of Dallas, and only by virtue of said agreement and because of the making thereof did the said Union National Bank secure from this defendant the note sued on herein, which was afterwards taken over by the Commonwealth National Bank of Dallas after maturity, and it was charged with the full knowledge of this defendant's defenses thereto."

[1, 2] It is assigned that the court erred in sustaining this demurrer, because the portion of the answer stricken "constituted a valid and legal pleading of a collateral contract made by the L. Wenar Millinery Company for whose accommodation the note sued on was given, with the bank the payee of the note and with the makers of the note, who were accommodation makers by which the deposits of the said Wenar Millinery Company made after the discount of said note became and were a fund set aside for the liquidation of said note, which was sufficient in amount to discharge the note." In this contention we concur. The whole contract of the parties in relation to the note sued on, according to the allegations of the answer, was not reduced to writing, and the agreement for the making and the application of deposits by the Wenar Millinery Company was collateral to the promise in the note and not merged in it. In other words, as argued by appellant, the fact that the note was given pursuant to a provision of the agreement respecting it, which provided that deposits made in the bank by the millinery company should be applied to its payment, was a fact collateral to and consistent with the note, which, together with the note, constituted and presented only the entire transaction or agreement between the parties. Proof of the agreement alleged by virtue of which the note in question was executed would not contradict the note. We are unable to see that there is any room here for application of the rule forbidding parol evidence which contradicts or varies a writing. The contract alleged is not such an one as is required by the statute of frauds or by the common law to be in writing, and it was not absolutely essential that it be alleged whether its evidence was a writing or rested in parol. The agreement being collateral to the note sued on, and serving as an inducement to the signing of the note, it could be proved by parol evidence. The portion of the defendant's answer stricken out in response to the demurrer under consideration was, in effect, a

plea of payment, and the bank's alleged agreement to apply the deposits of the millinery company as they were made to the payment of the note which it held, coupled with deposits made of sufficient amount to extinguish the note if applied to it, "under the equitable rule that between the parties what should have been done will be considered as done when necessary to protect the promisee, accomplished payment of the note before the institution of this suit." The answer alleged:

"That after the discount of the note herein sued on, which was on, to wit, the 7th day of November, 1911, the said L. Wenar Millinery Company deposited sums of money in the said Union National Bank of Dallas daily or frequently, and to the approximate extent of \$4,000 per month during the months of November, December, January, February, and March next ensuing after the execution of said note, which said deposits amounted to largely more than the principal, interest, and attorney's fees of the note herein sued on."

Deposits made pursuant to and in accordance with the said agreement alleged would be special deposits for a particular purpose, and would not create the relation of debtor and creditor between the bank and the L. Wenar Millinery Company in the sense and as would ordinary deposits in the usual course of business. The agreement to which the bank was a party constituted authority to the bank to apply the deposits as they were made to the liquidation of the note sued on, and no new direction by said company to the bank was necessary for that purpose.

Appellant further contends that the trial court erred in sustaining appellee's demurrer and striking out appellant's answer upon the ground that if the agreement in question was made with I. B. Walker and he was an officer of the Union National Bank, then it appears that the said Walker was adversely interested to the bank, and such contract or agreement would not be binding upon the bank, unless notice was brought to the bank through some other and proper source, and unless said contract was ratified by the bank. In this connection the proposition, in substance, is asserted that as a general rule the knowledge of an agent is the knowledge of his principal, and that it is only where such agent seeks his own personal interest or advantage in the transaction without benefit to his principal, who acts for himself personally or through another agent, that his knowledge cannot be held to be the knowledge of his principal; and, further, that a bank officer's personal adverse interest does not prevent the operation of the rule that notice to the agent is notice to his principal, when such officer is the sole representative of the bank in the transaction. That portion of the an-



swer of the defendant Goldstein which was stricken out alleges, in substance, that the Union National Bank, acting through its vice president and general manager, I. B. Walker, only, discounted the note sued on in accordance with the stated previous agreement between the millinery company, Walker, and Goldstein on the one hand, and, on the other hand, the bank, acting by Walker alone, and heretofore the question whether or not the allegations of appellant's answer disclose a transaction in which the knowledge of said Walker, as such officer, of the nature of appellant's undertaking in signing the note sued on and of the agreement to apply the deposits made by the Wenar Millinery Company to the payment of said note, as alleged in said answer, is imputable to said bank was certified to the Supreme Court for decision. In a lengthy opinion written by Mr. Justice Hawkins, the majority of the Supreme Court answered the question in the affirmative, Chief Justice Phillips dissenting. After a full discussion of the question and exhaustive citation of authorities Mr. Justice Hawkins says:

"In no practical sense, therefore, was Walker's action in agreeing on behalf of his bank to the application of such future special deposits in payment of said \$5,000 note adverse to any then existing substantial interest of said bank. It follows that, under the general rules of agency, Walker's knowledge of the terms of said general agreement was imputable to and binding upon his principal, said payee bank."

In concurring in the answer that the allegations of appellant's answer disclosed a transaction in which the knowledge of Walker, as sole representative of the bank, in consummating the transaction, is imputable to the bank, Mr. Justice Greenwood said:

"The bank could not act alone through its vice president and general manager in discounting the note, in consummation of the previous agreement, and escape the consequences of the knowledge of its vice president and general manager"—citing *Morris v. Georgia Loan Savings & Banking Co.*, 109 Ga. 12, 34 S. E. 378, 46 L. R. A. 511; *Bank v. Burns*, 88 Ohio, 434, 103 N. E. 93, 49 L. R. A. (N. S.) 768, and *Brobston v. Penniman*, 97 Ga. 528, 25 S. E. 350, as stating sound rules which should govern the determination of the question certified.

As we are bound by the holding of the Supreme Court, and should give effect to it on this appeal, it would serve no useful purpose for us to discuss and give expression to our views upon the question, and we shall therefore simply refer to the opinion of the Supreme Court found in 213 S. W. 584, for a full discussion of the question and reasons given for the decision made by that court.

[3, 4] The second assignment of error complains of the court's action in sustaining a special exception urged by the appellee to that portion of the answer of the defendant Goldstein, alleging that on August 30, 1909, and for some time prior thereto, L. Wenar Millinery Company, a corporation engaged in business in the city of Dallas, was indebted to the Union National Bank of Dallas in a sum approximating \$20,000, which was the full loaning capacity of said bank to any one person, firm, or corporation; that this indebtedness was carried in said bank to the extent of \$15,000 in the form of notes of the said millinery company, and a part of the indebtedness was carried in said bank as an overdraft; that the loaning power of said bank was not sufficient to enable it, without violating the law, to furnish to said millinery company all the money said company sometimes required. We think the assignment is well taken. This portion of the answer, standing alone, would not constitute a defense. "The entire matter of an overloan was one solely between the government and the bank, not affecting the validity of the loan or the ordinary contractual liabilities or obligations of the parties." But, as urged by the appellant, the allegations in question set up proper matter of inducement leading up to the contract and agreement alleged in the answer, out of which the note sued on originated, and by which provision was made for its payment by the Wenar Millinery Company, the beneficiary thereof.

[5] The court also erred in sustaining appellee's special exception No. 5 to that part of the appellant's answer charging that after the discount of the note sued on, which was on the 7th day of November, 1911, the Wenar Millinery Company deposited sums of money in the Union National Bank daily or frequently, and to the approximate extent of \$4,000 per month during the months of November, December, January, February, and March next ensuing after the execution of said note, which deposits amounted to more than the principal, interest and attorney's fees of said note. These allegations constituted a plea of payment of the note sued on, and, if true, presented a complete defense. The entire paragraph of the appellant's answer of which that portion here referred to constitutes a part is sufficient to show that the Wenar Millinery Company, soliciting accommodation makers of a demand note to be discounted for its benefit, agreed to make deposits with the payee and holder of the note, and directed that they be applied to the payment of the note. The payee, Union National Bank, agreed to receive and apply such deposits as were made to the note, but although, according to the allegations, deposits were made in sufficient amount to pay off and discharge the note, yet the payee

wrongfully applied them to the payment of another debt.

[6] Again, the court erred, we think, in sustaining appellee's exception No. 4 to that part of the answer of the defendant Goldstein wherein it is alleged that the note sued on and claimed by the intervener herein was executed by himself and his codefendant, I. B. Walker, under the agreement alleged, as another note theretofore made by them had been also executed under said agreement, which note, to wit, \$2,500, had been also paid off in accordance with said agreement prior to the execution of the note in suit; that appellant received no consideration for the note, the sole consideration therefor moving to the said millinery company. These allegations were of a character to show a recognition by the parties of the existence of the contract out of which the note sued on arose, and out of which the fund for the payment of the note, consisting of deposits made in the bank, accrued, and also the parties' construction of the contract. As argued by appellant, in view of the allegation that the note sued on was an accommodation note, made under an agreement by the party to be accommodated and the makers of the note that the deposits made by the accommodated party should be applied to the payment of the note, and the further allegation that sufficient deposits to pay it had been made and had not been applied, it was proper to plead that a note, executed prior to the execution of the note sued on, under the same agreement, had been discharged by the application to it of deposits.

[7] Appellant's fifth assignment of error complains of the court's refusal to permit the defendant Goldstein to put in evidence certain testimony under his plea of failure of consideration as set forth in the fifth paragraph of the answer. In disposing of this assignment we think it sufficient to say, without detailing the testimony offered, that, in our opinion, it was insufficient to prove failure of consideration. Under the allegations of the appellant's answer, which the trial court held to be obnoxious to the special exceptions of the appellee, appellant was, we think, entitled to introduce in evidence the entries made in the bank book of the L. Wenar Millinery Company by the receiving teller of the Union National Bank, showing the amount of deposits made by said company in said bank from September 4, 1909, to April 13, 1910. This evidence was relevant on the issue raised by the appellant's plea of payment.

The other assignments of error have been disposed of by what has already been said, or point out no reversible error; but for the reasons indicated the judgment of the lower court is reversed, and the cause remanded.

**DELTA LAND & TIMBER CO. v. SPILLER**  
et al. (No. 494.)

(Court of Civil Appeals of Texas. Beaumont.  
Nov. 18, 1919. Rehearing Denied  
Dec. 8, 1919.)

**1. EVIDENCE  $\S$ 460(2)—PAROL EVIDENCE TO IDENTIFY LAND CONVEYED BY AMBIGUOUS DEED.**

Where plaintiff in trespass to try title to a 100-acre tract of land claimed under a deed granting 87½ acres in a certain survey, "being the remaining part and interest in 400 acres deeded to me," evidence of a prior parol sale of the tract in controversy to a third party after a division of the entire tract into parcels, one containing 87½ acres and another 100 acres, was admissible to identify the land conveyed under plaintiff's deed.

**2. EVIDENCE  $\S$ 271(10) — DECLARATIONS BY GRANTOR SHOWING INTENT.**

Where plaintiff in trespass to try title claimed under a deed with an ambiguous description, testimony that defendant continued to claim the land after the execution of the deed held not self-serving, but admissible to show defendant's intention.

**3. EVIDENCE  $\S$ 271(10), 460(2) — SELF-SERVING DECLARATIONS TO EXPLAIN AMBIGUOUS DESCRIPTION.**

Where plaintiff in trespass to try title claimed under a deed with an ambiguous description, testimony that defendant subsequent to the conveyance claimed the timber on the land in controversy and sold it to another held not inadmissible as self-serving declarations, where a person has parted with title, nor as contradicting the written instrument.

**4. TRESPASS TO TRY TITLE  $\S$ 39(1)—ADMISSIBILITY OF EVIDENCE OF TERMS OF CONTRACT.**

In trespass to try title, evidence as to the terms upon which plaintiff purchased the property from its immediate predecessor in title held immaterial and properly excluded.

**5. DEEDS  $\S$ 118—SUFFICIENCY OF EVIDENCE TO IDENTIFY LAND SOLD.**

In trespass to try title, where plaintiff claimed under a deed conveying 87½ acres, evidence held to sustain findings that the deed did not convey a 100-acre tract previously sold to another.

Appeal from District Court, Montgomery County; J. L. Manry, Judge.

Trespass to try title by the Delta Land & Timber Company, substituted for the Delta Lumber Company, against W. F. Spiller and others. Judgment for defendants, and plaintiff appeals. Affirmed.

Nunn & Nunn, of Crockett, for appellant.

Dean & Humphrey, of Huntsville, and W. N. Foster and A. L. Kayser, both of Conroe, for appellees.

BROOKE, J. The Delta Lumber Company filed suit in the district court of Montgom-

ery county, Tex., on January 2, 1913, against W. F. Spiller and Thomas S. Foster, in form of trespass to try title, and for damages, for the recovery of the title and possession of 100.7 acres of the W. S. Taylor one-third league survey of land in Montgomery county, Tex., describing same by field notes. On July 12, 1915, the plaintiff, under leave of the court, filed its first amended original petition in lieu of its original petition filed in said court on January 2, 1913, and, in addition to the allegations in the original petition alleged that the Delta Land & Timber Company had succeeded to all the rights of the Delta Lumber Company, and asking permission to prosecute the suit in the name of the Delta Land & Timber Company, which was granted by the court; that since the institution of the suit the defendant W. F. Spiller had departed this life, testate, and his will has been duly probated in Montgomery county, Tex., and W. F. Griffin, Charles Spiller, W. F. Spiller, and E. A. Smith have been appointed and qualified as executors of his estate under said will, and Elizabeth Spiller, Bessie Spiller, Charles Spiller, Mary Garrett and husband, E. A. Garrett, Ollie Smith and husband, E. A. Smith, George Spiller, Browder Spiller, and the minors, Mable Spiller, Rice Spiller, Emma Tyree and husband, Emmett Tyree, and W. F. Spiller, are the representatives and sole beneficiaries under said will; that since the institution of the suit the defendant Thomas S. Foster departed this life, testate, and his will has been duly probated in the county of Jackson, state of Missouri, and a certified copy of said will and the probate thereof has been recorded among the deed records of Montgomery county, and by the terms of said will his widow, Florence Adare Foster, Ben B. Foster, Letitia Campbell and husband, Robert E. Campbell, are the representatives and sole beneficiaries under said will, and are made parties defendant.

The appellees Florence Adare Foster and Letitia Foster Campbell, joined by her husband, Robert E. Campbell, on January 13, 1919, under leave of the court, filed their first amended original answer, in lieu of the original answer theretofore filed by the defendant T. S. Foster, deceased, consisting of general denial, plea of not guilty, and special pleas setting up the purchase by T. S. Foster from W. F. Spiller on June 17, 1905, of the pine saw timber situated on the tract of land in controversy for the sum of \$500 cash paid, and the said Spiller, in consideration thereof, made, executed, and delivered his warranty deed in writing, conveying said pine saw timber, and asking that in the event the plaintiff did recover the land, or any part thereof, the defendants Florence Adare Foster and Letitia Foster Campbell, joined by her husband, Robert E. Campbell, have and recover of

the other defendants, the heirs and legal representatives of W. F. Spiller, deceased, on said warranty.

All of the other appellees answered by general demurrer and plea of not guilty.

The case was tried at the January term of the district court of Montgomery county, and on January 20, 1919, before the court without a jury, resulting in a judgment by the court against the appellant, in favor of the appellees. Appellant, Delta Land & Timber Company, in open court excepted to the action of the court in rendering judgment against the appellant in favor of the appellees, and gave notice of appeal to this court, and thereafter in all things perfected its appeal, and now brings the case before this court for review.

Appellant's first assignment of error complains that the court erred in permitting the witness G. W. Cheshire, over the objections of the plaintiff, to testify as to a parol transaction between W. F. Spiller during his lifetime and witness. Under its first assignment of error, appellant makes this proposition:

"All contracts for the sale of real estate or the lease thereof for a longer term than one year must be in writing."

The counter proposition to this is that the testimony of the witness Cheshire tended to show a valid parol sale of the 100 acres of land in controversy by W. F. Spiller to said witness long prior to the execution of the deed by Spiller to the Tonty Lumber Company, under which the appellant claims, and the testimony was therefore admissible.

The testimony of the witness Cheshire, as set out in appellant's bill of exceptions thereto, shows, among other things, that in 1896 W. F. Spiller caused the 400 acres of land claimed by him in the W. S. Taylor survey, Montgomery county, to be surveyed off and subdivided into four tracts, that on the west end thereof, being the land in controversy, and containing 100 acres approximately, and lying next to and adjoining the home place of the witness Cheshire; that the said Spiller and the witness Cheshire made an agreement of sale of the said land at the price of \$4 per acre; and that, pursuant to such agreement, the said witness went upon said land and at an expense of \$20 per acre cleared 4 or 5 acres of the land, and at considerable other expense inclosed the same with a substantial fence of rails and wire; and that he set out upon said land 350 peach trees; and that said witness continued to be and was in actual possession of said land, cultivating and using the same under his contract with Spiller at the time of the sale of the 87½ acres by the said W. F. Spiller to the Tonty Lumber Company, under whom appellant claims.

The deed from W. F. Spiller to the Tonty

Lumber Company under which the appellant claims the land in controversy, was executed December 20, 1899.

Appellees make the further proposition under this assignment that the deed from W. F. Spiller to Tonty Lumber Company under which appellant claims title to the land in controversy, contains latent ambiguities, and the land therein undertaken to be conveyed cannot be identified except by the aid of extraneous evidence; and that, where a deed contains latent ambiguities, parol evidence is admissible to show the intention of the parties; and that, where a deed contains latent ambiguities, parol evidence is admissible to identify the land conveyed therein.

It will be well, perhaps, to let this opinion show the deed from Spiller to the Tonty Lumber Company, as follows:

"The State of Texas, County of Montgomery.

"Know all men by these presents: That I, W. F. Spiller, of the county of Montgomery, state of Texas, for and in consideration of the sum of one hundred and seventy-five (\$175.00) dollars, to me in hand paid by the Tonty Lumber Company, the receipt of which is hereby acknowledged, have granted, sold and conveyed, and by these presents do grant, sell and convey unto the said Tonty Lumber Company, of the county of Cook, state of Illinois, all that certain piece, parcel or tract of land lying and being situated in the county of Montgomery and state of Texas, containing eighty-seven (87½) and one-half acres, and being a part of and out of the Wm. S. Taylor survey, abstract No. 545, patented to Jas. McCown, assignee of Wm. S. Taylor, and being the remaining part and interest in 400 acres deeded to me by the heirs of R. J. Bass and Mrs. H. L. Butler.

"To have and to hold the above-described premises, together with all and singular the rights and appurtenances thereto in any wise belonging, unto the said Tonty Lumber Company, their heirs and assigns forever; and I do hereby bind myself, my heirs, executors and administrators to warrant and forever defend all and singular the said premises unto the said Tonty Lumber Company, their heirs and assigns, against every person whomsoever lawfully claiming or to claim the same or any part thereof.

"Witness my hand at Conroe, this 20 day of Dec., A. D. 1899. W. F. Spiller."

The plaintiff undertook to identify the land conveyed in said deed by extraneous evidence, to wit, by the deed executed by W. F. Spiller to W. F. Uzzell, bearing date January 12, 1897, and which undertakes to convey by metes and bounds 152.5 acres out of the W. S. Taylor survey, Montgomery county; and by deed executed by W. F. Spiller to George M. Pool bearing date December 9, 1897, and which undertakes to convey a tract of land, quantity not given, but approximately 100 acres, out of said W. S. Taylor survey, and also by the testimony of J. M. Hall, a surveyor now in the employ of appellant. The said Hall, among other things, testified that

in 1896 he made a survey of the 400 acres of land in the Taylor survey claimed by W. F. Spiller and subdivided said land into four tracts, and that in 1911 after the acquisition of said land by the Delta Lumber Company, under whom appellant claims, he made a resurvey and plat thereof. He further testified:

"In the original survey that I made for Mr. Spiller in 1896, I had subdivided this tract of land, and I had located on the ground the several tracts, Nos. 1, 2, 3, 4, and 5, as I have just described them; that is, I ran these divisional lines through them. Yes, sir; I had run the divisional line on the east side of the tract No. 1, and had marked it on the ground. I had also run out the lines on the east side on my plat shown as tract No. 2 and marked out that land, and also the east line of No. 3 and No. 4. Those lines of the different tracts had all been marked out in 1896 when I made that survey for Mr. Spiller. As to whether I made a report of this survey that I made to Mr. Spiller, that is, the 1896 survey, well, I gave him the field notes to those separate blocks as well as I recall now. I think I gave him the field notes of each tract. I am not sure whether I furnished him a plat, but I think I did, but I am not sure. I have not at this time the field notes and copies of field notes that I furnished Mr. Spiller showing exactly what I found on the ground at that time. This is the record I made at the time of what I done on the ground, and that is all I have got. I gave Mr. Spiller the field notes which I prepared by having these corners, these distances and divisional lines. At the time I actually measured those several divisional lines and the date I furnished Mr. Spiller in the way of field notes was based upon the actual measurements as I made them there, and this particular map here constitutes the data showing the actual measurements made in 1911, and, if there are some slight differences in the acreage called for in the 1911 survey and the 1896 survey, it would be due to a slight difference in the measurements and a slight difference in the chaining. In the original survey I made I ran out those divisional lines for the first time and measured them, that is, the east line, and in the 1911 survey I did not run all of the lines. I measured this west one, the east one, the north one, and I measured the south one of this 100 acres in controversy here, and so the subdivisions as they show on the plat now are the same subdivisions that I ran off in 1896."

Said witness further testified that, according to his resurvey of tract No. 4, which is on the east side of the 400 acres claimed by Spiller, there showed to be 88.8 acres in said tract, but that in the first survey, that is to say, the survey made by him for Spiller in 1896, it measured 87½ acres, and that he so reported to Mr. Spiller showing this tract No. 4 to contain 87½ acres. Tract No. 5, the Ratto tract, is not here involved.

This witness further testified that the tract of land in controversy containing 100 acres was tract No. 1 in the subdivision made by him for Spiller, and that tracts 2 and 3

lay between the land in controversy and the 87½ acres tract known as tract No. 4, according to his survey and report made to Spiller in 1896. He also further testified that G. W. Cheshire took possession of the tract in controversy, being tract No. 1 of the survey made by him for Spiller, in 1896 or 1897; that Cheshire had a peach orchard on it and his home near by on a tract adjoining the said 100 acres.

[1] All of this testimony seems to have been in the record when appellees placed the witness G. W. Cheshire on the stand, and the testimony was adduced as undertaken to be set forth in appellant's bill of exceptions No. 1. We find no merit in this assignment, and the same is overruled. *Clark v. Regan*, 45 S. W. 169; *Regan v. Hatch*, 91 Tex. 616, 45 S. W. 386; *Ayers v. Snowball*, 181 S. W. 828; *Cook v. Oliver*, 83 Tex. 559, 19 S. W. 161; *Gorham v. Settegast*, 44 Tex. Civ. App. 254, 98 S. W. 665; *Pierson v. Sanger Bros.*, 93 Tex. 160, 53 S. W. 1012; *Clark v. Gregory*, 87 Tex. 189, 27 S. W. 56.

It seems that the cases of *Ayers v. Snowball*, *Clark v. Regan*, and *Regan v. Hatch*, supra, are conclusive in support of the action of the court in admitting the testimony undertaken to be objected to in appellant's bill of exceptions under consideration, and the said authorities are also decisive of perhaps all issues involved in this appeal.

Our attention is directly called to the language of the description in the deed executed by W. F. Spiller to Tonty Lumber Company under which the appellant claims, which is as follows:

"All that certain piece, parcel or tract of land lying and being situated in the county of Montgomery and state of Texas, containing 87½ acres, and being a part of and out of the Wm. S. Taylor survey, abstract 545, patented to James McCown, assignee of Wm. S. Taylor, and being the remaining part and interest in 400 acres deeded to me W. F. Spiller by the heirs of R. J. Bass and Mrs. H. L. Butler."

The testimony of the witness Hall, appellant's employé, shows that there was at the time the deed was executed by Spiller to Tonty Lumber Company a tract of 87½ acres claimed by him under the deeds referred to in the description contained in the conveyance executed by him to Tonty Lumber Company, that the 400 acres claimed by Spiller had been subdivided into four tracts, and that the 87½-acre tract was tract No. 4, and on the east side of the 400 acres; and the record shows that subsequent to the subdivision of the 400 acres made by Hall for Spiller in 1896, and prior to the execution of the deed by Spiller to Tonty Lumber Company in December, 1899, Spiller had sold and conveyed off two tracts, one to Uzzell in December, 1896, and one to Pool in November, 1897, and the evidence of Hall also showed that he cut off for Spiller, when he surveyed

the land for him in 1896, tract No. 1, containing 100 acres, which is the land in controversy, and that this lay adjoining the land of Cheshire and separated by tracts 2 and 3 from the 87½-acre tract, and that Cheshire took possession of tract No. 1 in 1896 or 1897.

Without further consideration, as above said, this assignment is overruled.

The second assignment of error complains that the court erred in permitting the witness, over the objections of the plaintiff, to testify on the stand as a witness to the transaction between W. F. Spiller and the Tonty Lumber Company as to what occurred at the time of the purchase of the land by the Tonty Lumber Company from W. F. Spiller, for the reason that such testimony varied and contradicted the term of the deed conveying said land, all of which more fully appears from plaintiff's bill of exceptions No. 2.

The first proposition under this second assignment of error is that parol evidence is not admissible to contradict or vary the terms of a valid written instrument.

Appellees present the following counter proposition to this assignment:

"The witness W. F. Griffin was the agent both for W. F. Spiller and Tonty Lumber Company in consummating the sale by Spiller to Tonty Lumber Company of the 87½ acres described and conveyed in the deed under which appellant claims, and was familiar with the land and knew what Spiller was selling and what the Tonty Lumber Company was buying and the price per acre the lumber company was paying; therefore, the testimony as set forth in defendant's bill of exception was properly admitted"

—and also that, where there is ambiguity in a deed, parol evidence is admissible to show the intention of the parties.

[2] We have closely read the statement of facts and find no error as pointed out, and the second assignment is therefore overruled. *Roberts v. Short*, 1 Tex. 373; *Stamper v. Johnson*, 3 Tex. 1; *Armstrong v. Wilson*, 109 S. W. 955; *Kingsbury v. Carothers*, 27 S. W. 15, affirmed 93 Tex. 712, 29 S. W. 21; *Lynch v. Ortleib*, 70 Tex. 727, 8 S. W. 515; *Montgomery v. Carlton*, 56 Tex. 431.

It seems that the testimony of the witness W. F. Griffin that W. F. Spiller continued to claim the land in controversy herein and the timber thereon after the execution of the deed by Spiller to Tonty Lumber Company, under which the appellant claims, was properly admissible as reflecting light upon the intention of Spiller in the execution of the deed to Tonty Lumber Company, which contains at best from appellant's standpoint an ambiguous description, and said testimony was therefore not self-serving, but was admissible as tending to explain the description in the deed from Spiller to Tonty Lumber Company.

[3] The third assignment complains that the court erred in permitting the witness W. F. Griffin, over the objection of plaintiff, to testify on the stand that, subsequent to the making of the deed by W. F. Spiller to the Tonty Lumber Company, W. F. Spiller claimed the timber on the land and sold it to the Foster Lumber Company afterward, for the reason that the same was a self-serving declaration and was after the Tonty Lumber Company had acquired the land, all of which more fully appears from plaintiff's bill of exception No. 3.

The proposition is made under this assignment that parol declarations are not admissible to contradict or vary the terms of a valid written instrument, and that self-serving declarations are not admissible if person has parted with title to his land.

Without comment, this assignment is overruled.

Appellant's fourth assignment complains that the court erred in sustaining defendant's objection to the question propounded by plaintiff to the witness W. H. McGregor on cross-examination, which was as follows:

"The Delta Lumber Company took over the holding of the Tonty Lumber Company, and then the Delta Land & Timber Company succeeded to all of the rights of the Delta Lumber Company. Now, can you tell us on what basis the Delta people took over the holdings of the Tonty Lumber Company and at what price?"

The court would not permit the witness to answer such question, which would have been to the effect that the Delta Lumber Company purchased the holdings of the Tonty Lumber Company on the basis of \$10 per acre, all of which more fully appears from plaintiff's bill of exception No. 4.

The proposition under this assignment is that all material and relevant evidence should be admitted and considered by the court upon the trial of the case.

On the contrary, it is contended that it was entirely immaterial upon what price basis the Delta Land & Timber Company took over the holdings of the Tonty Lumber Company, and therefore the court did not err in refusing to permit the witness W. H. McGregor to testify regarding the price basis upon which the Tonty Lumber Company's holdings were taken over by Delta Land & Timber Company as complained of in appellant's bill of exception No. 4.

[4] We have been unable to discover any error in this action of the court, and this assignment is overruled.

Appellant's fifth assignment of error complains that the court erred in its fourth finding of fact, as follows:

"I find that said W. F. Spiller sold and conveyed to the Tonty Lumber Company by deed bearing date December 20, 1899, 87½ acres

out of the said W. S. Taylor survey, said deed conveying further description as follows: And being the remaining part and interest in 400 acres deeded to me (W. F. Spiller) by the heirs of R. J. Bass and Mrs. H. L. Butler," etc.

—because the court in reaching such finding considered a part only of the description contained in the deed, when the entire description should have been considered.

The proposition under this assignment is that, if there be no ambiguity in the description contained in the deed, then the trial court must not resort to extrinsic evidence, but construe the deed and give it effect from the language therein contained.

On the contrary, it is contended that there was ambiguity in the deed executed by W. F. Spiller to Tonty Lumber Company, and therefore extraneous evidence had to be resorted to by plaintiff in its effort to identify the land described in said deed, and, as a matter of course, the appellees had the same right to resort to extraneous evidence to show the land that was actually conveyed by said deed, and it was the duty of the court to consider such extraneous evidence in determining just what land the deed conveyed.

We fail to find any error in this action of the court, and this assignment is overruled.

Complaint is made, by the sixth assignment of error, that the court erred in its fifth finding of fact, as follows:

"I find that on December 20, 1899, at the time of the execution and delivery of the deed from W. F. Spiller to the Tonty Lumber Company, conveying the 87½ acres of land, G. W. Cheshire was in actual possession of the said 100-acre tract on the west side of the 400 acres and designated as tract No. 1, claiming and using the same under parol contract with said W. F. Spiller, whereby the said G. W. Cheshire was to acquire title to said 100 acres, and that the said Cheshire had cleared up and fenced a portion of said land and put it in a state of cultivation and planted a peach orchard thereon and was claiming, using, and enjoying said land under parol contract with the said W. F. Spiller"

—because such finding is based on irrelevant and incompetent testimony, and should not have been considered by the court, all of which more fully appears from plaintiff's bill of exception No. 1.

The proposition under this assignment is that, where parties have embodied the terms of their agreement in writing, neither can, in an action between themselves, except in certain cases, give oral testimony that they did not mean that which the instrument, when properly read, expresses or legally implies, or that they meant something inconsistent therewith.

The counter proposition under this assignment asserts that the trial court's fifth finding of fact, assailed in this assignment of

error, was not based on irrelevant and incompetent testimony; but, inasmuch as the deed from Spiller to Tonty Lumber Company in its descriptive part was ambiguous, the trial court properly received evidence to identify the land therein conveyed, and the evidence so received not only sustained but compelled the fifth finding of fact.

Finding no merit in this assignment, it is overruled.

The seventh assignment of error complains that the court erred in its sixth finding of fact, as follows:

"I find that the Tonty Lumber Company paid the said W. F. Spiller the sum of \$175 for the 87½ acres called for in the deed of December 20, 1899, and that it was the intention of the parties that tract No. 4, containing 87½ acres according to the survey and plat of the witness Hall, above mentioned, and no more, should be conveyed by said deed of December 20, 1899. I further find that said sale was made for the consideration of \$2 per acre for said 87½ acres of land"

—because such findings are based on incompetent and irrelevant evidence which should not have been considered by the court.

Without going into the matter further, enough has been said already to indicate that there was no error in the court's action in this matter, and this assignment is overruled.

The eighth assignment of error is as follows:

"The court erred in its seventh finding of fact, as follows: 'I further find that said W. F. Spiller, in consideration of the sum of \$500 paid, conveyed to the Foster Lumber Company by an instrument bearing date June 17, 1905, all of the pine saw timber standing and growing on the said 100 acres of land involved in this suit, and conveyed to the grantee in said instrument sufficient right of way for cutting and removing said timber, and granted to said grantee and its assigns 15 years' time from and after the execution and delivery of said deed in which to cut and remove said timber, and such further time, not to exceed three years, that the grantee might desire upon the payment of ten cents per year, per acre; and I find that, since the date of the said timber conveyance, said 100 acres of land has been continuously claimed by said Spiller and his heirs and legal representatives subject to said Cheshire's right under said parol contract, and that the pine saw timber thereon has been continuously claimed by the Foster Lumber Company and its successors and assigns, said title of said Foster Lumber Company, in and to said pine tim-

ber, being owned and held by the defendants Mrs. Florence Adare Foster and Mrs. Letitia Foster Campbell at the time of the trial of this cause.' Because such finding is based on incompetent and irrelevant evidence, and such transaction was subsequent to the purchase by the Tonty Lumber Company of the land in controversy from W. F. Spiller."

Without going into the matter further, it is sufficient to say that in our opinion no error has been committed in this matter, and the said assignment is overruled.

In the ninth assignment of error complaint is made that the court erred in its eighth finding of fact, as follows:

"I find further that the Tonty Lumber Company and its assigns, Delta Lumber Company and the Delta Land & Timber Company, have claimed tract No. 4, containing 87½ acres according to the plat and survey of the witness Hall, made in 1896, continuously since the deed from W. F. Spiller of December 20, 1899"

—because such finding is unsupported and not warranted by the evidence.

We find the evidence amply sufficient to warrant this finding of the court, and the assignment is overruled.

[5] The tenth assignment complains of the following conclusion of law made by the trial court:

"I conclude as a matter of law from the foregoing findings of fact that no part of the land in controversy in this suit passes by the deed of conveyance from W. F. Spiller to the Tonty Lumber Company, and judgment will be rendered accordingly in favor of defendants"

—because by a proper construction the deed of W. F. Spiller to the Tonty Lumber Company conveys the land in controversy and precludes as a matter of law the conclusion reached by the court.

Without undertaking to go over the entire matter, it is sufficient to say that in our judgment there was no error in this action of the court, and this assignment is overruled.

The eleventh assignment of error complains that the court erred in not rendering judgment for plaintiff for the land in controversy and in rendering judgment for defendants.

We have given this matter our careful attention, and we believe that the judgment of the trial court is correct, as evidenced by this record, and therefore the judgment is in all things affirmed.

**J. L. COLLINS PIANO CO. v. ADAMS & ALLCORN.** (No. 6083.)

(Court of Civil Appeals of Texas. Austin.  
Oct. 29, 1919. Rehearing Denied  
Nov. 26, 1919.)

**APPEAL AND ERROR**  $\Leftrightarrow$  1040(4)—**ERROR IN RULING ON PLEADING CURED BY ADMISSION OF EVIDENCE.**

Error, if any, in sustaining exception to a paragraph of the supplemental petition is not prejudicial to plaintiff, where all the evidence on that issue was admitted.

Appeal from McLennan County Court; James P. Alexander, Judge.

Action by the J. L. Collins Piano Company against Adams & Allcorn. Judgment for defendants, and plaintiff appeals. Affirmed.

S. J. T. Smith, of Waco, for appellant.

JENKINS, J. Appellant sued appellees for the price of four pianos, which were contracted to be sold to appellees, but which were burned in the storage house of McCrary Storage Company.

Appellant's first assignment of error complains of the action of the court in sustaining exception to paragraph No. 2 of appellant's supplemental petition, wherein it was alleged that appellees were estopped to deny the delivery of the pianos. This error, if any, was harmless, inasmuch as the court admitted all the evidence upon this subject.

All of the other assignments of error relate to matters which cannot be reviewed by this court except upon bills of exceptions. No such bills of exceptions appear in the record.

Finding no error of record, the judgment of the trial court is affirmed.

Affirmed.

**BRADY et al. v. CORBS & BONNER.** (No. 6173.)

(Court of Civil Appeals of Texas. San Antonio.  
Dec. 6, 1919.)

**COSTS**  $\Leftrightarrow$  264—**DENIAL OF MOTION TO RETAX COSTS IN APPELLATE COURT.**

Where a cause is reversed and remanded, a motion by appellees filed at a subsequent term of Court of Civil Appeals to retax the costs so as to include an item representing stenographic fees incurred in preparing a statement of facts will be overruled, where it appears from the motion that such item of costs was not taxed in the district court and was not included in the bill of costs in the transcript, mandate having issued and been filed below prior to the making of the motion, although the error in omitting the item was not discovered until after the adjournment of the appellate court.

On motion to retax costs. Motion overruled. For opinion in the case, see 211 S. W. 802.

SPENCER, Special Judge. The appellants, Thos. F. Brady, A. Dentsch, and L. C. Edwards, prevailed in their appeal in this cause to the extent that the cause was reversed and remanded at the former term of this court. 211 S. W. 802. On October 18, 1919, appellees filed a motion in this court to retax the costs so as to include an item of \$128.70, representing stenographic fees incurred in preparing a statement of facts, alleging that the error in omitting the item was not discovered until after the adjournment of this court. The motion also alleges that the mandate in the case was issued on the 14th day of May, 1919, and filed in the district clerk's office of Bexar county, Tex., on the 26th day of May, 1919. It appears from the motion that this item of costs was not taxed in the district court and was not included in the bill of costs in the transcript filed in this court.

This motion comes too late. It was appellees' duty to see that the bill of costs was correct in the first instance, and this court will not now consider re-taxing the costs, but will follow the rule of practice prevailing in such cases and overrule the motion. Zarate et al. v. Villareal et al., 159 S. W. 873; H. & T. C. R. R. Co. v. Montgomery, 189 S. W. 350.

Motion overruled.

**GREGORY v. SOUTH TEXAS LUMBER CO. et al.** (No. 6266.)

(Court of Civil Appeals of Texas. San Antonio.  
Nov. 5, 1919. Rehearing Denied  
Dec. 3, 1919.)

**1. EVIDENCE**  $\Leftrightarrow$  448 — **PAROL EVIDENCE TO SHOW DUE DATE IN NOTE.**

Where the language of a note is plain, parol evidence is not admissible to change the due date specified therein.

**2. JUDGMENT**  $\Leftrightarrow$  145(4)—**DENIAL OF NEW TRIAL AFTER JUDGMENT BY DEFAULT.**

Where judgment was entered against a defendant failing to appear at trial, his motion for new trial will be denied, where the meritorious defense urged would require the use of incompetent parol evidence.

**3. MORTGAGES**  $\Leftrightarrow$  497(1) — **CONSTRUCTION OF JUDGMENT AS AWARDED FORECLOSURE TO JOINT PLAINTIFFS.**

In a suit on a note secured by deed of trust where the prayer is for judgment for plaintiff for its debt and for judgment of foreclosure for plaintiff and the trustee, and plaintiff is awarded a recovery of the debt and foreclosure of the lien is provided for in general terms without stating that such foreclosure is awarded plaintiff and the trustee, foreclosure will be presumed to have been awarded both plaintiffs.



4. APPEAL AND ERROR  $\Rightarrow$  79(1)—JUDGMENT  
AWARDING FORECLOSURE TO ONE OF TWO  
JOINT PLAINTIFFS ONLY APPEALABLE.

In a suit by the holder of a secured note and the trustee under the deed of trust, a judgment awarding foreclosure to the creditor only is a final judgment; the trustee being only a nominal party.

Appeal from District Court, Nueces County; W. B. Hopkins, Judge.

Action by the South Texas Lumber Company, a corporation, and another, against G. W. Gregory. From a judgment for plaintiffs and a denial of a new trial, defendant appeals. Affirmed.

J. C. Scott, of Corpus Christi, for appellant.

MOURSUND, J. South Texas Lumber Company, as beneficiary, and F. B. Bynum, as trustee, sued G. W. Gregory on a promissory note executed by him to said lumber company, and to foreclose the lien on certain real estate evidenced by a deed of trust given by Gregory to secure the payment of said note. It was alleged that Bynum was appointed substitute trustee in accordance with the terms of the deed of trust.

On January 8, 1918, Gregory by his then attorney, E. P. Scott, filed his original answer consisting of a general demurrer and general denial.

On January 9, 1919, the first day of the term, the case was set for trial on January 14th. It was called for trial on January 14th, and a judgment rendered in favor of the lumber company for \$1,537.04, principal, interest, and attorney's fee, and for foreclosure of the deed of trust lien.

On March 15, 1919, the court overruled Gregory's amended motion for a new trial.

The assignments of error presented relate chiefly to the ruling of the court in refusing to grant a new trial.

In the motion appellant urged various excuses for his failure to be present at the time of the trial, and alleged that he had good and valid defenses to the plaintiffs' suit. The only allegations in which he undertook to state any defense are as follows:

"And one of such defenses is, in effect, that at and before the time of making the note here-in sued upon and the execution by this defendant of the trust deed on lots one (1) and two (2), in section two (2) of the Flour Bluff and Encinal Farm and Garden Tracts, in Nueces county, Texas, to secure the payment of said note, it was clearly, distinctly and specifically understood and agreed by and between the defendant and plaintiff acting by and through its agent and attorney, that the payment of the note sued on would not be enforced by plaintiff against defendant, until defendant had

raised a cotton crop on his land in Nueces county, or from other sources had become able to pay off and discharge said note so sued upon; and such agreement and understanding was the inducement or consideration which caused this defendant to sign said note and execute the aforesaid deed of trust, and if it had not been for such understanding and agreement upon the part of plaintiff and this defendant, he, defendant, would not have made and executed said promissory note and trust deed. But this defendant has not been able, from the proceeds of a cotton crop, or other sources, to pay off and discharge said promissory note or any part of same, and in violation and disregard of said agreement, the plaintiff herein instituted and prosecuted this suit against defendant, notwithstanding his failure to realize from a cotton crop, or other sources, the means which would enable him to pay off and discharge said obligation."

[1] The allegations disclose that as a defense appellant desired to prove a parol agreement which would vary the terms of the note, so that, instead of it becoming due on the date therein stipulated, it would become due when appellant had raised a cotton crop on his land in Nueces county or from other sources had become able to pay off and discharge said note. The language of the note is plain, and it is well settled that parol evidence is not admissible to change the due date specified therein. *Rockmore v. Davenport*, 14 Tex. 602, 65 Am. Dec. 132; *Barnard v. Robertson*, 29 S. W. 697; *Bank v. Fuller*, 191 S. W. 830; *Leavell v. Seale*, 45 S. W. 171; *Riley v. Treanor*, 25 S. W. 1054.

[2] As the alleged defense could only be presented by incompetent evidence, it would have been fruitless for the court to have set aside the judgment. Another trial would have resulted in the same judgment. Under such circumstances, it cannot be held that the court erred in refusing to grant a new trial. *Bally v. Trammell*, 27 Tex. 317-328; *Holman v. Herscher*, 16 S. W. 984.

[3, 4] It is contended that the judgment is not a final one. The prayer was for judgment for the company for its debt and for judgment for the company and the substitute trustee for foreclosure of the lien. The judgment awards the company a recovery of its debt, and provides in general terms for foreclosure of the lien, without stating that such foreclosure is awarded to the company and the trustee. The implication is that the foreclosure is awarded both plaintiffs. We are also of the opinion that, if the judgment had stated that the foreclosure was adjudged only to the company, it would have been a final judgment, as the substitute trustee was only a nominal party, who on the face of the pleadings was shown to have no interest in the controversy. The contention is overruled.

Judgment affirmed.

**McGHEE v. SHELLEY. (No. 6263.)**

(Court of Civil Appeals of Texas. San Antonio.  
Oct. 29, 1919. Rehearing Denied  
Nov. 26, 1919.)

**VENUE**  $\Rightarrow$  5(2)—**ACTION ON NOTES AND MORTGAGE IN COUNTY WHERE LAND IS SITUATED.**

Under the express provision of Rev. St. 1911, art. 1830, subd. 12, fixing venue of suits to foreclose liens on land, suit to recover on notes and foreclose a trust deed or mortgage securing them may be brought in the county where the land is situated; though defendant resides in another county.

Appeal from District Court, Jim Wells County; V. W. Taylor, Judge.

Suit by W. A. Shely against Geo. S. McGhee. From a judgment overruling defendant's plea of privilege, defendant appeals. Affirmed.

W. R. Perkins, of Alice, H. S. Bonham, of Beeville, and M. E. Jenkins, of Alice, for appellee.

**COBBS, J.** This is a suit instituted against appellant, Geo. S. McGhee, by the appellee, W. A. Shely, on certain promissory notes, and for the foreclosure of a deed of trust securing said notes; said deed of trust being a lien on certain land situated in Jim Wells county, Tex. The appellant filed a plea of privilege to be sued in the county of his residence, to which plea of privilege the appellee filed a controverting plea, and upon a hearing of privilege the court overruled the same. From a judgment overruling the said plea of privilege, the appellant has appealed. The appellant has filed no briefs in this case, but appellee has as is provided by rule 42 of Courts of Civil Appeals (142 S. W. xiv).

While appellant has filed assignments of error embracing several issues involving the preliminary rulings of the trial court and appellee has briefed several propositions, there is but one question in this case raised that requires any notice, and that is the question of venue, raised by proper plea of appellant, demanding his right to be sued in McLennan county, Tex., his domicile. As stated, this suit is to recover against appellant on his notes aggregating \$1,900, evidenced by his two promissory notes, each \$600, and one for \$700, secured by said appellant by his deed of trust carrying a lien on his lands situated in Jim Wells county, the county in which the suit is filed. The court, at the request of appellant, made and filed his findings of fact and conclusions of law. That part relevant to this issue we quote as follows:

"Eighth. I find as a fact that plaintiff's cause of action is a suit based upon certain promissory notes executed by the defendant, Geo. S. McGhee, and for a foreclosure of a mortgage or

deed of trust lien on certain lands lying and situated wholly within the county of Jim Wells and state of Texas, and that plaintiff in good faith seeks to foreclose said lien."

"My conclusion of law deducted from the foregoing findings of fact is as follows:

"I conclude as a matter of law that the venue of this suit is properly laid in Jim Wells county, Tex., this being a suit upon certain promissory notes, and for the foreclosure of a mortgage or deed of trust lien upon land situated wholly within the county of Jim Wells and state of Texas, and that the same comes within exception No. 12 of article 1830, Revised Statutes of the state of Texas."

The statute itself makes it too clear to admit of any doubt as to the venue in foreclosure suits. Subdivision 12 of article 1830 provides:

"Suit may be brought in the county in which the property subject to such lien, or a portion thereof, may be situated."

See, also, *Com. Tel. Co. v. Territorial Bank & Trust Co.*, 38 Tex. Civ. App. 192, 86 S. W. 69; *Ogburn-Dalchau Lumber Co. v. Taylor*, 59 Tex. Civ. App. 442, 126 S. W. 48.

Finding no error in the ruling of the court, the judgment is affirmed.

**IIAMS et al. v. MAGER et al. (No. 1567.)**

(Court of Civil Appeals of Texas. Amarillo.  
Nov. 12, 1919. Rehearing Denied  
Dec. 10, 1919.)

**1. HUSBAND AND WIFE**  $\Rightarrow$  273(9)—**RIGHT OF SURVIVING HUSBAND TO SELL COMMUNITY PROPERTY TO PAY DEBTS.**

A surviving husband may sell community property for the purpose of paying community debts, provided the power is exercised in good faith.

**2. HUSBAND AND WIFE**  $\Rightarrow$  273(10)—**RIGHTS OF PURCHASER IN COMMUNITY PROPERTY AGAINST DECEASED WIFE'S HEIRS.**

In an action by deceased wife's heirs against persons purchasing community property from the surviving husband, the purchaser, in order to defend his title, need ordinarily show only the existence of community debts at the time of his purchase.

**3. HUSBAND AND WIFE**  $\Rightarrow$  273(10)—**EVIDENCE OF SALE OF COMMUNITY PROPERTY FOR DEBTS.**

In action by persons claiming under a deceased wife against purchasers of community property from the surviving husband, evidence that part of the purchase price of such community real estate was still due the state, and that it was incumbered by a judgment lien at the time it was sold, held to sustain a finding that defendants had discharged burden of showing existence of community debts at time of sale.

**4. HUSBAND AND WIFE ⇐273(8)—DEED TO COMMUNITY PROPERTY BY SURVIVING HUSBAND.**

A deed by which a surviving husband quitclaimed "all my right, title and interest" in certain community real estate, conveyed the entire interest that the husband and his deceased wife had in the land, and not merely that of the surviving husband.

Appeal from District Court, Dallam County; Reese Tatum, Judge.

Suit by John Harvey Iiams and others against John B. Mager and others. Judgment for defendants, and plaintiffs appeal. Affirmed.

Tatum & Strong, of Dalhart, for appellants.

W. I. Gamewell, of Dalhart, for appellees.

**BOYCE, J.** This suit was brought by appellants, John Harvey Iiams et al., against appellees, John B. Mager and others, to recover an undivided one-half interest in section 10, block 7, T. T. & N. O. Ry. Co., in Dallam county. The appellants claim such interest in said land through inheritance from their deceased mother, Viola Frances Iiams. The appellees claim through conveyance of such property by Frank W. Iiams, surviving husband of the said Viola Frances Iiams. The facts material to a determination of the rights of said parties are as follows:

The land belonged to the public school fund of the state and was awarded to Frank W. Iiams during the lifetime of his wife, Viola Frances Iiams, on March 25, 1902. The sale was made in accordance with the laws governing the sale of school lands in force at that time. One fortieth of the purchase price of one dollar per acre was paid, and the said Frank W. Iiams executed his obligation for the balance, payable in 40 years' time, bearing interest at the rate of 3 per cent. per annum. This obligation was outstanding at the time of the death of the said wife and at the time of the sale by the husband, mentioned later. The said Viola Frances Iiams died on October 3, 1903. The Jackson-Foxworth Lumber Company, on March 23, 1905, secured judgment against the said Frank W. Iiams, for \$279.12, on account of an indebtedness incurred during the lifetime of the said Viola Frances Iiams, and abstract of this judgment was recorded in Dallam county on March 24, 1905. On March 25, 1905, said Frank W. Iiams executed and delivered to J. K. Hearte an instrument denominated a "quitclaim deed," by the terms of which, for a recited consideration of \$4,000, he "bargained, sold and quitclaimed into the said J. K. Hearte, \* \* \* all my right, title and interest in and to that certain tract of state school land, described as follows: Section 10, block 7, T. T. & N. O. Ry. Co. (and three other sections of land not in-

volved in this suit)." The habendum clause in said deed is as follows:

"To have and to hold all the above-described premises, together with all the rights and appurtenances thereto in any wise belonging into the said J. K. Hearte, party of the second part, his heirs and assigns, forever."

The evidence indicates that the land was worth about one dollar per acre above the balance due the state thereon. There is testimony to the effect that the \$4,000 cash consideration recited was not the true consideration. This testimony indicates that the said J. K. Hearte bought the four sections of land and some personal property from the said F. W. Iiams, and as part consideration conveyed to the said Iiams some land in Parker county. The details of this trade are not made clear from the record, though it does appear that in the transaction Iiams realized some ready cash and Hearte agreed to pay the remainder due the state on the Dallam county lands. The testimony tends to show that the Dallam county land was sold for its full value at the time, and there is no testimony that tends to show that there was any collusion between Hearte and Iiams to defraud the appellants of their share of said property. The said Hearte, soon after the purchase, substituted his obligation to the state for the obligation of the said Iiams, which was thereupon canceled. A release of the Jackson-Foxworth Lumber Company's lien was offered in evidence. This release was dated February 28, 1906, and recited payment of said judgment on the day of the release. Nothing further was shown as to how, when, and by whom this payment was made. The appellees claim that they were innocent purchasers of the land without knowledge that the heirs of the deceased wife had any interest therein; but, as the decision of the other questions presented by appellant are sufficient to a decision of the case, it is not necessary to make a statement of the facts necessary to determine this issue.

The case was tried before the court and judgment rendered for the defendant. The appellants contend that this judgment is not warranted by the evidence, because: (1) A sale of the property for any other purpose than to pay community debts would not pass the title to the one-half interest in the property inherited by the appellants from their mother; that the burden of proof is upon the purchaser to show that such was the purpose of such sale, and the facts we have set out are insufficient to discharge such burden. As a part of this proposition, it was also urged that the conveyance by the husband was a quitclaim and would not support a plea of innocent purchaser for value; and (2) that the deed executed by the surviving husband conveys only the interest of the said F. W. Iiams and is not sufficient, no

matter what the purpose of the said Iiams was in making the sale, to convey the children's right and interest therein inherited from their mother.

[1-3] The property was the community property of Frank W. Iiams and his wife, and upon the death of the wife the children inherited her interest therein. The surviving husband, however, had the right to dispose of the entire community interest in the property for the purpose of paying community debts. When this power exists, the only limitation that the courts impose upon its exercise is that of good faith. The purchaser at a sale of community property, made by the survivor, is bound to ascertain that the facts exist that confer the power of sale on the survivor. Having ascertained that such facts do exist, he may assume that the survivor is acting in good faith in making the sale, provided, of course, that he has no notice or the facts surrounding the sale are not sufficient to excite inquiry that the power is being exercised for some ulterior purpose. So that ordinarily, the purchaser, in order to defend his title, against the claims of the wife's heirs, is only bound to show the existence of community debts at the time of his purchase. These general conclusions are supported by the following authorities: *Johnson v. Harrison*, 48 Tex. 266; *Sanger Bros. v. Heirs of Moody*, 60 Tex. 96; *Crawford v. Gibson*, 203 S. W. 375; *Cage v. Tucker's Heirs*, 14 Tex. Civ. App. 316, 37 S. W. 180; *Cruse v. Barclay*, 30 Tex. Civ. App. 211, 70 S. W. 358. In the case before us it was shown that community debts existed and were a specific charge on the particular tract of land that was sold; as a result of the sale the obligation due the state was discharged, though it is not shown whether the other debt was paid out of the proceeds of the sale or not. The purchaser, however, did not have to see to the application of the proceeds. The facts do not show that the sale was made in fraud of the heirs. These facts warranted the court in finding that the defendants had discharged the burden that the law imposed on them in order to uphold the sale. *Morgan v. Lomas*, 159 S. W. 869, and *Jones v. Harris*, 139 S. W. 69, in addition to authorities already cited.

[4] The case of *Jones v. Harris*, supra, is authority on the second proposition urged by appellant, as stated, to the effect that the conveyance by Iiams passed only such interest as the husband himself had to the property. The facts in this case are very similar to those in the case of *Jones v. Harris*. In the deed in that case the surviving husband, as in this case, conveyed "all my right, title and interest" in the land, and it was decided that such deed conveyed the entire interest that Jones and his deceased wife had in the land. The contention urged by appellant as to the effect of this deed was

thoroughly discussed by the opinion in that case. There was a dissenting opinion in the case, and a writ of error was denied by the Supreme Court. So that we think we must hold that this question was finally settled by that decision, and it is not necessary to devote further time to its consideration.

We conclude, therefore, that the judgment of the district court should be affirmed.

#### HEDRICK v. MATTHEWS. (No. 1598.)

(Court of Civil Appeals of Texas. Amarillo. Nov. 26, 1919.)

##### 1. APPEAL AND ERROR §781(6)—DISMISSAL ON SHOWING OF SETTLEMENT BY PARTIES.

Where parties have actually settled or agreed on terms of settlement of the matters in dispute pending an appeal, and the fact is shown in the Court of Civil Appeals, the appeal should be dismissed, having become moot.

##### 2. APPEAL AND ERROR §19—SETTLEMENT DOES NOT DEFEAT JURISDICTION ACQUIRED BY FILING BOND.

The Court of Civil Appeals acquired jurisdiction of an appeal when appellant filed his supersedeas bond with the clerk of the county court, and settlement of the matters in dispute by the parties would not defeat such jurisdiction.

##### 3. APPEAL AND ERROR §1127—CONSIDERATION OF AFFIDAVITS IN OPPOSITION TO MOTION TO AFFIRM.

If the issue made on the question of settlement by the parties affected the jurisdiction of the Court of Civil Appeals under *Vernon's Sayles' Ann. Civ. St. 1914*, art. 1593, it could consider, to determine the fact of jurisdiction only, the affidavits presented by appellant in opposition to appellee's motion to affirm on certificate.

##### 4. APPEAL AND ERROR §1127 — AGREEMENT TO SETTLE NOT CONSIDERED WHERE JURISDICTION HAS ATTACHED.

Jurisdiction of the Court of Civil Appeals having attached when appellant filed his supersedeas bond with the clerk of the county court, and the issues tried below being pending, the court will not consider the question whether there has been an agreement to settle between the parties, though appellant in his affidavits in opposition to appellee's motion to affirm on certificate states facts tending to show such an agreement.

Appeal from Hartley County Court; J. H. Phillips, Judge.

Action by J. E. Matthews against F. M. Hedrick. Judgment for plaintiff, and defendant appeals. On motion by appellee to affirm on certificate. Motion granted.

J. N. Browning, of Amarillo, for appellant. Tatum & Strong, of Dalhart, for appellee.

HALL, J. This is a motion by appellee, filed under Vernon's Sayles' Civil Statutes, art. 1610, to affirm a judgment rendered against appellant in the county court of Hartley county. The transcript filed in this court shows the amount of the judgment to be \$88. In addition to a copy of the judgment, the transcript also contains a copy of the supersedeas bond, filed with the clerk of the court below. The clerk certifies that no transcript of the record for appeal had been made because none had been ordered by the appellant. Appellant contests the motion to affirm, stating that he abandoned his appeal after filing the supersedeas bond upon advice of counsel that it would be cheaper to compromise the same; that on account of the litigation between the parties their personal relations were unpleasant, and he employed one Williams, a mutual friend to bring about a compromise of the matter in dispute; that through the said Williams he proposed to appellee that appellant would pay all the costs in the county court, abandon his appeal and all claims of every nature, if appellant would relinquish his rights under the judgment rendered in the county court; that through the said Williams appellee submitted to appellant a counter proposition, to the effect that he would accept appellant's proposition if appellant would pay off a note upon which suit had been filed against appellee in the justice court in Amarillo, and in which suit a writ of garnishment had been issued, and served on appellant, and would also pay the costs of the justice court at Amarillo; that appellant declined to accept the counter proposition, whereupon appellee agreed to appellant's proposition as originally outlined; that appellant then wrote his attorney at Amarillo, informing him of the compromise agreement, and thereafter, believing that a compromise had been actually made, and acting in good faith, he obtained a certified bill of costs from the county clerk of Hartley county, paying all of the costs except a balance of \$14.45, which was withheld until appellant's attorney had time to investigate certain items amounting to that sum, and notify appellant whether or not they were legal charges; that soon afterwards appellant's attorney sent appellee a written agreement of compromise, which appellee stated would be submitted to his own attorney before signing it; that since said time appellant has never been notified as to what would be done with reference to such writing, but, believing that appellee would abide by his agreement to compromise, he directed his attorney to take no further steps toward prosecuting the appeal; that he had about one month from the date of the compromise agreement in which to perfect his appeal, which would have been done but for his belief that the matter had been settled. There is attached to the affidavit of contest a post

card from appellant to his attorney, stating that appellee had agreed to withdraw his judgment claim and to let the matter stand. An affidavit of the county clerk of Hartley county is also attached, in which he states that on or about the 15th of August, 1919, appellee came into his office and asked if appellant had paid the costs in the case, saying that he and appellant had agreed to settle the matter in controversy between them, and that he would surrender his judgment when appellant complied with his agreement to pay the costs of the suit. At that time appellant had paid the \$124.69 costs and advised affiant that he and Matthews had reached an agreement and settlement of their suit and requested affiant to take no further action toward appealing the case. Appellee has filed in this court his reply to appellant's contest of the motion to affirm, in which the allegations of appellant are denied. Attached to this denial is the affidavit of appellee, stating in substance that, in the early part of the second week of August, Williams approached him at Hartley, saying that Hedrick wanted to settle the suit. Affiant replied, "All right, I have been willing to settle any time." Williams then stated to affiant:

"Hedrick says he is willing to pay the costs of the suit at Channing if you will drop the judgment you have against him."

The affidavit further states:

"I told him that I would not do this, but further told him I had been sued at Amarillo for something like \$50, and if Hedrick would pay off the amount of the note sued on and the costs of the suit, and pay all costs accrued in the county court of Hartley county, in this suit, and my lawyers would approve it, I would settle. I discussed the matter with my attorneys, and they told me they would submit the matter to appellant's attorney at Amarillo."

Affiant further states that he sent a mutual friend, F. A. Cox, to see appellant, who returned and told affiant that Hedrick had agreed to settle upon appellee's terms; that later an execution was issued against affiant out of the justice court at Amarillo, on the judgment rendered against Hedrick. There is also attached an affidavit by Williams, stating that Hedrick requested him to see appellee in regard to compromising this suit; that, so far as he knew, the parties never reached or made any settlement of the matter; that Hedrick handed him a written statement which he requested Matthews to sign in settlement, and Matthews said he would see his attorneys before signing it. Shortly thereafter, Matthews told affiant he would not sign the paper, and that he communicated that fact to Hedrick in a day or two. There is further attached an affidavit by one of the attorneys for appellee, showing his correspondence with appellant's attorney, stating that Mr. Mat-

thews would not accept the settlement offered by appellant and his attorney, but suggesting that, if the suit at Amarillo was paid off by appellant, he thought this suit could be settled. There is attached the carbon copy of a letter from appellee's attorney to appellant's attorney at Amarillo, stating that Matthews was in his office and agreed to accept the settlement previously submitted by the writer to appellant's attorney and had said that appellant had accepted appellee's proposition and the case had been settled on the terms stated in the former letter. This letter instructs appellant's attorney to get the note sued on in Amarillo, mark it paid, and send it with a statement, of the justice of the peace, showing that the case had been dismissed and the costs paid; to send also a written statement showing that this case had been settled, signed by appellant and his attorney, and showing that appellant had paid all the costs of this suit. These would be filed with the county clerk and the appeal stopped.

[1-4] Appellant is making no effort to file his record on appeal in this court, but is contesting appellee's right to an affirmance upon the ground that the suit had been compromised and an agreement to settle entered into between the parties. The fact of compromise and settlement is denied by appellee. Where parties have actually settled or agreed upon terms of settlement of the matters in dispute pending an appeal, and that fact is shown in this court, the appeal should be dismissed (*Fielder Lumber Co. v. Gamble*, 179 S. W. 522; *Knights of Maccabees of the World v. Parsons*, 182 S. W. 672); but we have no such case before us. According to the affidavits of the appellee and his witnesses, the minds of the parties have not met even upon an agreement to settle. This court acquired jurisdiction when appellant filed his supersedeas bond with the clerk of the county court. A settlement would not defeat the jurisdiction so acquired; but, upon a showing here that the parties had actually settled all matters involved, this court would dismiss the appeal, not because we had no further jurisdiction, but because the questions involved in the appeal had become moot. If the issue made upon the question of settlement affected the jurisdiction of this court, we could, under *Vernon's Sayles' Civil Statutes*, art. 1593, consider the affidavits presented for the purpose of determining the fact of jurisdiction only. *Selter v. Smith*, 105 Tex. 205, 147 S. W. 226. The matters set up by appellant and supported by the affidavits attached to his reply, contesting the motion to affirm, might be urged in support of a motion to file his record on appeal; but he seeks no such relief. Since the jurisdiction of this court has attached and the issues tried below are pending, we must decline to decide

the question of whether there has been an agreement to settle.

The motion to affirm on certificate is granted.

Affirmed.

#### J. I. CASE THRESHING MACH. CO. v. STREET et al. (No. 8179.)

(Court of Civil Appeals of Texas. Dallas.  
June 28, 1919. Rehearing Denied  
Dec. 6, 1919.)

#### 1. BILLS AND NOTES §64—NOTES AND MORTGAGES DELIVERED ON CONDITION.

Where notes and mortgage for purchase price of engine were delivered by defendant buyer on condition that they should not be effective until plaintiff seller demonstrated engine to defendant's satisfaction, and defendant accepted it in writing, *held* that notes and mortgage never became effective, where defendant did not accept the engine, but notified plaintiff that he would not do so.

#### 2. SALES §128—RESCISSION BY RETURN OF 'MACHINERY BOUGHT.

In suit on notes given for price of engine and separator, and to foreclose mortgages securing the notes, *held* that return of engine and its acceptance by plaintiff seller constituted a rescission.

#### 3. CONTRACTS §274 — WHAT CONSTITUTES "RESCISSION."

To rescind a contract is not merely to terminate it, but to abrogate and undo it from the beginning, and rescission necessarily involves a repudiation of the contract and a refusal of the moving party to be further bound by it.

[Ed. Note.—For other definitions, see *Words and Phrases*, First and Second Series, *Rescission*.]

Error from District Court, Dallas County; W. F. Whitehurst, Judge.

Suit by the J. I. Case Threshing Machine Company against W. G. Street and another. Judgment for defendants, and plaintiff brings error. Affirmed.

See, also, 188 S. W. 725.

Spence, Havin & Smithdeal, of Dallas, for plaintiff in error.

Cockrell, Gray, McBride & O'Donnell, of Dallas, and Reeder & Reeder and J. B. Dooley, all of Amarillo, for defendants in error.

RAINEY, C. J. Appellant brought this suit against appellees Street and Creamer to recover against Street as maker and Creamer as guarantor upon two sets of notes, one set dated January 30, 1913, and the second set dated July 1, 1913, and to foreclose a mortgage given by Street and wife covering one 40 horse power gas tractor engine to secure the first set of notes, and to foreclose

another mortgage given to secure both sets of notes covering the same engine and a separator and appurtenances.

Defendant answered by demurrer and general denial, and specially that—

"Plaintiff in error represented to Street that the engine was a full 40 horse power engine, and would develop 40 horse power on the belt and 20 horse power on the drawbar, and would pull plows enough to cut a strip of land as wide as the engine—about 8 feet—plowing the ground 10 inches deep, at an average speed of 2½ miles per hour, and that the company proposed to take the engine out to D. M. Creamer's farm near Amarillo, and there demonstrate its said representations as to the capacity of the engine if Street would thus sign the written order for the engine and the notes and chattel mortgage first above described, and also procure Creamer to sign a contract guaranteeing their payment, and deliver the papers to the company, but to become effective and binding only in the event and on condition that the company would demonstrate that the engine had the power and would do the work that the company represented it had and would do. That Street accepted this proposition, and signed the order for the engine and the notes and chattel mortgage, and procured Creamer's signature to the guaranty contract, but left all of these documents with plaintiff company upon the express agreement aforesaid, and that the delivery thereof was conditioned and would not be binding upon either defendant until plaintiff in error by actual use and operation of engine in the field demonstrated the power and capacity of the engine to be in accordance with its representations. That upon the first demonstration at Creamer's farm the engine did not develop the power and capacity as had been represented, but that plaintiff in error requested Street to continue the use of the engine, and that it would repair and adjust the engine and make it do the work as represented, and requested Street then to sign a written acceptance of the engine, which he then refused to do and did not do; but that, relying upon the promises and statements of the company as being true and made in good faith, he (Street) later in the spring of 1913 undertook to use the engine for the purpose of plowing, and found that it did not develop the 40 horse power, and did not have power to pull plows as represented by the company, of which he then notified the company, which sent its experts to test the engine, who stated that the failure of the engine to develop the rated horse power was on account of defective oiling process, which the company would promptly correct, and would either make the engine develop the horse power and do the work as represented or would furnish Street with another engine which would do so, and requested him to retain and continue to use the engine with the plows, and Street agreed to this proposition; but that the company, through its experts, could not and did not make the engine develop the rated horse power and do the work as the company had guaranteed it would do, and that Street then demanded the company to take the engine and furnish him with a new one, but that the company requested that the engine remain at Creamer's farm, and stated that it would yet discover the defects in

the engine and get it in shape to develop the rated horse power, and that Street stated that he would not care to be bothered further with the engine. That the company then represented that it would put in new bearings and rings in the engine and leave same on Creamer's farm, and requested Street to try the engine once more when he had time and inclination so to do. That the company did put in the bearings and rings and made other repairs, leaving the engine on Creamer's farm, where it stood until November 1, 1913, at which time Street made known to the company that he had some ensilage to put up, and could test the engine in that work, and the company requested him so to do. That upon this test being made the engine failed to develop sufficient power to run the ensilage cutter, whereupon the company sent its experts to the engine, who worked on it and requested Street to continue to use the engine and make further report to the company, which Street agreed to do, but with like results, which he reported to the company, and at its request removed the engine back to Creamer's farm, where the company requested that the engine remain, and that the company would put the engine in good repair by the next spring, and wished Street again to test the engine in pulling plows in both sod and cultivated land. That Street notified the company that he did not care to be bothered with the engine unless he could have the company's assurance that it would furnish him a new engine in the spring, having power to pull the plows as had been represented, and if he had such assurance that he could get contracts for plowing, and that the company advised Street that if he would get such contracts that the company would furnish a new engine to pull the plows if it failed to make the engine in question develop the power it had represented. That Street assented to this proposition, and, relying thereon, did make contracts for plowing in the spring of 1914, and in the spring the company, having done considerable repair work on the engine, assured Street that same was in good condition and would develop the horse power as represented, and requested him to go forward with the engine in carrying out his plowing contracts, which Street undertook to do, but found that the engine still did not have the power as represented by the company enough to pull the plows, and thereupon demanded that the company furnish him with another engine that would do so, but that the company neither made the engine in question develop the necessary horse power, nor furnished him with a new engine, but requested him to keep it, assuring him that it would continue working on the engine until it developed the full represented horse power, which Street did at a great cost of time, labor, and consumption of oil, gasoline, etc., and in May or June of 1914 he notified the company that he would make no further effort to test the engine, whereupon the company proposed to him to furnish him a Case separator with attachments if he (Street) would procure threshing contracts and use the engine in that work, but that he stated to the company that he would not accept the engine for any purpose. The company stated that it would guarantee that the engine would pull and operate the threshing machine to its capacity, and that it would furnish to him a Case Company separa-

tor and guarantee to make the engine operate it to its capacity or furnish Street with a new engine that would do so if he (Street) would go forward and procure threshing contracts and use the outfit, whereupon Street advised the company that he would not accept the engine and become obligated to pay the notes that he had left with the company until he knew by test made by himself that the engine would operate the threshing machine to its capacity. That the company, then proposed to furnish him with a separator under a similar agreement that had been made as to the engine if he would sign the notes—which he did sign therefor—and also sign a written order for the separator and a chattel mortgage thereon securing the notes, and procure Creamer to sign another guaranty of the notes, and leave same with the company on condition that same were not to become binding unless the company was successful in making the engine operate the separator to its full capacity, or, in the event of its failure so to do, it would deliver to Street a new engine that would so operate the threshing machine, and upon this condition the order, notes, chattel mortgage and guaranty were signed and left with the company, and accordingly Street received the threshing rig and began to use it, whereupon the engine again failed to develop power enough to pull the machine to its full capacity, and this was made known to the company, which sent experts, who overhauled the engine, and requested Street again to try it in operating the threshing machine, which he did, but same failed to develop sufficient power to pull the machine to more than half its capacity, when Street made these facts known to the company, and also made known his threshing contracts, and requested the company to furnish him a new engine as it had contracted to do, which the company failed and refused to do, stating its intention to again overhaul and adjust the engine, assuring Street that it would certainly be able to make it develop the rated power, and requested him to continue the use of the engine pending further adjustments, which he did, and proceeded with his threshing contracts as best he could with the defective engine until the month of January, 1915, during which time the engine never developed sufficient power to operate the machine, although the company's experts frequently worked on it, and that on or about the 10th of January, 1915, the company discontinued all efforts to make the engine work, and refused to furnish Street with a new engine, but requested him either to accept, in writing, the machinery and make payment therefor or cease operating it and return it to the company, whereupon Street discontinued all use of the machinery and returned it to the company at Amarillo, when and where the company accepted it.

"Defendant Street, by cross-action, sought to recover against the company large damages—alleged lost profits because of the failure of the engine to operate as represented. Defendant Street further answered that if he 'be mistaken as to the legal effect of the facts hereinbefore alleged,' and if it should be true that the notes, guaranties and contracts aforesaid were delivered to the company under such conditions as to become binding upon the defendants, then he pleaded a total failure of consideration of the notes because of the failure

of the engine to develop the rated horse power and the capacity which the company had represented it would do, and again averred that after the tests aforesaid he, at the instance and request of the company, returned the machinery to the company, which accepted it, and further he alleged that at the time he signed the notes and agreements in connection with the threshing machinery he also signed a written order therefor on the company's forms, but same did not speak the truth, and was not intended by either party thereto to be a binding obligation, but it was agreed that same was merely a formal matter for the accommodation of the company in keeping its records, and that on the 15th of January, 1915, by mutual agreement, all the contracts were rescinded and the machinery returned to the company, which accepted same in satisfaction of all obligations evidenced by the notes and guaranty contracts.

"Plaintiff in error, plaintiff below, answered by supplemental petition, which, after certain special exceptions not necessary to be further noticed, contained a general denial and special matters of replication," and the failure of defendant in complying with certain provisions of the different writings held by plaintiff claimed to be binding on defendant and not complied with by defendant. That plaintiff had not accepted the return of the engine in rescission of said contract of sale of which defendant was notified," etc.

The case was submitted to a jury upon special issues; upon return of answers to same the court rendered judgment for defendant, and plaintiff appealed.

The material allegations of defendant's answer are supported by the evidence, and the findings of the jury warrant the judgment of the court.

[1] The following issue, among others, was submitted to the jury:

"Do you find at the time of the execution of the notes and mortgage in reference to the tractor engine that plaintiff made an agreement with the defendant that said notes were not to become binding until the plaintiff company should demonstrate to the satisfaction of the defendant that the engine was capable of producing 20 horse power on the drawbar and 40 horse power on the belt?"

—which issue was answered in the affirmative and also answered that the engine did not possess said power, which is supported by the evidence. The counter proposition of appellee applies, which is:

"Where notes are delivered in the amount of the proposed purchase price of a chattel, but on the condition that same shall not become effective until the prospective seller demonstrates that the chattel has certain qualities or capacities and same is accepted in writing by the prospective buyer, there is no sale and no liability is incurred on such notes until such demonstration is made and such acceptance obtained."

Street never accepted the engine but notified plaintiff that he would not do so, unless plaintiff would make it do the work; hence



the notes and mortgage never became effective and binding. In the case of Street v. Threshing Machine Co., 188 S. W. 725, tried in Potter county, Street sued to cancel the notes and mortgages involved in this suit, the lower court excluding parol evidence showing the verbal contract in regard to said notes, and on appeal the appellate court at Amarillo reversed the case and held:

"We gather from the pleadings and the evidence offered it was the contention that the purchase and sale of the engine was not consummated, and should not be until after trial, and if as represented Street should accept the engine in writing; and the orders and notes were left with appellee upon that condition. The order therefore did not become a binding contract between the parties until the engine was so accepted, and the notes were not obligations binding upon appellants. If the allegations of appellants are true, the contract of sale, as evidenced by the order and notes, never went into effect, and therefore was not the contract of the parties. This being true, the evidence on that issue should not have been excluded, as it would not be in its nature a contradiction of the written order and notes. It was simply offered to show that the order and notes were not executed under such circumstances as to become a binding contract. Wigmore on Evidence, §§ 2408, 2410; Watson v. Rice, 166 S. W. 106; Parker v. Naylor, 151 S. W. 1096; National Novelty Import Company v. Duncan, 182 S. W. 888."

[2] The evidence in this case shows that Street never accepted the engine in writing, but informed plaintiff that he would not do so, as the engine had failed to comply with the warranty. Plaintiff insisted on defendant keeping and using the engine, promising to make it comply with the guaranty until May 23, 1914, whereupon plaintiff sold defendant a separator on the condition that plaintiff would make the engine develop the full capacity stated. Street procured contracts from various parties to thresh at the insistence of plaintiff, until the fall of 1914, when plaintiff's collector approached him for pay on the engine, and the collector testified:

"I told him I was going to send out and get it (machinery), and he said he would bring it in, the threshing machine, turn it over, in other words, make a settlement. \* \* \* I told him we wanted our money or would have to have the machinery."

Street testified, in substance, that he carried and delivered to plaintiff said engine and separator, which was accepted by plaintiff under said agreement, and was in settlement. This was the only reference in evidence relating to Street's return of the machinery, and in answer to the following questions submitted:

"Was the machinery in controversy returned to the plaintiff company by defendant Street under any agreement between them authorizing its return?" and "Did the plaintiff company accept the machinery in controversy under an agreement authorizing its return?"

—the jury answered yes to both questions.

As there was no other reference in the evidence to a return by defendant of the machinery, we feel compelled to hold, especially in view of the jury's finding that the machinery was returned by Street and accepted by plaintiff as a settlement of the whole transaction, that the machinery was returned by Street. As a rescission was not specifically mentioned in the questions submitted by the court, and as the mortgage authorized a return of the machinery for the purpose of a foreclosure, plaintiff contends that it should be presumed that the plaintiff received it in compliance with that provision of the mortgage. As defendant set up a rescission by the return of the machinery, and as the evidence only related thereto, we are of the opinion that the questions related to a rescission and the jury so understood. If it should be held that such an issue should have been specifically presented, and as it was not presented, we will presume that the court so found, as the evidence authorized such a finding.

Plaintiff complains of some alleged conflicts in the jury's findings. When the whole evidence is duly considered we do not see any real conflict in the findings, but think any apparent conflict can be harmonized when all things are considered; and, when we consider that no binding contract was made between the parties; that plaintiff was striving from the first to make the engine develop full power; that in order to sell the separator plaintiff agreed to make the engine comply with the warranty; that it never demanded the return of the engine until it had determined it could not remedy its defects; and that the machinery was returned and accepted—therefore we conclude plaintiff is bound by said rescission, and everything is settled as to said transaction with Street.

[3] The rule on rescission is:

"To rescind a contract is not merely to terminate it, but to abrogate and undo it from the beginning; that is, not, merely to release the parties from further obligation to each other in respect to the subject of the contract, but to annul the contract and restore the parties to the relative positions which they would have occupied if no such contract had never been made. Rescission necessarily involves a repudiation of the contract and a refusal of the moving party to be further bound by it." Black on Rescission and Cancellation, vol. 1, § 1.

The judgment is affirmed.

**GALVESTON, H. & S. A. RY. CO. v. HARRIS. (No. 7755.)**

(Court of Civil Appeals of Texas. Galveston. Oct. 23, 1919. Rehearing Denied Nov. 20, 1919.)

**1. TRIAL  $\S$  86—OBJECTION TO EVIDENCE ADMISSIBLE FOR PARTICULAR PURPOSE.**

In an action for the burning of grass on leased land, an objection to testimony of plaintiff and his son as to reasonable value of the grass, when they were not shown to be qualified to testify as to its market value, was not well taken, and the testimony was admissible to show that the leased premises were used by plaintiff exclusively for pasture and their reasonable value therefore.

**2. DAMAGES  $\S$  112—MEASURE OF DAMAGES FOR BURNING GRASS.**

The measure of damages for the negligent burning of grass by a railroad company is its market value for any use or purpose for which it may be valuable to its owner, but in the event that it has no market value then the measure of damages is its value to its owner for any uses to which he may put it.

**3. DAMAGES  $\S$  188(2) — MARKET VALUE OF GRASS BURNED.**

In an action against a railroad company for burning grass, evidence held to support finding that the grass burned had no market value.

**4. EVIDENCE  $\S$  113(11)—RENTAL VALUE OF LAND FOR PASTURAGE AS MEASURE OF VALUE OF GRASS DESTROYED.**

In an action against a railroad company for damages, the contention that the value of the grass burned should be determined by what rental other persons paid for pasture land is not tenable, since what plaintiff and others paid per acre may or may not have been the value of the land for pasturage or other purposes at the time of making the rental contract, and at the time of the fire the value of the grass might have been more or less than the rental price.

**5. APPEAL AND ERROR  $\S$  1033(7)—HARMLESS ERROR IN FAILURE TO FIND MARKET VALUE OF BURNED GRASS.**

The defendant railroad company, on appeal from a judgment for damages for destruction of grass by fire, has no just reason of complaint that the jury should have found from the evidence that the land had a market value for hay-making purposes, where the evidence of such value showed a larger damage than found by the jury.

**6. DAMAGES  $\S$  174(3)—EVIDENCE OF EXPENSE OF FEEDING CATTLE CAUSED SOLELY BY BURNING OF GRASS.**

In an action against a railroad company for damages for the burning of grass, proof that plaintiff had to spend 10 cents per head per day to feed his cattle, which he would not have been required to feed had the grass not been destroyed, was admissible and could be considered in arriving at the value to him of the grass for the purpose for which he leased the land.

**7. DAMAGES  $\S$  174(3) — EVIDENCE OF DESTRUCTION OF GRASS BY FIRE.**

In an action against a railroad company for damages resulting from the burning of grass, evidence as to the amount of hay plaintiff could have cut from the land had the grass not been burned and the turf destroyed was admissible, since plaintiff was entitled to have the damages measured by the extent of the injury to the grass and land for any lawful purpose.

Appeal from District Court, Harris County; Hugh M. Potter, Special Judge.

Suit by J. S. Harris against the Galveston, Harrisburg & San Antonio Railway Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Baker, Botts, Parker & Garwood and McMeans, Garrison & Pollard, all of Houston, for appellant.

Pleasant F. Graves and H. L. Livingston, both of Houston, for appellee.

LANE, J. This suit was brought by appellee, J. S. Harris, against the Galveston, Harrisburg & San Antonio Railway Company to recover damages for the negligent burning by the railway company of grass and hay on 208 acres out of a tract of 365 acres of land situated in Harris county, held by Harris under lease, and also for damages for the killing of the turf on the same.

He alleged that on or about the 24th day of November, 1916, defendant negligently set fire to the grass then located and growing on said land, and to the hay thereon, and negligently caused the said grass and hay to be burned and destroyed on a large part of the land so leased and controlled by him, that is, defendant negligently set fire to and negligently caused to be burned the grass and hay then growing on about 208 acres of the land leased by plaintiff, to his damage \$1,500, and that by reason of said negligent acts and conduct of defendant and the burning of grass on said land the turf and roots of the grass were so burned, damaged, and injured by the fire that the same were killed, and that plaintiff had been deprived of any and all grass and hay thereby on said 208 acres ever since the same was burned by defendant, to his further damage to the 30th day of March, 1918, in the sum of \$500, and that by reason of the killing of said turf and roots of the grass plaintiff would thereby be deprived of any and all grass on said 208 acres from March 30, 1918, up to the end of his lease, to wit, October 31, 1920, to his further damage in the sum of \$500. He prayed for judgment in the sum of \$2,500.

Defendant answered by general denial.

The case was submitted to a jury upon special issues, in answer to which they found:

(1) That defendant's section crew originated the fire on defendant's right of way that destroyed plaintiff's grass.

(2) That the acts of said section crew in originating the fire, or in failing to keep the fire which they originated confined to defendant's right of way, were negligence.

(3) That such negligence was the proximate cause of the burning of plaintiff's grass.

(4) That the grass which was destroyed had no market value for grazing pasturage or hay purposes at the time of the fire.

(5) That the actual value per acre to plaintiff of the grass for pasturage or hay-making purposes at the time in question was \$3 per acre.

(6) That 208 acres of grass were burned by the fire in question.

(7) That the turf or roots of the grass was injured by the burning of said grass.

(8) That \$312 if paid to plaintiff at the time of the trial would fairly compensate him for the injury to said turf and roots up to March 30, 1918 (and in this connection the jury were told that in estimating said damages they would exclude the value of the grass growing on the plaintiff's land at the time of the fire).

(9) That the plaintiff suffered no damage for injury to the turf or roots after March 30, 1918.

Upon said answers the court rendered a judgment in favor of the plaintiff for \$936, with six per cent. interest per annum on \$624 thereof from November 24, 1916, to April 24, 1918, and for all costs of suit. From this judgment the defendant appealed.

[1] By the first and second assignments it is insisted that the measure of damages for the negligent burning of grass is its market value for the purpose of its intended use at the time and place it was burned, but, in the event it has no market value, then the measure of damages is the reasonable value thereof for the use for which it was intended; that where there is a market value it alone is the true measure, and before the reasonable value can be shown it must be proved by witnesses qualified to speak that there is no market value; and that, as the witnesses J. S. Harris and his son, Henry Harris, were not shown to have been qualified to testify that there was no market value for the grass, the action of the court in permitting them to testify as to its reasonable value was harmful error to defendant, for which this case ought to be reversed.

Appellee, J. S. Harris, testified that he leased the 365-acre tract of land in August, 1915; that he moved upon it about September 1, 1915; that he was engaged in the dairy and stock-raising business, and had about 125 or 130 head of cattle; that during the years of 1916 and 1917 he had about 140 head; that at the time the grass was burned it was in good condition, extra good;

that it was about 12 to 14 inches high and was worth \$10 per acre when burned; that the grass was used for grazing his cattle; that the fire that burned the grass killed the stubble, the roots of the grass; that as a result of the fire he had no grass on the 208 acres burned, and had to feed his cattle during two winter seasons, as he had no grass on said land; that he had about 100 head of dry cattle; that at the time of the fire the grass in the condition it was did not in his opinion have any market value, because he would not have sold it, and did not know that he would have sold it had he desired to do so, and besides he had no right to sell it under the terms of his lease; that he heard of others who leased land in the neighborhood of his lease; that the land about there is used for pasturage purposes, but did not know what the lessees paid for the land leased; that he never cut any hay; never used the land for cutting and harvesting hay; that he was making his estimate as to what he thought the grass was worth because that was the only way he had to estimate its value; that in 1916 the grass burned would have produced a ton of hay or better to the acre at one cutting; that some people cut hay once a year and others twice a year; that hay was selling at \$12 to \$14 per ton in 1916, and in 1917 from \$20 to \$30 per ton.

Henry Harris testified that they pastured their cattle on the land before the fire; that before the fire they did not feed their dry cattle, but since the fire they fed these cattle in the winter because they had no grass; that he had heard that several parties had leased land in the neighborhood, but did not know what they paid; that under the circumstances this grass, this range grass for grazing purposes, had no market value; that the reason he said the grass had no market value was because he did not know what land was leasing for and what grass was bought and sold for out there for grazing purposes, and another reason was that their lease did not authorize the subleasing of the land.

While these witnesses stated that in their opinion the burned grass had no market value for hay or pasturage purposes, they amplified this statement by giving all the facts relative to the value, and finally concluded with the statement that they did not know whether it had a market value or not and did not know how much, if any, land was leased in that neighborhood; in other words, the effect of such evidence was to show that they did not know whether it had a market value or not. The testimony was not an unqualified statement that the burned grass had no market value.

The effect of this testimony, we think, is that the witnesses knew of the existence of

no fact or facts which gave the grass any market value.

We have reached the conclusion that the testimony of the witnesses, when considered as a whole, is not subject to the objection urged by appellant, and that it was admissible as tending to show that the leased premises were used by plaintiff exclusively for pasturing his cattle, and the reasonable value thereof for such purposes.

[2] It is well settled that the measure of damages for the negligent burning of grass is its market value for any use or purpose for which it may be valuable to its owner, but in the event it has no market value, then the measure of damages is its value to its owner for any uses to which he may put it. *Steger v. Barrett*, 58 Tex. Civ. App. 331, 124 S. W. at page 176; *Ft. Worth & N. O. Ry. Co. v. Wallace*, 74 Tex. 581, 12 S. W. 227; *Railway Co. v. Anderson*, 173 S. W. 908; *Ft. Worth & D. C. Ry. Co. v. Hapgood*, 201 S. W. 1040.

Both appellee and his son, Henry, who was in charge of the premises, in substance testified that so far as they knew the grass had no market value, and that they thought it had no such value. They also testified to facts and circumstances tending to show that the grass had an actual value to its owner for pasturage purposes greatly exceeding the amount of damages found by the jury.

We think that the opinion of the Supreme Court in the *Wallace Case*, 74 Tex. 581, 12 S. W. 227, entirely eliminates any merit that might be urged as existing in appellant's contention on this phase of the case. The court there said:

"She [plaintiff] claimed that the fire destroyed grass of the value of \$650, fence of the value of \$200, and that the injury to the land by burning the turf and grass roots amounted to \$375. The averments in reference to the grass \* \* \* were 'that said 130 acres so burned off was at the time covered with a fine coat of grass of luxuriant growth, which she had reserved for the wintering of her stock; and which she had begun to use for that purpose only a short time prior to the said burning; that said grass was very valuable, to wit, of the value of \$5 per acre, and that by reason of the loss and destruction of the same \* \* \* she was deprived of her only winter feed for said stock; that she sustained damage by reason of the loss of said grass in the sum of \$650.'

"The court instructed the jury that in estimating the damages to which plaintiff might be entitled they would look to the market value of the grass destroyed at the time and place where it was, and that they might consider the market value for pasturage or hay purposes; there being much evidence as to the value for either purpose. It is urged that it was error so to charge, and the ground of the objection we understand to have been that there was no averment as to the particular manner in which plaintiff desired to use the grass. Such an averment was not necessary. The grass belonged to the plaintiff, and, if entitled to re-

cover at all, she was entitled to the market value of the grass as it stood, to be ascertained by its value for any legitimate use. Many witnesses had testified to its value if to be used for pasturage, as had many if it was to be used to make hay; but they all had reference to the value of the grass as it stood at the time it was destroyed. \* \* \* It is not the right of one through whose wrongful act an injury has been done to the land of another to have the measure of damages fixed by the effect the injurious act may have on the land if used for some purpose other than that to which it was applied or desired to be applied by its owner; but it is the right of the owner to have his damages measured by the extent of the injury to the land used for any lawful purpose to which he had appropriated it, desired to appropriate it, or to which it is adapted. *Railway v. Hogsett*, 67 Tex. 687, 4 S. W. 365. \* \* \*

It will be noted that plaintiff in the *Wallace Case* had specifically alleged the purpose for which she was to use said grass, viz. pasturage; yet she was allowed to prove its highest value for other uses.

The *Wallace Case* was followed in the later cases of *Railway v. Anderson*, 173 S. W. 908, *Railway v. Hapgood*, 201 S. W. 1040, and *Railway v. Matthews*, 3 Tex. Civ. App. 493, 23 S. W. 90, in all of which the proposition is asserted that plaintiff is not restricted to evidence of the use for which his property was at the time intended or made by him, but its value is determined by evidence of any use for which such property was valuable or could be used; and the case which appellant has cited as supporting its proposition as to market value were cases in which the question was not raised as to the value of same for other purposes than that for which actually used; so that the decisions so referred to are not in point on this phase of the case. But, notwithstanding that, the courts in those very cases refer to the *Wallace Case* and *Matthews Case*, supra, and quote portions of the very opinion above quoted as being the law.

The first and second assignments are overruled.

[3] The effect of the third assignment is that, as there was such a degree of certainty that the grass burned had a market value for the uses intended for it by its owner as to render any other conclusion wrong; the finding of the jury that it had no such value should have been set aside and a new trial ordered.

We overrule the assignment. There was evidence showing that the land upon which the grass burned was growing was leased and used by plaintiff exclusively for grazing or pasturage purposes, and that the grass had no recognized or ascertainable market value. There was also evidence showing that the grass burned was a part of a tract of 365 acres leased by plaintiff and was the best grass on the tract; that it was burned on the 24th day of November after the season for

cutting hay was over, and was valuable for pasturage purposes only. E. R. Taylor, introduced as a witness by appellant, testified in part as follows:

"I do not think there could be a standard recognized market value for grass for pasturage purposes at any particular time, because I do not think you could set a price on land that way. \* \* \* I am telling you what it leased for in my neighborhood."

All the evidence offered by appellant in attempting to show that the grass had a market value was to the effect that prairie land situated some miles distant from appellee's land, and further from Houston, was being leased for pasturage purposes at 50 cents to \$1 per acre per year. None of the witnesses undertook to testify to the value of the particular grass burned. There was no showing that these leased lands contained grass of like kind and quality or of the same value as that destroyed by the fire.

[4] It seems to be the contention of appellant that the value of the grass destroyed should be determined by what rental other persons paid for pasture land leased by them. This contention is not tenable. What appellee or others paid per acre as a rental may or may not have been the value of the land for pasturage purposes or for any other purpose at the time of making the rental contract. At the time of the fire the value of plaintiff's grass might have been much more or less than the rental price. *Chicago, R. I. & G. Ry. Co. v. Word*, 207 S. W. 902.

[5] We think the evidence sufficient to support the finding of the jury. But we might suggest here that we can see no just reason for complaint by appellant, if any such there is, that the jury should have found from the evidence that the land had a market value for hay-making purposes, because, if the value must be fixed for such purposes, there was evidence showing that the land would yield one or more tons of hay to the acre, and that such hay was worth, at the time of the fire, \$10 to \$12 per ton, thus showing a much larger damage than that found by the jury.

We overrule the fourth, fifth, and sixth assignments. After a careful examination of the plaintiff's petition, we think the allegations sufficient for the admission of the evidence complained of in the sixth assignment. *Pickering Lumber Co. v. Childress*, 206 S. W. 573. We also think that the evidence as a whole is sufficient to support the judgment rendered. We are unable to say from the evidence that the verdict of the jury is excessive in any respect, as insisted on by the fourth and fifth assignments.

[6] Appellant's seventh assignment is as follows:

"The court erred in permitting the plaintiff to testify, over the objection of the defendant, that it costs him 10 cents per day per

head for the feeding of his cattle after the grass was burned, for the reason that the same is an opinion and conclusion of the witness, and is not the best evidence, the plaintiff having shown that he knew the amount of feed purchased during the fall of 1916 and 1917, and the plaintiff's damages, if any, were limited to the actual amount of feed purchased, and the plaintiff should have been required to show the actual amount of feed purchased, and the price paid therefor, and not been allowed to estimate the amount it had cost him per head, such knowledge being in the possession of and within the power of the plaintiff to show the actual amount of feed purchased and price paid therefor."

The assignment cannot be sustained. Appellee testified that because of the loss of his grass he had to feed about 100 head of cattle which he would not have been required to feed if his grass had not been burned; that he had to feed these cattle from the first of December, 1916, to the latter part of March, 1917, and that it cost him 10 cents per head per day during this period to feed said cattle.

We are unable to conceive why it was thought incumbent on appellee to show how much feed he bought before he could explain how much of it he fed to the cattle in question. We think it reasonable to assume that from the gross amount of feed purchased appellee fed some 20 or 30 milk cows which he testified he owned and which he says he fed independent of the pasture. We may also assume he also fed some of the feed to his horses, mules, and other stock not of the 100 head in question. It was not error to admit the testimony. Proof of the fact that appellee had to expend 10 cents per head per day to feed his cattle, which he would not have been required to feed had his grass not been destroyed, was admissible and could be considered in arriving at the value to him of the grass for the purpose for which he leased it.

[7] By the eighth assignment it is insisted that—

"The court erred in permitting plaintiff to prove, over the objections of the defendant, the amount of hay that he could have cut from the said land, and the amount of money that he could have received from said pasture by pasturing other people's cattle, for the reason that the plaintiff had not sued for the value of the hay that he could have cut from said land that was burned, or the amount of money that he could have made by renting it to other people for pasturage purposes, but had only sued for the value of the grass destroyed, as well as the damages to him by reason of the destruction of the turf, if any."

It will be noted from the statement of the pleadings of plaintiff set out in the first part hereof that the plaintiff in effect alleged that the grass and hay upon his land on the 24th day of November, 1916, was destroyed through the negligence of appellant on said date; that such destruction was to plaintiff's damage in the sum of \$1,500; that the fire

which burned and destroyed his grass and hay also so damaged and injured the turf and roots of the grass on 208 acres of his land that he had been deprived of any and all grass and hay on said land ever since the burning, to his further damage in the sum of \$500, etc.

The testimony the admission of which is complained of is that of the plaintiff as to the quantity of grass and hay his land would have produced per acre and its value per ton from the 24th day of November, 1916, to March 18, 1917, and for the year from March 18, 1917, to March 18, 1918, and the testimony of the witnesses Walter Reed and S. L. Haines to the effect that they knew the customary rate for pasturing stock and cattle on grass like the plaintiff's in 1916 and 1917 per month per head; that the customary rate paid for pasturage purposes in that community for grass like plaintiff's was from 75 cents to \$1.50 per head per month for the whole year, and that the plaintiff's pasture could have taken care of 150 to 200 head of cattle.

Under the rule laid down in the case of *Railway v. Wallace*, 74 Tex. 581, 12 S. W. 227, we think the testimony complained of was admissible. The Supreme Court in the *Wallace Case* said:

"The grass belonged to the plaintiff, and, if entitled to recover at all, she was entitled to the market value of the grass as it stood, to be ascertained by its value for any legitimate use. Many witnesses had testified to its value if to be used for pasturage, as had many if it was to be used to make hay."

And again:

"It is the right of the owner to have his damages measured by the extent of injury to the land used for any lawful purpose to which he had appropriated it, desired to appropriate it, or to which it is adapted. *Railway v. Hogsett*, 67 Tex. 687, 4 S. W. 365."

We have examined and considered assignments 9 to 12, inclusive, and have, for reasons already given under the consideration of other assignments, reached the conclusion that none of them present reversible error.

Finding no error committed in the trial of this case as should require at our hands a reversal of the judgment rendered by the trial court, such judgment is affirmed.

Affirmed.

=====  
KOGER et al. v. CLARK et al. (No. 6262.)  
(Court of Civil Appeals of Texas. San Antonio. Nov. 5, 1919. Rehearing Denied Dec. 10, 1919.)

1. BANKRUPTCY ¶141, 293(2)—JURISDICTION TO SET ASIDE DEED TO LAND IN OTHER STATES.

The federal District Court of Kansas had jurisdiction in a bankruptcy proceeding over

land in Texas belonging to the bankrupt, and could render a decree canceling a preferential deed executed within 4 months before the filing of the petition in bankruptcy.

2. BANKRUPTCY ¶295 — STATE COURT MAY SET ASIDE TRANSFER IN FRAUD OF BANKRUPTCY ACT.

In cases of transfers of property by a bankrupt within 4 months before the filing of the petition in bankruptcy, any state court which would have jurisdiction if bankruptcy had not intervened can set aside the transfer.

3. ESTOPPEL ¶69 — TESTIMONY IN BANKRUPTCY PROCEEDING.

Where wife of bankrupt admitted in bankruptcy proceeding under oath that certain land belonged to the estate of her husband, and swore that a deed to her was a mortgage, and not intended as a conveyance of title, and the federal court set aside the deed on said admission, and she accepted a compromise of her claim, and accepted money of the estate on the compromise, and other benefits, she is estopped from thereafter setting up any claim to the land on the ground that transfers made under order of the federal court were void.

4. TRUSTS ¶103(3)—NOT CREATED BY MONEY FURNISHED HUSBAND.

Where wife did not place money in her husband's hands to buy land, but he had her money and invested it in land, the effect was a loan to him, and he owed her a debt, and she had no right, title, or interest in the land, only holding a lien on the same.

5. APPEAL AND ERROR ¶1171(2)—DOCTRINE OF FUNDAMENTAL ERROR NOT APPLIED TO TRIVIAL MATTERS.

In an action involving thousands of dollars, an error in calculation amounting to \$415 will not be considered on appeal, where complaint is made there for the first time, even though the doctrine of fundamental error is applied.

6. COSTS ¶238(2) — MODIFICATION OF JUDGMENT ON GROUND NOT RAISED BELOW.

Where a judgment for \$16,650 was too large by \$415 by reason of error in calculation, the appellate court, though it reduces the judgment, will not relieve appellants of the payment of the costs in the appellate court, where such error in calculation was raised for the first time on appeal.

Appeal from District Court, San Patricio County; M. A. Childers, Judge.

Action by Bettie A. Koger and Stephen H. Koger against Fred A. Clark and others. Judgment for defendants, and plaintiffs appeal. Affirmed.

Dougherty & Dougherty, H. S. Bonham, and G. C. Robinson, all of Beeville, for appellants.

James G. Cook, of Sinton, and Samuel Feller, of Kansas City, Mo., for appellees.

FLY, C. J. This is an action of trespass to try title to 632.23 acres of land, being sec-

tion 33 out of the George H. Paul subdivision in the Coleman-Fulton Pasture Company's lands lying west of Taft, in San Patricio county, and incidentally to cancel a deed of trust held by R. W. Rogers as trustee on said land, instituted by Bettie A. Koger and Stephen H. Koger against Fred A. Clark, the Lee Live Stock Commission Company, and R. W. Rogers, trustee. It was alleged that Rogers was claiming a valid deed of trust on the land to secure the payment of five promissory notes, aggregating \$16,650, given to the Lee Live Stock Commission Company. Appellees pleaded not guilty, general denial, and specially that the Commission Company claims, through R. W. Rogers, that it has a valid lien on the land sued for, given to secure the payment of five notes as alleged in the petition. Neither the petition nor answer in terms discloses who executed the notes and deed of trust in question, but it may be inferred from the answer that they were executed by B. F. W. Juhlin and Margaret Juhlin. It was further alleged in the answer that every issue sought to be raised by appellants in this case had been fully and finally adjudicated against them in the United States District Court of Kansas; that prior to December 17, 1913, Stephen H. Koger was the owner of the land described in appellants' petition; that on the date named Lee Live Stock Commission Company, which for brevity's sake will be denominated the "Company," filed a petition in bankruptcy against Stephen H. Koger in the District Court of the United States for Kansas, to adjudge him a bankrupt; that afterwards, on January 16, 1914, the said Stephen H. Koger filed a petition, with schedules of his assets and liabilities, in the same court, praying that he be adjudged a bankrupt; that on January 19, 1914, Stephen H. Koger was adjudged a bankrupt on both petitions; that Bettie A. Koger and the company were creditors of Stephen H. Koger; that Scott Hopkins was elected trustee. It was further alleged that on October 13, 1913, Stephen H. Koger, being insolvent and within 4 months before the filing of the petitions in bankruptcy, conveyed by deed to Bettie A. Koger the land in controversy; that on November 12, 1914, said Bettie A. Koger filed in the bankruptcy court proof of a claim against the estate for \$12,815.04, claiming that it was secured by the conveyance aforesaid, dated October 13, 1913; that the claim was allowed, but not as a secured claim; and it was further adjudged that the conveyance aforesaid, while in the form of a deed, was in truth and fact a mortgage made while the bankrupt was insolvent and to prefer the claim of Bettie A. Koger, and that the latter knew of the insolvency of the maker of the instrument.

It was further alleged that the trustee brought a suit to set aside the conveyance, when Bettie A. Koger claimed in her answer

that the property was her separate estate, held by her husband in trust for her, and that the deed was made to fulfill the trust; that the cause was heard and adjudicated against the said Bettie A. Koger and the conveyance declared null and void. It was also alleged that the trustee obtained an order authorizing him to settle and adjust all matters with Bettie A. Koger, specifying the terms of adjustment and settlement; that afterwards said Bettie A. Koger asked that the order be modified in certain respects for her convenience and benefit, and the request was granted; that the company was ordered to pay to the trustee a sum sufficient to pay all cash obligations, and should receive in full settlement of its claims notes aggregating \$12,650, to be secured by a first lien on the real estate herein involved, the land being conveyed by the trustee to one B. F. W. Juhlin, who should execute the notes and deed of trust and should immediately convey the property to Fred A. Clark, subject to said deed of trust, who should hold it in trust for Bettie A. Koger, and that said Clark, as trustee, and said Bettie A. Koger, should assume payment of said indebtedness. It was further alleged:

"That the plaintiff Bettie A. Koger was a party to all of the proceedings set out and agreed to and acquiesced in said settlement and adjustment, and received and accepted the benefits thereof in full payment and settlement of all her claims and demands against said bankrupt and his estate, and which was the same money she now claims in this suit Stephen H. Koger invested for her as her separate estate in the real estate herein described. \* \* \* That in compliance with said orders and judgments, and after having received the benefits therein provided for, said plaintiff Bettie A. Koger released all her claims against said Stephen H. Koger and his estate in bankruptcy."

The cause was tried without a jury, and judgment was rendered that appellants recover of the Lee Live Stock Commission Company, Fred A. Clark, and R. W. Rogers, trustee, the land in controversy, subject to the payment of certain promissory notes due the company, described in its answer, and a foreclosure of the lien claimed. It was further ordered that the company recover of B. F. W. Juhlin the sum of \$13,830.65, and that its lien on the land be foreclosed. This appeal is prosecuted by Bettie A. Koger and Stephen H. Koger.

The following summary of the issues is presented by appellants:

"Appellants earnestly contend that the decree of the federal District Court, attempting to cancel the deed from S. H. Koger to Bettie A. Koger, attempting to divest title out of Bettie A. Koger and invest same in Scott Hopkins, trustee, was ineffectual and void; that Mrs. Bettie A. Koger is not estopped to assert title to said land; that defendants' said answer

showed no title ever to have been held by Juhlin, and said deed of trust was therefore void; that plaintiff's general demurrer to defendants' said answer in the court below should have been sustained; and that, on account of the error in overruling the same, this cause should now be reversed, and rendered for appellants.

"Appellants earnestly insist that the compromise order was void, and that it did not make any such disposition of the bankrupt's estate as is authorized by law, and further that, even if such compromise order is valid and binding, the deed of trust, its provision being at variance with the provisions of the compromise order, is void.

"Appellants still further insist that if, by virtue of the decree of the federal District Court, the title was divested out of Mrs. Bettie A. Koger, and invested in Scott Hopkins, trustee, the transfers of the Texas land by Scott Hopkins, trustee, to B. F. W. Juhlin, and by said Juhlin to Fred A. Clark, together with the execution of the deed of trust hereinabove mentioned, are void, for the reason that said transactions constituted an attempted sale of the Texas land, which was subject to approval by, and should have been, but was not, approved by, the court or the referee in bankruptcy, and that said attempted sale was therefore void.

"Appellants further show to the court that the judgment rendered is excessive to the amount of \$415."

We adopt the conclusions of fact filed by the trial judge, which find that the substantial allegations of the answer as herein set out were sustained by the evidence. The correctness of the conclusions of fact is not assailed in any manner by appellants.

The evidence showed that the deed of conveyance made by Stephen H. Koger to his wife, Bettie A. Koger, was in fact a mortgage, and was given within four months of the time when bankruptcy proceedings were filed, for the purpose of giving said Bettie A. Koger a preference over other creditors. This matter was so found and adjudicated by the federal court of the state of Kansas, in the one administration of the estate of the bankrupt. Bettie A. Koger filed her claim in the bankrupt court, making no claim to the land, except that she had a lien on it to secure her debt, and her effort at that time was to obtain a preference lien on the land. Afterwards the claim to the title was set up, when it had been ascertained that her lien was void, and had been declared inoperative by the court.

The first, second, and fourth assignments of error are overruled. The answer set up a compromise and a release by Bettie A. Koger, and the facts estopped her as against any claim on her part to the land. No proposition is filed attacking the power and authority of Bettie A. Koger to make a compromise and give a quitclaim deed to the land. In the judgment of the federal court, to which Mrs.

Koger agreed, it was provided, among other things, that she should receive the sum of \$3,000, paid by Nannie A. Koger, and the money was paid to and accepted and appropriated by said Bettie A. Koger; that money belonged to the bankrupt estate, and, except through the compromise, Mrs. Koger had no right whatever to it, and yet she used it under the compromise, which she was active in procuring, for her own use and benefit. The answer showed, further, that both of the appellants swore in filed papers in the bankrupt court that the land in question was a part of the estate of the bankrupt, and that the deed given by the bankrupt to his wife was indeed and in truth a mortgage given to secure a debt due by the husband to the wife. It would be permitting the triumph of a palpable fraud over the claims of other creditors of the bankrupt and of a fraud upon the federal court for Mrs. Koger to ignore her agreements and set up title to the land on which she claimed to have a mortgage. The allegations were sufficient, as against a general demurrer, to show estoppel as against Bettie A. Koger.

[1, 2] The Supreme Court of the United States has held directly contrary to the contention of appellants that the federal District Court of Kansas had no jurisdiction over land in Texas, and that the decree rendered in the bankrupt cause, canceling the deed from the husband to the wife, and divesting it out of the wife and investing it in the trustee in bankruptcy, was null and void. Clearly, in cases of transfers of property by a bankrupt within 4 months before the filing of the petition in bankruptcy, any court in bankruptcy, or any state court which would have had jurisdiction if bankruptcy had not intervened, can set aside the transfer or conveyance of such property. Appellants have cited a number of cases, none of which have any applicability to bankrupt cases. The matter is clearly and definitely settled, according to the plain terms of the bankrupt law, against the contention of appellants, by the Supreme Court of the United States in the case of *Robertson v. Howard*, 229 U. S. 254, 33 Sup. Ct. 854, 57 L. Ed. 1174. After fully discussing the provisions of section 70b of the Bankruptcy Act, Act July 1, 1898, c. 541, 30 Stat. 565 (U. S. Comp. Stat. § 9654), the court concluded that the effect of the adjudication in bankruptcy was to transfer the title of the property of the bankrupt and vest it in the trustee, who is empowered to administer the same, under control of the court. Proceeding, the court said:

"No limitation on this general principle arises from the mere fact of the particular situation of the property, as the principle is general and embraces all the property of the bankrupt estate, wherever situated."



After citing the statute the court said:

"This provision makes it manifest that it was the purpose of Congress to give bankruptcy courts full and complete equitable power in matters of the administration and sale of the bankrupt estate, wholly irrespective of the mere situs of the property; the controlling factor being, not where the property is situated, but did it pass to the trustee, and is it a part of the estate, subject to administration under the direction of the court?"

The contention of appellants was sustained in the Robertson Case by the Supreme Court of Kansas, but the decision was reversed by the Supreme Court of the United States. The same ruling was made in U. S. Fid. & Guar. Co. v. Bray, 225 U. S. 205, 32 Sup. Ct. 620, 56 L. Ed. 1055.

[3] Mrs. Bettie A. Koger admitted, under oath, that the land belonged to the estate of her husband, and swore that the deed to her was a mortgage, and not intended as a conveyance of title, and the court in Kansas set aside the deed on her admission, and she accepted a compromise of her claim, and accepted \$3,000 on that compromise, besides other benefits, and she is estopped from setting up any claim to the land. To allow her to recover for the land would be to put the stamp of approval upon a palpable fraud. No such immunity from the effects of fraud should be accorded even to a married woman. *Ryan v. Maxey*, 48 Tex. 192.

[4] If appellants swore to the truth when they filed papers in the federal court, and if Mrs. Koger answered truthfully in that court, she did not place any money in her husband's hands to buy any land, but he had her money and invested it in land. The money had been loaned to him by her and he owed her a debt. She had no right, title, or interest in the land, only holding a lien on the same. *Blethen v. Bonner*, 30 Tex. Civ. App. 585, 71 S. W. 290; *Levy v. Williams*, 20 Tex. Civ. App. 651, 49 S. W. 930, 50 S. W. 528.

The third assignment of error is without merit, and is overruled. The trial court corrected any mistakes made by the federal court, and sought to place appellants in the exact situation they had contracted for, and there is no merit in the complaint that the Texas court gave them that which they contended the federal court should have given.

[5, 6] No complaint was made in the trial court as to any mistake or error in the calculation of what was due on the notes held by the company, but for the first time it is claimed that such mistake was made, and action by this court is sought on the ground of fundamental error. If the judgment is excessive, it is in too small an amount to require any action by this court, even though the doctrine of fundamental error could be applied, to which theory this court does not commit itself. If the judgment had been re-

duced in the amount claimed by appellants, it would not, under the circumstances, relieve appellants of the payment of the costs of this court.

The sixth and seventh assignments are overruled.

The judgment is affirmed.

# COOK et al. v. DENIKE et al. (No. 6225.)

(Court of Civil Appeals of Texas. San Antonio. June 26, 1919. On Motion for Re-hearing Nov. 26, 1919.)

## 1. DEPOSITIONS $\S$ 88 — NO EXCLUSION FOR ASSURANCE THAT WITNESS WOULD BE AVAILABLE.

Defendants' assurance that a witness who had testified by deposition would be available in person at the trial, if plaintiffs desired to examine him, in reliance on which plaintiffs announced ready for trial, though entitling plaintiffs to withdraw the case from the jury if the witness was not present in court, did not entitle them to an exclusion of the deposition from evidence.

## 2. DEPOSITIONS $\S$ 88—EXCLUSION ON INTRODUCTION OF TESTIMONY OF WITNESS AT FORMER TRIAL.

Introduction by defendants of testimony of witness given at a former trial does not entitle plaintiffs to exclude from evidence a deposition of the same witness.

## 3. DEPOSITIONS $\S$ 88—EXCLUSION FOR FAILURE TO PLACE ON STAND WITNESS PRESENT AT TRIAL.

Under Rev. St. art. 3675, entitling either party to use depositions whether presence of the witness was obtainable or not, the fact that the witness had been subpoenaed by the opposite party, but not placed on the stand so as to be available for cross-examination, is no ground for excluding the deposition.

## 4. WILLS $\S$ 378—TESTIMONY ON PROBATE ADMISSIBLE IN SUIT TO SET ASIDE PROBATE.

Under Rev. St. art. 3273, requiring testimony for the probate of a will to be reduced to writing and subscribed in open court, and article 3275, permitting a copy of such testimony to be read in evidence on the trial of the same matter in any other court, the written testimony on the hearing for probate is admissible in a suit to set aside the probate tried in the district court on appeal.

## 5. WILLS $\S$ 294—EVIDENCE AT PROBATE AS TO CAPACITY.

Under Rev. St. art. 3271, specifying proof required for probate, in a suit to set aside the probate of a will, witnesses to the probate can testify that testatrix was of age and of sound and disposing mind; that the witnesses were credible, and would have known it if she had revoked her will.

## 6. DEPOSITIONS $\S$ 107(9) — OBJECTION THAT ANSWER IS NOT RESPONSIVE MUST BE RAISED BY MOTION.

The objection that an answer of witness in a deposition is not responsive to the question

can only be raised by motion before announcement of ready for trial.

**7. WILLS §288(3)—BURDEN OF PROOF AND PRESUMPTIONS IN SUIT TO ANNUL PROBATED WILL.**

In a suit to annul a will admitted to probate, the burden is on plaintiffs suing to set it aside for want of capacity, or undue influence to establish such matters, and every presumption will be indulged in favor of the will.

**On Motion for Rehearing.**

**8. WITNESSES §266—CROSS-EXAMINATION OF WITNESS TESTIFYING BY DEPOSITION.**

The fact that a party introduced the deposition of a witness does not entitle the adverse party to call such witness at the trial for the purpose of oral cross-examination.

**9. DEPOSITIONS §90—MAY BE USED, THOUGH WITNESS PRESENT IN COURT.**

It is within the discretion of the trial judge to permit a deposition to be used at the trial, though the witness is present in court.

Appeal from District Court, Nueces County; W. B. Hopkins, Judge.

Suit by R. O. Cook, Sr., and others against Mrs. Eva Noessel Denike and others. Judgment for defendants, and plaintiffs appeal. Affirmed.

Hicks, Phelps, Dickson & Bobbitt, of San Antonio, Dougherty & Dougherty and H. S. Bonham, all of Beeville, and G. R. Scott, Boone & Pope, of Corpus Christi, for appellants.

Kleberg, Stayton & North and Pope & Sutherland, all of Corpus Christi, for appellees.

**FLY, O. J.** This is a suit instituted by appellants against appellees in the county court of Nueces county to set aside the probate of the will of Mary O. Russell, deceased, on the ground of mental incapacity to execute a will, and of undue influence and fraud being used by appellees to procure the making of the will. The county court denied the relief sought, and the cause was appealed to the district court, where it was tried by jury, resulting in a verdict and judgment in favor of appellees.

There are over 400 printed pages in the brief of appellants, nearly 300 pages of which consist of testimony copied from the statement of facts. There is evidence which sustains the verdict of the jury and the judgment of the court; and, unless there be some error of law which may have affected the verdict, it must be affirmed.

The first assignment of error assails the action of the court in permitting the depositions of Dr. Harry G. Heaney to be read to the jury by appellees. The depositions were regularly and properly taken, the only objection to the depositions by appellants being

"that on the day this cause was called for trial plaintiffs announced ready for trial on the assurance of defendants that said Dr. Harry G. Heaney would be available as a witness, should plaintiffs desire to use him; that said witness was then and there under process caused to be issued and served by plaintiffs, but was not in attendance on court. And upon such assurance by defendants to plaintiffs that said witness would be available plaintiffs announced ready for trial. That when the witness, Edward R. Kleberg, of counsel for defendants, was on the stand, just previous to the offer of defendants to read said depositions of Dr. Harry G. Heaney, said Kleberg was questioned by defendants with reference to the testimony of said Dr. Harry G. Heaney at the trial of this cause in the county court. Plaintiffs objected to such testimony, and on the assurance of defendants' counsel that Dr. Harry G. Heaney would testify in this cause the court overruled plaintiffs' objections, and admitted in evidence certain portions of the testimony of Dr. Harry G. Heaney, given in the court and proven up by the said Edward R. Kleberg; that the said Dr. Harry G. Heaney was under process, and subject to the order of the court and was, in effect, present in court, and is available as a witness, and that to permit said deposition to be read in evidence was, in effect, a denial of the right of cross-examination, and would deprive plaintiffs of the right to cross-examine said witness and of the cross-examination of said witness." The bill of exceptions is obscure, and leaves it doubtful whether the objection was to depositions or to the hearsay evidence of what Kleberg swore as to what Dr. Heaney testified in the county court. It will be assumed, however, that the objections were urged to the use of the depositions of Heaney, on the ground, first, that defendants assured plaintiffs that Heaney would be available if plaintiffs desired to use him, and on that assurance they had announced ready.

[1] Of course that did not constitute a reasonable objection to the depositions. If appellants were enticed into an announcement of ready for trial, it might, under certain circumstances, have formed a basis for a withdrawal of the case from the jury, but could not be an objection to the depositions. It is not pretended that the witness was not present and could not have been used by appellants, but, on the other hand, it is stated by appellants in their bill of exceptions that Dr. Heaney "was under process and subject to the order of the court, and was, in effect, present in court and available as a witness."

[2] The second objection was that the court permitted certain portions of the testimony of Dr. Harry G. Heaney to be used in evidence. This was no objection to the legality of the depositions offered in evidence.

[3] The true grounds for objection to the depositions, that are merely hinted at in the bill of exceptions, are that appellants desired that the witness should be placed on the stand by appellees so that appellants could subject him to another cross-examination in addition to one to which he had been subjected when the depositions were taken. Appellants admit that the witness was available, and if they desired his presence on the stand they had the full legal right to place him there. Under the terms of the statute, either party had the right to use the depositions, whether the presence of the witness was obtainable at the trial or not. Article 3675, Rev. Stats. And no tenable objection was urged to the use of the depositions.

When the depositions had been properly taken appellees had the right to use them, without the condition being attached to their use of placing the witness on the stand, and in that way open up an opportunity to appellants to cross-examine him. Appellees were under no obligation to put a witness on the stand in order that appellants might cross-examine him. They were defending their entrenchments against the attacks of their adversaries, and could not be compelled to make a breach therein in order that appellants might find a place of attack. No authority has been or can be offered for such a proposition. If appellees inveigled appellants into a trial on the representation that they would place Dr. Heaney on the stand in order that appellants might cross-examine, let the attack be made on that line, if any, and not on the ground that their opponents should open up avenues of attack for them. Appellees had the right to use the depositions even though the witness was in court, and were not compelled to call him to the stand. *Holt v. Guerguin*, 106 Tex. 185, 163 S. W. 10, 50 L. R. A. (N. S.) 1136. The matter was one peculiarly within the discretion of the trial judge, and no abuse of such discretion is shown. *Schmick v. Noel*, 64 Tex. 406; *O'Connor v. Andrews*, 81 Tex. 28, 16 S. W. 628.

Through the second assignment of error appellants claim that the court refused to permit them to call Dr. Heaney to the stand for the purpose of a cross-examination, but the record fails to sustain their contention. Dr. Heaney was never offered as a witness for cross-examination or any other purpose. The bill of exceptions shows that appellants "notified the court and counsel for defendants that they insisted upon, and would insist upon, their right to cross-examine said witness, Dr. Harry G. Heaney, in person, and to have the said Dr. Harry G. Heaney called to the witness stand for such cross-examination before defendants concluded the introduction of their evidence in chief." The threat was never carried into execution, nor was any attempt made to execute it. The assignment of error is overruled.

[4] The third, fourth, fifth, sixth, and ninth assignments of error assail the action of the court in permitting the use in evidence of the written testimony used in the probate of the will in the county court. It is provided in article 3273, Revised Statutes, that:

"All testimony taken in open court upon the hearing of an application to probate a will shall be committed to writing at the time it is taken, and subscribed in open court by the witness or witnesses, and filed by the clerk."

Then it is provided in article 3275:

"A certified copy of such record of testimony may be read in evidence on the trial of the same matter in any other court when taken there by appeal or otherwise."

In the case of *Beeks v. Odom*, 70 Tex. 183, 7 S. W. 702, it is held that such testimony is admissible on appeal to the district court. To the same effect is *Prather v. McClelland*, 76 Tex. 574, 13 S. W. 543.

[5] It is provided in article 3271 that, in order to probate a will, it must be proved that the testator at time of executing the will was 21 years of age, or was married; that he was of sound mind; that he is dead; that the will was executed "with the formalities and solemnities and under the circumstances required by law to make it a valid will"; and of course it was proper for the witnesses to the probate of the will to swear that the testatrix was "more than 21 years of age and was of sound and disposing mind," and that the witnesses to the will were credible witnesses, and that the witnesses would have known it if she had revoked her will. *Perdue v. Perdue*, 208 S. W. 353.

[6] The seventh assignment of error is overruled. Even though the answer of the witness was not responsive to the question, it could not have injured appellants in any way, nor is such claim made. The only objection made is that it was not in response to the question. Such objection could only be raised by motion before announcement of ready for trial, and this was not done by appellants. *Railway v. Kuehn*, 2 Tex. Civ. App. 210, 21 S. W. 58; *Railway v. Scheerer*, 1 Tex. Civ. App. 343, 21 S. W. 133; *McFarlane v. Howell*, 16 Tex. Civ. App. 246, 43 S. W. 315; *Clafin v. Harrington*, 23 Tex. Civ. App. 345, 56 S. W. 370. The same rule applies to evidence objected to through the eighth assignment of error.

The remaining assignments of error assail the verdict of the jury as not supported by and contrary to the evidence. The evidence is very conflicting; and, while it may be that this court originally would have reached a different conclusion from that reached by the jury, still there is testimony to sustain the verdict, which was returned in response to a charge against which not a single objection has been presented.

[7] This is an attack upon a will already

probated, to set it aside and annul it. It was an attack upon the judgment of a court which had heard the testimony and probated the will. When the will was probated the presumption arose of the validity of the instrument; due compliance with all legal formalities being shown. The rule always obtains that testamentary incapacity will never be presumed as to a will duly probated, and the burden, rests on him who seeks to set aside a will, duly probated, to show such incapacity. *Alexander, Wills*, § 396, p. 535. By the judgment of the county court everything necessary to the probate of the will was determined, and in an original suit to set it aside on account of insanity or want of testamentary capacity, or undue influence, or fraud, the burden rests upon the plaintiffs to establish such matters, and every presumption will be indulged in favor of the probate of the will. *Fowler v. Stagner*, 55 Tex. 393. Appellants failed to establish the incapacity of the testatrix, or that undue influence or fraud was used to procure the execution of the will.

The judgment is affirmed.

#### On Motion for Rehearing.

The first assignment of error objected to the use of the depositions of Dr. Heaney because, "on the day this case was called for trial, at the present term of this court, plaintiffs announced ready on the assurance by defendants that said Dr. Harry G. Heaney would be available as a witness, should plaintiffs desire to use him; that said witness was then and there under process caused to be issued and served by plaintiffs; that said witness would be available, plaintiffs announced ready for trial." Immediately following that part of the assignment is an objection, not to the depositions, but to certain statements made by Edward R. Kleberg. Then, returning to the depositions, appellants objected to them because the witness was in effect present in court. If the last statement be true, then the first objection falls to the ground, because appellees had promised to have the witness available, and he was in effect in court. If he was not available, it follows there could be no objection because the depositions were not used while he was in court; and, if he was in court, then he could have been used by appellants. In the proposition under the assignment, it is admitted that the witness was present and available, that he was under process issued by appellants, and that they had taken the depositions to which they urged objections. It is not claimed in the assignment or proposition that the use of the depositions or a failure to cross-examine the witness had in any way injured appellants, except that it is stated generally that the error was material and affected the jury. How was it material, and how did it affect the jury?

[8] It seems to be the contention that if a party takes a deposition which is used in evidence by his antagonist, the fact of such use authorizes the party who took the deposition to call the witness in person in order to cross-examine him. In other words, the use of the deposition not only makes the testimony that of the party offering it, but also gives the other party the right to place the witness on the stand for purposes of cross-examination. No authority has been presented for this proposition, nor do we believe it can be produced. The depositions of a witness cannot be blended with or merged into his testimony on the stand in person, and the taking of his depositions and their use by the opposite party from the one who took them does not change or alter a single rule as to the examination of the witness in person. All that is held in the cited cases is that when the opposite party introduces depositions not taken by him they become his evidence, and none has held that when so used the witness can be called for cross-examination as though he had testified in person for the opposite party. It would indeed be a novel practice.

There was no objection to the form of taking the depositions, the only objection being that the court did not make it a condition to their use that appellants should then be permitted to call the witness to the stand and cross-examine him on his answers to the interrogatories propounded by them. Of course, the cited cases of *Railway v. Ritter*, 16 Tex. Civ. App. 482, 41 S. W. 753, *Railway v. McKenzie*, 41 S. W. 831, and *W. U. Tel. Co. v. Lovely*, 29 Tex. Civ. App. 584, 69 S. W. 128, hold nothing even tending in the least to sustain any such rule.

[9] Whatever may have been held by the Supreme Court at one time as to using the depositions of a witness when he is present in court, as opposed to such use, it is now well established in later opinions, both by the Supreme Court and Courts of Civil Appeals, that it is within the discretion of the trial judge to permit them to be used. *Schmick v. Noel*, 64 Tex. 406; *Hittson v. Bank* (Sup.) 14 S. W. 780; *Schmick v. Noel*, 72 Tex. 1, 8 S. W. 83; *O'Connor v. Andrews*, 81 Tex. 28, 16 S. W. 628; *Railway v. Renken*, 15 Tex. Civ. App. 229, 38 S. W. 829; *Railway v. McKenzie*, 41 S. W. 831; *Railway v. Burnett*, 42 S. W. 315.

There was not, as stated in the original opinion, any offer to place Dr. Heaney upon the stand, nor does the record show what questions were to be propounded on the cross-examination, nor what the probable answers nor probable effect might have been. The cross-examination, had it been permitted, may not have elicited a single fact favorable to appellants, or which would have tended to have shaken the testimony of the witness embraced in the depositions. The depositions indicate a high order of intelligence upon

the part of the physician, and he does not seem to belong to a class whose evidence might be discounted or broken down by a cross-examination. They permitted appellants to call Dr. Heaney to the witness stand if they so desired.

In connection with the affidavits of the witnesses who proved up the will in the county court, it may be stated that if the affidavits should not have been admitted, every fact contained in the affidavits was testified to by the affiants in the district court.

The motion for a rehearing is overruled.

## AMERICAN INDEMNITY CO. v. NOBLE. (No. 488.)

(Court of Civil Appeals of Texas. Beaumont.  
Nov. 13, 1919. Rehearing Denied  
Dec. 17, 1919.)

### 1. GUARDIAN AND WARD §15 — CONSTRUCTION OF BOND WITH REFERENCE TO EXISTING LAW.

A guardian's bond is to be construed with reference to the law in force when and where it was given, and read in the light of the provisions of the law then in force; the obligation of the sureties being measured and determined by it.

### 2. GUARDIAN AND WARD §15 — BOND REQUIRED OF SUCCESSOR OF GUARDIAN IN "PENDING" PROCEEDINGS.

Where a guardian for the estate of a minor was appointed in 1901, and qualified by giving bond in double the estimated value of her ward's property, after her removal in 1913 the case was "pending" within Vernon's Sayles' Ann. Civ. St. 1914, art. 4177, providing that in cases pending when the law became effective, and in which the guardian had a satisfactory bond filed equal to twice the amount of all personal property of the ward, and twice the amount of real estate sold, he would not be required to file a new bond, and the guardian succeeding her and coming into possession of the ward's property was required to give bond only identical with that given by the original guardian.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Pending.]

Appeal from District Court, Shelby County; Daniel Walker, Judge.

Suit by J. Bennett Noble against the American Indemnity Company and others. From judgment for plaintiff against certain defendants, the named defendant appeals. Affirmed.

Davis & Davis, of Center, and Terry, Calvin & Mills, of Galveston, for appellant.

Sanders & Sanders, of Center, for appellee.

BROOKE, J. This suit originated in the district court of Shelby county, Tex., by

petition filed therein on January 28, 1918, by J. Bennett Noble, as plaintiff, against J. S. McLamore, Jr., General Bonding & Casualty Insurance Company, American Indemnity Company, Louis A. Adoue, George Sealy, and Lion Bonding & Surety Company, all designated as defendants, said petition alleging the appointment of McLamore as plaintiff's guardian on a former date with General Bonding & Casualty Insurance Company as surety on such bond as such guardian, of his reappointment at a later date with appellant as surety on his second bond. Said petition further alleged the receipt on the part of said McLamore as guardian of two several sums of money, one being the proceeds of a judgment rendered against Mrs. Fannie Noble, plaintiff's mother, and former guardian, and her surety, Fidelity & Deposit Company of Maryland, in the sum of \$2,953.85, the other being in the sum of \$600 arising from the sale of a tract of land in Shelby county by said McLamore as guardian, in which said ward had one-half interest. Misappropriation and failure to account for each and both of such sums of money was alleged and judgment therefor asked against the defendants McLamore as guardian, General Bonding & Casualty Insurance Company, and American Indemnity Company, Adoue and Sealy as sureties on his two bonds, and against Lion Bonding & Surety Company as a reinsurer of General Bonding & Casualty Company. He also asked for interest on said sums of money, as provided by statute.

McLamore, guardian, though duly cited, made no appearance in the case.

Appellant, American Indemnity Company, answered denying liability on said bond as to the proceeds of said sale of land, assigning as reason therefor, among other things, that said purported sale of the said land was illegal under the law, as amended by act of 1913, in that no sale bond was required or given in said proceeding. It denied liability for any part of the \$2,953.85 item, alleging that if the same, or any portion thereof, had been received and misapplied by said McLamore, it was prior to the execution and filing of the bond on which applicant was surety. Appellant asked for judgment over against McLamore, its principal, and its codefendant, General Bonding & Casualty Insurance Company, for any sum for which judgment might be rendered against it.

Defendant General Bonding & Casualty Insurance Company answered denying liability on the ground that, while it was at one time surety on McLamore's bond, it had been released and relieved thereon from liability by the acceptance of the bond on which American Indemnity Company was surety; that no misappropriation occurred during the tenure of its bond. It also impleaded the Lion Bonding & Surety Company on a contract of reinsurance, asking for judgment over against

it, and also over against its principal, McLamore.

Defendants Adoue and Sealy answered that they were not sureties on said bond, but that they executed same as officers of the corporation and not individually, and adopting, if answer was required, that of the American Indemnity Company.

Lion Bonding & Surety Company filed its plea of privilege to be sued in the county of its domicile, which does not seem to have been acted on, and also denying liability on the ground that, if any misappropriation occurred, it was either before or after the term of its reinsurance contract.

Trial was before the court without a jury and resulted in a judgment in favor of Adoue and Sealy and Lion Bonding & Surety Company and against General Bonding & Casualty Company for \$2,073.89, and against American Indemnity Company for \$663.

Upon motion therefor, the court duly filed its findings of fact and conclusions of law, whereupon appellant, having previously given notice of appeal, filed its appeal bond, and has perfected its appeal to this court.

The various parties and defenses thereof, together with the cross-action thereon, are substantially correct, as stated above.

[1] As presented to the court, this case really hinges on one proposition. A guardian's bond is to be construed with reference to the law in force when and where it was given, and read in the light of the provisions of the law then in force. The obligation of the sureties will be measured and determined by it. Prior to the passing of chapter 151, General Laws of the regular session of the Thirty-Third Legislature, the guardian of the estate of a ward was required to give bond in an amount equal to double the estimated value of the property belonging to such estate (*McAdams v. Wilson*, 164 S. W. 59), and acting under such bond, and without additional bond, the guardian has the right to sell property belonging to the said ward and take into his charge the proceeds of said sale. By the act of 1913 (*Vernon's Sayles' Civil Statutes* 1914, art. 4099), the existing law was so changed as to require the guardian's bond to be in an amount equal to double the estimated value of the personal property belonging to the estate of said ward, plus a reasonable amount to be fixed at the discretion of the county judge, to cover rents, revenues, and income derived from the renting or use of real estate belonging to said estate. The condition of the bond under the amendment is identical with the condition provided for under the act, and it is clearly apparent that the form of the bond would be the same, whether executed prior or subsequent to the act of 1913. The law was further changed by the act of 1913, in that an order for the sale of real estate should require the guardian to file a good and sufficient bond in an amount equal to twice the amount for which

such real estate is sold, and required the court, in confirming this sale, to be satisfied that the guardian had filed his bond as required. On August 12, 1901, Fannie Noble, mother of appellee, was by the probate court of Shelby county appointed guardian of the estate of appellee, and qualified, giving bond with the Fidelity Deposit Company of Maryland as surety, and she continued as guardian of the estate of this ward until July 8, 1913, when, in a proceeding brought by appellee, acting through a next friend, she was removed as his guardian, and one McLamore was appointed with directions to collect from Fannie Noble and the surety on her bond a sum of money owing to the minor and in the hands of the guardian. McLamore qualified as guardian, having on August 23, 1913, filed his application to be allowed to return an inventory and appraisal, and make bond and qualify as such guardian. McLamore filed his bond in the sum of \$10,000, as guardian of the estate of the minor appellee in legal form with General Bonding & Casualty Insurance Company as surety.

All proceedings seem to be regular, and after which McLamore took possession of the estate of the minor, collected the judgment against the former guardian and her surety, and afterwards on June 8, 1914, filed an additional application in the probate court of Shelby county, wherein he recited that some question had been raised as to the legality of his former appointment, and asking again for the appointment as guardian of the estate of the minor. In regular order he was appointed as prayed in his application, his bond was fixed at \$10,000, his former bondsmen released, and he made a new bond with appellant as the surety on his bond, which bond was duly approved, and he continued in possession of the property of the estate as guardian. Among the property of the minor coming into the hands of McLamore as guardian was a half interest in a tract of 156 acres in Shelby county, and on October 6, 1914, after application had been regularly made and notice given, the probate court entered an order permitting McLamore to sell this tract of land. In regular order the land was sold for the sum of \$600, and this sum of money was paid to the guardian. The sale was confirmed and title passed to the purchaser, under a deed from the guardian, with regular orders from the court. The guardian misapplied the \$600 coming into his hands from the sale of this land, and this suit was brought to recover from him and appellant, as surety on his bond, said sum of money, with interest, and recovery was had in the district court of Shelby county, and from which this appeal is perfected.

Under the act of 1913 (*Vernon's Sayles' Civil Statutes* 1914, art. 4177), it is provided that in cases pending at the time this law becomes effective, and in which the guardian has a satisfactory bond filed equal to twice

the amount of all personal property of the ward and twice the amount of real estate sold, he would not be required to file a new bond. This exception has application to those provisions of the act requiring the guardian to file a sufficient bond in an amount equal to twice the amount of the real estate sold when he makes a sale of the real estate of the ward. The probate court of Shelby county, in granting the application of the guardian to sell the property, and in ordering the sale, made this recital in its order:

"And it further appearing to the court that this guardianship proceeding was pending in this court previous to the amendment of the probate law by the act of the Legislature in 1913, and that the said J. S. McLamore, Jr., guardian of the estate of said J. Bennett Noble, has a satisfactory bond filed herein equal to twice the amount of all personal property of said ward and twice the amount of real estate sold, it is therefore ordered," etc.

[2] From the above order and statement, the question of whether this case is a case "pending," within the meaning of the act of 1913, becomes material, and is, in our opinion, of controlling importance.

When, in 1901, the probate court of Shelby county appointed Mrs. Fannie Noble guardian of the estate of the minor, and she qualified by giving the required bond, it was undoubtedly at that time a case pending, in which the guardian had a satisfactory bond filed. There could be no reasonable contention that this pending case did not remain pending until the removal of Mrs. Fannie Noble as guardian in 1913. It is our opinion, based upon unquestionable ground, that the removal of the guardian did not put an end to the pending case, but was an act done in the pending case, in strict line with the legal duties of the court, and subsequent appointment by the court of McLamore as guardian was in the same pending case, and in line with the duties resting upon the court, and at no time was the pending case ended or interrupted. It is true that the act of the court in removing Mrs. Noble terminated her connection with the estate of the minor; but under the law of this state the estate of the minor was still within the jurisdiction of the probate court of Shelby county, and it was incumbent upon that court to give to that estate all proper protection. The removal of the guardian absolutely terminates the guardianship, but it does not, in our judgment, terminate the pending case or remove in any respect the power of the court to deal with the estate of the minor, afford it protection, con-

serve it, and, if need be, appoint a new guardian or custodian for it, and this would all be done in the same proceeding, and as a result of the jurisdiction acquired by the court over the estate when the pending case was first filed. When the court took jurisdiction by reason of a proper application for the appointment of a guardian of the estate of the minor, it became a pending case in that court, and, when the guardian was appointed and filed a satisfactory bond and has on file a satisfactory bond equal to twice the amount of all personal property of the ward and twice the amount of the real estate sold, it then becomes a pending case, within the exception specified in the act of 1913. The pending case is not ended until ended in some of the ways provided by law for closing up the estate of the ward. The death, resignation, or removal of one or more guardians would not put an end to the pending case, but rather it would be the duty of the probate court, in the face of changes in the proceedings, to still protect and preserve the estate of the ward, retaining at all times full jurisdiction for that purpose.

When Mrs. Noble was appointed guardian of the minor appellee, she gave a bond in double the amount of the estimated value of the property of the ward, and under that bond she took possession of all of the property of the ward, and, in our judgment, all succeeding bonds of any guardian that might succeed her and that would have come into possession of the property of the ward, should give a bond identical with the one given by the original guardian, and would have just such power under the bond as the original guardian would have had in the event she had continued as guardian under the original appointment and qualification until the estate had been completely wound up.

Our holding in this case renders it unnecessary and, in our judgment, improper, for us to consider or discuss the very interesting question raised in the briefs as to whether or not there would be liability on the general bond of the guardian where no bond for the sale of real property had been given under the act of 1913. That question would be one undecided in this state, and not being necessary to a decision of this case, and the decisions of other states being apparently in conflict, we withhold comment thereon, because it is our opinion that the present case falls within the exception mentioned in the act of 1913, and the judgment of the trial court appearing to be just and right, the same is in all things affirmed.

**EL PASO & S. W. RY. CO. et al. v. HAVENS.**  
(No. 1021.)

(Court of Civil Appeals of Texas. El Paso.  
Nov. 20, 1919. Rehearing Denied  
Dec. 11, 1919.)

**1. APPEAL AND ERROR ¶1043(7)—HARMLESS  
ERROR IN DENIAL OF CONTINUANCE.**

Where defendant railroad company requested a continuance on the ground that persons in its service were necessary witnesses, that it would cripple the operation of the road to take them from service, and that it was not practicable to take their depositions, the denial of the petition will not be reviewed where such witnesses in fact were present and testified.

**2. RAILROADS ¶5½, New, vol. 6A Key-No.  
Series—ABATEMENT OF ACTIONS BY FEDERAL  
CONTROL.**

Though the President, as a war measure, pursuant to Act Cong. Aug. 29, 1918, § 1 (U. S. Comp. St. § 1974a), assumed control of the railroads, such control is no ground for the abatement of suits on causes of action accruing before governmental operation.

**3. TRIAL ¶191(10)—INSTRUCTIONS ASSUMING  
FACTS.**

A charge submitting issues of negligence causing injury to servant which prefaced such issues with the words "if you find," etc., did not assume that defendant was guilty of the negligence submitted.

**4. APPEAL AND ERROR ¶1006—SUBMISSION  
OF ISSUES NOT RAISED BY EVIDENCE PREJUDICIAL  
ERROR.**

It is error to submit an issue not made by the evidence, unless it clearly appears the jury were not misled.

**5. MASTER AND SERVANT ¶236(32)—CARE AS  
TO CAR INSPECTOR QUESTION FOR JURY.**

In an action for injuries to a car inspector struck by a locomotive while he was looking under a car, evidence held to warrant the submission of the issue as to whether the locomotive was operated without proper lookouts.

**6. EVIDENCE ¶514(3)—EXPERT TESTIMONY  
AS TO DISTANCE IN WHICH LOCOMOTIVE MAY  
BE STOPPED.**

There is no error in allowing witnesses of experience to give their testimony as to the distance in which a locomotive may be stopped.

Appeal from District Court, El Paso County; Ballard Coldwell, Judge.

Action by A. S. Havens against the El Paso & Southwestern Railway Company and others. Judgment for plaintiff, and defendants appeal. Affirmed.

W. M. Petcolas and Del W. Harrington, both of El Paso, for appellants.

Jno. T. Hill, of El Paso, for appellee.

HARPER, C. J. This suit was filed January 8, 1918, to recover of appellants damages for personal injuries occasioned by appellee

having been run over by appellants' switch engine in its yards, at Dawson, N. M., October 16, 1917.

The grounds of negligence alleged by first amended original petition filed October 3, 1918, are: First, failure to provide a safe place to work; second, failure to keep a lookout for plaintiff; third, failure to give warning of the approaching engine and; fourth, failure to use the means at hand to prevent the alleged injuries after discovering his perilous situation.

Defendants interposed plea to the jurisdiction of the court, based upon General Order No. 26 issued by the Director General of Railroads, general denial, assumed risk, and contributory negligence, in that plaintiff was incapacitated from overindulgence in intoxicating liquors.

Tried with a jury; a verdict and judgment for plaintiff for \$5,000, from which this appeal.

[1, 2] The first, second, and third assignments urge that it was error to overrule motion for continuance and plea in abatement, thereby requiring defendants to go to trial during federal control of railroads. Whilst appellant urges error for failure to grant a continuance for certain witnesses, employees of the company present at the time of the accident and still working for the railroad company at the time of announcement for trial, upon the ground that it would cripple the operation of the road, etc., to take them away from the service, and not practicable to take their depositions, etc., we take it that, since the named witnesses were present and testified upon the trial, in fact, the only question which can be urged with any degree of consistency is the failure of the court to sustain the plea in abatement, thereby continuing the case during the period of the war, because the act of Congress (Aug. 29, 1918, c. 418, § 1, 39 Stat. 645 [U. S. Comp. St. § 1974a]), operating through the President, by virtue of the orders issued by him and under his authority by the Director General of Railroads, viz. General Orders Nos. 18 and 26, had the effect of depriving the courts of Texas of jurisdiction to try causes of action pending at the date of the issuance of the orders during federal control, where the cause of action arose in another state.

This court held to the contrary of this contention in *El Paso S. W. R. Co. v. Lovick*, reported in 210 S. W. 283, by holding that the trial court did not err in refusing to sustain a plea in abatement under similar facts and conditions, and we see no reason to change our views upon the question at this time.

[3] It is next urged that the cause should be reversed because the evidence is not sufficient to support the verdict of the jury upon



any theory of negligence pleaded by appellee. As to this, we are of the opinion that the evidence is sufficient to sustain a verdict upon both of the theories pleaded and submitted by the court.

Among the charges submitted by the court is the following:

"Now, if you find from a preponderance of the evidence that on or about the time complained of by plaintiff he was in the act of inspecting a car or cars of defendant's railroad, or one of them, and that while so doing he was struck by an engine of one of the defendants, and you further find that the employees of the defendant whose engine struck plaintiff did not keep a lookout along the track on which such engine was moving, and you find that in failing to keep a lookout, if they did fail, the employees of defendant whose engine struck plaintiff were negligent, and that such negligence, if any, was a proximate cause of plaintiff's injury, you will find for the plaintiff, unless you find that plaintiff assumed the risk, as herein submitted to you in this main charge."

This was excepted to: First, because it is a charge upon the weight of the evidence; second, it assumes that there was evidence that no lookout was kept, while the contradicted evidence is to the effect that the employees operating the engine were keeping a proper lookout; and, third, that therefore the court submitted an issue not made by the evidence.

There are two issues involved in this case which are submitted by this charge, but the wording "if you find \* \* \* and you further find" does not assume that plaintiff or defendant did so, but leaves it to the jury to be found or believed from the evidence before them. *Railway Co. v. Casseday*, 92 Tex. 525, 50 S. W. 125.

[4, 5] As to the third it would be error to submit an issue not made by the evidence unless it should clearly appear that the jury were not misled thereby. *T. & P. Ry. Co. v. McCoy*, 90 Tex. 284, 38 S. W. 38.

However, all have concluded that the record does not support the contention that there was no evidence that the employees operating the engine were not keeping a proper lookout.

Plaintiff's theory of the manner in which his accident occurred, as pleaded, is that he was engaged in the work of inspecting one of defendant's cars at the time, and was in a stooping position looking under a car, when,

without any warning, he was struck by defendant's switch engine, and his testimony supports the allegations. At least he testified that he did not hear the approaching engine until it was too late for him to get into a position of safety. Defendant's theory is that plaintiff was intoxicated and lying asleep near the track with his head against a pile of coal, and one leg out straight and the other crumpled up.

Defendant's switchman riding on the front of the car testified:

That, if plaintiff had been stooping down, he could have seen him sooner. "If any one had been squatting down behind one of the coal piles, that wouldn't obstruct any view, because the coal pile was not high enough. They are 16 or 18 inches high. I could have seen him 10 or 12 car lengths if he had been standing up, but I didn't see him because he was lying down."

And he further testified that he was keeping a constant lookout along the track.

The jury evidently accepted plaintiff's theory that he was standing up in a stopping position, and further that, if the employees on the engine had been keeping a proper lookout, he would have been seen, and, since they did not see him, circumstantially it is evidence that they were not keeping a proper lookout, and we think there are other circumstances which tend to support plaintiff's theory of the way the accident occurred, which we need not quote, but content ourselves with the holding that the evidence was sufficient to raise the issue and to require the court to submit it.

It follows that we do not think the record supports the seventh assignment to the effect that the undisputed evidence shows that plaintiff assumed the risks and dangers of his employment.

The other criticisms of the court's charge are not well taken. Nor did the court err in refusing special charge upon discovered peril because the issue was properly covered by the general charge.

[6] There was no error in admitting the testimony of witnesses of experience in the work, of their opinions as to the distance in which an engine might be stopped. *San Antonio U. & G. Ry. Co. v. Galbreath*, 185 S. W. 901.

Finding no error in the record, the cause is affirmed.

**BASSHAM et al. v. EVANS. (No. 1566.)**

(Court of Civil Appeals of Texas. Amarillo. Nov. 12, 1919.)

**1. SEQUESTRATION  $\Leftrightarrow$  21—PROCEEDING NO DEFENSE IN TRESPASS WHEN OWNER WAS NOT A PARTY.**

In action against defendants who had obtained possession of plaintiff's premises by sequestration proceedings without making plaintiff a party thereto, the sequestration proceedings and the issuance and levy of the writ on the property is no defense.

**2. SEQUESTRATION  $\Leftrightarrow$  15—REPLEVY BY OWNER NOT PARTY TO PROCEEDINGS.**

Owner of sequestered property who was not a party to the sequestration proceedings could not have replevied property under Rev. St. 1911, art. 7103, providing that when property has been sequestered the defendant therein may replevy, by giving bond.

**3. SEQUESTRATION  $\Leftrightarrow$  21—PETITION IN ACTION FOR WRONGFUL SEQUESTRATION.**

Owner attacking sequestration proceedings to which he was a party as being wrongfully sued out would be required to negative the grounds stated in the affidavit and state his damages occasioned by such wrongful act, and, if he desires punitive damages, would be required to allege that it was willful, malicious, or the like, and without probable cause.

**4. ARMY AND NAVY  $\Leftrightarrow$  34—DAMAGES FOR SEQUESTRATION OF SOLDIER'S PREMISES.**

Soldier who was ejected from his premises by means of sequestration proceedings and was deprived of the protection to which he was entitled under Soldiers' & Sailors' Civil Relief Act (U. S. Comp. St. §§ 3078 $\frac{1}{4}$ a-3078 $\frac{1}{4}$ ss) could recover damages, regardless of whether facts stated in affidavit for sequestration are true or false.

**5. TRESPASS  $\Leftrightarrow$  12 — UNAUTHORIZED ENTRY UPON LAND.**

Every unauthorized entry upon land of another is a trespass, and is a willful trespass if intended and deliberate.

**6. SEQUESTRATION  $\Leftrightarrow$  21 — PETITION SUFFICIENT TO AUTHORIZE EXEMPLARY DAMAGES.**

In action against defendants who had obtained possession of premises by means of sequestration proceedings to which plaintiff had not been made a party, allegations showing a conscious disregard of plaintiff's rights by defendants held to authorize exemplary damages.

**7. ATTACHMENT  $\Leftrightarrow$  368—EXECUTION  $\Leftrightarrow$  464—SEQUESTRATION  $\Leftrightarrow$  21—COMMON-LAW REMEDY FOR FAILURE TO MAKE OWNER A PARTY IN SEQUESTRATION.**

When real or personal property had been levied on by a writ of execution, attachment, sequestration, or other such writ, to which the claimant or owner is not a party, he may resort to his common-law remedy for the damages inflicted by seizure thereunder.

**8. ARMY AND NAVY  $\Leftrightarrow$  34—CONSTRUCTION OF SOLDIERS' AND SAILORS' CIVIL RELIEF ACT.**

Soldiers' and Sailors' Civil Relief Act, art. 3, § 302 (U. S. Comp. St. § 3078 $\frac{1}{4}$ ff), relating to proceeding to enforce obligations originating prior to approval of the act and secured by mortgage, trust deed or other security in the nature of a mortgage on property owned by person in military service has no application, in view of subdivision 1, to other obligations named in article 3, such as leases, rental contracts, or contracts for purchase of property which may at vendor's option be rescinded for nonpayment of purchase-money installments.

**9. VENDOR AND PURCHASER  $\Leftrightarrow$  95(1)—FORECLOSURE OF LIEN AS ELECTION TO AFFIRM CONTRACT.**

If vendor sues to foreclose his lien, he has elected to affirm the contract and rely upon his debt and lien, and after such suit stands in the position of a mortgagee, and cannot rescind the contract as executory.

**10. ARMY AND NAVY  $\Leftrightarrow$  34—REMEDY OF PURCHASER UPON VENDOR'S VIOLATION OF SOLDIERS' AND SAILORS' CIVIL RELIEF ACT.**

Where vendor brought suit to foreclose his lien against maker of purchase-money notes, even if he had made a party to the proceeding maker's grantee, who was in military service, the latter could not recover, under Soldiers' and Sailors' Civil Relief Act, § 301 (U. S. Comp. St. § 3078 $\frac{1}{4}$ f), prior payments of purchase money as damages for vendor's recovery of the property without proceeding under such act, since vendor by lien foreclosure elected to affirm contract and to treat grantee as owner and to assume the position of mortgagee, so that grantee's rights were governed by section 302 (U. S. Comp. St. § 3078 $\frac{1}{4}$ ff), and not section 301.

**11. ARMY AND NAVY  $\Leftrightarrow$  34—RIGHT TO DAMAGES FOR VIOLATION OF SOLDIERS' AND SAILORS' CIVIL RELIEF ACT.**

Where vendor violated Soldiers' and Sailors' Civil Relief Act, § 302 (U. S. Comp. St. § 3078 $\frac{1}{4}$ ff), in foreclosing lien on soldier's property because of nonpayment of notes which soldier had guaranteed to pay upon conveyance of property to him by the maker without making soldier a party to the proceedings, soldier's right to damages was not affected by fact that maker was a party, and that soldier's father who was made a party was his agent and in possession, or by the fact that soldier's brother was a co-owner; the right under the statute being personal to the soldier in view of subdivision 3, and sections 203, 204 (U. S. Comp. St. §§ 3078 $\frac{1}{4}$ d, 3078 $\frac{1}{4}$ dd).

**12. SEQUESTRATION  $\Leftrightarrow$  21—MENTAL ANGUISH NOT AN ELEMENT OF ACTUAL DAMAGES BUT GROUND FOR EXEMPLARY DAMAGES.**

In action for trespass in wrongfully obtaining possession of plaintiff's property by sequestration proceedings, mental anguish occasioned by the trespass cannot be recovered as actual damages; although if the trespass were malicious or with evil intent, so that exemplary damages are recoverable, mental anguish may be considered in assessing such damages, under the rule permitting the jury, in assessing such

damages, to consider damages too remote to be considered strictly compensatory.

**13. DAMAGES ¶91(1), 151—EVIL INTENT OR GROSS NEGLIGENCE NECESSARY TO RECOVER EXEMPLARY DAMAGES; PLEADING NECESSARY.**

In order to recover exemplary damages, the act which constituted the cause of action must be actuated by or accompanied with some evil intent, or must be the result of such gross negligence, such disregard of another's rights, as is deemed equivalent to such intent; and, when the bad intent is not a necessary inference from the act charged, it must be alleged.

**14. SEQUESTRATION ¶21 — WRONGFUL SEQUESTRATION; INSUFFICIENT PLEADING OF EXEMPLARY DAMAGES TO ALLOW RECOVERY OF DAMAGES FOR MENTAL DISTRESS.**

In action for trespass in wrongfully obtaining possession of plaintiff's premises by sequestration proceedings, where the allegations of the petition may have sufficiently charged a willful or evil intent and gross disregard of plaintiff's right, but the mental anguish as alleged was confined to actual damages, the petition alleging plaintiff "has suffered mental distress on account of his being deprived of the use of the said building for his said mother and father," and that he had been damaged in a sum equal to the rental value, etc., the petition would not support a recovery of exemplary damages, in which form only could damages for mental distress be recovered in such a case.

**15. SEQUESTRATION ¶21—MEASURE OF DAMAGES.**

In action against defendants who had obtained possession of premises by sequestration proceedings without making plaintiff a party to the proceedings in violation of his rights as a soldier under Soldiers' and Sailors' Civil Relief Act (U. S. Comp. St. §§ 3078¼a-3078¼ss), plaintiff's measure of damages was, not recovery of purchase money installments paid, but was the value of the use of premises and any special damage to the property.

**16. TENANCY IN COMMON ¶55(8)—PARTIES TO ACTION FOR TRESPASS.**

In action for trespass to property owned by two brothers, both should join in the action.

**17. PARTIES ¶80(2)—ACTION FOR TRESPASS WITHOUT JOINING CO-OWNER.**

In action for trespass wherein plaintiff's co-owner should have been joined as a party, plaintiff in absence of a plea in abatement may recover in proportion to his interest.

**18. ARMY AND NAVY ¶84—IN ACTION FOR SEQUESTRATION OF SOLDIER'S PROPERTY EVIDENCE OF SEQUESTRATION PROCEEDINGS ADMISSIBLE.**

In action against defendants who had obtained possession of plaintiff's premises by means of sequestration proceedings without making plaintiff a party in violation of plaintiff's rights under Soldiers' and Sailors' Civil Relief Act (U. S. Comp. St. §§ 3078¼a-3078¼ss), evidence of sequestration proceedings held properly admitted.

Appeal from District Court, Terry County; W. R. Spencer, Judge.

Action by Vard Evans against W. B. Bassham and others. Judgment for plaintiff, and defendants appeal. Reversed.

G. E. Lockhart, of Tahoka, for appellants.  
Percy Spencer, of Lubbock, for appellee.

HUFF, C. J. This is an appeal from a judgment in favor of appellee, Evans, against W. B. and T. F. Bassham and P. B. Brothers, for the sum of \$1,500. The cause of action set up by Evans against the defendants is, substantially: That one C. C. Van Zandt, on February 1, 1918, purchased from W. B. Bassham lot 15, block 22, in the town of Brownfield, together with certain articles of furniture then in use as a rooming house. That Van Zandt, as part of the consideration, executed 69 notes, of \$25 each, due one on the 1st of each month, and consecutively thereafter, with interest from date at the rate of 8 per cent. per annum. That Bassham executed his warranty deed to Van Zandt, conveying the lot, therein reciting a cash consideration of \$275, and the execution of the 69 notes. Thereafter, on the 28th day of March, 1918, the appellee, Vard Evans, with his brother, Jim Evans, purchased the lot, paying a cash consideration of \$300, and assumed to pay 68 of the notes executed by Van Zandt, and that Van Zandt executed his warranty deed to the lots, reciting the consideration therein as above stated. That soon thereafter appellee was drafted in to the army of the United States of America, and was in the military service as that term is defined in the "Soldiers' and Sailors' Civil Relief Act" (Act March 8, 1918, c. 20, 40 Stat. 440 [U. S. Comp. St. §§ 3078¼a-3078¼ss]), at the times of the transactions thereafter set out and alleged. "Your plaintiff would also show to the court that the rights of this plaintiff in and to said property came within the meaning of a contract for the purchase of real and personal property, as used in said act." That about the 24th day of July, 1918, the appellants conspired to eject the appellee and did eject him from said property. That, although W. B. Bassham knew appellee was the owner of an interest in the property and in the military service, he attempted to exercise the right of option expressed in the notes, to declare all of them due on account of the nonpayment of certain installments due and which fell due while appellee was in military service, and instituted suit in the district court of Terry county against the said C. C. Van Zandt, the maker of said notes, and one M. L. Evans, the father of appellee, who was in possession of the premises, and asking for a personal judgment against Van Zandt upon the last 66 notes, principal, interest, and attorney's fees, and to foreclose the vendor's lien thereon.

That on the 29th day of July, 1918, W. B. Bassham made application to the clerk of that court for a writ of sequestration, and W. B. Bassham, joined by T. F. Bassham and P. B. Brothers, made and filed with the clerk a bond for sequestration and instructed the clerk to issue the writ of sequestration, which was issued, commanding the sheriff to seize the property and on the 30th day of July, 1918, caused the sheriff to seize and take possession thereof. That the sheriff held the property about 10 days, whereupon the appellants, in furtherance of their conspiracy to eject appellee, made and filed with the sheriff a replevy bond for said property, whereupon all of the property was delivered to W. B. Bassham, who has since about August 10, 1918, been in possession, enjoying the fruits, benefits, and revenues thereof. At the time of the institution of the suit and until the ejection, appellee and Jim Evans, his co-owner, were in possession of the property in the following manner:

"The mother and father of the said Vard Evans, your plaintiff, who were and are dependent upon him for support, were occupying said premises as a home and renting out certain rooms therein as a means for their support, and your plaintiff had in the building on said premises his trunk with his clothes therein, and other articles of personal property. That your plaintiff and his said mother and father were forcibly thrown out of said house and placed into the streets. That all of the actions and proceedings hereinabove set out were in this honorable court, and the papers in said cause are on file in the office of the clerk hereof and are hereby specially referred to and made a part hereof. That all of such actions are and were in gross violation of the right of your plaintiff, and were nothing less than an aggravated and willful and gross violation of the act of the Congress of the United States of America, enacted for the purpose of enabling the United States the more successfully to prosecute and carry on the war with Germany and her allies, and in gross violation of the protection thereby extended to the soldiers engaged in the service of the United States of America, and without any lawful right whatever.

"Your plaintiff would show to the court that he had paid the sum of \$400 for said property, at the time of said unlawful ejection, and that the reasonable rental value of the said premises from the 10th day of August, A. D. 1919, is \$35 per month.

"Your plaintiff would further show to the court that, on account of the fact that the United States government was behind with his pay, he was unable to meet the installments due upon said contract of purchase, at the time of said ejection.

"Your plaintiff would show to the court that on account of the humiliation of having his dependent mother and father, each of whom are in feeble health and necessitous circumstances, thrown out in the streets and without a place to live in comfort and decency, while he was in the service of his country, he has suffered

mental distress, and on account of his being deprived of the use of the said building for his said mother and father during said term he has been damaged in the sum equal to the rental value thereof, and on account of the unlawful eviction he has been damaged in the sum paid upon said premises, all of such damages being in the sum of \$5,000, for which amount he sues. Wherefore, plaintiff prays that the defendants be cited to appear and answer this petition, and that on the trial hereof he have judgment for his damages, interest, and costs, and for such other and further relief, in law or equity, to which he may be entitled, and for this he will ever pray."

The first assignment is based on the action of the court in overruling the general exception. The appellants present three propositions thereunder, to the effect: (1) That this suit could not be maintained for the wrongful issuance and levy of the sequestration without the allegation that appellant was a party to the suit out of which it was issued. (2) The petition should also allege that the grounds set out in the affidavit for sequestration were untrue. (3) The exception should have been sustained as the petition shows the obligation of appellee was made subsequent to the passage and approval of the act referred to in the petition.

[1,2] The sequestration proceedings and the issuance and levy of the writ on property, the title to which and possession of which is in a person not a party to the proceeding out of which it issued, is no protection to those using the writ to obtain possession of the property. It is as much a trespass on the rights of such third persons as if no writ had been issued. When such third person sues for damages or for redress for the invasion of his rights, the sequestration proceedings will not be a defense to such suit, much less a justification. If appellants desired to take the property out of appellee's possession and to foreclose his rights, they should have made him a party and have made the necessary affidavit charging him with the alleged wrong, and also indemnified him by making a bond, payable to him in case the writ was wrongfully sued out, and levied upon his property. The appellee, not being a party to the original suit for sequestration, could not have replevied the property under article 7103, R. C. S., providing that when property has been sequestered the defendant therein may replevy by giving bond. *Lane v. Kempner*, 184 S. W. 1091; *Vickrey v. Griffin*, 154 S. W. 1057; *Lang v. Dougherty*, 74 Tex. 228, 12 S. W. 29. Our Supreme Court, in the case of *Vickrey v. Crawford*, 93 Tex. 373, 55 S. W. 560, 49 L. R. A. 773, 77 Am. St. Rep. 891, held that a sequestration writ did not protect a sheriff in taking property from the possession of the owner who is not a party to the proceeding. In discussing that question, the court said:

"The history of our legislation shows that it was never allowable to take the property of a citizen from his possession without a proper proceeding against him, in which security was given for damages and costs which might result."

Again it was said, after reviewing former acts of the Legislature:

"The plain purpose of these provisions was to require a suit with a verified petition against, and a bond to, the person whose property was to be seized, before its seizure under any writ was authorized. \* \* \* While a sworn petition may not be necessary, a suit is required, with an affidavit and bond which would meet the purposes of the former law. The sequestration law requires no bond to secure any person but the defendant. It authorizes the defendant, and no one else in the first instance, to give a replevy bond, and retain the property; and, if he fails to do so, it authorizes the plaintiff to replevy. It provides for a sale of the property, if it be perishable, in case the defendant does not replevy. There is no provision whatever in this state for the protection of the rights of any but the parties to the suit. If it be true that the officer is authorized to invade the possession of a stranger to the action, and take his property, it may be replevied by either party to the suit, or sold as perishable; and, in case of insolvency of the plaintiff, its owner would be left without substantial redress. In our opinion, the statute contemplates no such result. It requires the party desiring to sue for property to bring his action against him who holds it, and to direct his oath against him, and to make his bond payable to him. When he has complied with these requirements, he has entitled himself to a writ to take the property from the defendant for the purposes of preserving it or securing the fruits of the litigation pending the action; but he has not entitled himself, and therefore cannot require the officer, to take the property of any other person."

[3] If the sheriff is not protected in such case, certainly the plaintiffs, who directed the proceeding and had the property seized by such writ, would not be. If appellee had been a party to the former action, it is doubtless true, if he desired to attack to the sequestration proceeding as being wrongfully sued out, he would be required to negative the grounds stated in the affidavit and state his damages occasioned by such wrongful act, and if he desired punitive damages he would have been required to allege in addition that it was willful, malicious, or the like, and without probable cause.

[4-7] This, however, is an action charging a trespass upon the appellee's rights by appellants, and to eject him from the premises in pursuance of a conspiracy, alleging that appellants used the sequestration proceeding to effect that purpose, and to deprive him of the protection Congress had thrown around him as a person in military service, through the Soldiers' and Sailors' Civil Relief Act.

216 S.W.—29

If these facts are true, he can recover his damages whether the grounds stated in the affidavit for sequestration are true or false. Every unauthorized entry upon the land of another is a trespass, and it is a willful trespass if intended and deliberate. *Ripy v. Less*, 55 Tex. Civ. App. 492, 118 S. W. 1084; *McCauley v. McElroy*, 199 S. W. 817. The allegations show a conscious disregard of appellee's rights by appellants and may be sufficient to sustain a verdict for exemplary damages. When real or personal property had been levied on by a writ of execution, attachment, sequestration, or other such writ, to which the claimant or owner is not a party, he may resort to his common-law remedy for the damages inflicted by seizure thereunder. *Sparks v. Ponder*, 42 Tex. Civ. App. 431, 94 S. W. 428; *Lang v. Dougherty*, 74 Tex. 226, 12 S. W. 29; *Cross v. Hays*, 73 Tex. 515, 11 S. W. 523; *Simpson v. Lee*, 34 S. W. 1053; *Land v. Klein*, 21 Tex. Civ. App. 3, 50 S. W. 638; *Knox v. McElroy*, 103 Tex. 357, 127 S. W. 798; *Waggoner v. Wyatt*, 43 Tex. Civ. App. 75, 94 S. W. 1076; *Lamar v. Hildreth*, 209 S. W. 167. It is our view that a cause of action was alleged whether or not the third proposition above mentioned is correct. Possibly it is not necessary to determine the question presented by the parties to this appeal with reference to the effect the Soldiers' and Sailors' Civil Relief Act has on the rights of the parties, since, as we conceive it, the petition in any event alleges a trespass.

But as this law may affect the question of damages, we have concluded to give our view on the matter presented. It will be perceived that appellee alleged as part of his cause of action that his rights come within the meaning of a contract for the purchase of real or personal property, as used in the act, and that Bassham knew appellee owned the property and was then in the military service, and that he attempted to exercise the right of option expressed in the notes, to declare all of them due on account of the nonpayment of certain installments which fell due while appellee was in the service.

[8] It is appellants' contention that section 302, art. 3, of the act (U. S. Comp. St. § 3078½ ff), applies to all of that article and is not confined to section 302. Subdivision 1 of the section reads:

"The provisions of this section shall apply only to obligations originating prior to the date of approval of this act and secured by mortgage, trust deed, or other security in the nature of a mortgage upon real or personal property owned by a person in military service at the commencement of the period of the military service and still so owned by him."

It is evident this language means what it says. The provision of the section, which consists of three subdivisions and also sub-

heads a and b, are confined to obligations secured by mortgages, trust deeds, or other security in the nature of a mortgage, "upon real or personal property owned by a person in military service at the commencement of the period of military service and still so owned by him." The section does not purport to refer to other classes of obligations or rights named in article 3 of the act, such as leases or rental contracts, or contracts for the purchase of property which at the option of the vendor may be rescinded for nonpayment of installments of the purchase price. It is our view, if the appellee had been a party to the original suit, section 301 (U. S. Comp. St. § 3078 $\frac{1}{4}$ f) would not have applied, as apparently is the contention of appellee. Subdivision 1 of section 301 is:

"No person who has received, or whose assignor has received, under a contract for the purchase of real or personal property, or of lease or bailment with a view to purchase of such property, a deposit or installment of the purchase price from a person or from the assignor of a person who, after the date of payment of such deposit or installment, has entered military service, shall exercise any right or option under such contract to rescind or terminate the contract or resume possession of the property for nonpayment of any installment falling due during the period of such military service, except by action in a court of competent jurisdiction."

[9] It is appellee's contention that, when a note or deed retains an express vendor's lien, under the holdings of the courts of this state the contract is executory, and the vendor, at his election, may rescind the contract. *Summerhill v. Hanner*, 72 Tex. 224, 9 S. W. 881. But in this case appellee does not allege that there was an express lien retained in the deed or notes, but, waiving that allegation, it is settled in this state, if the vendor brings a suit to foreclose the lien, he has elected to affirm the contract and rely upon his debt and his lien; such vendor, after such suit, stands in the position of a mortgagee. *Gardener v. Griffith*, 93 Tex. 355, 55 S. W. 314; *Moon v. Sherwood*, 180 S. W. 296. In this case the vendor, Bassham, sued the maker of the notes and to foreclose his lien. He did not exercise his option or offer to do so to rescind the contract. If he had desired to do so, as we understand the act, he was required to go into court, where upon hearing the court might have ordered "the repayment of prior installments or deposits or any part thereof, as a condition of terminating the contract and assuming possession." Or he could have ordered a stay of the proceedings unless he should find the defendant had the ability to comply with the terms of the contract.

[10, 11] The appellee in this case was not entitled to recover the prior payments or installments as part of his damages, which

under the act a court before whom a rescission is sought might allow as a condition to rescind; in other words, prior payments, etc., are not the proper measure of the damages in this case. The appellee being the owner or part owner of the property, his rights as such fall under section 302. The obligation upon which suit was instituted and for which a foreclosure was sought originated prior to the approval of the Act March 8, 1918. Under this section the court could have made a stay of the proceedings, or such other disposition equitable to the parties. The fact that the maker of the note was sued, and that the father of appellee was his agent and in the house, or that his brother was a co-owner, would not affect his rights under the law. The right given him is personal to him. *Hoffman v. Charleton*, 231 Mass. 324, 121 N. E. 15. In subsection 3 the sale under a power of sale, or under a judgment upon warrant of an attorney to confess judgment contained in any such obligation, is invalid as to such soldier. By the act in question it was the manifest purpose of Congress to temporarily suspend legal proceedings and transactions which may prejudice the civil rights of persons in the service. To that end default judgments cannot be taken without a proper affidavit, and, if the person is in the service, an attorney must be appointed to represent him in any default, and after judgment it can be set aside by showing a meritorious defense. *Howie Mining Co. v. McGary* (D. C.) 256 Fed. 38. The court before whom an action is brought against a soldier has also the power to stay executions, attachments, and the like, as well also the power to vacate them. Sections 203, 204 (U. S. Comp. St. §§ 3078 $\frac{1}{4}$ d, 3078 $\frac{1}{4}$ dd). It appears to have been the purpose of Congress to place the civil rights of the person in the service under the supervision of the courts. It evidently was not the purpose to permit parties holding claims or obligations affecting such rights to act arbitrarily, or to enforce liens without those rights being considered by the court, or to seize the property of the soldier by ancillary or harsh writs, and to dispossess the soldiers, or their agents, without giving the courts which Congress had constituted and authorized an opportunity to protect, and prevent prejudice to such rights. We think all these matters may be looked to in ascertaining the motive and animus of appellants in this case. By their act they may have deprived the soldier of the protection from the courts as to his rights to which he was entitled. If the land is not sold or foreclosed, he may yet tender the money and redeem the land. It may be that the court before which the foreclosure was or is pending, upon proper equitable showing, could have set aside the option to advance the due date of the notes. However, it is not our purpose

to hold he could have done so. The matter is only suggested. The propositions under the first assignment will be overruled.

[12] The second, sixth, and tenth assignments present error with reference to the allegations in the petition and instruction of the court relating to mental anguish as an item of damage. The appellee objects to the consideration of these assignments because not properly briefed. We find the objections are well taken, but conclude to consider the case under the assignments, as we believe they call attention to fundamental error apparent of record. It will be observed that the plaintiff, by his petition, did not sue for exemplary damages, as such, but sought to recover mental anguish as actual damages, occasioned by wrongful trespass upon the property. The trial court instructed the jury:

"Mental anguish is such mental suffering, pain, and distress of mind, if any, that the plaintiff may have sustained as the proximate result of defendant's acts in this case complained of."

And submitted the special issue:

"What amount, if any, do you allow plaintiff for the mental anguish, if any, suffered by him, if any, as the proximate result of defendant's acts?"

The jury answered this issue: "\$1,000." Our Supreme Court, we think, has settled this question in the case of *Crawford v. Doggett*, 82 Tex. 139, 17 S. W. 929, 27 Am. St. Rep. 859, in which damages were claimed for the wrongful sequestration of land upon which plaintiff and his family resided, and by the writ were dispossessed. The court there said:

"So much of the charge as instructed the jury that injury to the plaintiff's feelings was an element of actual damages is assigned as error, and we think the assignment well taken. In the case of *Trawick v. Martin Brown Co.*, 79 Tex. 460, 14 S. W. 564, after mature consideration, this court held that injury to feelings could not be recovered in a suit for wrongfully suing out an attachment; but that, if the writ were maliciously issued, and exemplary damages were recoverable, distress of mind produced by it was proper to be considered by the jury in assessing such damages." *Williams v. Yoe*, 19 Tex. Civ. App. 281, 46 S. W. 659; *Railway Co. v. Trott*, 86 Tex. 412, 25 S. W. 419, 40 Am. St. Rep. 866; *Malin v. McCutcheon*, 33 Tex. Civ. App. 387, 76 S. W. 586; *Morris v. Williford*, 70 S. W. 228; *Evans v. Kingsbury*, 25 S. W. 729; *Dunn v. Wilkerson*, 203 S. W. 59, and authorities cited.

[13] In allowing exemplary damages, our Supreme Court has said there is much confusion as to the grounds upon which they are allowed. Our decisions recognize the rule that exemplary damages are allowed as a matter of punishment but at the same time, when a proper case is made, permit the jury, in assessing their amount, to take into con-

sideration damages too remote to be considered strictly compensatory. *Mayer v. Duke*, 72 Tex. 445, 10 S. W. 565. In order to recover such damages, "the act which constitutes the cause of action must be actuated by or accompanied with some evil intent, or must be the result of such gross negligence—such disregard of another's right—as is deemed equivalent to such intent; and, where the bad intent is not a necessary inference from the act charged, it must be alleged." *Connor v. Sewell*, 90 Tex. 275, 38 S. W. 35. It may be that the allegations of the petition are sufficient to charge a willful or evil intent, and a gross disregard of the appellee's rights; but the mental anguish as alleged is confined to actual damages. It is alleged:

"He has suffered mental distress on account of his being deprived of the use of the said building for his said mother and father." That he has been damaged in a sum equal to the rental value, and for the sum paid upon the premises, and all such damages being \$5,000.

[14] The court treated such mental suffering as the proximate result of being deprived of the use of the house. Mental suffering in such case is not considered by our courts as the proximate result of an act, but as being a remote contingency, and not the necessary result of such an act. The allegation as made and the prayer in this case will not support a recovery for exemplary damages under which mental distress can only be recovered in this character of case. *Harmon v. Callahan*, 85 S. W. 705; *Railway Co. v. Le Gierse*, 51 Tex. 189, 203.

[15-17] There is no assignment assailing the allegation of the recovery of the money paid on the purchase of the property, or to the charge of the court authorizing such recovery, or to the verdict of the jury for the money paid *Van Zandt*, as the cash consideration on the purchase price, or for the payment of the monthly notes. Manifestly, appellee could not recover such sum of money. This is not the measure of his damages; he could only recover the value of the use of the house and lot and any special damages the property may have received. *Estes v. Browning*, 11 Tex. 237, 60 Am. Dec. 238; *Banks v. McQuatters*, 57 S. W. 334; *Lipscomb v. Fuqua*, 103 Tex. 585, 131 S. W. 1061. We do not think this case comes within section 301 of the *Soldiers' and Sailors' Civil Relief Act*, which authorizes a court, where the vendor or grantor seeks in the court to rescind a contract of sale for nonpayment of installments, and "upon hearing of such action the court may order the repayment of prior installments." This provision does not in this case give the measure of damages as hereinbefore pointed out. The furniture and the like, in the building, being personal property, we suggest possibly the appellee could treat the seizure under

the writ as a conversion and recover the value of such personal property at the time of its seizure. We only suggest this as the case will be reversed. *Norwood v. Inter-State National Bank*, 92 Tex. 268, 48 S. W. 3. We also suggest in this case, as appellee's brother was a co-owner of the property, that both should have joined in this action; but in the absence of a plea in abatement the plaintiff may have recovered only in proportion to his interest. *Ry. Co. v. Cusenberry*, 86 Tex. 525, 26 S. W. 43.

[18] The assignments complaining of the admission of the sequestration proceedings are overruled. We think they were properly admitted.

The judgment will be reversed for the reasons stated.

MILLER, County Judge, et al. v. BROWN.  
(No. 1023.)

(Court of Civil Appeals of Texas. El Paso.  
Nov. 13, 1919. On Motion for Rehearing, Dec. 11, 1919.)

1. SCHOOLS AND SCHOOL DISTRICTS §48(1)—  
OFFICE OF COUNTY SUPERINTENDENT DEPENDENT UPON ANNUAL CENSUS.

The office of county superintendent of public instruction depends for its existence, under *Vernon's Sayles' Ann. Civ. St. 1914*, art. 2750, on the condition of the scholastic census at each general election, no election to such office being valid in a county having a scholastic population of less than 3,000, as shown by the preceding census, except in counties where the office has been created by an election held for that purpose.

2. COUNTIES §47—JURISDICTION OF COMMISSIONERS' COURT.

A commissioners' court is not a court of general, but of limited, jurisdiction, having no authority except as expressly or impliedly conferred by law.

On Motion for Rehearing.

3. SCHOOLS AND SCHOOL DISTRICTS §48(5)—  
DE FACTO SUPERINTENDENT NOT ENTITLED TO COMPENSATION.

Since it was not the purpose of *Vernon's Sayles' Ann. Civ. St. 1914*, art. 2750, to create the office of county superintendent of public instruction, nor authorize the election to the same, in counties having a scholastic population of less than 3,000, as shown by the preceding census, except in counties where such office has been created by an election held for that purpose, one elected to such office in a county having a scholastic population of less than 3,000, where such office was not created by an election held for that purpose, even if termed a de facto officer, is not entitled to the emoluments of the office for the term for which elected.

Appeal from District Court, Presidio County; Joseph Jones, Judge.

Suit by Allie R. Brown against K. O. Miller, County Judge, and others. Judgment for plaintiff, and defendants appeal. Reversed and rendered.

Walter Gillis, of Del Rio, for appellants.  
J. Q. Henry, of Del Rio, for appellee.

WALTHALL, J. This suit was brought in the district court of Presidio county, by Allie R. Brown, appellee, against appellants, K. C. Miller, county judge of Presidio county, R. Barnett, G. A. Chavez, W. T. Davis, and T. C. Mitchell, county school trustees of said county, praying for a temporary writ of injunction restraining appellants, individually and in their official capacities, from in any manner attempting to displace appellee as county superintendent of public instruction of Presidio county, and to substitute, appoint, and recognize in his said place appellant K. C. Miller, and to restrain appellant Miller from in any way exercising the functions and duties of county superintendent of public schools of said county, and to restrain appellants or any of them from in any manner interfering with appellee in the discharge of her official duties as the duly elected, qualified, and acting county superintendent of public instruction of said county, and from further attempting to deprive appellee of receiving the salary and enjoyment of said office.

On an ex parte hearing of the application for the temporary injunction, the district judge, in chambers, on the 22d day of March, 1919, granted the writ as prayed for, the same to continue in force until the next succeeding term of said court, unless sooner dissolved on motion of appellants. On June 27, 1919, appellants filed their original answer and cross-action directly attacking appellee's right to hold the office, basing said attack upon the facts as agreed upon and found by the court as hereinafter stated. On the last-named date, by an instrument in writing signed by all of the parties to said cause and filed, it was agreed that said cause should be finally tried in vacation and without a jury, and final judgment rendered therein by Hon. Joseph Jones, judge of said court, as provided in article 1714, *Vernon's Civil Statutes*. On July 8, 1919, the cause was tried in said court in accordance with said agreement, resulting in a judgment in favor of appellee against all of the appellants, holding that the election of appellee to said office of county superintendent of public instruction at the general election held November 5, 1918, was authorized by law, and that she was entitled to hold said office for the period of two years thereafter and until the election and qualification of her successor,



and enjoining appellant County Judge Miller from acting as ex officio county superintendent of public instruction in said county during said time, and all of the appellants from in any manner interfering with appellee in the performance of the duties of said office. The facts so agreed upon and found, but by this court abbreviated, substantially are as follows:

First. The scholastic census for Presidio county for 1917, duly taken, shows a scholastic population for that year of 3,110.

Second. On August 15, 1917, the commissioners' court duly appointed appellee as county superintendent of public instruction for Presidio county. Appellee duly qualified and entered upon the discharge of the duties of said office, and continued therein until the next general election, held on November 5, 1918.

Third. At the general election held in Presidio county in 1918 the commissioners' court of Presidio county provided for the election of a county superintendent of public instruction in said county, and appellee was a candidate for the office, and in the election received a majority of all the votes cast for the office. A certificate of election was duly issued and delivered to her, and on December 2, 1918, she duly qualified and entered upon the discharge of the duties of the office, and has continued to remain in possession of said office and discharge the duties of said office, except as prevented by appellants and the commissioners' court.

Fourth. On March 31st the Governor duly issued to appellee her commission for said office.

Fifth. Appellee is competent and qualified and possesses all of the qualifications necessary and required to hold the office.

Sixth. Appellant Miller is the duly elected, qualified, and acting county judge of Presidio county, and also qualified as ex officio county superintendent of public instruction for said county, and the other appellants are the duly elected, qualified, and acting county school trustees of said county.

Seventh. On December 10, 1918, the commissioners' court of Presidio county passed and entered on the minutes an order to the effect that their attention had been called to the fact that the scholastic census was less than 3,000, and was at the time the office was created (we take it as meaning and referring to the scholastic census for 1918 and the general election of that year). It was ordered that the office of county school superintendent be abolished, and that the duties of the office be thereafter performed by the county judge as ex officio officer; further ordered that the county treasurer honor no more vouchers as salary for county superintendent of public schools.

Eighth. On January 13, 1919, the commissioners' court passed an order providing for the compensation to be paid the county judge

for services rendered as ex officio county superintendent of public instruction.

Ninth. The scholastic census for the county for 1918 was duly taken. The rolls and summaries duly compiled show the scholastic population of Presidio county for the scholastic year 1918 to be 2,712.

Tenth. The scholastic census for 1919 had been taken at the time of the trial of the case, and showed a scholastic population of 2,959, and that 52 children within the scholastic age and entitled to enumeration and enrollment were omitted from the census, rolls, and summaries through failure of the census trustees appointed by appellee to take a full census of the scholastic population.

Eleventh. The uncertain condition of the question as to who was entitled to discharge the duties of the office of superintendent somewhat delayed the taking of the scholastic census for 1919.

Twelfth. No election has ever been ordered or held in Presidio county to determine whether or not the office of county superintendent of public instruction should be created in said county.

Thirteenth. From the passage of the order of the commissioners' court as outlined in paragraph 7, above, appellant Miller, by virtue of his office, has claimed the right and assumed to act as ex officio county superintendent of public instruction and receive the compensation provided by the commissioners' court, and since March 13, 1919, appellants, trustees, have refused to recognize appellee as their secretary and executive officer, but have recognized, and officially acted with, appellant Miller; that appellants have assumed to apportion among the school districts all of the available state and county school funds for said county (except an amount sufficient to pay the salary of appellee in the event she is finally held entitled to hold said office); that appellants, acting together since March, 1919, have prevented appellee from performing the duties of the office, and it is the intention of appellants to so continue unless enjoined. Appellants assign error to the court's conclusions of law continuing appellee in the office.

We agree with appellants' contention as outlined in the argument of counsel found in the brief, which we here state in substance as expressing the views we entertain on the issues presented by the record.

The correct decision of the case, we think, depends entirely upon the proper construction to be placed upon article 2750, Vernon's Sayles' Civil Statutes, when considered in connection with article 2763 and additional article 2774 of the supplement thereto (Vernon's Ann. Civ. St. Supp. 1918), and articles 2775 and 2776; and we add to the reference given article 2758, as amended by chapter 12, tit. 48, 4th Called Session 35th Legislature (1918) p. 70.

[1, 2] An examination of article 2750 will

show that it creates the office of county superintendent of public instruction, and provides for appointment and election to the office in such counties only as have a scholastic population of 3,000 or more, as shown by the preceding census. Under the provisions of the article, when a county attains a scholastic population of 3,000 or more, but not until then, the commissioners' court is authorized to appoint a county superintendent of public instruction. In like manner said article 2750 also authorizes an election to said office at each general election in every county, but only in such counties as have a scholastic population of 3,000 or more, as shown by the preceding census. Neither article 2750 nor any other provision of the statute tends in any way to indicate an intention of the Legislature to authorize a commissioners' court to appoint, or the people to elect, a county superintendent of public instruction in counties having a scholastic population of less than 3,000, unless an election had first been ordered held and carried in such county in favor of the creation of such office, in the manner provided in the last half of said article 2750, and no such election had ever been held in Presidio county. We concur in the suggestion of counsel for appellants that the fact that the Legislature, in the same act by which it created the office and provided for the appointment and election of county superintendents of public instruction in counties having scholastic populations of 3,000, also expressly authorized and provided for the manner of calling and holding elections in counties having a less scholastic population for the purpose of determining whether or not such office should be created in these counties, shows conclusively that it was not the purpose or intention of the legislative act to create the office, nor authorize an election to the same in counties having a scholastic population of less than 3,000 as shown by the preceding census, except in counties where said office had been created by an election held for that purpose. By the articles referred to, other than 2750, it clearly appears that the scholastic census of Presidio county taken in May and June, 1918, for the scholastic year beginning with September of that year was the next preceding scholastic census taken prior to the general election held on November 5, 1918, and the one controlling the action of the commissioners' court in providing for the election to the office for that year. The scholastic census in general election years is the inquisition made under express legislative warrant and authority, and by the statute is made the only basis for the official action of the commissioners' court. A commissioners' court is not a court of general, but of limited, jurisdiction, having no authority except as expressly or impliedly conferred by law. *Von Rosenberg v. Lovett*, 173 S. W. 508.

We conclude that the court was in error in the judgment rendered. The judgment is therefore reversed, and judgment here rendered in favor of appellants as prayed for in their original answer and cross-action.

#### On Motion for Rehearing.

[3] On appellee's insistence that the office of county superintendent of public instruction provided for by article 2750, Vernon's Sayles' Civil Statutes, has a potential existence in each county in the state, and that appellee, as in the case under review, who was regularly elected to the office, and possessing all of the qualifications required, is a de facto officer and entitled to the emoluments of the office for the term to which she was elected, we will briefly outline our view of that feature of appellee's contention.

If we are not in error in our construction of the above article that the office of county superintendent of public instruction depends for its existence upon the condition of the scholastic census at each general election, there would be no separate and independent office as is contemplated by the article when the scholastic population of the county as shown by the preceding census in a general election year falls below 3,000. In that event the office created or brought into existence by reason of the showing of the scholastic census likewise, by reason of the showing of the scholastic census, has no further existence, potential or otherwise, and that, by article 2763, "in each county \* \* \* having no school superintendent, the county judge shall be ex officio county superintendent of public instruction."

There seems to be an irreconcilable conflict of authority on the proposition as to whether or not it is possible to have a de facto officer in the absence of a de jure office. The two views on that question are stated in 22 R. C. L. 591, and many cases cited. We think we need not enter upon a discussion of that question; suffice it to say that, in our judgment, the instant case does not present a question of an act of an officer whether de facto or de jure. Here the office of county superintendent of public instruction as an office, in our judgment, terminated, and when such condition occurs the law, by statutory provision, enjoins the discharge of the duties of that office upon the county judge. The procedure here is a direct attack, not upon any act of appellee as an officer, but goes more to the question of the existence of the office rather than to any act of hers or her right to occupy it. Our view, as expressed in the opinion, is that, Presidio county not having created the office of county superintendent of public instruction by a vote of the people, the existence of that office, on the facts shown, terminated.

The motion is overruled.

HARTWIG v. SOUTHERN SURETY CO.  
(No. 6260.)(Court of Civil Appeals of Texas. San Antonio.  
Oct. 29, 1919. Rehearing Denied  
Nov. 28, 1919.)1. INSURANCE  $\Rightarrow$  452—RECOVERY UNDER ACCIDENT INSURANCE FOR DEATH OF ONE TRAVELING AS PASSENGER.

Where accident policy provided for specific indemnity for loss of life "only when \* \* \* sustained in the manner specified in section D, clause I," which specified accidents while insured was traveling as a passenger, beneficiary could not recover thereon for death of insured, which occurred in a manner not specified in such clause, but in a manner specified in another clause of section D, even though there was no provision in policy for indemnity for death resulting from accidents sustained in manner specified in such other clause, where there was another section in policy referring to all clauses of section D.

2. INSURANCE  $\Rightarrow$  146(1)—THAT POLICY WAS UNFAVORABLE TO INSURED IMMATERIAL.

That a policy is a poor one for the insured cannot alter or affect its provisions.

Error from District Court, Bexar County; S. G. Tayloe, Judge.

Suit by Bertha Hartwig against the Southern Surety Company. From a judgment giving her insufficient relief, plaintiff brings error. Affirmed.

Don A. Bliss, Benj. A. Greathouse, and T. T. Vanderhoeven, all of San Antonio, for plaintiff in error.

W. S. Peyton, of San Antonio, for defendant in error.

MOURSUND, J. Bertha Hartwig sued Southern Surety Company for \$7,500, besides interest, penalty, and attorney's fees, on an insurance policy insuring her husband, Rudolph Hartwig, against accidents and illness. The company denied all liability, except for \$200, which it tendered into court. The case was tried on an agreed statement of facts, and resulted in a judgment for Mrs. Hartwig for \$200.

The only question necessary to be decided is whether the policy provided for the payment of \$7,500 in case Hartwig died from the result of an accident such as caused his death. The portions of the policy necessary to be considered are as follows:

"In consideration of the statements in the application, a copy of which is indorsed hereon and made part hereof, and of fifteen dollars (\$15.00) premium, hereby insures Rudolph Hartwig, herein called the insured, the person described in the copy of the application, subject to all the provisions and limitations hereinafter contained, for the term of one year from noon, standard time, of the day and at

the place this policy is dated, against the effects of bodily injuries caused directly, solely, and independently of all other causes by external, violent, and accidental means, which bodily injuries or their effect shall not be caused wholly or in part, directly or indirectly, by any disease, defect, or infirmity, and which shall from the date of the accident result in continuous disability, and also against the effects of sickness, as follows:

## "Accident Indemnities.

"The company will pay:

## "Section A.

"For loss of—

Life, the principal sum of.....	\$7,500 00
Both hands, by complete severance at or above the wrist.....	7,500 00
Both feet, by complete severance at or above the ankles.....	7,500 00
One hand and one foot, by complete severance as defined above.....	7,500 00
Entire sight of both eyes if irrecoverably lost .....	7,500 00
Either hand, by complete severance at or above the wrist.....	1,875 00
Either foot, by complete severance at or above the ankle.....	1,875 00
Entire sight of one eye, if irrecoverably lost .....	1,125 00

—resulting within thirty days from date of accident solely from such injuries which shall have caused continuous total disability from date of accident to date of loss, but only when such injuries are sustained in the manner specified in section D, clause I.

## "Section B.

"For loss of time, fifty dollars (\$50.00) per week.

"The company will pay indemnity at the rate of fifty dollars (\$50.00) per week, not exceeding fifteen consecutive weeks, if such injuries shall from date of accident continuously and wholly prevent the insured from attending to any and every kind of business, but only when such injuries are sustained while traveling as a passenger in a place regularly provided for passengers, within any common carrier's public passenger conveyance (animals, aerial machines, or conveyances excepted), and only when such injuries shall be caused by the wrecking of such conveyances.

## "Section C.

"For loss of time, twenty-five dollars (\$25.00) per week.

"The company will pay indemnity at the rate of twenty-five dollars (\$25.00) per week, not exceeding fifteen consecutive weeks, if such injuries shall from date of accident continuously and wholly prevent the insured from attending to any and every kind of business, but only when such injuries are sustained in any manner specified in section D.

## "Section D.

"I. While traveling as a passenger in a place regularly provided for passengers, within any common carrier's public passenger conveyance

(animals, aerial machines, or conveyances excepted), or \* \* \*

"II. While riding within a conveyance drawn by horse power, provided that the insured shall not then be a hired driver thereof, nor be riding or driving in or upon any conveyance containing any merchandise or used for any business purpose or any work whatsoever (but this exception shall not apply to any physician or surgeon then employed in the practice of his profession, or any commercial traveler or buyer selling or buying goods from sample for future delivery only), and only in case of an accident which shall materially injure the conveyance; or \* \* \*

"Section E.

"The company will pay for loss of life of the insured which results within thirty days from date of accident, solely from such injuries caused by any accident in or out of business, if not otherwise covered by this policy, and which shall have caused continuous total disability from date of accident to date of loss, the sum of two hundred dollars (\$200.00)."

The only provision in the policy in which the company binds itself to pay \$7,500 for loss of life is contained in section A, and in the latter part of the section liability is limited expressly to cases in which the injuries are sustained in the manner specified in section D, clause I. Hartwig did not lose his life in the manner stated in section D, clause I, but in the manner stated in section D, clause II.

Section B provides for an indemnity at the rate of \$50 per week for loss of time for injuries sustained in the manner pointed out in clause I of section D. Instead of referring to clause I of section D, the language thereof is copied in section B, perhaps to render inconspicuous the limitation to the effect that the section will only apply "when such injuries shall be caused by the wrecking of the conveyance." Section C provides for indemnity at the rate of \$25 per week for loss of time, if the injuries are sustained in any manner specified in section D. So far the policy appears to be plain in its terms, although the terms are perhaps subject to the criticism that as drawn the unwary might easily overlook the fact that section A is limited in its operation to clause I of section D, instead of all of section D.

[1, 2] Section E provides for the payment of \$200 for loss of life. At first glance this provision appears to provide only for the

payment of \$200, if the accident causing death was one not otherwise covered by the policy; but it is possible that the words, "if not otherwise covered by this policy," were intended to relate back to the words for "loss of life." Plaintiff in error contends that the first construction is the proper one, and that therefore the policy fails to provide for payment of any sum whatever for death resulting in the manner described in clauses II to XIV, inclusive, of section D. We fail to see how this fact, if it be a fact, can aid plaintiff in error. The fact that a policy is a poor one for the insured cannot alter or affect its provisions. There is no ambiguity in section A, which is the only one that provides for the payment of \$7,500. It plainly provides that the sum is payable only in the event death resulted from such an accident as is covered by clause I of section D. It may be admitted that section E is ambiguous with reference to the description of accidents resulting in death, which will entitle the beneficiary to \$200, but only \$200 is involved in the construction thereof, and not \$7,500. Again, it may be admitted that no provision has been made for payment of any sum in case death resulted in any one of the ways described in clauses II to XIV of section D, but that fact would not bring about any ambiguity with respect to the provision for paying \$7,500 only in case death resulted in the manner specified in clause I of section D.

The suggestion that, unless section A refers to all of section D, and not merely clause I, the other clauses of section D are surplusage, is without merit, for section C refers to all of section D, and thus accounts for the inclusion in the policy of clauses II to XIV of that section.

There is no contention that there is any doubt or uncertainty concerning what is meant by section D, clause I, and there can be no doubt that there is no provision of the policy to the effect that \$7,500 will be paid if death results in the manner described in clause II.

While we concede the correctness of the rules of law relied upon by plaintiff in error with reference to the construction of insurance policies, we find no occasion for applying the same in this case, for the language of the policy, in so far as it relates to the payment of \$7,500, is plain.

Judgment affirmed.

GULF, C. & S. F. RY. CO. v. CULWELL.  
(No. 6084.)

(Court of Civil Appeals of Texas. Austin. April 30, 1919. On Appellant's Motion for Rehearing June 18, 1919. On Appellee's Motion for Rehearing Oct. 15, 1919. On Appellant's Second Motion for Rehearing Dec. 17, 1919.)

1. CARRIERS  $\S$ 228(5) — EVIDENCE INSUFFICIENT TO SHOW NEGLIGENT VENTILATION OF STOCK CAR.

Evidence held insufficient to show that defendant railroad was negligent in failing properly to ventilate the box car in which plaintiff's horses were shipped because it failed to nail strips across the open north door of the car through which the horses were loaded, but instead shut the door.

2. CARRIERS  $\S$ 215(2)—CARRIER LIABLE FOR INJURY TO LIVE STOCK IN DEFECTIVE PENS.

A railroad company is under duty to exercise ordinary care to provide suitable pens for loading and unloading live stock; and where horses to be shipped were overheated in a "cutting out" process made necessary by the railroad's negligence in permitting water troughs to overflow, rendering the pen muddy, such road was liable for consequent injuries to the horses in transit.

On Appellant's Motion for Rehearing.

3. APPEAL AND ERROR  $\S$ 1177(8)—JUDGMENT REVERSED WHERE FINDING WAS GENERAL AND ONE ISSUE ERRONEOUSLY SUBMITTED.

In action for injuries to horses in transit, where two issues of negligence were submitted to jury, one allowing recovery for an improper element of damage, and jury found for plaintiff on both, and in response to another special issue awarded lump sum as damages, there must be a reversal and a new trial.

On Appellee's Motion for Rehearing.

4. CARRIERS  $\S$ 215(1) — LIABILITY FOR INJURY TO STOCK FROM CONCURRING CAUSES.

Where injury to live stock is produced by negligence of the carrier concurring with another cause from which it is exempt from liability by law, as the act of God, or by contract, and there is no negligence on the part of the shipper contributing to such injury, the carrier is liable in damages for its full amount.

On Appellant's Second Motion for Rehearing.

5. CARRIERS  $\S$ 215(1) — APPORTIONMENT OF DAMAGE WHEN INJURY IS PARTLY ATTRIBUTABLE TO CARRIER.

If part of the injury to a shipment of horses arose solely from the shipment being in a box car, and part solely from the condition of the shipping pens, the risk from the use of a box car being assumed by the shipper, while the improper condition of the pens was negligence of the railroad for which it was liable, the damage from each cause should be apportioned, and the shipper given recovery only

for the part caused by the condition of the pens.

Appeal from District Court, Tom Green County; C. E. Debois, Judge.

Action by C. C. Culwell against the Gulf, Colorado & Santa Fe Railway Company. From judgment for plaintiff, defendant appeals. Affirmed.

Terry, Cavin & Mills, of Galveston, Joseph Spence, Jr., of San Angelo, and Lee, Lomax & Smith, of Ft. Worth, for appellant.

Blanks, Collins & Jackson, of San Angelo, for appellee.

## Findings of Fact.

JENKINS, J. The appellee, being desirous of shipping some horses from San Angelo to Brownwood, applied to appellant's agent at San Angelo for cars in which to ship the same. On account of pressure of business created by war conditions, appellant was unable to furnish appellee a stock car, and so informed appellee. Appellee entered into an oral agreement with the agent of appellant that, if he would furnish box cars in which to ship his horses, he would assume all risk of damage from the use of such cars; and, when the horses were loaded, and before the shipment started, appellee signed the following written statement, indorsed on the contract of shipment:

"Shipper assumes all risk of damage likely to occur caused by loading in box car."

Upon arrival at Brownwood, some of the horses were found to be dead, occasioned by suffocation and overheating. The jury found the damage as thus occasioned to be \$500, and the evidence supports such finding. The horses were very hot when loaded into the car. Had they not been overheated, they would not have been injured on account of lack of ventilation of the box car in which they were shipped, as is shown by the fact that other horses, not overheated, shipped in the same train in the same kind of cars, with the same kind of ventilation, were not injured.

The cars were ventilated on the south side by strips being nailed across the door, but the north door was practically closed. Had the north door been left open, and strips nailed across same, the horses would not have been injured, notwithstanding the fact that they were overheated when they were loaded.

The overheating of appellee's horses before shipment was occasioned by cutting or separating the colts from the mares in muddy pens, by reason of which the cutting could not be done in the usual way, that is, on foot, but had to be done on horseback. Had the pens not been muddy, the mares and colts could have been separated without overheating.

ing them, and no damage would have occurred by reason of using a box car for their shipment.

In shipping mares and colts, it is customary to separate them in the shipping pens, and ship them in separate cars, as was done with appellee's mares and colts. This is necessary to protect the colts from being injured by being trampled upon by the grown stock.

#### Opinion.

Appellee alleged negligence upon two grounds: One in failing to properly ventilate the car in which the injured horses were shipped; and the other in not furnishing suitable pens for loading said horses.

[1] We do not think that the first ground is sustained by the evidence. The south door of the car was ventilated by nailing strips across it from the inside before the horses were put in the car. The horses were loaded through the north door. It is shown by the testimony that strips could not have been nailed across this door from the inside after the horses were loaded, as the car was full of untamed horses. If strips had been nailed across from the outside, the weight of the horses would have pushed them off, and the horses would have fallen out. Appellee testified that an open barred gate could have been made and fastened in the north door with cleats, and thus have ventilated the car so that no injury would have occurred. Granting this to be true, the appellant did not expressly contract to thus ventilate the car, nor do we think it did so impliedly. Four or five other box cars were loaded in the same manner, and shipped in the same train. Appellee was present and saw how they were loaded, and made no objection to his horses being loaded and shipped in this way. He left the pen after his horses were in the car, but before the north door was closed. He had seen that the north door of the other cars had been closed, and had no reason to presume that the same would not be done as to the car which contained his horses. We think that, when he assumed "all risk of damage likely to occur caused by loading in a box car," he assumed the risk arising from the car being in the condition that it was as to ventilation.

[2] But, notwithstanding the lack of ventilation, appellee's horses would not have been injured but for their overheated condition when they were placed in the car, and they would not have been overheated but for the muddy condition of the pens. This condition was caused by appellant negligently permitting the water troughs to overflow, by reason of the hydrant being left open.

This case was submitted on special issues, the first of which was as follows:

"Did plaintiff's horses sustain any damage as a direct result of any failure on the part of

defendant, its agents, or employes, to exercise ordinary care to provide suitable pens for the separating and loading of said horses? Answer yes or no." To which the jury answered, "Yea."

It is the duty of railway companies to exercise ordinary care to provide suitable pens for loading and unloading stock. *Railway Co. v. McRae*, 82 Tex. 614, 18 S. W. 672, 27 Am. St. Rep. 926; *Railway Co. v. Mitchel*, 85 S. W. 286; *Railway Co. v. Trawick*, 80 Tex. 270, 15 S. W. 568, 18 S. W. 948; *Railway Co. v. Crenshaw*, 59 Tex. Civ. App. 238, 126 S. W. 602.

For the reason that appellant negligently failed to provide suitable pens for loading appellee's horses, as the result of which they were injured in the amount adjudged in the court below, the judgment of the trial court herein is affirmed.

**Affirmed.**

#### On Appellant's Motion for Rehearing.

[3] We have concluded that we were in error in sustaining the judgment of the trial court herein, which was for \$500 damages for appellee. This judgment was based on the answers of the jury to the following special issues:

"Special issue No. 1: Did plaintiff's horses sustain any damages as a direct and proximate result of any failure on the part of defendant, its agents or employes, to exercise ordinary care to provide suitable pens for the separating and loading of said horses?" To which the jury answered: "Yea."

"Special issue No. 2: Did the plaintiff's horses sustain any damage as the direct and proximate result (as said term is herein defined) of any failure on the part of defendant, its agents or employes, to exercise ordinary care (as herein defined) to properly ventilate the box car in which plaintiff's horses were being transported?" To which the jury answered: "Yea."

"Special issue No. 3: If you have answered either or both of the foregoing special issues in the affirmative, then state how much in dollars and cents said horses were damaged as the result of such failure on the part of defendant, its agents or employes." To which the jury answered: "\$500.00."

It cannot be told from these answers how much, if any, damages were awarded for the failure as to each matter submitted. As we have held that the plaintiff was not entitled to recover as to the matter submitted in special issue No. 2, it becomes necessary, in order for appellee to recover in this suit, to show how much, if any, he was damaged by reason of the failure of appellant as to the matter set out in special issue No. 1.

For the reasons stated, appellant's motion for rehearing is granted, and our former judgment herein is set aside, and this case is reversed and remanded for a new trial.

**Motion granted.**

**Case reversed and remanded.**

## On Appellee's Motion for Rehearing.

At the time we granted appellant's motion for a rehearing herein, our attention had not been called to a proposition of law which we have concluded is controlling in this case, and requires the affirmance of the judgment of the trial court. That proposition is as follows:

[4] Where injury is produced by negligence of the carrier concurring with another cause from which it is exempt from liability, by law, as the act of God, or by contract, and there is no negligence on the part of the shipper contributing to such injury, the carrier is liable in damages for the full amount of such injury.

The proposition is thus stated in C. J. vol. 10, p. 188:

"The excepted cause of liability must be the sole cause of the loss, for if the negligence of the carrier mingles with it as an active and co-operating cause the carrier will be responsible."

See, also, same volume, p. 125, and 6 Cyc. p. 525.

The decisions in this state support this view of the law. *Ryan v. Railway Co.*, 65 Tex. 13, 57 Am. Rep. 589; *Railway Co. v. Bland*, 84 S. W. 675; *Railway Co. v. Boyce*, 39 Tex. Civ. App. 195, 87 S. W. 395; *Railway Co. v. Brass*, 175 S. W. 780; *Railway Co. v. Nation*, 92 S. W. 827; *Fentiman v. Railway Co.*, 44 Tex. Civ. App. 455, 98 S. W. 939; *Bonnor v. Wingate*, 78 Tex. 337, 14 S. W. 790; *Railway Co. v. China Mfg. Co.*, 79 Tex. 28, 14 S. W. 785.

For the reason stated, appellee's motion for a rehearing is granted; our judgment reversing and remanding this cause is set aside, and the judgment of the trial court is affirmed.

Motion granted.

Judgment affirmed.

## On Appellant's Second Motion for Rehearing.

[5] Appellant insists that our decision on first [appellee's] motion for rehearing is erroneous, in that it appears from the verdict of the jury that some of the injury to the horses was occasioned by their being shipped in a box car, and that, therefore, the damage should be apportioned. This would be correct, if a part of the injury arose solely from the shipment being in a box car, and a part solely from the condition of the pens. Such, however, is not the fact in the instant case. No injury would have occurred by reason of the shipment being made in a box car, but for the heated condition of the horses when loaded. This condition would not have existed but for the condition of the pens.

It is true that appellee assumed the risk arising from the use of a box car, but this was, as a matter of law, predicated upon the

supposition that appellant would not be guilty of some act of negligence, which would cause the use of a box car to injure the horses, without which no injury would have occurred.

Motion overruled.

Overruled.

WM. CAMERON & CO., Inc., v. GAMBLE.  
(No. 6110.)

(Court of Civil Appeals of Texas. Austin.  
Oct. 29, 1919. Rehearing Denied  
Dec. 10, 1919.)

1. MASTER AND SERVANT  $\Leftrightarrow$  389—WORKMEN'S COMPENSATION ACT; SUBROGATION OF INSURER LIMITED SO THAT EMPLOYÉ MAY SUE THIRD PARTY AFTER RECEIVING COMPENSATION.

Under Workmen's Compensation Act, § 6a, authorizing an injured employé to either sue a third party injuring him or seek compensation, but not to do both, and providing that insurer paying compensation should be subrogated to the employé's rights and should pay any sum recovered in excess of the compensation to the injured employé, an employé after receiving compensation may sue a third party upon the insurer's failure or refusal to sue, and recover full damages minus the compensation previously received.

2. MASTER AND SERVANT  $\Leftrightarrow$  410—WORKMEN'S COMPENSATION ACT; INSTRUCTIONS IN ACTION AGAINST THIRD PARTY PROPER.

In an employé's action against a third party instituted after the employé had received workmen's compensation, an instruction that the jury should deduct the compensation paid for whatever damages they may have found is proper, since a failure to make this deduction would result in double damages.

3. APPEAL AND ERROR  $\Leftrightarrow$  1033(5)—ERROR IN INSTRUCTIONS FAVORABLE TO APPELLANT.

In an action against a third party by an employé who had already received workmen's compensation, any error in an instruction that such compensation should be deducted from any damages found is favorable to defendant, and it cannot complain thereof on appeal.

Appeal from District Court, McLennan County; H. M. Richey, Judge.

Action by N. B. Gamble against Wm. Cameron & Co., Incorporated. Judgment for plaintiff, and defendant appeals. Affirmed.

Sleeper, Boynton & Kendall and Sanford & Harris, all of Waco, for appellant.

Tom M. Hamilton and J. A. Kibler, both of Waco, for appellee.

## Findings of Fact.

BRADY, J. Appellee instituted this suit against appellant for personal injuries alleg-

ed to have resulted from appellee's falling into an elevator shaft in the office building of appellant. It was alleged that on or about September 1, 1917, appellee, together with another employé of the Potts Furniture Company, went to the building of appellant for the purpose of delivering a library table sold by the furniture company to a tenant in said office building, and that to deliver such table it was necessary to use an elevator in the building provided by appellant for carrying freight and heavy objects. Appellee averred that, for the purpose of placing the table on the elevator in the ordinary and usual manner, he placed his hand lightly on the lower portion of the door or gate of the elevator shaft for the purpose of locating the lift, when, without warning or notice of any kind, the lower portion of the door or gate dropped, and he was thrown into the elevator shaft and fell a distance of about 18 feet to the concrete foundation, causing serious bodily injuries of a permanent nature.

The grounds of negligence, briefly stated, were that the first floor of the office building at the place where the elevator is located was dark, and that appellant failed to provide proper illumination for same; that appellant failed to provide and maintain on said elevator any means of indicating and showing the location of the lift and a proper bell thereon or other signal by which the lift could be called when needed; that appellant was guilty of negligence in the construction and maintenance of the elevator, and especially the door or gate, in that it was so constructed and maintained that it was necessary for a person desiring to use the same to lean his body over the lower portion of it in order to locate the position of the lift; and also was negligent in failing to provide a proper and secure lock or fastening to the same.

Appellant answered by general demurrer and general denial, and by pleas of contributory negligence, especially the failure to observe the directions of a large warning sign posted on the elevator, and by violating such warning by attempting to operate the elevator; and further that appellee was a trespasser on the property. It also relied upon the special defense that, at the time of his injuries, appellee's employer, Potts Furniture Company, was insured under the Texas Workmen's Compensation Act in the United States Fidelity & Guaranty Company; that appellee had elected to accept and had received compensation under the act, and was therefore barred from prosecuting the suit.

Appellee, by supplemental petition, demurred generally and specially to the defense based upon the Workmen's Compensation Act, as pleaded by appellant, but admitted that he had received the sum of \$158.40 under such act, and that the United States Fidelity & Guaranty Company became and was subrogated to the rights of appellee against appellant to the extent of the amount received by

appellee. He further pleaded that the Fidelity & Guaranty Company, which was required by the terms of the Workmen's Compensation Act to institute suit against appellant for recovery of the damages sustained by appellee, had failed and refused, and still fails and refuses, to institute suit against appellant, or to authorize appellee to sue, or to join him in his suit, although requested so to do by appellee. It was also specially alleged upon information and belief, that the Fidelity & Guaranty Company carried a policy of insurance issued to appellant, indemnifying appellant against loss and damages arising from accidental injuries to persons by reason of the operation of the elevator upon which appellee was injured, and that for this reason the insurance company refused to join in this suit with appellee, or authorize him to file suit, or to itself institute suit against appellant on its subrogation to the rights of appellee. He further alleged that he was authorized by the Industrial Accident Board to institute and prosecute this suit, and that he had tendered to the United States Fidelity & Guaranty Company the sum received by him under the Workmen's Compensation Act, to be deducted from any judgment he might recover against appellant.

Appellant demurred generally and specially to these supplemental averments, and denied the facts alleged.

The case was submitted to the jury upon a general charge, and a verdict returned in favor of appellee for \$2,341.60; the jury, under the instructions of the court, having deducted from the total damages the sum of \$158.40, the amount received by appellee under the Workmen's Compensation Act.

In deference to the verdict of the jury, which is sustained by evidence, we find that appellee was injured substantially as alleged through the negligence of appellant, which was the proximate cause of his injuries; that appellee was not a trespasser upon the premises; and that he was not guilty of contributory negligence, as pleaded by appellant. We also find that the insurer, the United States Fidelity & Guaranty Company, failed to bring suit under the subrogation conferred by the Workmen's Compensation Act, for appellee's injuries, and refused to join appellee in the prosecution of this suit, and substantially failed and refused to authorize him to prosecute the same, although requested to do so. We further find that such insurer had issued a policy to appellant, which was in force at the date of the injuries in question, agreeing to hold appellant harmless from liability for injuries resulting from the use of the elevator in appellant's building, and which covered the injuries sustained by appellee.

#### Opinion.

[1] The principal question upon this appeal is whether appellee is precluded from maintaining this suit, as a result of his having



accepted compensation under the Workmen's Compensation Law. The proper solution of this question depends upon the effect of section 6a, pt. 2, of chapter 103, Acts of the Thirty-Fifth Legislature, p. 285, which reads as follows:

"Where the injury for which compensation is payable under this act was caused under circumstances creating a legal liability in some person other than the subscriber to pay damages in respect thereof, the employé may at his option proceed either at law against that person to recover damages or against the association for compensation under this act, but not against both, and if he elects to proceed at law against the person other than the subscriber, then he shall not be entitled to compensation under the provisions of this act; if compensation be claimed under this act by the injured employé or his legal beneficiaries, then the association shall be subrogated to the rights of the injured employé in so far as may be necessary and may enforce in the name of the injured employé or of his legal beneficiaries or in its own name and for the joint use and benefit of said employé or beneficiaries and the association the liability of said other person, and in case the association recovers a sum greater than that paid or assumed by the association to the employé or his legal beneficiaries, together with a reasonable cost of enforcing such liability, which shall be determined by the court trying the case, then out of the sum so recovered the association shall reimburse itself and pay said cost and the excess so recovered shall be paid to the injured employé or his beneficiaries. The association shall not have the right to adjust or compromise such liability against such third person without notice to the injured employé or his beneficiaries. The association shall not have the right to adjust or compromise such liability against such third person without notice to the injured employé or his beneficiaries and the approval of the board, upon a hearing thereof."

"The association," as used in this section, means the insurance company authorized under the act to insure the payment of compensation to injured employés or beneficiaries, and in this case means the United States Fidelity & Guaranty Company, which insured the appellee as one of the employés of Potts Furniture Company.

We confess to have had great difficulty in determining the proper construction of the section above quoted, and in ascertaining the legislative intent as applied to the facts of this case. Indeed, the interesting question has suggested itself whether the provisions of the section are not so repugnant and irreconcilable as to destroy the force of the entire section. However, it is our duty to reconcile apparently conflicting provisions of a legislative act, or portions thereof, whenever possible to do so; and we believe that this may be done in the present case and a construction given which will save the section.

In the first portion of the section it is clearly stated that the employé may at his option proceed against the third person or

wrongdoer to recover damages, or against the association for compensation, but not against both; and it is also clearly expressed that, if he elects to proceed at law against the third person for damages, then he shall not be entitled to compensation under the act. If this were all, there would be no difficulty; or, if there were a similar provision to the effect that, where the employé elected to claim compensation under the act, there should be no right of action against the wrongdoer, the question would be easy of solution, and there would be no occasion for judicial interpretation. The Legislature did not see fit to stop with declaring the result where the employé elects to proceed at law against the third person, but proceeded to subrogate the insurance company to the rights of the injured employé, in so far as may be necessary, and authorized it to enforce either in his name or its own, and for their joint use and benefit, such liability, where the employé elects to take compensation under the act. Provision is carefully made for the reimbursement of the insurance company, and for the payment of any excess recovered to the injured employé or his beneficiaries. The rights of the employé are further safeguarded by the denial to the insurance company of any right to adjust or compromise the liability of the third person without notice to the employé or his beneficiaries, and without the approval of the board upon a hearing of the matter.

It is idle to deny that the Legislature did thus recognize and preserve a substantial right in the employé for the recovery of damages, notwithstanding he should elect to first proceed under the act for compensation. It is true that the insurance company is expressly subrogated to the rights of the employé with respect to the liability of third persons for damages, and is authorized to maintain a suit; but the subrogation is not absolute. As far as substantial rights are concerned, it is limited to reimbursement for any amount paid out by the insurer for compensation under the act, and the reasonable cost of maintaining the suit, together with the right to institute and control the action. This is the most that can be claimed as the rights of the insurance company under the subrogation clause, and there remains the substantial and carefully protected right of the employé or his beneficiaries to receive the excess of the recovery, which may often be largely in excess of the compensation paid under the act and the cost of maintaining suit.

It is also true that this right of the employé or his beneficiaries seems to be primarily enforceable by the insurance company. In a broad sense, however, he is a trustee, and is not vested with the arbitrary discretion to refuse to enforce the liability of third persons, and to fail or refuse to maintain suit, without regard to the facts or legal liability, and thereby foreclose the rights of the employé.

Such a construction would practically nullify the legislative intent, as we gather it from the entire section. It would put it within the power of the insurance company, by collusion or otherwise, to fritter away or to practically destroy valuable rights of others. This seems to us an impossible view of the legislation, especially where the Legislature has safeguarded the rights of the employé to the extent even of denying the insurer the right to adjust or compromise the liability without notice, a hearing by the Industrial Board, and its approval of the settlement. If the insurer cannot arbitrarily or with uncontrolled discretion compromise with the third person the liability for damages, it must follow that it cannot waive the employé's rights to damages by failing or refusing to institute suit when necessary.

It is our construction of this section that the literal language of the first portion, seeming to put the employé upon his election absolutely to either proceed at law for damages, or to claim compensation under the act, but denying both remedies, must yield to the entire language of the section. When thus considered, the conflict is more apparent than real, and the legislative intent fairly ascertainable.

Having indicated our views, let us apply our interpretation to the facts and situation of this case. It appears that the appellee was injured September 1, 1917, and up to November 6, 1917, when this suit was filed by appellee, the insurance company had made no effort to enforce the liability of Wm. Cameron & Co. (Inc.) and had brought no suit thereon. It further appears from the pleadings and the facts that up to July 17, 1918, when appellee filed his first supplemental petition, the insurance company had still failed and refused to institute suit against Cameron & Co., and refused to authorize the plaintiff to sue, or to join in this suit. It was also shown that the insurance company had issued an accident policy to Wm. Cameron & Co., protecting it against liability for accidental injuries on the elevator by which appellee was injured, which was in force at the time of appellee's injuries. This latter fact may account for the insurer's failure to institute suit against the wrongdoer, and its refusal to authorize appellee to sue, and to join him in this suit. Be that as it may, under these circumstances, we think appellee had the legal right to maintain this suit for the recovery of such damages, and that his acceptance of compensation under the Workmen's Compensation Act from the insurance company is no defense to this suit, under the provisions of the act, especially as he bore the expense of its prosecution, and offered to deduct from his recovery the amount paid him by the insurance company as compensation, which deduction was made by the jury under the instructions of the court.

The section we have been discussing, as far

as we are aware, has never received judicial interpretation; but it is claimed by appellant that *Dallas Hotel Co. v. Fox*, 196 S. W. 654, a decision by the Court of Civil Appeals for the Eighth District, is authority for its contentions here. Without discussing that case, in which a writ of error has been granted by the Supreme Court, we think it is sufficient to say that it was decided under the original Workmen's Compensation Act of 1913 (Acts 1913, p. 429), which did not contain section 6a of the act of 1917, nor any similar provision. This section appears for the first time in the act of 1917, and, conceding the correctness of the *Dallas Hotel Company Case*, it is not any more authority in this case than *City of Austin v. Johnson*, 204 S. W. 1181, decided by this court, which seems to hold differently from the *Dallas Hotel Company Case*, but was also decided under the old law, and in which a writ of error was likewise granted.

Appellant also relies upon several Massachusetts cases, namely: *Barry v. Ry. Co.*, 222 Mass. 386, 110 N. E. 1031; *Turnquist v. Hannon*, 219 Mass. 580, 107 N. E. 443; *Cripp Case*, 216 Mass. 586, 104 N. E. 565, Ann. Cas. 1915B, 828. It asserts, too, that the Texas compensation statute is copied from the Massachusetts act, and that section 6a, added to our statute by the amendment of 1917, is practically copied from the Massachusetts act (St. 1911, c. 751); and invokes the doctrine that the interpretation given by the courts of Massachusetts is persuasive, if not controlling, as to the proper construction of the section, as it is presumed that in adopting the act the Legislature also adopted the construction given it by the courts of Massachusetts.

It is true that our original Workmen's Compensation Act, enacted in 1913 (Acts 1913, c. 179), appears to have been modeled after the Massachusetts law; but the amendment of 1917 is a comprehensive and complete statute in itself, and amounts to virtually a substitute statute. An inspection of its provisions, and a comparison with the workmen's compensation laws of the several states, and also with the English act, will show that the Legislature borrowed freely from various statutes, and also that it embraces features not found in any other act. But, conceding that Massachusetts was the original source of our legislation on this subject, and that the Massachusetts cases were correctly decided, we do not think they are controlling, or even persuasive here. Giving to the decisions of the Supreme Judicial Court of Massachusetts that deference which rightfully belongs to that high tribunal, universally recognized as a court of the highest authority in this country, the cases cited, because of the statute considered in each of them, are not regarded as in point.

In *Turnquist v. Hannon*, supra, it is stated that the action was brought by the insurance

company for its benefit, in the name of the administratrix of the deceased employé, under section 15 of part 3 of the Workmen's Compensation Act of 1911, as amended in 1912 (St. 1912, c. 571). The opinion quotes section 15 as in these words:

"Where the injury for which compensation is payable under this act was caused under circumstances creating a legal liability in some person other than the subscriber to pay damages in respect thereof, the employé may at his option proceed either at law against that person to recover damages, or against the association for compensation under this act, but not against both, and if compensation be paid under this act, the association may enforce in the name of the employé, or in its own name *and for its own benefit*, the liability of such other person." (Italics ours.)

It is obvious that this section of the Massachusetts act differs very materially from section 6a, part 2, of the Texas Act of 1917. For instance, there is no reservation to the employé of any benefits to the liability of the third person, where the employé has elected to take compensation under the act. On the contrary, such election by the employé results in depriving him of any rights whatever against the third person for damages, and expressly confers all his rights upon the insurer. This consideration, alone, serves to distinguish the two statutes. That we are right in this view of the effect of the Massachusetts act, we quote the language of Chief Justice Rugg, who delivered the opinion of the court in the Turnquist Case, at page 565 of 219 Mass., 107 N. E. 445, as follows:

"The act by part 3, § 15, does not import into its terms the equitable principle of subrogation. It simply provides that, where the insurer has afforded the prompt relief to the dependents of a deceased employé which the act requires, it may enforce for its own benefit the rights against tortious third persons causing his injury which otherwise would have been available to the employé or his representatives.

"This right is not dependent upon reimbursement or subrogation. It puts upon the insurer the burden of undertaking what in many instances might be litigation uncertain by reason of disputed facts or novel law, but gives it all the advantage of the right of action which in substance is assigned to it. Hence it is an immaterial circumstance how much it may have paid or be liable to pay under the act."

Thus the Massachusetts court has itself said in effect that, under the statute of that state, where the employé elects to take compensation under the act, he waives all rights

to damages against the third person, and his cause of action is assigned absolutely; whereas, under our statute his rights are preserved and jealously guarded. The subrogation of the insurer is limited, and is intended only to prevent a double satisfaction to the employé, and to reimburse the insurer.

In our opinion, the trial court did not err in its rulings denying the defense asserted by appellant under the Workmen's Compensation Act, and the first seven assignments in appellant's brief, relating to this subject, are each therefore overruled.

[2, 3] In the twelfth assignment of error, appellant complains that the trial court erred in instructing the jury that, if they found for the appellee, they should deduct from whatever damages they found the sum of \$158.40, paid appellee as compensation under the Workmen's Compensation Act, because that portion of the charge was unwarranted by law, was improper and prejudicial; the evidence showing that appellant neither paid nor authorized the payment of such sum, and, as far as the record shows, knew nothing of such payment.

There is no merit in this assignment, because under section 6a of the Workmen's Compensation Act appellee was not entitled to recover both compensation under the act and damages against the third party, and it was shown by the evidence that the insurance company, which paid the compensation to appellee, was liable under its policy to appellant for accidents occurring on such elevator to indemnify it for any amount paid out by reason thereof. If the trial court had not instructed the jury to make this deduction, it would have resulted in double satisfaction, pro tanto, to appellee for the same injuries, which it is clear the Workmen's Compensation Act intended to exclude. It was proper for the court to instruct the jury to deduct this amount from the damages found; but, if there was any error in so doing, it was favorable to appellant, and it is in no position to complain. The assignment is overruled.

There are a number of other assignments in the brief; but, as they all relate to familiar questions of negligence law, it is not deemed necessary to unduly prolong this opinion to discuss them. However, they have all been carefully considered, and, believing that they are without merit, they are each overruled.

The judgment will be affirmed.

Affirmed.

**HOME LIFE & ACCIDENT CO. v. CORSEY.**  
(No. 7633.)

(Court of Civil Appeals of Texas. Galveston. Dec. 5, 1918. On Appellee's Motion for Rehearing, June 18, 1919. On Appellant's Motion for Rehearing, Oct. 14, 1919.)

**On Appellee's Motion for Rehearing.**

**1. MASTER AND SERVANT §405(6)—WORKMEN'S COMPENSATION ACT; FINDING OF TOTAL DISABILITY SUSTAINED BY EVIDENCE.**

Evidence held sufficient to support a finding that injured servant, claiming compensation under Workmen's Compensation Act (Vernon's Sayles' Ann. Civ. St. 1914, arts. 5246h-5246zzzz), suffered total incapacity for the period stated in the finding.

**2. MASTER AND SERVANT §385(5)—WORKMEN'S COMPENSATION ACT; "TOTAL INCAPACITY FOR WORK" DEFINED.**

The phrase "total incapacity for work," in the Workmen's Compensation Act (Vernon's Sayles' Ann. Civ. St. 1914, arts. 5246h-5246zzzz), does not imply an absolute disability to perform any kind of labor, and a person disqualified from performing the usual tasks of a workman in such a way as to render him unable to procure and retain employment is ordinarily regarded as being totally incapacitated.

[Ed. Note.—For other definitions, see Words and Phrases, Second Series, Total Incapacity.]

**3. STATUTES §226 — CONSTRUCTION OF WORKMEN'S COMPENSATION ACT.**

Since the Workmen's Compensation Act (Vernon's Sayles' Ann. Civ. St. 1914, arts. 5246h-5246zzzz) is largely copied from the Massachusetts Act, it should receive the same construction as that given the latter act by the courts of that state.

**4. MASTER AND SERVANT §382—WORKMEN'S COMPENSATION ACT; EFFECT OF RECEIVING COMPENSATION FOR SUBSEQUENT INJURY.**

The fact that an injured employé may have obtained compensation for total incapacity from another master for a subsequent injury to which he was not entitled cannot defeat his right to recover compensation for total disability in an action against the insurer of the first master, the fraud, if any, being on the second, and not the first master.

**5. MASTER AND SERVANT §411—WORKMEN'S COMPENSATION ACT; RECOVERY NOT TO EXCEED AMOUNT CLAIMED.**

In an action by an injured servant against the insurer of his master, the servant is not entitled to recover compensation at a greater rate per week than that prayed for in the petition.

Appeal from Harris County Court; W. E. Monteith, Judge.

Suit by P. J. Corsey against the Home Life & Accident Company. Judgment for plaintiff, and defendant appeals. Reformed and affirmed.

Andrews, Streetman, Burns & Logue, of Houston, for appellant.

A. B. Wilson, of Houston, for appellee.

**PLEASANTS, C. J.** This suit was brought by appellee to recover the sum of \$1,000 alleged to be compensation due him by appellant under the Workmen's Compensation Act of this state (Acts 1913, c. 179 [Vernon's Sayles' Ann. Civ. St. 1914, arts. 5246h-5246zzzz]).

The petition alleges in substance that plaintiff was injured on April 29, 1916, while working for the Kirby Lumber Company at a weekly wage of \$10.50; that defendant was the insurer of said lumber company under the Texas Workmen's Compensation Act; that the Industrial Accident Board had investigated his claim for compensation, and had decided that he was entitled to compensation at the rate of \$5 per week, beginning May 7, 1916; that plaintiff was totally and permanently disabled by reason of his said injuries, and was entitled, under the provisions of the Workmen's Compensation Act, to receive compensation from defendant at the rate of \$5 per week for a total of 300 weeks. The prayer was for recovery of \$1,000.

The cause was submitted to a jury in the court below upon special issues, and upon the verdict returned judgment was rendered in favor of plaintiff for the sum of \$479.70.

The jury found, in response to the issues presented to them by the charge of the court, that as a result of injuries received by him while engaged in performing the duties of his employment by the Kirby Lumber Company on April 29, 1916, plaintiff was incapacitated for work for a period of 537 days, and that for 504 of said days plaintiff's incapacity was total, and for the remaining 33 days was only partial. Under appropriate assignments of error each of these findings is assailed on the ground that it is without any evidence to support it.

Plaintiff, in substance, testified that on April 29, 1916, while he and other employes of the Kirby Lumber Company were engaged in moving and stacking lumber, one of his coemployes let a piece of lumber he was lifting slip and fall from the lumber hook with which he was lifting it, and such piece of lumber, which was about 14 inches wide, 2 inches thick, and about 18 or 20 feet long, struck plaintiff on the foot, and so injured him as to prevent his securing any permanent work since said injury was received.

Two other witnesses for plaintiff testified that they were present and saw the lumber fall and strike plaintiff's foot, and both testified that this injury to plaintiff caused him to stop work, and that his foot was swollen for some time thereafter.

On cross-examination plaintiff testified

that in the latter part of July, 1916, he went from Silsbee, where he was then living, to Beaumont, and obtained employment with the creosote works for one day, or 10 or 12 hours. He quit this job, and went to work for the Beaumont Lumber Company handling lumber on trimmers. His work for this company only lasted 2 days. In August, 1916, he went to Houston, and there obtained employment with Horton & Horton, who were constructing a sewer for the city. He worked for these contractors about 2 weeks. The first day of his work there he cut dirt down in the sewer. He was then told by his employer that he was not good enough for that work, and, to use his language, he was then given "a little job, piddling around keeping wood in the furnaces." On December 16, 1916, he obtained employment from the Armour Fertilizer Company, for whom he worked one day. While working for this company he was again injured by a pile of cotton seed cake falling on him, and he has done no work since.

A witness for the defendant testified, and the testimony is uncontradicted, that plaintiff worked for the Westheimer Transfer Company at Houston for about two or three weeks in November, 1916, and was paid a wage of \$1.50 per day.

The injury received by plaintiff at the Armour Company consisted of a broken hip bone. For this injury he made claim for compensation against the insurer of the Armour Company, and was allowed compensation at the rate of \$5.77 per week. He testified that this compensation was paid him from December, 1916, to April, 1917, at which time he made a lump sum settlement with the insurance company. He said he did not remember what amount he received in this settlement, and that he did not "think it had anything to do with this case." The 537 days that the jury found the plaintiff was incapacitated covers the period from the 8th day after the accident, when his right to receive compensation began under the Workmen's Compensation Act, up to the date of the trial in the court below.

We think this evidence was sufficient to sustain a finding that plaintiff received injuries as claimed by him on April 29, 1916, and as a result of such injuries he was partially incapacitated for 33 days, and probably totally incapacitated for some days, but the evidence is wholly insufficient to sustain the finding that as a result of such injuries he was totally incapacitated for 504 days. The period of partial incapacity found by the jury was evidently the 33 days which the evidence shows plaintiff had worked subsequent to his injury. Plaintiff testified that he only received \$35 for this 33 days' work, and that because of his inability to properly perform the work he could not keep his job. We think this testimony would authorize a

recovery by plaintiff for compensation for partial incapacity for the 33 days, and probably for the whole period from the 8th day after his injury up to the 16th day of December, 1918. But as before stated, we find no evidence to sustain the finding that he was totally incapacitated for 504 days, or for any number of days. All that the evidence shows is that his injured foot has caused, and still causes, him pain, lessens his capacity to work, and prevents him from securing permanent or continuous employment. He described his condition as follows:

"I worked for the Beaumont Lumber Company two days, I think it was, and he told me he could give me a permanent job if I did the work. He looked at me and asked me what ailed me, and I told him about that little accident at Kirby's, and he told me if I could stand up and do the work he would give me a steady job. The reason I can't work is that that leg and foot simply fail me, and the misery has gone all up in that leg and rib, and it pains at times, just pains; most of the pain is in the instep; the whole foot swells up and it pains me all over.

"I have not earned more than \$35 since May 7, 1916. Yes; no more than \$35 actually paid me for work. The reason I haven't is on the condition I haven't been able to hold a job since that time. I have been putting forth my efforts trying to work, but have not been able to secure a job long enough to show I was able to do the work. I am unable to stand up and do the work that I could demand before. It affects my foot when I stand on it. It pains and sometimes swells up on me."

The witness Jones testified:

"He (Corsey) worked there (Westheimer Transfer Company) in the year 1916, in November. He worked from about the 25th or 26th of November is the first day he went to work. He quit between that time and before the first of the year. He was gone before Christmas; was there about three weeks. We paid him 15 cents an hour; we paid him \$1.50 for the work all day; that is, when he was working on the wagon he made on an average of \$1.50 per day; he was on the wagon only about two weeks; he stayed around the office to help. He did this and that, whenever he could work, and by that he did not make enough to justify him staying there, I don't suppose, and he disappeared and didn't come back. That week we paid him by the hour—15 cents. If he worked only one hour a day he would be paid 15 cents. If he worked 10 hours he would be paid \$1.50, etc. He seemed to be a willing worker. We never had any trouble as to his being courteous or anything like that; of course, he was not in a position to do otherwise. Yes; he was obedient. Under his condition he was not a desirable employé. He couldn't do the work on the wagon. He could hardly get on the wagon when he was on the ground. No; he couldn't make enough to feed himself after he went to work in the office, around the place, at little odd jobs," etc.

As before shown, he did work for 33 days bringing the period of time from July, 1916, to December 16, 1916, and received

some compensation therefor. These 33 days covered periods from 1 to 15 days' duration, with intervals of several weeks or months intervening, and there is nothing in the evidence to show that his condition during these intervals was different from what it was on the days he worked. The undisputed evidence shows that on December 16th he received a second injury, which caused total incapacity, and that he has received compensation under the Workmen's Compensation Act for such incapacity. If he was totally incapacitated by the injury received on April 29th, and was suffering from such total incapacity on December 16th, when he received his second injury, the total incapacity which may have existed subsequent to that time might be chargeable to one or the other of said injuries, or partly to one and partly to the other. He made claim for compensation for total incapacity caused by the injuries received on December 16th, and has received the monthly compensation provided by the statute for the period from December, 1916, to April, 1917, and for such time thereafter as was covered by the amount received in his lump settlement, which amount is not shown. If he was entitled to the compensation received by him from the insurer of the Armour Company for total incapacity caused by the injuries received on December 16th, it is manifest that he was not totally incapacitated prior to receiving such injury.

To permit him to recover from appellant compensation for total incapacity caused by the injuries received on April 29th and existing during the time he was receiving such compensation for injuries received December 16th would be to sanction the perpetration of a fraud in one or the other case. We are, however, not called upon by the evidence to dispose of the case upon this ground; there being no evidence that he was totally incapacitated as a result of the injury of April 29th.

If any error is shown by any of the other assignments presented in appellant's brief, it is not such as is likely to occur upon another trial, and therefore need not be discussed.

For the reason before indicated the judgment of the court below is reversed and the cause remanded.

Reversed and remanded.

#### On Appellee's Motion for Rehearing.

[1, 2] Upon re-examination of the record, and consideration of authorities cited in appellee's motion for rehearing, we have reached the conclusion that we erred in our former opinion in this case in holding that there was no evidence to support the finding of the jury that appellee suffered total incapacity, as a result of the injuries complained of in this suit, for the number of days found by the jury. After stating in our former

opinion that for 33 days during the period of time from July 1, 1916, to December 16, 1916, the plaintiff was only partially incapacitated, and performed work for which he received wages, we say that—

"These 33 days covered periods of from 1 to 15 days' duration, with intervals of several weeks or months intervening, and there is nothing in the evidence to show that his condition during these intervals was different from what it was on the days he worked."

We do not now think that we were justified in concluding that because plaintiff was able to perform some kind of work during these 33 days the finding of the jury that he was totally incapacitated during the remainder of the period mentioned could not be sustained. The plaintiff testified:

"This injury hurt me so that I have not been able to demand any salary since. I have attempted to work, but every job that I got I lost because the employers would say that my disabilities were of such a nature that my services were not of use to them."

There was other testimony corroborative of this statement of the plaintiff. It seems to be settled by the authorities that—

"The phrase 'total incapacity for work,' as used in Workmen's Compensation Act, does not imply an absolute disability to perform any kind of labor, but a person disqualified from performing the usual tasks of a workman in such a way as to enable him to procure and retain employment is ordinarily regarded as 'totally incapacitated.'" *Moore v. Peet Bros.*, 99 Kan. 443, 162 Pac. 295.

The same general rule is announced in the following cases: *In re Lacione*, 227 Mass. 269, 116 N. E. 485; *In re Sullivan*, 218 Mass. 141, 105 N. E. 463, L. R. A. 1916A, 378; *Deprey's Case*, 219 Mass. 189, 106 N. E. 686.

[3] Our employe's compensation act is largely copied from the Massachusetts Act, and should receive the same construction as that given the latter act by the courts of that state. In the *Sullivan Case*, supra, the court, referring to some of the cases above cited, say:

"In our opinion these decisions are correct in principle. The object of our statute was to give compensation for a total or partial loss of the capacity to earn wages. *Gillen's Case*, 215 Mass. 96, 99, 102 N. E. 346 [L. R. A. 1916A, 371]. If, as in this case, the injured employe by reason of his injury is unable, in spite of diligent efforts, to obtain employment, it would be an abuse of language to say that he was still able to earn money, that he still had a capacity for work, even though his physical powers might be such as to enable him to do some kinds of work if practically the labor market were not thus closed to him. He has become unable to earn anything; he has lost his capacity to work for wages and to support himself, not by reason of any change in market conditions, but because of a defect which is personal to himself, and

which is the direct result of the injury that he has sustained. He is deprived of the benefit which the statute promises to him if he is told that because he could do some work if he could get it, he is not under an incapacity for work, although by reason of his injury he can obtain no opportunity to work. But we said in *Donovan's Case*, 217 Mass. 76, 104 N. E. 431, Ann. Cas. 1915C, 778, 4 N. C. C. A. 549, that the statute was to be construed broadly for the purpose of carrying out its manifest purpose."

[4] We further think we erred in our former holding that plaintiff could not recover for total disability for the time allowed him by the jury because of the fact that he had for a portion of said time received compensation for total incapacity from a different insurance company, and for an injury sustained subsequent to the injury of which he complains in this suit. The fact that he may have obtained compensation for the subsequent injury to which he was not entitled cannot defeat his right to recover in this suit.

[5] There is, however, an error in the judgment in this case which requires the reformation of the judgment. The jury found that plaintiff was totally incapacitated for a period of 504 days or 72 weeks. On this finding the court rendered judgment for plaintiff, allowing him compensation for said period at the rate of \$6.30 per week. This judgment is for \$1.30 per week more than is claimed in plaintiff's petition. The allegations of the petition setting out the amount claimed by plaintiff are as follows:

"That the Industrial Accident Board for the state of Texas heard and adjudicated the plaintiff's rights and compensation as against the defendant, and found in favor of plaintiff, finding that he was entitled to the compensation of \$5 per week, beginning on the 7th day of May, 1916, on account of the injuries sustained by the plaintiff while engaged by the Kirby Lumber Company.

"That since sustaining the said injury, as alleged by plaintiff and found by the Industrial Accident Board, plaintiff's leg and foot have continued to pain him, and he is unable to work, being unable to walk without crutches, and plaintiff alleges that he is entitled to have and receive of the defendant the sum of \$5 per week for a period of 300 weeks, as plaintiff will be unable to work and earn a living, as he was prior to sustaining said injury, and has been totally disabled by reason of sustaining said injuries as hereinbefore alleged.

"Wherefore, plaintiff prays that the defendant be cited, and that upon a hearing hereof plaintiff recover of defendant the sum of \$1,000, at the rate of \$5 per week from and after the 8th day after said injury, and for all such other general and special relief as he may be entitled to, and for costs of court."

It goes without saying that the plaintiff cannot recover compensation at a greater rate per week than that alleged in his petition.

It follows from what we have said that the motion for rehearing should be granted, judgment of the court below reformed, as above indicated, and affirmed; and it has been so ordered.

Reformed and affirmed.

On Appellant's Motion for Rehearing.

In a motion for rehearing presented by appellant our attention has been called to an error apparent upon the face of the record which requires a further reformation of the judgment of the trial court.

In answer to special issue No. 5 the jury found that the difference between appellee's wages before and after his injury during the 33 days of his partial incapacity was \$1.50 per week. Under article 5246m of Vernon's Sayles' Civil Statutes he was entitled to recover 60 per cent. of this difference, which amounts to 90 cents per week. Thirty-three days is  $4\frac{5}{7}$  weeks, and at 90 cents a week the compensation to which appellee is entitled is \$4.24. The portion of the judgment which allows appellee \$28.10 compensation for this period is clearly wrong, and must be reformed as above indicated.

The motion for rehearing has been given due consideration, and, except in the matter of this obvious error we think it should be refused; and it has been so ordered.

GANDY v. CORNELIUS. (No. 6278.)

(Court of Civil Appeals of Texas. San Antonio. Nov. 12, 1919. Rehearing Denied Dec. 3, 1919.)

SEQUESTRATION  $\Leftrightarrow$  17—QUASHAL IN ABSENCE OF ALLEGATIONS AS TO VALUE OF PROPERTY.

Where the holder of a secured note, given for the purchase price of three mules, sought to foreclose his mortgage lien and prayed a writ of sequestration for possession of the property, the writ must be quashed, where neither the affidavit nor the petition alleged the value of each item of the property, as required by Rev. St. 1911, art. 7095.

Appeal from Kleberg County Court; Ben F. Wilson, Judge.

Action by A. W. Cornelius against A. C. Gandy. Judgment for plaintiff, and defendant appeals. Affirmed in part, and reversed and rendered in part.

W. C. Jones, of Robstown, for appellant.  
T. Wesley Hook, of San Antonio, and Chas. H. Reese, of Kingsville, for appellee.

COBBS, J. This suit was instituted to recover on a note for \$260 and 10 per cent. attorney's fees, which note was alleged to be secured by a mortgage lien on three mules, fully described in the petition. The petition

refers to an attached mortgage as "Exhibit A," but it is not in the record. The petition prayed for a judgment on the note and foreclosure of the lien, and sale of property in satisfaction thereof. It prayed for a writ of sequestration to issue to take possession of the property. It did not allege the value of the property. Its prayer is in the usual form of such petitions, but is not signed either by appellee or any attorney for him. It was filed on the 31st day of December, 1918. On the same day appellee made and filed an affidavit praying that a writ of sequestration issue for the possession of the property, describing it as described in the petition, stating that he feared defendant "will make use of his possession to convert said property to his use." A bond was filed, and thereupon the writ was issued and placed in the hands of an officer. On the 4th day of January, 1919, the sheriff executed said writ and took possession thereof and in his return showed his costs for executing the same to be \$45.90, less a credit of \$4.45 cash, leaving \$41.50. On the 16th day of January, 1919, the appellant delivered to the sheriff his replevy bond and took possession of the mules.

On the 3d day of March, 1919, the defendant filed his answer in which he admitted the execution of the mortgage declared on, but averred within a few days thereafter, the mules being useless to appellant because they would not work to a cultivator, the trade was rescinded, and appellant kept said mules in his pasture at the request of and for appellee, and prayed for a cancellation of the mortgage and the note and recovery of his costs. On the same day he filed a motion to quash the affidavit and writ: First, because neither the petition nor affidavit stated the value of each item of property; and, second, because of a fatal variance between the petition and the affidavit, in that the suit is for the foreclosure of a mortgage lien and the affidavit is merely for the possession of the property. On the 6th of March, 1919, the court, after hearing the motion to quash, overruled the same. And on the same day the case was heard by the court on its merits and without a jury, and the judgment was entered for appellee with a foreclosure of the lien on the property secured by the mortgage. There are no findings of facts or any statement of facts in the record made by the court.

The first assignment is that the court erred in not sustaining the motion to quash the affidavit and writ, because neither the affidavit nor petition alleged the value of each item of the property sequestered as the law requires in such cases.

This assignment is well taken, for it is nowhere stated "the value of each article of the property" as the statute plainly requires. Rev. St. 1911, art. 7095; McSpadden v. La Force, 89 S. W. 163; Morgan v. Turner, 4 Tex. Civ. App. 192, 23 S. W. 284; Caruthers v.

Hadley, 115 S. W. 80; Cleghorn et al. v. Boxley et al., 58 Tex. Civ. App. 161, 123 S. W. 438; Butts v. Lucie, 153 S. W. 686.

To sustain the affidavit appellee relies upon the cases of McMillan v. Moon, 18 Tex. Civ. App. 227, 44 S. W. 414, and Caruthers v. Hadley, 115 S. W. 80.

In the McMillan Case it was a suit to foreclose a mortgage on lumber to satisfy a balance due of \$1,320.36, as alleged, and further stating it was "worth the above set forth amount"; the court there holding:

"This was sufficiently definite, and in compliance with the statute, because there was but one sum of money or amount set forth in the affidavit, and the reference could have applied to no other"—saying "that is certain which can be made certain."

And in the Caruthers Case the court said:

"Appellant's first assignment of error complains of the court's action in overruling his motion to quash the sequestration. There was no error in this ruling of the court. It is not essential to the validity of sequestration proceedings under our statute in an action for the recovery of land that the affidavit therefor state the value of each acre of land sued for. It is sufficient, in such case, if the affidavit describes and states the value of the whole number of acres. It is only when personal property is the subject-matter of the suit and is sought to be sequestered that the value of each item of the property must be stated in the affidavit."

We do not think we are called upon to look to the petition in this case to support the affidavit, if it could be done. The suit is predicated upon a debt seeking to foreclose a mortgage lien upon the property, while the affidavit simply is to recover the possession of the property as a whole valued at \$260, as though based upon the right of possession, without stating any indebtedness, and without reference to any suit for the foreclosure of any mortgage lien, and entirely variant from the petition.

There is no recovery sought against the sureties on the replevy bond, but the judgment is merely for the amount sued for with a foreclosure of the mortgage lien on the property.

While there was no motion made to retax the costs below, or any error assigned that the court erred in not taxing the costs of the sequestration against appellee, still, as the record plainly shows what the costs amounted to, we think the ends of justice may be met without reversing the whole case, and we therefore affirm the judgment in part and reverse and render it in part so that the appellant shall here recover his costs of \$41.50, the costs of the sequestration proceedings, and tax the costs of the appeal against the appellee.

Affirmed in part; reversed and rendered in part.



## VAN VELZER v. HOUSTON INSTALLMENT CO. (No. 7780.)

(Court of Civil Appeals of Texas. Galveston.  
Nov. 18, 1919.)APPEAL AND ERROR  $\S$ 496 — REVERSAL OF  
JUDGMENT AGAINST GARNISHEE NOT SHOW-  
ING COMPLIANCE WITH STATUTE.

There being no adequate basis shown for judgment within Rev. St. 1911, arts. 2108-2114, as to preparation and contents of transcript, judgment against garnishee containing no recitations that necessary statutory proceedings were had will be reversed, where record contains no writ in the nature of garnishment or a showing that one was issued and no answer to any purported writ or fact authorizing judgment against garnishee in the absence of answer under articles 271-300.

Appeal from Harris County Court; Roy F. Campbell, Judge.

Controversy between A. C. Van Velzer and the Houston Installment Company. From a judgment against Van Velzer as garnishee, he appeals. Reversed and remanded.

A. C. Van Velzer, of Houston, pro se.

GRAVES, J. This judgment must be reversed because the transcript filed in this court upon the appeal fails to disclose sufficient predicate for the action of the court below; a judgment in garnishment was there rendered against A. C. Van Velzer as garnishee, but the record contains no writ of that nature, nor other showing that one was in fact ever issued; indeed, no answer of Van Velzer to any purported writ of garnishment appears, nor do any facts which would have authorized a judgment against him in the absence of an answer. See R. S. arts. 271 to 300.

There is furthermore nothing from which this court might presume that these positive requirements of the statute in garnishment cases were complied with, there being in this respect merely the transcript of a cost bill and certain docket entries from the justice court, together with an amended original petition, which makes no reference to a garnishment proceeding, and a copy of an affidavit and bond in garnishment bearing the file marks at different dates of both the justice of the peace and the clerk of the county court at law.

The judgment appealed from contains no recitations that these necessary proceedings were had, being merely a straight recovery in favor of D. and U. S. Frosch, a co-partnership doing business under the firm name and style of Houston Installment Company against Van Velzer, as garnishee, and the sureties on his appeal bond, in the sum of \$181.25, with further provision that its payment should operate as a discharge of

any claim of plaintiffs therein against Mrs. Leona M. Hearne, as well as of any in her favor against Van Velzer.

Obviously, under R. S. arts. 2108 to 2114, no adequate basis for the judgment is shown; it is accordingly reversed, and the cause is remanded.

Reversed and remanded.

GRIFFITH v. STATE ex rel. AINSWORTH.  
(No. 1017.)(Court of Civil Appeals of Texas. El Paso.  
Nov. 18, 1919.)

1. QUO WARRANTO  $\S$ 11 — TO TRY TITLE TO COUNTY OFFICE.

The action of quo warranto is the proper proceedings to try title to a county office.

2. QUO WARRANTO  $\S$ 29 — TRIAL OF TITLE TO OFFICE BEFORE QUALIFICATION OF SUCCESSOR.

Although a county judge is entitled to hold the office until his successor is elected and qualified, quo warranto will lie before his successor has qualified.

3. ELECTIONS  $\S$ 293(1) — INSUFFICIENCY OF PAPERS SHOWING RETURNS AS EVIDENCE.

In view of Vernon's Sayles' Ann. Civ. St. 1914, arts. 2994, 3024, and 3081, relating to counting and canvassing of election returns, the admission in evidence of papers designated as tally sheets and election returns for the purpose of showing an election was error, where no one testified as to who prepared the papers, nor that they were accurately made and they were only signed by a clerk, and not in such form as to constitute any part of the lawful return of an election.

4. EVIDENCE  $\S$ 158(19) — BALLOTS AS BEST EVIDENCE.

In a quo warranto proceeding to determine title to the office of county judge, where there was positive proof of the existence of the ballots, it was improper to permit the voters to testify as to how they voted because such testimony was secondary evidence not admissible without accounting for absence of the best evidence.

Appeal from District Court, Pecos County; Jas. Cornell, Judge.

Petition in quo warranto by the State of Texas, on the relation of L. W. Ainsworth, against H. B. Griffith. Judgment in favor of relator, and respondent appeals. Reversed and remanded.

See, also, 210 S. W. 293.

Snodgrass, Dibrell & Snodgrass, of Coleman, for appellant.

Jackson & Isaacs, of El Paso, Wright & Harris, of San Angelo, and R. D. Blaydes and Howell Johnson, both of Ft. Stockton, for appellee.

HARPER, C. J. This is a quo warranto instituted by the state of Texas, through its district attorney, R. D. Blaydes, upon the relation of L. W. Ainsworth, to oust the appellant, H. B. Griffith, from the county judge's office of the county of Upton.

The case was filed in said county and subsequently transferred to Pecos county by agreement of the parties, and in the latter county tried by the court without a jury, and from a judgment in favor of Ainsworth this appeal is prosecuted.

[1] The first proposition is that the court should have sustained appellant's exceptions to the plaintiff's petition, because it showed upon its face that he (respondent) was the rightful holder of the office as holdover until the qualification of his successor; therefore could not be removed therefrom by proceeding in quo warranto.

The petition charged and the facts are:

That appellant was the elected and qualified county judge of Upton county for the term beginning November, 1916.

That relator, Ainsworth, was the Democratic nominee for the election of 1918, and that after the election the commissioner's court of the county met to canvass the returns, but upon inspection of the returns entered the following order:

"On this day came on to be canvassed the returns of a general election, and it appearing to the court that the said returns are insufficient as there has been no certificate made to said returns by the judges and clerks of said election, \* \* \* it is therefore ordered by the court that said election be held for naught, and that the several county officers of said county, who are now duly qualified, remain in their respective offices until a successor be duly elected and qualified."

The action of quo warranto is the proper proceeding to try title to a county office, and will lie when the commissioners' court have failed or refused to canvass the returns. *Dean v. State*, 88 Tex. 290, 30 S. W. 1047, 31 S. W. 185; *Buchanan v. Graham*, 36 Tex. Cr. App. 468, 81 S. W. 1237.

[2] Appellant is correct in his suggestion that he is entitled to hold the office until his successor is elected and qualified, and the the trial court so held and rendered judgment accordingly; but his further contention that the quo warranto will not lie until the successor has qualified is not well taken. *Little v. State*, 75 Tex. 616, 12 S. W. 965.

[3, 4] The court permitted a number of witnesses to testify that they voted for appellant for county judge at the election, to which appellant objected for the following reasons:

(1) Not the best evidence; (2) the ballots cast by the witnesses were the best evidence; (3) because the testimony of the witnesses does not show legal votes; (4) because the statute requires the result of the election to

be shown (1) by returns properly certified to by the election officers, (2) by the legal ballots cast in the election and preserved as required by the statute, and in the absence of showing the loss or destruction of the ballot cast parol evidence of the individual voter is inadmissible to show how he voted. The action of the court in overruling the objections is assigned as error. In this connection the court permitted two papers, designated "tally sheet" and one called "election returns," to be introduced in evidence for appellee, to the introduction of which the following objections were made: (1) It is a mere hearsay statement. (2) Is secondary evidence. (3) The original ballot is the primary evidence. (4) Because there were no returns made out and properly certified to by the managers of the election as required by article 3024, Rev. Stat. (5) Because the statute does not make the tally list kept by the presiding officer in his custody after the election any evidence of the votes cast or authorize same to be used in the contest of said election. (6) Because the statute contemplates that the result of the election in the first place shall be ascertained by returns, properly certified to, as required by articles 3024 and 2994, Vernon's Sayles' Revised Statutes of Texas, by all of the managers of the election in person in the first place, and, in case of said returns not being properly made, then by an inspection of the original ballots themselves, if in existence, there being no evidence offered of the loss or destruction of said ballots. (7) Because the said tally list is only the act of the clerk keeping same and is not an official act of the managers of the election, and not certified by said managers. (8) Because no evidence was offered showing the loss and destruction of the original ballots. These objections were overruled, and the evidence admitted to which appellant duly excepted. The contention then is that these papers and the testimony of the witnesses as to how they voted being all the evidence introduced to prove that appellee was elected to the office of county judge, being inadmissible, in view of the fact that the ballot box containing the original ballots was in the court room, because they were secondary evidence, the trial court erred in rendering its judgment for relator and its order ousting respondent from the office sued for.

Article 3024, Vernon's Sayles' Statutes, reads:

"When the ballots have all been counted, the managers of the election in person shall make out triplicate returns of the same, certified to be correct, and signed by them officially, showing: First, the total number of votes polled at such box; second, the number polled for each candidate; one of which returns, together with poll lists and tally lists, shall be sealed up in an envelope and delivered by one of the

precinct judges to the county judge of the county; another of said returns, together with poll lists and tally lists, shall be delivered by one of the managers of election to the clerk of the county court of the county to be kept by him in his office open to inspection by the public for twelve months from the day of the election; and the other of said returns, poll and tally lists shall be kept by the presiding officer of the election for twelve months from the day of election."

And article 3031 is:

"No election returns shall be opened or estimated, unless the same have been returned in accordance with the provisions of this title."

The papers above mentioned were all the returns offered. One of them was shown to have been in the possession of the presiding officer after the election according to witnesses Wright and Love's testimony, until turned over to them later, some time before the trial. The only signature to the certificate thereto was that of M. M. Longino, clerk. No one testified as to who prepared the papers, nor that they were accurately made. It follows that such papers were in no such form as to constitute any part of a lawful return of this election, or any evidence of probative value that relator was elected. And since there was positive proof of the existence of the ballots, the voters were improperly permitted to testify as to how they voted, because such testimony was secondary evidence, and not admissible over objection without accounting for the absence of the best evidence. State v. Owens, 63 Tex. 268; Id., 64 Tex. 505; Gray v. State, 92 Tex. 396, 49 S. W. 217; Savage v. Umphries, 118 S. W. 893.

Thus, we are left without legal evidence to support the judgment of the court, for which reason the case is reversed and remanded.

MASSACHUSETTS BONDING & INS. CO. v. FLORENCE. (No. 1022.)

(Court of Civil Appeals of Texas. El Paso. Nov. 13, 1919.)

1. TRIAL §68(1) — TIME FOR OFFERING RELEASE IN EVIDENCE.

In an action on a health insurance policy, based on a disability caused by hernia, where defendant set up a release from liability for disability due to such cause, it was error to exclude such release, where through inadvertence it was not formally offered in evidence until the close of the evidence, and this though trial court entertained view that release constituted no defense.

For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

2. INSURANCE §144(1) — CONSIDERATION FOR RELEASE OF DESIGNATED CAUSES OF DISABILITY IN HEALTH POLICY.

Where insurer under a health policy waived its legal right to cancel the policy, upon the execution by insured of a release covering disability caused by hernia, which release became a part of the insurance contract, such waiver constituted a sufficient consideration for the release.

3. INSURANCE §247 — ESTOPPEL TO CANCEL HEALTH INSURANCE POLICY.

Where insured accepted a health policy, reserving to insurer the right to cancel the policy at any time on notice and return of unearned premiums, that insurer had knowledge that insured was ruptured prior to the execution of the policy did not constitute an estoppel on insurer to cancel the policy on that ground.

4. TRIAL §66 — DISCRETION OF COURT IN RE-OPENING CASE.

Generally the question of reopening the evidence after the parties have rested lies in the discretion of the court.

5. INSURANCE §454 — HEALTH INSURANCE; DISABILITY DUE TO AGGRAVATION OF HERNIA.

A health insurance policy, covering disability resulting from illness, embraces disability of an insured who, while suffering from a hernia, accidentally stepped into a hole in a street, displacing the truss, and causing the hernia to come down, whereby he was incapacitated for two months.

Appeal from El Paso County Court at Law: W. P. Brady, Judge.

Action by Elbert H. Florence against the Massachusetts Bonding and Insurance Company. From a judgment for plaintiff, defendant appeals. Reversed and remanded.

John L. Dyer and C. H. Kirkland, both of El Paso, for appellant.  
D. W. Burkhalter and S. J. Dodson, both of El Paso, for appellee.

Findings of Fact.

HIGGINS, J. On March 12, 1918, appellee, Florence, applied to appellant for a "health policy," and the application signed by him contained a representation that he did not then have and had never had hernia. Upon this application appellant issued its policy, dated May 21, 1918, insuring Florence against "disability resulting from illness which is contracted and begins during the life of this policy, \* \* \* and providing for a monthly illness indemnity of \$70. This policy contained a provision which reads:

"The company may cancel this policy at any time by written notice delivered to the insured or mailed to his last address as shown by the records of the company, together with cash or the company's check for the unearned portion of the premiums actually paid by the in-

sured, and such cancellation shall be without prejudice to any claim originating prior thereto."

Some time prior to the dates mentioned Florence had received from appellant an "accident policy." In appellee's application for the accident policy it was shown that he had a rupture and wore a suspensory. This last-mentioned policy had a rider attached releasing appellant from any liability for disability due wholly or in part to hernia or rupture. As a matter of fact appellee did have hernia, and on August 27, 1918, during the life of both policies, he accidentally stepped into a hole in the street, thereby displacing the truss which he wore, and his hernia came down. As a result thereof he became disabled for a period of two months. Appellant having refused to pay any indemnity for the period of his disability, appellee brought this suit, declaring upon both policies.

In bar of liability upon the accident policy, appellant set up the release attached as a rider to the same and above described. In bar of liability upon the health policy appellant alleged that after the execution of the same the falsity of the representation in the application upon which it was based as to hernia came to its notice, and it thereupon advised appellee that it would cancel the policy, unless he would waive his right to recover thereunder for any illness that he might suffer from hernia or rupture, and on July 20, 1918, appellee executed and delivered a release from all further liability for any disability or loss due wholly or in part to hernia or rupture, and such release became a part of the contract.

By supplemental petition appellee denied under oath the execution of the release dated July 20, 1918; also pleaded in avoidance thereof that it was without consideration; also that appellant was estopped to defend on the ground that his illness and disability was the result of hernia for the reason that at the time the health policy was issued appellant had full knowledge that he was suffering from hernia. A peremptory instruction was given the jury to find in favor of appellee in the sum of \$140. Verdict was so returned, and judgment rendered.

#### Opinion.

In view of the rider attached to the accident policy, appellee manifestly cannot recover upon that contract, and he does not so contend. His right, if any, depends upon the health policy, and if he in fact gave the release dated July 20, 1918, and the same is supported by a valuable consideration, he cannot recover upon that contract. Appellant's first and third assignments will be considered together.

[1] Under the first assignment it is complained that the court erred in withdrawing

from the jury the issue of whether or not the release of July 20th was executed by appellee. Appellee upon the stand denied the genuineness of his signature thereto, but there was ample evidence offered by appellant that it was genuine, and an issue of fact in this respect was raised. It appears that by inadvertence the release was not formally offered in evidence by appellant, but immediately upon the close of the evidence this fact came to the notice of appellant's counsel, and he requested that he be then permitted to formally introduce the same. This the court declined to do, and its action in this respect is the basis of the third assignment.

In so doing the court erred. In justice to the trial court it should be said that his action was not arbitrary but was based upon the view that if, in fact, the release was executed by appellee, it constituted no defense. The release which is copied in the bill of exception recites that in consideration of appellant continuing the health policy in force appellee released appellant from all future liability on account of any disability or loss due wholly or in part to hernia or rupture. We are not advised by the record of the basis of the trial court's opinion that the release, if before the jury, would have constituted no defense; but, looking to the pleas set up in appellee's supplemental petition, we find he pleaded non est factum, want of consideration, and estoppel. As to non est factum, the evidence raised an issue of fact; as to the want of consideration, the health policy contained a clause reserving to appellant the absolute right to cancel the same at any time upon notice and return of unearned premium. Appellant's general agent, Lay, testified that the release was signed and delivered to him by Mr. Florence, and further:

"I absolutely would not have permitted this health policy to have remained in force, without Mr. Florence's signature having been given to this release."

[2] This testimony shows that the consideration for the release was the waiver by appellant of its legal right to cancel the policy, and is a sufficient consideration. 1 Parsons on Cont. 444; Hannay v. Moody, 31 Tex. Civ. App. 88, 71 S. W. 326; Benson v. Phipps, 87 Tex. 578, 29 S. W. 1061, 47 Am. St. Rep. 128.

[3] There is no merit in the plea of estoppel. Appellee accepted a contract reserving to appellant the clear right, at any time, to cancel the policy upon notice and return of unearned premium, and there is not in the contract, nor the circumstances surrounding its execution, anything which would estop appellant from exercising its right of cancellation simply because it may have had previous notice that appellee was suffering from hernia. The right of cancellation was entirely independent of any matter of notice or knowledge of hernia.

[4] For the reasons indicated, the third assignment is sustained. As a general rule the question of reopening the evidence after the parties have rested lies in the discretion of the court; but it appears here that the court based its ruling upon the erroneous view that the release, if executed, constituted no defense. There is thus no question involved as to the exercise of a discretion vested in the lower court; but, if it were, we would not, upon the record here presented, hesitate in holding that there had been an erroneous exercise of discretion in refusing to reopen the evidence and permit appellant to formally introduce the release. An inspection of the statement of facts and bill of exception discloses that under the circumstances the trial court in the exercise of its discretion would not have been warranted in refusing appellant's request. Appellee does not contend that the court properly exercised a discretion vested in it, and we deem it unnecessary to state the condition of the record in respect to this question.

[5] There is no merit in appellant's contention under its second assignment to the effect that appellee's disability was not from illness within the scope of the health policy. Illness embraces a bodily indisposition such as appellee sustained from stepping in the hole, and appellant is liable for the monthly indemnity which it contracted to pay, unless a recovery is precluded by the release of July 20, 1918. As to this release the issue raised by the plea of non est factum should be submitted to the jury.

Reversed and remanded.

# STARK et al. v. ROGERS et al. (No. 491.)

(Court of Civil Appeals of Texas. Beaumont.  
Nov. 24, 1919. Rehearing Denied  
Dec. 3, 1919.)

## ADVERSE POSSESSION §7(2)—REFUSAL OF STATE TO ISSUE PATENT NO DEFENSE.

In trespass to try title based on adverse possession, it is no defense that state has refused to issue a patent to defendants, where defendants could at any time have obtained a patent by making a correction in field notes; there being no issue as to the boundaries to the land in controversy, the boundaries as existing on the ground being old recognized established surveys.

Appeal from District Court, Newton County; W. T. Davis, Judge.

Suit by Will Rogers and others against W. H. Stark and others. Judgment for plaintiffs, and defendants appeal. Affirmed.

Holland & Holland, of Orange, for appellants.

Wightman & Hancock, of Newton, for appellees.

WALKER, J. This suit was brought by appellees against appellants in the district court of Newton county, Tex., to try title, as well as for damages, to 160 acres undivided, claimed by appellees out of and a part of a certain 600-acre tract awarded to G. Bedell Moore on September 1, 1905, abstract No. 1172, Newton county, Tex.; said 600 acres being a part of certificate 91 T. & N. O. R. R. Co. survey. Appellees based their title on the 10-year statute of limitation. On the trial it was admitted that appellants own whatever right or title G. Bedell Moore acquired from the state. Upon the trial of the cause before the court without a jury, the court rendered judgment, September 9, 1918, for the appellees for the land sued for. From this judgment this cause is now before us for review.

The timber on the 600 acres, being the north and west seven-eighths of section No. 30, was sold by the state of Texas to G. Bedell Moore on May 5, 1900; the only evidence of title given to said Moore being an award card containing as the only description of the land "the north and west seven-eighths of section 30." The 600 acres of land was awarded by the state of Texas to G. Bedell Moore at \$2 per acre on September 1, 1905, on his application to purchase timbered lands by the owner of the timber, filed in the office of the commissioner of the general land office of Texas on May 17, 1905; the only evidence of the award being a card to the said Moore describing the land as "the N. and W. seven-eighths of section 30." G. Bedell Moore fully paid for said land on the 18th of September, 1905. The land office has continuously refused and still refuses to patent the land, claiming there is uncertainty in the description of the location of the land; rejecting all field notes thereof, new field notes of said 600 acres are required to be made by or under the direction of the land office surveyor before the commissioner will issue patent for said land.

The plaintiffs offered in evidence the field notes of section 30, T. & N. O. R. R. Co. certificate No. 91, recorded in volume 3, p. 401, of the surveyor's records of Newton County, Tex., which notes were recorded, as above stated, March 6, 1872, and returned and filed on said date in the land office. On November 7, 1895, T. F. Burnham bought 40 acres from the State out of section 30, certificate No. 91, T. & N. O. R. R. Co. survey, for which patent duly issued. Maps and plats were offered and received in evidence showing the location of T. & N. O. section 30 on the ground and its relation to the surrounding surveys. No proof was offered that the field notes made and returned in 1872 were incorrect; all the evidence on this issue being that

the land office, since the sale of the timber, had refused to recognize the old set of field notes. The proof is clear as to the occupancy of the plaintiffs, and no issue is made against their 10-year occupancy, their improvements are located on section 30, and the proof is sufficient in every respect to sustain plaintiffs' 10-year limitation, provided appellants were the owners of a legal or an equitable title to this land. We further find that appellants have had it in their power, at any time since this land was awarded to their grantor, to obtain corrected field notes to section 30, if the old field notes are not correct.

Appellants bring this case to us on two assignments of error; the first being restated in the second, as follows:

"The court erred in rendering judgment for plaintiff for the land sued for on his limitation claim, because there has never been a legal or recognized survey of the land, and defendants, having never received any field notes thereof, cannot know the boundaries thereof, and the boundaries thereof have never been legally established, and cannot be determined that plaintiff has ever had possession of any portion thereof according as such boundaries may be established, and under which the state will have parted with its title and vest ownership in defendant."

We cannot sustain this assignment. As we understand this record, from the maps and plats introduced before the jury, there is no issue as to the land in controversy, section No. 30. The boundaries, as they exist on the ground, are recognized; old established surveys surrounding this section. *Sparks v. Hall*, 29 Tex. Civ. App. 177, 67 S. W. 918, an opinion by the Court of Civil Appeals for the Fourth District, on which writ of error was denied by the Supreme Court, is decisive of this appeal. Discussing *Von Rosenberg v. Cuellar*, 80 Tex. 249, 16 S. W. 58, Chief Justice James, speaking for the court, said:

"That case is essentially different from this one, and it is our opinion that, as defendants had it in their power to obtain the correction at any time, without waiting until 1901, it was practically in their power to have sued at any time since 1871 for so much of the land as they were entitled to under the certificate, and they could not, simply by refraining from making the correction, hold their claim to the land in abeyance, and defeat the running of the statute upon that ground."

See, also, *Udell v. Peak*, 70 Tex. 547, 7 S. W. 786, *Robles v. Cooksey*, 70 S. W. 584, *Hogue v. Baker*, 92 Tex. 58, 45 S. W. 1004, and *Spearman v. Mims*, 207 S. W. 573.

Finding no error in this record, this case is in all things affirmed.

# CARDENAS v. BARRERA et al. (No. 6290.)

(Court of Civil Appeals of Texas. San Antonio. Nov. 26, 1919.)

## 1. HABEAS CORPUS §85(1)—EVIDENCE OF UNFITNESS OF FATHER TO HAVE CUSTODY OF CHILD.

In habeas corpus proceedings by father to recover possession of his child from its grandparents, evidence tending to show that he had once been found drunk, and that an unknown woman had at one time claimed him as her property, *held* insufficient to establish his unfitness to have his child's custody.

## 2. HABEAS CORPUS §85(1) — BURDEN OF PROOF OF UNFITNESS IN PROCEEDINGS BY FATHER TO OBTAIN CUSTODY OF CHILD.

In habeas corpus proceedings by father to recover possession of his child from its grandparents, the grandparents have the burden of proving that the father was unfit to have charge of the child, or that its best interests would be subserved by the grandparent's custody.

Appeal from District Court, Maverick County; Joseph Jones, Judge.

Habeas corpus proceedings by Margarito Cardenas against Mrs. George Barrera and another. From a judgment denying relief, the plaintiff appeals. Reversed and remanded.

Sanford & Wright, of Eagle Pass, for appellant.

D. E. Hume, of Eagle Pass, for appellees.

FLY, C. J. This is a habeas corpus proceeding by appellant to obtain the custody of his nine year old son, Isidro Cardenas, who was in the custody of his grandparents, Mrs. George Barrera and Clemente de los Santos. The court denied the relief prayed for.

[1] The evidence is quite vague and unsatisfactory, both as to the ability of the father to care for the child and as to his moral character. It is merely hinted that appellant's relation with other women was not correct and exemplary, but the evidence is too unsatisfactory to affect the character of a man, shown by at least one witness, whose testimony was not assailed, to have been sober and industrious and of good moral character. The charge of adultery is based alone on the assertion of Mrs. Barrera that she and her daughter, while, at some indefinite time, on their way to church, met some woman who said to the daughter, "This man you live with (meaning her husband) belongs to me." That testimony, if it can be so dignified, is too shadowy and unsatisfactory upon which to base a denial to him of the custody of his child. He claims to have contributed to the support of the child until the death of the wife and mother in September,

1918, and that claim was not proven untrue by any positive, competent testimony. It was stated by the grandmother that appellant was drunk on a certain occasion and fell down on the steps of appellees' house, and that the sheriff found him drunk on the steps. When that occurred was not mentioned and the sheriff did not testify. The same witness who swore to the good character of appellant testified to the good reputation of Mrs. Barrera.

The evidence did not show whether or not appellees had a home or what their financial condition may have been; the only testimony on the subject being that of Mrs. Barrera that she was able to support the child. Appellant did show that he was in the employ of the Eagle Pass Ice Manufacturing Company and had been for a number of years, and was receiving a salary of \$60 a month. No effort was made to show that appellant was immoral or unfitted to have the custody of his boy, unless the fact that he may have once been drunk at some uncertain time on the steps of Mrs. Barrera's house, or that some unknown woman at some time had claimed him as her property, be evidence. If he had been a habitual drunkard, it would have been easy to show it; if he had been living in adultery with some woman, it would have been hard to conceal it in a town the size of Eagle Pass. Appellant had never attempted to surrender his natural right to the custody of the child, but he stated that he did not demand its custody while the mother was living, which was commendable rather than otherwise.

[2] The evidence is wholly insufficient to show any unfitness upon the part of appellant to have the custody of his child, or that it would be most conducive to the welfare and happiness of the boy for him to remain in the custody of the grandparents. Appellant naturally has the right to the custody of his child as against the grandparents, and the burden was on them to show that appellant was morally and financially unfit to have charge of the child or that the best interests of the child would be subserved by placing him in their custody. As said by this court in *Schneider v. Schwabe*, 143 S. W. 265:

"No sentimentality should attend a proceeding of this character, but the permanent interest and welfare of the child should be the great aim and end to be attained."

The burden of making that showing, according to the Supreme Court, rested on appellees, and they failed to meet it. *State v. Deaton*, 93 Tex. 243, 54 S. W. 901.

Judgment would be here rendered for appellant were it not apparent that there was no development of the case, so as to make it clear that judgment should be rendered one way or the other; so the judgment will be

reversed, and the cause remanded in order that it may be fully developed along the lines herein indicated.

Reversed and remanded.

# MILLERS' MUT. CASUALTY CO. v. HOOVER et al. (No. 8251.)

(Court of Civil Appeals of Texas. Dallas.  
Nov. 8, 1919. Rehearing Denied  
Dec. 6, 1919.)

MASTER AND SERVANT — 361 — WORKMEN'S COMPENSATION ACT; CORPORATION'S DIRECTOR SERVING AS EMPLOYE, NOT EXCLUDED AS OFFICIAL.

Under Workmen's Compensation Act (Ver-non's Ann. Code Cr. Proc. Supp. 1918, arts. 5246—2, 5246—82), naming employes entitled to its benefits and excluding officers and directors of corporations, one under contract of hire, who is injured in the performance of his duties as superintendent and head miller, is not excluded from the benefits of the act, though he is also a director of the corporation employing him.

Appeal from District Court, Grayson County; Silas Hare, Judge.

Proceeding by Louise E. Hoover, surviving wife of Guy Frank Hoover, before the Industrial Accident Board, for an award for his death, opposed by the G. B. R. Smith Milling Company, employer, and the Millers' Mutual Casualty Company, insurer. From a judgment affirming the award, the insurer appeals. Affirmed.

Hamp. P. Abney, of Sherman, for appellant.

G. P. Webb, of Sherman, for appellees.

RASBURY, J. The Industrial Accident Board, upon hearing, awarded Louise E. Hoover, and Kenneth E. and Francis L. Hoover, surviving wife and children, respectively, of Guy Frank Hoover, deceased, judgment against appellant for \$5,400, payable \$15 per week for a period of 360 weeks, upon the showing that Guy Frank Hoover lost his life while in the employ of the G. B. R. Smith Milling Company, which was a subscriber to the Employers' Insurance Association and at the time of the death of Hoover held a policy in appellant company protecting its employes. After the award appellant, in the time and manner provided by the Workmen's Compensation Act, brought this proceeding to cancel said award on the ground that Guy Frank Hoover was not an employe of the G. B. R. Smith Milling Company, within the meaning of said act, nor under the terms of the policy issued by appellant to the milling compa-

ny. There was trial to jury, to whom the issues of fact were referred in the form of the usual interrogations for special verdict; but, inasmuch as the court directed the answers to be made to the interrogatories, we shall only state the facts which bear upon and control the single issue presented in the brief and presently stated. Those facts are not controverted in the evidence and are briefly these:

The G. B. R. Smith Milling Company is a private domestic corporation and conducts a flourmill at Sherman. It had a board of seven directors, consisting of G. B. R. Smith, Guy Frank Hoover, and five others. G. B. R. Smith was its president and general manager. Guy Frank Hoover was its superintendent and head miller. Generally, his duties were to direct the operation of the plant machinery, the making of flour, overlook and direct repairs, and at times do the actual work in connection with such matters. He was without authority to employ and discharge servants, though he did at times exercise that authority to a limited extent. The ultimate authority to direct the mill and its operation, to employ and discharge servants, was reposed in G. B. R. Smith, the president and general manager, who employed Hoover and had authority to discharge him. Hoover received a salary of \$165 per month. Whether any part of said sum was paid him as a director of the corporation the evidence does not disclose. Hoover was accidentally killed at the mill while engaged in the performance of his duties as superintendent and head miller. Thereafter within the time and manner directed by the act his claim was presented to the Industrial Accident Board, and the award indicated was made.

The Workmen's Compensation Act, after excepting from its provisions domestic servants and farm laborers, and providing that its terms shall not include persons, firms, or corporations employing less than three persons, or operating steam, electric, street, or interurban railways, etc., enacts that the employes entitled to the benefit of the act "shall mean every person in the service of another under any contract of hire, express or implied, oral or written," unless they be masters of or seamen on vessels, etc., and unless the employment is not "in the usual course of trade, business, profession or occupation of his employer." Articles 5246-2, 5246-82, vol. 2, Vernon's 1918 Supp. Tex. Civ. & Crim. Stats. The act also provides, which provision is an amendment of the original act, that "the president, vice president or vice presidents, secretary or other officers \* \* \* and the directors" of corporations who accept the act "shall not be deemed or held to be an employe within the meaning of that term as defined" in the act. Article 5246-83, vol.

2, Vernon's 1918 Supp. Civ. & Crim. Stats.

The appellant contends that, since Hoover was a director of the subscribing corporation, he was not entitled under the provisions of the act quoted to the benefits thereof, regardless of what other relation he may have in fact sustained to the corporation, since he could in no event be an employe, within the meaning of the act. Stated otherwise, even though he was in fact an employe of the kind defined by the act as being entitled to its benefits, if he was also a director of the subscribing corporation, he was excluded from its benefits.

We are unable to agree with the contention. The provisions of the quoted article, which exclude officials of the corporation from participating in the benefits of the act, we are convinced refer to them as such; that is to say, while they are engaged in the performance of the duties conferred on them by law, as, for example, as to directors, the general management and direction of the corporate affairs, and as to the officers, the exercise of those duties and powers conferred on them by the directors or the by-laws of the corporation. The article purports to deal with them in that respect only. It neither directly nor inferentially denies the right of such officials to have other and different relations with the corporation. Conceivably, and not unnaturally, officers and directors of corporations might be employed in the performance of duties of a character wholly distinct from and unrelated to those ordinarily exercised as such officials. The act as a whole neither denies them the right to serve in the capacity of an ordinary servant or employe, nor denies the corporation the right to engage their services in that particular. If, as matter of fact, they are so otherwise employed, and that the employment is such as to bring them within the definition of "employe" contained in the act, and while so engaged they are injured, they are, in our opinion, entitled to the benefits of the act. What employes or servants are included in the definition, or what particular test is to be applied to determine that issue, will depend largely upon the facts of each case.

In the present case it is not claimed that Hoover was engaged in the performance of his duties as director when injured. It is, in effect, conceded that his services were such as to raise the ordinary relations of master and servant, as it is also conceded that he was in the employ of the milling company under a contract of hire. Such being the facts, and having reached the conclusion that the article excluding corporate officials from the provisions of the act applies to them only as such, it becomes our duty to affirm the judgment of the trial court.

**Affirmed.**



## LEBER v. DIBRELL. (No. 6291.)

(Court of Civil Appeals of Texas. San Antonio.  
Nov. 28, 1919.)GAMING  $\Leftrightarrow$  6, 29—RECOVERY FROM STAKE-  
HOLDER AFTER RESCINDING BET ON HORSE  
RACE.

Where plaintiff agreed with another to run a horse race, the owner of the fastest horse to get the stakes, and if either failed or refused to race the other to have the stakes, such agreement was illegal under Pen. Code 1911, art. 578, as betting on a horse race, and either party could rescind and recover his money from defendant stakeholder.

Appeal from Guadalupe County Court; J. B. Williams, Judge.

Suit by Jim Dibrell against Walter Leber. From judgment for plaintiff, defendant appeals. Affirmed.

Wurzbach & Wirtz, of Seguin, for appellant.

H. E. Short and Dibrell & Mosheim, all of Seguin, for appellee.

FLY, C. J. This suit originated in the justice's court, where appellees sued appellant to recover \$200, which was deposited with appellant as a stakeholder for a horse race which was not run. Appellee recovered in the justice's court, and upon appeal to the county court appellee recovered the sum sued for.

The evidence showed that appellee and one R. J. Porter entered into a written agreement to run a horse race on December 28, 1917; that appellee deposited \$200 with appellant as stakeholder. On the day fixed for the race appellee failed and refused to agree on a judge or starter, and the race was not run. On the day following appellee demanded a return by appellant of the money deposited by appellee; the same still being in the hands of appellant. He refused to return the money. It had been agreed between Porter and appellee that in case either party failed or refused to run the race the other should have the money placed with the stakeholder.

The county court held that the contract was illegal, being one for gaming purposes. Undoubtedly the evidence showed that the agreement was one to run a horse race, the owner of the fastest horse to get the stakes. The contention that the evidence failed to show that the money would be won by the fastest horse is utterly without foundation. Men do not usually put up money on the proposition that the slow horse should take the money, but, if this was the case, it would not alter the fact that the money was to change hands at the end of a speed contest, and consequently that the whole affair was

illegal. It was betting on a horse race, which is condemned by the laws of Texas. Rev. Crim. St. (Pen. Code) art. 578. Either party could rescind the contract and recover his money from the stakeholder. As said by this court in *Lewy v. Crawford*, 5 Tex. Civ. App. 293, 23 S. W. 1041:

"The terms of the bet, or who was winner or loser, can cut no figure in the decision of this case. The whole transaction was clearly against public policy, and in open violation of one of the penal statutes of Texas. \* \* \* A gaming contract being illegal and void, courts have invariably refused to interfere between the parties to the wager, who, being in pari delicto, cannot invoke the aid of the courts in carrying out their contracts. The question, however, presented to this court is not whether it will enforce or affirm a gambling contract, but whether it will permit one of the parties to disaffirm it. We have investigated a large number of American cases, and in nearly all of them the rule is laid down that as long as the money is in the hands of the stakeholder either party has the right to demand his part of the money, and, if refused, can maintain an action at law, whether demand is made on the stakeholder before or after the happening of the contingency upon which the wager is suspended."

The entire transaction was illegal, the provision for the forfeit as well as the rest of the contract. It may be, as stated, by appellant, that "horse racing is the sport of kings," but it is one of the sports of those delectable personages, when accompanied with gambling, which, like many others of their doubtful, if not criminal, pastimes, has been branded by the laws of civilization with their disapproval and condemnation.

The judgment is affirmed.

## HERNANDEZ v. GARCIA et al. (No. 1012.)

(Court of Civil Appeals of Texas. El Paso.  
Oct. 30, 1919. Rehearing Denied  
Nov. 28, 1919.)1. SALES  $\Leftrightarrow$  190—TITLE PASSES ON PAYMENT  
WHERE PARTIES SO INTEND.

Where it is the understanding of the parties that title to goats sold shall not pass until payment is made for them, title does not pass, though possession of the goats was delivered to the buyer and a bill of sale, reciting payment, was executed.

2. SALES  $\Leftrightarrow$  218½ — EVIDENCE THAT TITLE  
HAD PASSED INSUFFICIENT TO WARRANT PER-  
EMPTORY INSTRUCTION.

In suit to recover value of goats wrongfully seized by defendants, evidence held insufficient to warrant a peremptory instruction for defendants on the theory that plaintiff had parted with title to the goats before the seizure by defendants.

### 3. REPLEVIN $\Rightarrow$ 88 — EVIDENCE OF DEFENDANTS' OWNERSHIP INSUFFICIENT FOR DIRECTED VERDICT.

In an action to recover the value of goats wrongfully seized as damages, where defendants claimed the goats had been stolen from them by another, testimony by plaintiff that he had raised the goats on his ranch requires the issue of ownership to be submitted to the jury.

Appeal from District Court, Brewster County; Jos. Jones, Judge.

Action by Fells Hernandez against Bartola Garcia and others. Judgment for defendants after a directed verdict in their favor, and plaintiff appeals. Reversed and remanded.

C. R. Sutton and Mead & Metcalfe, all of Marfa, for appellant.

W. Van Sickle, of Alpine, and F. G. Morris, of El Paso, for appellees.

#### Statement of Case.

HIGGINS, J. In a suit pending in the district court of Brewster county, brought by Bartola Garcia, appellee, against Tom Burnam and Jim Mitchell, said Garcia caused to be issued a writ of sequestration against 1,200 goats. Under the writ the goats were seized and thereafter replevied by Garcia.

Thereafter appellant Hernandez brought this suit against Bartola Garcia and Wenscelado Garcia, son and agent of Bartola Garcia. Hernandez alleged that he was the owner of the goats, and that they had been converted by the Garcias in the manner above shown. He sought recovery of the value of the goats as actual damages and exemplary damages for the wrongful and malicious issuance of the writ. Upon trial the court instructed the jury that the evidence disclosed Hernandez had parted with title prior to the sequestration proceedings, and directed a verdict for defendants upon that theory.

The evidence discloses that Bartola Garcia was forced by the Villistas to leave Mexico in 1913. He came to Texas. When he left Mexico he had various properties, among them a ranch stocked with goats. These goats were stolen by the Villista General Rosalio Hernandez, a brother of appellant. The goats in controversy were crossed from Mexico into Texas in December, 1916, at Lajitas, Tex. Garcia had been advised of the probable entry of the goats, and sent his son, Wenscelado Garcia, to Lajitas. Wenscelado arrived there December 3d. Appellant testified that the goats were his and his children's, having been raised by them upon his property in Mexico, and that his brother Miguel Hernandez and one Luis Flott were commissioned to pass and sell the goats. One Jim Mitchell was at Lajitas, and expected to

purchase the goats. Tom Burnam was also present, but just what interest he had in the matter is not clearly disclosed by the record. Wenscelado Garcia testified:

"I know Luis Flott. At that time I had a conversation with Luis Flott with reference to those goats that were brought there; he said that he was commissioned by Rosalio Hernandez to sell some goats, and he says, 'I suppose they are yours.' Then Luis Flott came to me the day before or the day after the crossing of the goats, and says, 'Let's have some understanding about these goats so that you will not take them away,' his proposition was that Luis Flott offered him \$500 in the presence of Hernandez if they wouldn't molest the goats, let them go. After they talked a little while I agreed to take the \$500 and this man went off with Flott and was gone about 15 minutes and came back, and he said Don Tomas said he had to pay \$500 duties, and he would assume the expense of the litigation. Don Tomas is Tom Burnam. Luis Flott told me that Tom Burnam had to pay \$500 duty and he would take the consequences of a suit. I don't know who Tom Burnam was to pay the \$500 to, because there was nobody representing the government there. Luis Flott said that Tom Burnam would loan them \$500 to pay the duties there; that Luis Flott was responsible for the duty, and they would take the money for the government there. I told them I would take the \$500. I didn't want to have any trouble, just to get it and bring it here. Then Luis Flott went to get the money and did not get it, and he came back in about 15 minutes. When he came back he told me that Don Tomas had forbid the Hernandezs from paying the \$500, and therefore he couldn't do it. Luis Flott said the defendant Mitchell was the one that he thought was going to buy the goats. Luis Flott didn't pay me the \$500.00 that I agreed to accept because Don Tomas wouldn't let him. I don't know who Don Tomas represented. I never had known Luis Flott as the representative of the Mexican government. I didn't do nothing after Don Tomas refused to let Luis Flott pay the \$500—came up to Alpine and instituted proceedings."

From the whole record it is plainly apparent that there was some hitch in the consummation of the purchase by Mitchell arising out of the adverse claim to the goats by Bartola Garcia represented by his son Wenscelado. But it appears the goats were delivered to Mitchell by Flott and Miguel Hernandez, and Mitchell started to Alpine, Tex., with them. Garcia then instituted the sequestration proceedings, and the goats were seized before they reached Alpine, and replevied as above stated. The sequestration issued December 9, 1916, and the goats seized thereunder on December 12th. On December 8, 1916, at Lajitas, the following bill of sale was executed by Miguel Hernandez:

"La Jitas, Texas, Dec. 8, 1916.

"Before me, the undersigned authority, Paul H. Albright, 2d Lt. 4th Texas Infantry, sum-

mary court, La Jitas, Texas, personally appeared Miguel Hernandez, who on his oath disposes and says that he has this day sold for the sum of \$1,212, and by these presents does bargain and sell to Jim Mitchell eleven hundred and fourteen (1,114) goats, of various ages, and hereby acknowledge receipt of \$1,212. That he further guarantees the ownership of said goats, and guarantees the said Jim Mitchell against all claims against said goats. These goats were raised and on and have been in peaceable possession of the undersigned for more than eight years.

"[Signed] Miguel Hernandez.

"Sworn to and subscribed to before me this the 8th day of December, 1916, known to me to be the party who signed this contract. [Signed] Paul H. Albright, 2d Lt. 4th Texas Infantry, Summary Court."

This instrument was delivered to B. Crawford, who testified concerning it as follows:

"I was present when this bill of sale was signed. I know Miguel Hernandez. The bill of sale was delivered to me. Miguel Hernandez, Luis Flott, Mr. Burnam, Jim Mitchell, and a captain and a lieutenant and another soldier were there when that was delivered to me. This bill of sale was to Jim Mitchell. They gave me that bill of sale, and told me to keep it until Jim Mitchell come to Alpine with the goats, and when he paid me for the goats to give it to him, that bill of sale to him. I never delivered that bill of sale to Mitchell."

Jim Mitchell testified:

"After the goats were crossed over on the Texas side I did not see Wenscelado Garcia, not down where the goats were crossed. I never did see him there. I saw him in Lajitas, I saw him there the evening before I went down to cross the goats, left early next morning, but I saw him when I got back that night. He was not down at the river that day to look at the goats of my knowledge. I tried to get him to go out and look at the goats. I went to the place where he was stopping and called him out and tried to get him to go out and look at the goats, but he refused. I don't know that I could tell you exactly what he did say when I tried to get him to go out and look at the goats—anyway he didn't go to look at the goats. I did not use an interpreter when I was talking with him. I speak some Spanish.

"Q. After you received word, Mr. Mitchell, that the goats were stolen you stated you refused to take them. Was any further arrangement made whereby you could take possession of the goats? A. Not at that time. I stayed with the goats until we got to Lajitas; next morning Mr. Burnam, Mr. Crawford, Garcia, and several were there trying to get the matter straightened up. We couldn't do anything, so Mr. Burnam and Mr. Crawford loaned Luis Flott the money to pay the duty with, and there was a bill of sale issued, and they held the bill of sale. That bill of sale was made in my favor, made to me. We had a verbal contract there that if I got the goats and they were not taken away from me I was to pay them the money. Garcia was claiming them, and I figured they might be sequestered, as they were—some of that kind might turn up. There was no time set, only when got to Al-

pine and loaded them on the cars, and if there was no trouble, the goats hadn't been taken away from me, I was to pay them the \$1,215."

### Opinion.

[1] As stated above, the court gave the peremptory instruction against appellant upon the theory that title had passed from him at the time of the sequestration proceedings, but it is very clear that the mere delivery of the goats to Mitchell did not pass title. The evidence quoted clearly shows that the bill of sale was not to be delivered to Mitchell until he had paid for the goats, and that it was the intention and understanding of the parties that title should not pass until such payment had been made. If that was the intention of the parties, title did not pass to Mitchell, as there is no contention that he had made the required payment. *Lang v. Rickmers*, 70 Tex. 108, 7 S. W. 527; *Scott v. Childers*, 24 Tex. Civ. App. 349, 60 S. W. 775; *Tillman v. Janka*, 15 S. W. 39; *Austin v. Welch*, 31 Tex. Civ. App. 528, 72 S. W. 881.

[2] Appellee in support of the court's charge and the judgment asserts:

"As the evidence shows beyond controversy that the sale to Mitchell by appellant of the goats in controversy was completed by verbal sale and delivery before the bill of sale was executed, and as the bill of sale was subsequently executed without delivery or acceptance thereof by Mitchell, the conditions attached by Hernandez to the delivery of the bill of sale and whether or not they were violated are unimportant. It was an ex parte performance by Miguel Hernandez after title had passed under the verbal sale, and it could not have the effect of reinvesting him with title and imposing conditions."

We do not view the evidence in the light indicated in the foregoing proposition. Under the evidence quoted it does not appear that the sale of the goats to Mitchell and passing of title had been effected prior to the execution of the bill of sale. Upon the contrary it appears that it was all a part of one transaction, and that Mitchell held possession subject to the condition that title would not pass and the bill of sale be delivered until he had paid for the animals. Certainly, an issue of fact as to the intention of the parties with reference to the passing of title was raised by this evidence. The peremptory instruction should not have been given.

[3] Upon the question of title raised by the evidence of Garcia that the animals belonged to him and had been stolen from his ranch in Mexico an issue of fact in this respect was raised by the testimony of appellant that they belonged to him, and had been raised on his ranch in Mexico by himself and family. Thus upon no theory of the case can the peremptory instruction be sustained.

Reversed and remanded.

**WATKINS v. VAUGHN et al. (No. 496.)**

(Court of Civil Appeals of Texas. Beaumont.  
Nov. 13, 1919.)

**ANIMALS §55—STOCK LAW IS LOCAL OR SPECIAL AND MUST BE PLEADED AND PROVED.**

Where plaintiff in suit for damages done to his crops by defendants' hogs did not allege or prove that his crops were protected by a good and lawful fence, he could not recover, where he failed to allege and prove that the county judge published or posted, as required by Rev. St. 1911, art. 7221, notice of result of election, putting the special stock law into effect; it being necessary to allege and prove each of steps required by article 7209 et seq., where special stock law is relied upon.

Appeal from San Augustine County Court;  
E. T. Anderson, Judge.

Suit in the justice court by Pink Vaughn and another against W. W. Watkins. Plaintiffs had judgment in the justice court, and on appeal to the county court they again prevailed, whereupon the defendant appeals. Reversed and rendered.

J. W. Minton, of Hemphill, and Davis & Ramsey, of San Augustine, for appellant.

Wm. McDonald, of San Augustine, for appellees.

**BROOKE, J.** This was a suit filed in the justice court of precinct No. 1, San Augustine county, Tex., on September 15, 1917, by Pink Vaughn and J. O. Payne, as plaintiffs, against W. W. Watkins, who is appellant here. The case was tried in the justice court on November 26, 1917, and resulted in judgment in favor of appellees for \$110, with interest and costs of suit. The case was duly appealed to the county court of San Augustine county. In the county court plaintiffs filed a trial amendment, and the case was tried on December 4, 1918, resulting in judgment in favor of appellees for the sum of \$119. Appellant, in due season, filed his motion for new trial, also amended motion for new trial, which amended motion for new trial was heard by the court of December 7, 1918, and was by the court overruled, to which action of the court the defendant in open court excepted and gave notice of appeal to this court.

There is an agreed statement of facts in this case and of the issues made in the case, and filed on December 24, 1918, and appellant presents his case under said statement of facts, as follows:

"We, the parties to the above styled and numbered cause, whose names are signed hereto, being all of the parties to this suit, hereby agree that the following is a brief statement of this case and of the facts proven on the trial thereof:

"(1) The plaintiffs brought this suit in the justice court of precinct No. 1, San Augustine

county, Tex., alleging damages to their crops in the sum of \$110, alleged to have been caused by the depredation of defendant's hogs running at large on their premises, which were alleged to be in territory where the stock law prohibiting hogs, sheep, and goats from running at large, was in force.

"The defendant answered by general exception and general denial, and the case was tried in the justice court and resulted in a verdict for plaintiff. It was appealed to the county court, and trial there resulted in a verdict for the plaintiffs for the amount sued for based upon special issues found by the jury. The special issues submitted to the jury covering only the question of whether the crops were damaged by defendant's hogs, and, if so, the amount of the damage. The defendant gave notice of appeal to the Court of Civil Appeals of the Ninth Supreme Judicial District.

"(2) The following facts were proved:

"(A) That the crops were damaged as alleged, by defendant's hogs, and that the value of the crops so damaged was as prayed by plaintiffs.

"(B) Plaintiffs introduced in evidence an order of the commissioners' court, made at the November term, 1902, directing the holding of an election to determine whether or not hogs, goats, and sheep shall be permitted to run at large in the subdivision of the county of San Augustine as described in the petition of the numerous freeholders this day presented to the court. (Then follows the petition giving the boundaries, which include the premises in the plaintiffs' petition and on which the damages are alleged to have occurred.) Which said petition contains the names of more than 50 freeholders.

"(C) Plaintiffs also introduced the following order or declaration of the results of said election found in the minutes of the commissioners' court:

"In vacation January 19, 1903. On this day the county judge in the presence of the sheriff, Co. clerk & John Thompson, J. P. of precinct No. 1, proceeded to count the votes cast at the stock law election held at Mount Nebo Church about six miles east of the town of San Augustine, and on the 20th day of December, 1902, the result of said election being 43 votes for and 6 votes against, and the county judge ordered that hogs, sheep and goats be prevented from running at large in the territory described in election order after thirty days from this date. The boundaries are as follows: Beginning at a point in the public road leading from San Augustine to Patroon in Shelby county, where the east boundary line of the corporation of San Augustine crosses said road. Thence easterly with said road to the west boundary line of the J. B. Dillard survey of land. Thence southerly with said Dillard's west boundary line. Thence easterly with John Chumley and J. B. Dillard's surveys to the S. W. corner of the Thomas Wright survey. Thence continuing in an easterly direction with the Thomas Wright south boundary line and the P. A. Sublett north boundary line to the N. E. corner of the P. A. Sublett survey. Thence southerly with the division line of the P. A. Sublett and M. Usery surveys to the S. E. corner of the P. A. Sublett survey, being corner No. 9, of said survey. Thence easterly with the south boundary line of

the M. Ussery survey to the west boundary line of the Enoch Jones survey. Thence in a southerly direction with Enoch Jones west boundary line to the S. L. Young north boundary line. Thence easterly with the S. L. Young north boundary line to a point due north from Tom Sublett's N. W. corner of land. Thence S. to the N. W. corner of the Tom Sublett survey. Thence south with the Tom Sublett west boundary line to the S. W. corner of the Tom Sublett survey. Thence easterly with the Tom Sublett south boundary line to the S. E. corner, continuing thence east across the S. L. Young survey to the Cypress creek. Thence down Cypress creek with its meanderings to Pollygoche creek. Thence down Pollygoche creek with its meanderings to the west boundary line of Sabine county. Thence in a southerly direction with the division line of Sabine and San Augustine counties to the north boundary line of beat No. 4, San Augustine county. Thence westerly with the dividing line of beat No. 4 and beat No. 1, to the public road leading from San Augustine to Jasper. Thence in a northerly direction with said road to the south boundary line of the corporation of San Augustine. Thence easterly with said corporation to the S. E. corner of the same. Thence northerly with the east corporation line to the beginning"—said above field notes embracing the premises where said damage was alleged to have been done.

"(3) The following issues of law are involved in this case:

"(a) The defendant lays down the proposition that it is necessary for the plaintiffs in this case to allege and prove: First, that their crops were protected by a good and lawful fence; or, second, that they must allege and prove each of the steps required by the statutes to be performed to put the special stock law into force and effect, and that this was not done, in this, that no effort was made to show that the county judge published the result of the election as required by article 7221 of the Revised Civil Statutes, nor that it was ever posted in any manner. The defendant contending that this proclamation was never made, nor posted, and that therefore the stock law was not enforced in the territory where plaintiffs' crops were situated.

"The above issue was raised in due season by the defendant, in offering objections to the testimony and the introduction of the order granted the election, and the order declaring the result, also any motion for instructed verdict for defendant to the court's refusal to give which proper exceptions were taken, also in motion for new trial.

"We agree that this case upon appeal may be decided upon this agreed statement in accordance with the provisions of the statutes, and determined accordingly."

The above statement was agreed to by counsel for both appellant and appellees, and approved by the court.

Appellant's assignments will be grouped and considered together, being as follows:

(1) The court erred in refusing to give the special requested charge of appellant, directing a verdict in favor of the defendant.

(2) The court erred in permitting the appellees to offer in evidence, over the appellant's objection, the order granting the spe-

cial stock election and the order declaring the result of said election, because these steps in putting the special stock law in force had not been pleaded by appellees.

(3) The court erred in overruling appellant's motion for new trial, in which appellant set up and pointed out the fact in the second paragraph of said motion that no attempt was made to prove that plaintiffs' crops alleged to have been damaged by defendant's hogs were inclosed with a legal fence, or that the proclamation giving the alleged hog law into effect was ever made or posted as required by law, which proclamation and the posting thereof was a prerequisite to the validity of the stock law.

It is necessary for the plaintiffs, in a suit for damages to crops by hogs, to allege and prove: First, that their crops were protected by a good and lawful fence; or, second, they must allege and prove each of the steps required by the statutes to be performed to put the special stock law into force and effect.

It is agreed that the plaintiffs introduced evidence that their crops had been injured to the extent claimed; that the special stock law election was properly ordered; that an order declaring the results was made by the county judge in the presence of three witnesses. No effort was made to show that appellees' crops were protected by a lawful fence. Further, no effort was made to show that the county judge ever published or posted in any manner the result of the election, as required by article 7221, Revised Civil Statutes.

Articles 7209 et seq., Revised Statutes, provide a method by which the legally qualified voter of a given territory may proceed to prevent the running at large of hogs, sheep, and goats in such territory. These statutes provide that there must be first a legal petition and which shall contain certain requisites; second, an order of the county judge for the election with certain requisites which are fully set out in article 7214. Subsequent articles provide the manner of holding and making returns. Article 7220 provides that the return shall be opened and tabulated and counted by the county judge in the presence of the county clerk and at least one justice of the peace of said county, or two respectable freeholders; that, if a majority of the votes cast be for the stock law, the county judge shall immediately issue his proclamation declaring the results, which proclamation shall be posted at the courthouse door, and after the expiration of 30 days from its issuance it shall be unlawful to permit to run at large within the limits designated any animal of the class mentioned in said proclamation. Such law is a local or special law, and, when the law itself comes into question or is sought to be enforced in the courts of this state, it is necessary to allege and prove that the necessary steps were taken to put

such local or special law into effect. In this case the only allegation made by the plaintiffs is contained in the citation in which they allege that appellant lived within the limits or on the line of the limits of the territory wherein such animals as hogs were prohibited from running at large, and that, notwithstanding the fact that he was living in said territory, he negligently permitted his hogs to run at large without regard to the rights of plaintiffs, whose farm was located within the territory of where the hogs were running at large. In the county court plaintiffs filed a trial amendment, in which they alleged that the Brooks farm worked by Vaughn was in the territory where the law was in force, prohibiting hogs, sheep, and goats from running at large. As shown by the agreement in this case, no effort was made to show that appellees had a lawful fence around their premises, nor was any proof offered that the proclamation prescribed in article 7221 was ever made, issued, or posted.

In the case of *City of Austin v. Walton*, 68 Tex. 507, 5 S. W. 71, our Supreme Court used the following language:

"The courts do not take judicial knowledge of the ordinances of municipal corporations. They stand upon the same footing as private and special statutes, the laws of other states, and of foreign countries, and must be averred and proved like other facts. \* \* \* In pleading private statutes the common-law practice was to recite so much of the act as was pertinent to the issue made. \* \* \* The same strictness should not be required under our system as was demanded by the rigid rules of the common law. Yet the substantial principle must be complied with that a party, in order to recover, must make known to the court, through his pleading and by his proof, every law and fact essential to support his action, of which the court does not take judicial notice; and his pleading should state the facts, and not the conclusions the pleader deduced from them. The petition in this case fails to advise the court of the contents of the ordinance relied upon, either by quoting its language, or stating the substance of its provisions. It is simply averred, in effect, that by virtue of article 103 plaintiff was entitled to receive 10 per cent. upon money collected from fines by the city. This is a conclusion of law purely, and is not sufficient. The contents should have been stated, so that the court could judge from the provisions of the ordinance itself whether plaintiff was entitled to receive the commission claimed or not."

The above has been quoted in order that the profession may know what the highest court in our state says about private ordinances and laws which do not embrace the entire state. It is well known that these hog, sheep, and goat law provisions are not applicable to every county in the state, and in some respects are local in their nature. However that may be, it is necessary to plead and prove the facts relied on in each in-

dividual case, and the pleader is bound to plead and prove the facts with reference to putting the law into effect by the commissioners' court of the particular county, in order that it may be determined whether or not the law was in force in that particular locality. Publishing the result of an election, as required by the statute, is a prerequisite to the validity of the law, and it is necessary to allege that a legal petition for the election was presented to the court, an order for the election and a declaration of the result by the county judge, and publication 30 days prior to the prosecution of the suit.

In this case, unless the plaintiffs showed they had a lawful fence, they cannot recover, unless they plead and prove all of the steps necessary to putting in force a special stock law in the territory where their premises were situated. This has not been done, and in our opinion the judgment of the lower court is not supported by the law, and this case should be reversed, and judgment rendered in favor of appellant, and it is so ordered.

#### PARIS TRANSIT CO. v. FATH. (No. 8220.)

(Court of Civil Appeals of Texas. Dallas. Oct. 25, 1919. On Rehearing, Nov. 29, 1919.)

##### 1. STREET RAILROADS §118(5)—KNOWLEDGE OF PERIL OF DRIVER OF UNMANAGEABLE HORSE.

In an action for injuries to the driver of a buggy struck by a street car when the horse became unmanageable, a charge requiring the jury to find that the motorman "actually discovered" the driver's peril before the latter would be entitled to a verdict was not erroneous as failing to require the jury to find that the motorman "realized" and "appreciated" the peril.

##### 2. STREET RAILROADS §118(5) — CARE REQUIRED BY MOTORMAN OBSERVING DRIVER OF FRIGHTENED HORSE.

An instruction that if the jury believed that plaintiff was on the street car tracks in a position of peril due to the balking or fright of his horse, and the motorman actually discovered him in that position in time to have stopped the car before the collision but failed to do so, then to find for plaintiff, was not erroneous as imposing a greater duty than the law required.

Appeal from District Court, Dallas County; W. F. Whitehurst, Judge.

Action by C. H. Fath against the Paris Transit Company. Verdict and judgment for plaintiff, and defendant appeals. Affirmed.

Templeton, Beall, Williams & Callaway, of Dallas, for appellant.

John White and M. M. Parks, both of Dallas, for appellee.

RASBURY, J. This is an appeal from verdict and judgment awarding appellee \$575 damages for personal injuries due to the alleged negligence of appellant in injuring appellee after it discovered him upon its street railway tracks in a position of peril.

The facts proven by appellee at trial disclose that he was driving a horse attached to a buggy east on Washington avenue in Paris, Tex. When he reached and was upon the tracks of appellant on Main street, where they cross Washington avenue, for some unknown reason the horse became frightened, commenced prancing and "dancing," and refused to go forward. When the horse became unmanageable, it was in full view of and observed by the motorman who was operating a street car of appellant about 225 feet distant and north of the street intersection and approaching appellee and his horse. The motorman made no attempt to stop his car, though he could have done so, and as a consequence struck the buggy while practically across the tracks, threw plaintiff therefrom, and injured him. After striking the buggy, the car traveled a distance of about 200 feet before it was stopped.

The facts proven by appellant disclose that its motorman saw appellee and his horse and buggy upon the tracks when 100 feet or more distant, at which time the street car was going about 12 miles an hour. The motorman made no effort to stop his car when he first saw appellee. When within 40 or 50 feet of appellee, at which time the buggy had cleared the tracks by 2 or 3 feet, but while the horse was continuing to "cut up," the motorman wound up the slack in his brake, in order to be prepared to stop his car if the horse got upon the tracks, and continued on his way; but when the front of the car had passed the buggy about 6 feet the horse backed it into the car, which was stopped in less than the car length.

[1] The court in presenting the case to the jury eliminated all issues save that of discovered peril. On that issue he charged the jury, in substance, that if they believed that due to the balking, fright, or ungovernable disposition of the horse driven by appellee, it placed him upon appellant's tracks in a position of peril from the approaching car, and that appellant's motorman actually discovered appellee's peril in time to have stopped the car and avoided the accident, by using all the means at his command, consistent with the safety of the car and its passengers, but that the motorman, after discovering appellee's peril, if he did discover it, failed to stop the car, and such failure proximately contributed to injure appellee, to find for him such damages as were authorized by subsequent portions of the charge.

The charge is assailed as erroneous on the ground that it did not require the jury to believe that the motorman "realized" and "ap-

preciated" appellee's peril. The charge required the jury to find and believe that the motorman "actually discovered" appellee's peril before the latter would be entitled to verdict. That is all that is required by the rule. Any language that conveys the requirement is sufficient. *M., K. & T. Ry. Co. of Texas v. Reynolds*, 103 Tex. 81, 122 S. W. 531. To actually know a thing is to realize it, since a thing realized is a thing actually known. To "appreciate" a thing, in the sense contended for by appellant, is to perceive, detect, be fully aware or conscious of, which, in final analysis, is but to actually know. We conclude the charge was sufficient in the respect complained of.

[2] The charge is further assailed on the ground that it imposes a greater duty upon appellant than that required by law. The precise point is that the charge directs the jury, in the event they believe appellee was on the tracks in a position of peril, and that the motorman actually discovered him in that position in time to have stopped his car before injuring him, but failed to do so, then to find for appellee, while the correct rule is that the motorman was required only to exercise ordinary care to stop the car. That appellant was only required to use ordinary care to avoid injuring appellee if he discovered his peril in time to do so will, we assume, be conceded, since that is the legal standard of care to be exercised in all cases, save where special relations exist, but it is none the less a high degree of care in cases of imminent peril.

It has been held that a charge which is "addressed to the particular things that should have been done, rather than to the legal standard of duty, is unobjectionable because, practically viewed, it exacts no more than the doing of that which obviously was necessary under the facts of the particular situation to constitute the care required." *San Antonio & A. P. Ry. Co. v. Hodges*, 102 Tex. 524, 120 S. W. 848. The inquiry then, under the rule, is: Was it the duty of the appellant's motorman, in the light of the facts in the record, to stop his car, for it must be conceded that that is what the charge required him to do? We have recited the facts proven by both sides. Under those adduced by appellee it was the duty of the motorman to stop the car. It was his duty because he was conscious of appellee's peril and could have stopped the car. Some facts adduced by appellant, however, were not in harmony with those adduced by appellee, and the question is: Did those differences make it any less the motorman's duty to stop the car? The first point of difference is the distance of the street car from appellee when the motorman discovered him, which the latter places at 100 feet. That difference is immaterial, for the reason that the motorman conceded at trial that he could not only have

stopped his car within that distance, but could have done so within less distance. The second point of difference in the facts is the situation of appellee. The latter says he was upon the tracks. The motorman testified that when his car was within 100 feet of appellee he saw the horse upon the track "cutting up," but that when he got within about 50 feet of appellee and the horse and buggy they had cleared the track by 2 or 3 feet. At this time he wound up the slack in his brake in order that he might stop his car if the horse got back upon the track, and continued his course; but, when the front of the car had passed the horse and buggy about 6 feet, the horse backed into the car. Were the acts of the motorman such as a jury would have been authorized to find constituted ordinary care, which in the instant case was a high degree of diligence to avert injury? We believe not. It is said that knowledge of the danger of injury, and not the certainty of it, is what requires the use of all means to avoid it, and that operatives cannot speculate on the probability or not of injuring one in a perilous position. *Gehring v. Galveston Electric Ry. Co.*, 134 S. W. 288. That the motorman was conscious of the danger with which appellee was threatened is hardly to be denied. He admits that he wound his brake when within about 50 feet of the horse and buggy so as to be prepared in case the horse got upon the tracks, which is obviously an admission that he realized the danger of such an occurrence; in short, that the danger was a continuing one. That being true, we are constrained to hold that it was the motorman's duty to stop the car from the time he observed appellee upon the track. That he could have done so is not denied.

The third assignment raises questions disposed of by our ruling upon the first assignment, and the issue presented by the fourth assignment is disposed of by our holding that it was appellant's duty under the facts in the case to stop the car.

The judgment is affirmed.

#### On Rehearing.

We have carefully examined and considered appellant's motion for rehearing, and, being of opinion that our original conclusion is correct, the motion is overruled. In our opinion we made the following statement:

"When within 40 or 50 feet of appellee, at which time the buggy had cleared the tracks by 2 or 3 feet, but while the horse was continuing to 'cut up,' the motorman wound up the slack in his brake chain in order to be prepared to stop his car if the horse got upon the tracks, and continued on his way."

Counsel assert that the statement is wholly without support in the evidence. We notice this claim for the reason that it is not only our duty to state the facts as the record dis-

closes them, but it is of much importance to litigants who desire to review our decision, and for that reason we have again examined the evidence, and we find that appellant's motorman testified:

"I guess I was 100 feet or further than that from the (cross) street when they drove on the track. \* \* \* I did not put on my brake, but I taken the slack out of my brake chain when I got in about, well, 50, 40 or 50, feet \* \* \* of appellee. I took the slack up because the horse was cutting up, to be safe if he got upon the track, so I could stop the car."

The foregoing evidence is taken from appellant's brief, and it will be observed that the statement made in our original opinion is precisely supported thereby.

#### CHANDLER et ux. v. YOUNG et al. (No. 6114.)

(Court of Civil Appeals of Texas. Austin.  
Nov. 26, 1919.)

#### 1. HUSBAND AND WIFE $\S$ 270(5)—PARTIES TO ACTION ON COMMUNITY DEBT.

A wife is not a necessary party to suit upon a note given for a community debt and to foreclose a mortgage on community property.

#### 2. HUSBAND AND WIFE $\S$ 270(7)—RIGHT OF HUSBAND TO ANSWER FOR WIFE IN ACTIONS INVOLVING COMMUNITY.

In an action on a note given for a community debt and to foreclose a mortgage on community property, a husband has the right to answer for his wife, though she has not been cited.

#### 3. JUDGMENT $\S$ 429—NECESSITY OF PLEADING DEFENSE.

Usury being a defense which is required to be specifically pleaded, such issue cannot be raised for the first time in a suit to set aside the judgment on a note asserted to be usurious.

#### 4. JUDGMENT $\S$ 744—CONCLUSIVENESS AS TO AMOUNT DUE ON NOTE.

A judgment in an action on a note and to foreclose a mortgage held conclusive as to the amount due on the note and the right to foreclose the lien.

#### 5. HUSBAND AND WIFE $\S$ 270(10)—ACTION ON COMMUNITY DEBT; PERSONAL JUDGMENT AGAINST WIFE.

A husband has no right to appear for his wife in an action on a note given for a community debt and to foreclose a mortgage on community property, so as to give the court jurisdiction to render personal judgment against the wife.

#### 6. MORTGAGES $\S$ 529(3) — SETTING ASIDE FORECLOSURE SALE; STIFLING COMPETITION.

A complaint setting out that one of defendants represented to plaintiffs that he would buy in the entire property which was being sold to foreclose a mortgage lien and allow them to redeem, etc., held to state a good cause of ac-



tion against such defendant, who did not carry out the agreement to have the sale set aside as to him; it appearing that by reason of the agreement competition was stifled.

**7. HOMESTEAD §108—EFFECT OF DESIGNATION ON MORTGAGED LAND.**

Where mortgagors designated a homestead on a portion of the mortgaged premises, their homestead right became perfect, except as to the mortgage, and on foreclosure they are entitled to have the land outside the homestead first sold.

**8. MORTGAGES §530—RESALE AFTER SETTING ASIDE FORECLOSURE SALE; SALE IN PARCELS.**

Where mortgagors established a homestead on part of the mortgaged premises, and on foreclosure one of the defendants agreed that he would buy in the property if sold as a whole and allow the mortgagors to redeem, but did not carry out his agreement, *held* the mortgagors were not, where the land was resold, etc., entitled to have that portion exclusive of their homesteads sold in separate parcels pursuant to Rev. St. 1911, art. 3756.

Jenkins, J., dissenting in part.

Appeal from District Court, McLennan County; Richard I. Munroe, Judge.

Action by R. F. Chandler and wife against Mrs. Mary Young and another. From judgment sustaining a general demurrer to the petition, plaintiffs appeal. Reversed and remanded.

Adams & Stennis, of Dallas, for appellants.

J. W. Young, of Crockett, and A. B. Gelpert, of Teague, for appellees.

**JENKINS, J.** This is an appeal from a judgment sustaining a general demurrer to appellants' petition. Appellants are and were, during all the times herein referred to, husband and wife.

The petition alleges in substance that the appellants executed their note for \$6,600, with 8 per cent. interest thereon, for a loan of \$5,500, and that the remainder of the note was for usurious interest; that the note provided that upon failure to pay any installment of interest the holder thereof had the option to declare both principal and interest due; that default was made in the payment of interest, as provided in said note; that Mrs. Young, the holder thereof, brought suit against both appellants on said note, and to foreclose a mortgage given by appellants to secure same.

That no citation was served on appellant Emma E. Chandler, and that she did not appear nor file an answer, and did not authorize any one to do so for her. That her husband, R. F. Chandler, employed an attorney, who filed an answer for both appellants, but that the same was done without her knowledge or consent.

That the plaintiff recovered judgment for

the principal and interest of the note sued on, and foreclosure of the mortgage lien, and recovered a personal judgment against appellant Mrs. Emma E. Chandler, for the full amount of said note and interest, to wit, the sum of \$7,730.

That the debt for which the note was given was the community debt of appellants, and was in no wise for the benefit of the separate estate of appellant Mrs. Chandler.

That the land mortgaged to secure said note was the community property of appellants, and was not at the time of the execution of such mortgage the homestead of appellants, but that they acquired a homestead therein several months prior to the sale thereof under an order of sale issued on said judgment, and that they were living on same as their home at the time of said sale, and at the time of filing their petition herein. That there were 800 acres of said land.

That said land was offered for sale by the sheriff on December 7, 1915, by virtue of an order of sale issued on said judgment; and that R. F. Chandler at said time, and prior to said sale, demanded that the same be sold in lots or parcels, according to a plat and field notes of such parcels made by the county surveyor, such lots or parcels being not less than 50 acres each; and that the same would have been so sold by said sheriff, but for the fact that appellee Riley agreed with appellant R. F. Chandler that if he would withdraw said demand, he, Riley, would bid the land in, as a whole, and would convey the same to him, Chandler, upon the payment to him, Riley, within 30 days, of the amount of his bid, with interest thereon. That appellant R. F. Chandler, relying upon said promise, withdrew his demand that the land be sold in parcels, and that the same was sold in bulk, by reason of which competition was stifled, and the land was sold to Riley for a grossly inadequate price, to wit, the sum of \$8,200, when the same was reasonably worth the sum of \$30,000. That had the land been sold in parcels a sufficient amount to pay off the judgment would have been realized without selling appellants' homestead of 200 acres.

That Riley breached his contract to convey the land to appellants in this: He well knew at the time of making said agreement that appellants' only means of raising said money was by executing a mortgage on said land. That appellant R. F. Chandler arranged with a mortgage company for a loan on said land, for \$8,000, outside of his homestead, and consummated arrangements for money to pay Riley the remainder of his bid on said land. That said mortgage company offered to deposit with said Riley \$8,000, provided he would sign a written contract to convey said land to R. F. Chandler, upon his being paid

the remainder of the money, principal and interest, paid by him for said land, and that Riley refused to sign such contract; by reason of which, appellants were prevented from obtaining said loan.

Appellants further allege that Riley did not intend to comply with his agreement to transfer the land to R. F. Chandler at the time he made the same, but that he made such agreement for the fraudulent purpose of obtaining a deed to said lands for a grossly inadequate consideration.

The foregoing is the substance of the material allegations of appellants' petition, as the same must be construed as against a general demurrer, and which, for the purposes of such demurrer, are admitted to be true.

We hold:

[1] 1. That Mrs. Chandler was not a necessary party in the suit, upon the note given for a community debt, and to foreclose a mortgage on community property.

[2] 2. In such suit the husband had the right to answer for his wife, though she had not been cited.

[3] 3. Usury being a defense which is required to be specially pleaded, such issue cannot be raised for the first time in a suit to set aside a judgment.

[4] 4. The issue as to the amount due on the note and the right to foreclose the mortgage lien on all of the land is res adjudicata.

[5] 5. Mrs. Chandler not having been cited, her husband had no authority to appear for her as to the right of the court to render a personal judgment against her.

[6] 6. The allegations of the petition show good cause for setting aside the sale to appellee Riley.

[7] 7. That such allegations show good cause for requiring the land outside of appellants' homestead to be first sold, if the appellants shall first designate their homestead.

It is the settled policy of this state to protect homesteads from forced sales. This includes the policy of encouraging the acquisition of homesteads, where it can be done without injustice to those who have acquired liens upon lands subsequently dedicated to homestead purposes.

When appellants established their homestead, upon the lands previously mortgaged, their homestead right became perfect, except as to the right of the mortgagee to collect her debt from the proceeds of such land. If this can be done, without selling the homestead equity, conforming to public policy, requires that it shall be done. *King v. Hapgood*, 21 Tex. Civ. App. 217, 51 S. W. 534, 535; *Henkel v. Bohnke*, 7 Tex. Civ. App. 16, 26 S. W. 645; *Pridgen v. Warn*, 79 Tex. 594, 15 S. W. 559.

If upon the trial of this cause, the facts alleged in the petition are shown to be true, the trial court should hold:

(a) That the judgment in favor of Mrs. Young, establishing her debt and foreclosure of her mortgage lien on all of the land, is res adjudicata.

(b) That the sale to Riley should be set aside.

(c) That an order of sale should be issued, requiring the land outside of the homestead, as designated by appellants, to be first sold, and, if the same should not bring enough to pay the debt, interest, and cost, that the homestead be then sold.

(d) That if the judgment in favor of Mrs. Young has been paid, from the proceeds of the sale to Riley, he be subrogated to her rights therein.

(e) That no execution should issue against Mrs. Chandler.

[8] In addition to what is above stated, the writer is of the opinion that in the sale of the land, exclusive of the homestead, appellant B. F. Chandler will have the right, if he so demands, to have the lands, exclusive of the homestead, sold in tracts not less than 50 acres, upon compliance with article 3756, R. S. To this the other members of this court do not assent.

For the reasons stated, the judgment of the court below is reversed and remanded. The court will proceed with said trial in the manner indicated in this opinion.

Reversed and remanded.

#### SPIVEY et al. v. HOOKS. (No. 497.)

(Court of Civil Appeals of Texas. Beaumont. Nov. 13, 1919.)

#### 1. FRAUDS, STATUTE OF §129(8)—AMBIGUITY IN DESCRIPTION NO DEFENSE TO BREACH OF CONTRACT.

Where defendants entered into possession under a turpentine lease or contract, and began to cut trees, and part of the rental was paid, defendants cannot defeat an action for recovery of rental thereafter becoming due, on the ground that the contract or lease was void because of ambiguity in the description of the property.

#### 2. APPEAL AND ERROR §994(8)—REVIEW OF FINDINGS ON EVIDENCE.

In action tried without jury, credibility of witnesses is for the court, who is not required to accept the version of interested parties, and whose determination on questions of credibility of witnesses will not be reviewed.

Appeal from Jefferson County Court; D. P. Wheat, Judge.

Action by J. L. Hooks against J. H. Spivey and another. Judgment for plaintiff, and defendants appeal. Affirmed.

Smith & Crawford, of Beaumont, for appellants.

Anderson & Masterson, of Beaumont, for appellee.

WALKER, J. In January, 1916, J. L. Hooks leased to Spivey and Brown, for a period of three years from said date, for the purpose of operating timber thereon for turpentine purposes, 250 acres approximately of T. B. and D. E. Spell survey and 100 acres out of the southeast corner of the Francisco Arriola league, in Hardin county, Tex. The rental under said lease was the sum of 10 cents per cup, payable one-third in cash, one-third in one year, and one-third in two years after date; the consideration for said lease being expressed in the contract as follows:

"In consideration of the premises, parties of the second part agree to cup the timber on the above-described land in time for the 1916 season, and to pay to the party of the first part as full rental under this lease the sum of ten cents per cup payable as follows: One-third of said rental in cash to the party of the first part as soon as said timber is cupped and the number of cups ascertained, and the balance in two equal annual payments, payable one and two years after the date the first payment comes due."

The land is described in the contract as follows:

"All that certain tract or parcel of land, lying and being situated in Hardin county, Texas, same being a part of the T. B. and D. E. Spell survey, and being all of that portion of said survey owned by party of the first part containing approximately 250 acres; also 100 acres out of S. E. corner of Francisco Arriola league, in Hardin county, Texas."

Spivey and Brown placed 7,352 cups on and before April 11, 1916. Thus under the contract, at 10 cents per cup, they promised to pay for this number of cups \$735.20. After placing these cups, they sold their rights under the contract to Fenn and Prather, who assumed the obligations of said lease. On April 11, 1916, Fenn and Prather paid \$245.07 to J. L. Hooks on said lease. On April 12, 1917, Fenn and Prather paid \$245.07 to J. L. Hooks on said lease. They did not pay for the year 1918. In their brief appellants say:

"There is no dispute but that appellants breached the contract sued upon."

Upon trial in the county court without a jury, judgment was rendered for the plaintiff for \$245.06, with interest from April 11, 1918, at the rate of 6 per cent. per annum. From this judgment appellants have appealed to this court.

Upon the execution of the contract appellants went upon the premises and turpentinced the land for two years. Appellants' first assignment of error is that the court erred

in admitting the contract in evidence, because said contract is void, in that the description of the property attempted to be conveyed is ambiguous, and said ambiguity is patent. Their second assignment of error is that the court erred in admitting the contract in evidence—

"because said contract is void on account of the fact that the description of the property attempted to be conveyed is ambiguous, and said ambiguity is patent, and, if said ambiguity is not patent, the same is latent, and no extraneous facts were offered in explanation of same."

[1] These assignments are not well taken. This is not a suit to recover real estate, but was brought by the appellees on the promise to pay made by appellants, being the consideration for their right to turpentine the land. Appellants went in possession of the land and worked the timber for two years. No question is made by them that they wrongfully breached the contract. As we construe these facts, this case comes within the rule announced in *Crutchfield v. Donathon*, 49 Tex. 691, 30 Am. Rep. 112, *Cammack v. Prather*, 74 S. W. 354, *Watson v. Baker*, 71 Tex. 751, 9 S. W. 867, *Busby v. Bush*, 79 Tex. 656, 15 S. W. 638, and *Bowden v. Waggoner*, 210 S. W. 605.

In *Crutchfield v. Donathon*, supra, Donathon brought suit on the following note:

"Jacksboro, May 8, 1878.

"Thirty days after date I promise to pay to J. W. Donathon, or bearer, \$250, with 5 per cent. interest per month from date until paid. \* \* \* The consideration of the above note is one-half of a certain town lot in the town of Jacksboro, lot No. 4 in block No. 3.

"[Signed] L. L. Crutchfield."

Justice Gould discusses the same proposition in that case involved in the assignment made by the appellants in this case. After an extensive review of the authorities, Justice Gould says:

"Our conclusion is that this action was not brought upon a contract for the sale of lands, but upon a promissory note given for the purchase money of land; that it was not shown by the evidence that the consideration of the note had failed; and that the plaintiff was entitled to his judgment on his note, and a foreclosure of the lien evidenced by the note."

The other authorities cited above amply sustain the distinction announced in *Crutchfield v. Donathon*.

[2] Appellants' third assignment of error is that the court erred in rendering judgment against the defendants for the amount sued for:

"Because the undisputed facts show that plaintiff was not damaged by the breach of the contract by defendants, for the reason that if defendants had not breached said contract, and had operated the timber for turpentine during

the year of 1918, all of said timber would have been killed, which said timber amounted to 7,000,000 feet, and its market value being in the sum of \$3,900, which amount exceeded the damages sued for."

W. G. Prather, one of the defendants, testified:

"We worked the timber under this lease for turpentine during the year 1916 and 1917, for which years we paid to Mr. Hooks the amount provided for by said lease. We did not work said timber during the year 1918, because the latter part of the year 1916 and all of the year 1917 was extremely dry. We had very little rainfall. \* \* \* About the middle of the year 1917 the timber in question began to hard-face; that is, the face made upon the pine trees to take the turpentine from, said trees began to heal over and harden. This is an indication that the tree is not receiving enough moisture. \* \* \* My experience, as well as all other turpentine men, has been that to continue to turpentine timber after it begins to hard-face, as above stated, will kill the timber. By the fall of 1917 at least one-third of all the timber on said land had hard-faced, and, had we worked this timber during the year 1918, our opinion is that it would have killed all of the timber on said land. I have been in the turpentine business for the past 20 years. I figure that to have worked said timber during the years 1918, that would have damaged Mr. Hooks much more than the amount due him for said year under said lease."

J. M. Brown, another defendant, testified substantially as did Mr. Prather. Both defendants further testified that during the year 1918 all other leases held by them near plaintiff's land had expired, and that it would not have been profitable for them to operate plaintiff's lease.

J. L. Hooks, plaintiff, testified as follows:

"There was found to be 7,352 cups. The amount due me as per said agreement, at 10 cents per cup, was \$735.20. I received a check from Fenn & Prather on April 11, 1916, for the one-third payment for said turpentine privilege, amounting to the sum of \$245.07, and on April 12, 1917, I received a check from Fenn & Prather for \$245.07 to cover the second one-third payment. I have not received payment for the last one-third installment, which was due April 11, 1918, amounting to the sum of \$245.06. The 350 acres of land covered by the agreement will cut 5,000 feet of pine timber per acre. This timber is estimated to be worth \$5 per 1,000 feet, and was worth the same during the year 1918."

He further testified that he did not direct nor request appellants to cease operating this timber; that it would have been perfectly satisfactory to him for them to have operated it under the contract.

We doubt very much the correctness of this assignment as a legal proposition. However, it is not necessary for us to determine that question. On the issue of fact raised by this

assignment, the defendants were interested parties, and the court was not required to accept their version of why they breached the contract. The court was the judge "of all the facts and circumstances in evidence, and the credibility of the witnesses," and, having found against appellants on the fact issue involved in this assignment, we will not disturb his finding.

This case is in all things affirmed.

#### MELTON et ux. v. MANNING. (No. 8235.)

(Court of Civil Appeals of Texas, Dallas. Nov. 1, 1919. Rehearing Denied Dec. 6, 1919.)

#### 1. HIGHWAYS $\S$ 184(3)—QUESTION FOR JURY AS TO NEGLIGENCE CAUSING INJURY.

In an action for personal injury to one of the plaintiffs resulting from collision upon a bridge on a highway between plaintiffs' surrey and team and defendant's automobile, where defendant had the right to travel on the bridge, which was too narrow for them to pass each other, and it was night, and the dust obscured the view, whether defendant negligently caused the accident was a question for the jury.

#### 2. HIGHWAYS $\S$ 184(3)—CONTRIBUTORY NEGLIGENCE IN COLLISION QUESTION FOR JURY.

In view of Vernon's Ann. Pen. Code Supp. 1918, art. 820k, requiring drivers to operate motor vehicles on public highways in a careful manner with due regard to the safety and convenience of others, keeping to the right-hand side whenever practicable, whether plaintiffs suing for personal injuries could have seen defendant's automobile before driving on the bridge, which was too narrow for passing, and used due caution to prevent the collision, was for the jury.

#### 3. TRIAL $\S$ 228(1)—SUBMISSION OF DIFFERENT ITEMS CONJUNCTIVELY IN MAIN CHARGE.

In a personal injury action, it is not error to submit the different items of damage conjunctively in the main charge.

#### 4. TRIAL $\S$ 260(1)—REFUSAL OF REQUESTS COVERED BY INSTRUCTIONS GIVEN.

It was not error to refuse requested charges which were, in effect, the same as given in the main charge, which corresponded to the allegations in the petition.

#### 5. APPEAL AND ERROR $\S$ 1068(4)—ERROR IN INSTRUCTION ON DAMAGES HARMLESS.

In an action for personal injury to a wife resulting from a collision upon a highway, the court's error in eliminating damages for a miscarriage became immaterial, where the verdict found there was no liability on the part of defendant.

Error from District Court, Hunt County; A. P. Dohoney, Judge.

Action by T. B. Melton and wife against Lon Manning. Judgment for defendant, and plaintiffs bring error. Affirmed.

B. Q. Evans, of Greenville, for plaintiffs in error.

Clark & Sweeton, of Greenville, for defendant in error.

RAINEY, C. J. Plaintiff in error sued defendant in error to recover damages for personal injuries to his wife, and injuries to surrey and mules, alleging that—

"On the 24th day of August, 1916, while plaintiffs were coming along the public road north of Greenville, Tex., from their home, and were crossing a public bridge in and driving a pair of mules to a surrey, the defendant came meeting them in an automobile, and, instead of stopping until plaintiffs could get over and off the bridge, negligently and carelessly attempted to and did run on and over said bridge while plaintiffs were still on the bridge with their team and surrey, and negligently ran into their team and surrey, in which plaintiffs were riding, injuring the mules and surrey, causing injury to Mrs. Hattie Melton, as follows: Mrs. Hattie Melton was four months advanced in pregnancy; was very much frightened; was made very nervous, suffering great pain and mental anguish; was threatened with miscarriage; unable to work; suffered pain in her back, hips, and abdomen. The suffering continued until the 24th day of December, 1916, when she gave a premature birth to a baby. It was further alleged that since the birth of the baby Mrs. Hattie Melton had been an invalid suffering with great pain in her back, side, and abdomen, and in various portions of her body, suffering great mental anguish. That she is now a nervous wreck and will never be well again."

"Defendant, after pleading a general denial, alleged that he did not see plaintiffs on account of the dust, until they were on the bridge, and it was the duty of the plaintiffs to have discovered defendant's lights and not to have driven onto the bridge, which was too narrow for both to pass, and was therefore guilty of contributory negligence, and further that plaintiffs failed to exercise ordinary care to get relief or medical attention for his wife, which contributed to bring about the miscarriage, and was therefore guilty of contributory negligence."

A trial resulted in a verdict for defendant. The cause is before us on writ of error, and only two errors are assigned to the action of the court.

The first error assigned is:

"Because the verdict of the jury for the defendant is contrary to the law as given them in charge by the court and the great preponderance of the evidence in this cause; in that, the undisputed evidence of the plaintiffs themselves and the defendant, Lon Manning, and the witness J. N. Levins, and as shown from all the surroundings and circumstances, that the defendant, Lon Manning, negligently and without exercising ordinary care ran into and against the plaintiffs while crossing and on a bridge and injured plaintiff's surrey, harness, and mules, and caused great fright to plaintiff's wife and mental pain and anguish, and caused her to have discharge from the womb and threatened miscarriage at intervals until she gave birth to her child prematurely on the 24th day of December, 1916."

[1] The verdict was a general one, as follows: "We, the jury, find for the defendant." We are of the opinion that the verdict is not contrary to the evidence. While a verdict for either party would have been sustained by the evidence, we think the evidence warranted a finding that the defendant was not guilty of negligence, and the same was true as to the plaintiff being guilty of contributory negligence. The evidence shows that the collision took place on a narrow bridge in the road, not wide enough for two vehicles to pass each other. Defendant went upon the bridge after plaintiff had gotten upon it, and defendant ran into his mules and surrey. It was at night, and, the road being traveled by a great number of vehicles, a great amount of dust had arisen and hung suspended over the ground, and was such that defendant's light was obscured by the dust, which prevented defendant from seeing but a little way in front of the auto, and when he struck the bridge he did not see plaintiff's surrey until he was so close he did not have time to stop before running into the surrey. Not being able to see the surrey at the time of going on the bridge and having the right to travel thereon, he cannot be charged with negligence in so doing; at least, it was a question for the jury to pass upon, and, it having done so, we find, in obedience thereto, that said verdict will therefore be sustained.

We also hold that the evidence under the circumstances justifies the verdict that there was not sufficient injury shown to plaintiff or his wife to warrant a recovery.

[2] Plaintiffs' second assignment of error is as follows:

"Because the court erred in refusing to give special charge No. 1 requested by the plaintiffs, before the main charge was read to the jury as follows: 'You are charged that if you find from the evidence that defendant was negligent in running into plaintiff's surrey which caused plaintiff's wife to become frightened, and you believe that plaintiffs were not guilty of contributory negligence under the law as given you under the general charge, and if you find as the proximate result of the negligence of defendant, if any, that the plaintiff's wife suffered pain and mental anguish at the time or afterwards, and that she suffered from a discharge of the womb and a threatened miscarriage from said fright as alleged, if any, then you will find for the plaintiffs such damages as would reasonably and fairly compensate them for said injuries, if any, irrespective of any damages she may be entitled to by reason of the premature birth, if there was a premature birth.'"

The second proposition presented under this assignment, "first assignment of error," is:

"The evidence in support of the allegations of injury were conflicting as to some of them, while others were undisputed, or at least the evidence was less conflicting, and the court in his general charge having submitted all the allegations of injury to the jury conjunctively,

that is to say, plaintiff's right to recover was, by said charge, made to depend upon the proof of plaintiffs of all of his allegations as to injuries, it was the right of plaintiffs to have submitted to the jury this issue with reference to proof of any of the allegations, about which there was no dispute or where the evidence was less conflicting when a proper special charge was requested for the purpose."

On the general issues of negligence and contributory negligence and the measure of damages, the court charged the jury as follows:

"Now, if you believe from the evidence that on or about the 24th day of August, 1916, the plaintiffs, T. B. Melton and wife, while driving along the public road approaching Peniel, in Hunt county, Tex., and while in the exercise of ordinary care for their own safety, started to drive across a bridge in said road, and that the defendant, Lon Manning, who was approaching them in an opposite direction on said road, failed to stop his car until the plaintiffs should have driven off said bridge, and drove his car onto the said bridge while the plaintiffs' team and surrey were thereon, and ran his car into the plaintiffs' said team and surrey, and that this was negligence on the part of the defendant, which proximately caused the injuries to the team and surrey alleged in plaintiffs' petition, and the plaintiff Mrs. Melton at said time was pregnant, and that she became frightened and excited, and that as a proximate result of such fright and excitement, if any, she began to suffer with pains in her back and hips and to have discharges from her womb, and that as a proximate result of such collision, fright, and excitement, if any, said suffering and discharge continued until she gave birth to a child prematurely, then you will find for the plaintiffs, and assess their damages according to the rule hereinafter given you.

"Now, if you believe from the evidence that upon the occasion in question the plaintiff T. B. Melton saw the lights of defendant's car approaching before he drove on the bridge, or that he could have seen said lights by the exercise of ordinary care and drove on said bridge and undertook to drive across before the defendant's car reached the bridge, and that this was negligence on his part which proximately caused or contributed to the collision and injuries complained of, you will find for the defendant, even though you may find that the defendant was negligent in one or both of the ways referred to in the fourth paragraph hereof."

Article 820k, Vernon's Ann. Pen. Code Supp. 1918, provides, treating of the law of the road:

(2) That "the driver or operator of any vehicle in or upon any public highway in this state, shall drive or operate such vehicle in a careful manner with due regard for the safety and convenience of pedestrians and all other vehicles or traffic upon such highway, and whenever practicable shall travel upon the right-hand side of such highway. \* \* \*"

After getting on the bridge, neither could turn to the right in this instance, and the issue whether the plaintiff in error could

have seen the approaching of the auto before driving on the bridge, and, if so, was such caution used by him to prevent the collision? This was a question for the jury which they could have determined, and we think in considering their verdict we should consider against plaintiff in error and that it should not be ignored by us.

[3] The contention that the different items of damage were presented by the main charge conjunctively is, we think, without merit.

In the cases of *Railway Co. v. Word*, 69 Tex. 679, 7 S. W. 372, and *Railway Co. v. Brown*, 78 Tex. 402, 14 S. W. 1034, it was held that it was proper to so present damages, and these cases were approved in the case of *Railway Co. v. Hill*, 95 Tex. 629, 69 S. W. 136.

[4, 5] We think the requested charge refused by the court is in effect the same as that given in the main charge, and the main charge corresponded in this respect to the allegations in the petition. While the special charge tells the jury to eliminate damages for a miscarriage, we think the evidence fully warranted it as it was given in the main charge. The evidence was such that, if plaintiffs were entitled to any damages, it was error for the court to have excluded the issue of miscarriage. Besides, as the jury by its verdict in effect found there was no liability, it became immaterial if there was an error in the charge on the measure of damages.

There was no objection made to the charge of the court, unless the special charge requested operates as one, and upon this question we do not decide.

The judgment is affirmed.

#### LANE v. FIRST NAT. BANK OF GREENVILLE et al. (No. 8242.)

(Court of Civil Appeals of Texas. Dallas. Oct. 18, 1919. Rehearing Denied Dec. 6, 1919.)

#### ATTACHMENT $\Leftrightarrow$ 209(4) — FORECLOSURE OF LIEN ON PROPERTY OF NONRESIDENT AFTER PERSONAL SERVICE.

An attachment lien on land of a nonresident defendant, duly served personally by notice as provided by statute, can be foreclosed, though the defendant was not informed by the nonresident notice served on him that foreclosure was sought.

Error from District Court, Hunt County; A. P. Dohoney, Judge.

Suit by the First National Bank of Greenville, Tex., against R. W. Lane and another. To review judgment for plaintiff by default foreclosing writ of attachment on the named defendant's land, he brings error. Affirmed.

J. G. Matthews, of Greenville, for plaintiff in error.

Clark & Sweeton and L. L. Bowman, all of Greenville, for defendant in error.

RAINEY, C. J. Suit by defendant in error First National Bank of Greenville to recover on a promissory note for \$1,348.65, interest at 10 per cent. per annum and 10 per cent. attorney's fees against J. C. Dial and R. W. Lane. The petition alleged the execution of the note by Dial and Lane, and that Dial was a resident of Hunt county, and that Lane was a nonresident, being a resident of California. Citation was issued to Hunt county and duly served on Dial. Citation was issued to California and duly served on Lane, the statutory notice for nonresidents being duly served on him. After the foregoing proceedings on October 28, 1917, plaintiff made an affidavit and executed a bond and caused an attachment against the property of R. W. Lane to issue, which was levied on the land of said Lane, situated in Palo Pinto county, Tex., and due return was made of said levy. On December 11, 1917, the cause coming on for hearing, and the defendants having failed to appear but made default, judgment was entered by default for the amount of the note, interest, attorney's fees, and foreclosing the writ of attachment on the said land. In serving Lane with nonresident notice, he was served with copy of plaintiff's petition charging for a recovery on the note as per its terms, but he was never notified of the suing out of a writ of attachment and its levy on his land. R. W. Lane on December 6, 1918, sued out a writ of error to this court which he perfected, and the cause is here for review as to him.

There are various assignments of error presented, which we have carefully examined; but we think none present reversible error.

The main contention in substance of appellant is that the nonresident notice served on Lane did not inform him that a foreclosure of an attachment lien was sought, or that the proper allegations for the recovery of attorney's fees were contained in the petition, and that the judgment rendered by default against him, he being a nonresident, was contrary to law and void. This contention we think should not be sustained. Several decisions of our Courts of Civil Appeals have passed upon the powers of the district courts in proceedings on the question of liability of nonresidents, and we think these holdings sustain the action of the district court in this case, to wit: *Milburn v. Smith*, 11 Tex. Civ. App. 678, 33 S. W. 910; *Findlay v. Lumsden*, 171 S. W. 818; *Wilson v. Bank*, 27 Tex. Civ. App. 54, 63 S. W. 1067. These decisions state the doctrine so clearly that judgment by default can be taken against a nonresident duly served personally by notice

as provided by statute, and the foreclosure of attachment lien on land without being informed of plaintiff's intention to seek a foreclosure is so convincing to us, that they are relied on for our holding as herein expressed.

The judgment of the district court is therefore affirmed.

## EVANS v. HUDSON et al. (No. 6120.)

(Court of Civil Appeals of Texas. Austin.  
Nov. 12, 1919.)

### 1. TRESPASS TO TRY TITLE $\S$ 32—PETITION IN SUBSTANTIAL COMPLIANCE WITH STATUTE.

A petition, alleging plaintiff's ownership in fee simple of land, that defendant was in possession thereof and forcibly detaining it from plaintiff, with facts showing plaintiff's right to possession, though not literally complying with the fiction prescribed by Rev. St. art. 7733, for petition in trespass to try title, and not containing the indorsement required by article 7734 substantially complies with those statutes and shows the suit to be for recovery of land.

### 2. TRESPASS TO TRY TITLE $\S$ 33—PETITION TO SUPPORT AMENDMENT.

A petition substantially complying with the requirements of a petition in trespass to try title prescribed by Rev. St. art. 7733, though not literally complying therewith, is sufficient to support an amended petition containing all the allegations of fact required by that article.

### 3. INJUNCTION $\S$ 111—VENUE $\S$ 5(3)—TITLE TO LAND AND ANCILLARY INJUNCTION.

The venue of a suit which was primarily to recover possession of land, though injunction is asked as relief ancillary to the main suit, is governed by Vernon's Sayles' Ann. Civ. St. 1914, art. 1830, subd. 14, permitting suit for the recovery of land to be brought in the county where land is situated, not by article 4653, requiring suits for injunction to be brought in the county of defendant's residence.

### 4. VENUE $\S$ 5(3)—PETITION SHOWING INJUNCTION TO BE ANCILLARY TO RECOVERY OF LAND.

An original and amended petition, which alleged plaintiff's ownership of the land and its detention from him by defendants, and prayed for title and possession of lands and also for an injunction to restrain rounding up and driving off cattle from the land and damaging windmills thereon, states a cause of action to recover land in which the injunction is merely ancillary to the main relief.

Appeal from District Court, Tom Green County; C. E. Dubois, Judge.

Suit by Chas. H. Evans against W. A. Hudson and others. From an interlocutory order dissolving a temporary writ of injunction previously granted, plaintiff appeals. Reversed and remanded.

Wardlaw & Elliott, of Sonora, for appellant.

BRADY, J. This is an appeal from an interlocutory order, dissolving a temporary writ of injunction previously granted upon appellant's application, in this cause. The suit was instituted by appellant in the district court of Tom Green county, Tex., for the recovery and possession of certain lands situated in Tom Green, Schleicher, Menard, and Comcho counties, and appellant prayed for a temporary writ of injunction, which was granted, and the writ duly served upon appellees. W. A. Hudson, one of the appellees, filed a motion to dissolve the injunction, raising by exception the point that the district court of Tom Green county was without jurisdiction of either the defendants or the subject-matter of the suit. It was urged that defendant W. A. Hudson resided in Menard county, Tex., and that the defendant F. B. W. Hudson resided in San Saba county, Tex., which facts were shown on the face of the petition.

The court sustained the exception to the jurisdiction of the court, upon the ground that the suit was one primarily for injunction, and dissolved the injunction theretofore granted, but allowed plaintiff leave to amend, over the exception of defendants. Thereupon appellant filed his first amended original petition; and appellees answered, excepting to the court's action in granting leave to amend, and renewed their exception to the jurisdiction of the court, upon the ground that the venue of the cause was in Menard or San Saba county, and not in Tom Green county, where it had been instituted. It was further claimed that the court having previously sustained the first exception to the petition, because it had no jurisdiction over the defendants, should have dismissed the case, or should have transferred it to the district court of Menard county, and that the court erred in retaining jurisdiction and venue, especially because appellant had set up an entirely new cause of action. The exception was sustained, and the writ of injunction dissolved; but the court provided that his order should not have the effect to suspend the injunction pending an appeal, provided appellant should file his supersedeas bond in the sum of \$2,500, which was properly executed and filed.

#### Opinion.

Under his first assignment, appellant makes the proposition that, where the injunction applied for is merely ancillary to the main purpose of the suit, the cause is not a suit for injunction within the meaning of article 4653 of Vernon's Sayles' Civil Statutes, and the jurisdiction, where the title and possession of land, or to stay waste on land, is involved, is controlled by article 1830, subd. 14, of such statutes. The articles referred to read as follows:

"Art. 4653. \* \* \* Writs of injunction, \* \* \* if the party against whom it is granted be an inhabitant of the state, it shall be returnable to, and tried in, the district or county court of the county in which such party has his domicile, according as the amount or matter in controversy comes within the jurisdiction of either of said courts: If there be more than one party against whom any writ is granted, it may be returned and tried in the proper court of the county where either may have his domicile."

Article 1830 is the general venue statute, which provides that no person who is an inhabitant of this state shall be sued out of the county in which he has his domicile, except in certain cases. Subdivision 14 is one of the exceptions, and provides that—

"Suits for the recovery of lands or damages thereto, suits to remove incumbrances upon the title to land, suits to quiet the title to land, and suits to prevent or stay was on lands, must be brought in the county in which the land, or a part thereof, may lie."

Chapter 1, tit. 128, Revised Statutes, prescribes the method of trying titles to lands by action of trespass to try title, and article 7783 prescribes the requisites of a petition in such case.

Appellant concedes that the original petition did not literally comply with the fiction prescribed in article 7783, as to possession by appellant of the premises, and subsequent dispossession by appellees, and also was defective in not complying with article 7784 of the same chapter, requiring the plaintiff to indorse on his petition "that the action was brought as well to try the title as for damages." No exception was made below to the failure to so indorse the petition. Appellant contends, however, that his petition was in substantial compliance with the statutes regulating the action of trespass to try title, and that the defects indicated did no prevent his suit being substantially one to try title and for possession of the premises claimed. He cites the following cases, which seem to support the contention: *Seay v. Fennell*, 15 Tex. Civ. App. 261, 39 S. W. 181; *Day Land & Cattle Co. v. State*, 68 Tex. 526, 4 S. W. 865; *Rains v. Wheeler*, 76 Tex. 393, 13 S. W. 324; *Sanders v. Rawlings*, 77 S. W. 41; *Dangerfield v. Paschal*, 20 Tex. 536.

[1] We think the fair construction of the averments in the original petition is that appellant sued appellees for the title and possession of the land described. The petition expressly alleges that he was at the date of the filing of the petition the legal and equitable owner, and seized in fee simple in his own right, of the lands; that the defendant W. A. Hudson was in possession of the land; and that he failed and refused to vacate and deliver the possession, and was forcibly detaining the possession thereof from appellant. Appellant also alleged facts



which, if true, show him entitled to the possession, and, in connection with the allegations mentioned, alleged facts as a basis for equitable relief, and prayed for an injunction against defendants to restrain them from rounding up and driving off certain live stock which appellant had placed upon the land, and from damaging certain windmills thereon, and from interfering with the access of the live stock to watering places. His prayer was for the title and possession of the lands, for a perpetual injunction, and for general relief.

[2] The amendment contained substantially all the original allegations, but more specifically alleged facts to comply with the trespass to try title statute. As we have indicated, we think the original petition was a substantial compliance with such statute; but, if not, it was clearly an action for the recovery and possession of the land. The petition was defective, at most, in failing to state a technical action of trespass to try title, and, we think, was sufficient to authorize the trial court to allow an amendment to supply the deficiencies, under the authorities above cited.

[3] It only remains to be considered whether the suit as filed and the amendment to the petition were primarily a suit for injunction in which case it would be controlled by article 4653, or whether the relief sought in the prayer for injunction was merely ancillary to the main suit, in which instance the venue would be controlled by the fourteenth subdivision of article 1830.

In the following cases it has been held that, where the injunctive relief is sought merely as ancillary to the main suit, article 4653, the injunction statute, does not apply: *I. & G. N. Ry. Co. v. Anderson County*, 150 S. W. 239; *Id.*, 106 Tex. 60, 156 S. W. 499; *Royal Amusement Co. v. Columbia Piano Co.*, 170 S. W. 278; *Palmer v. Jaggaers*, 180 S. W. 907; *Parsons v. McKinney*, 63 Tex. Civ. App. 617, 133 S. W. 1085. We believe they announce the correct rule, and that if this is a suit for the recovery of lands or damages thereto, or to quiet the title to land, or to prevent or stay waste on lands, it must be brought in the county in which the land or a part thereof may lie, as provided in subdivision 14 of article 1830.

[4] Our conclusion is that both the original and amended petitions stated a cause of action within the purview of the latter article, and the suit was properly brought in Tom Green county, where a part of the land was situated. We have no doubt that the primary purpose of this suit was to recover the land described in the petition and the possession thereof, which it was alleged defendants were withholding.

For these reasons, we believe the trial court

erred in sustaining appellee's special exception to the amended petition, and also in dissolving the temporary injunction, upon the ground of a want of jurisdiction, and because of the supposed error in permitting appellant to amend his pleading. The case will be reversed and remanded for trial in accordance with this opinion.

Reversed and remanded.

**MARDEZ LUMBER CO. v. LUFKIN FOUNDRY & MACHINE CO.**  
(No. 506.)

(Court of Civil Appeals of Texas. Beaumont.  
Dec. 8, 1919. Rehearing Denied  
Dec. 17, 1919.)

**1. EVIDENCE  $\S$ 376(9) — TESTIMONY AS TO ACCOUNT WITHOUT IMMEDIATE RECOLLECTION ADMISSIBLE.**

In suit on an open account for materials and labor, testimony of plaintiff's foreman as to items of the account sued on was admissible, where he testified that, though he had no personal knowledge at the time of suit of the accuracy of the items of the account, nevertheless he would not have O. K.'d time slips from which they were made up unless at the time he had known them to be accurate.

**2. EVIDENCE  $\S$ 377 — PROPER AUTHENTICATION OF TIME SLIPS.**

In suit on an open account for labor and materials, the trial court properly admitted in evidence certain time slips from which the items of the account were made up; plaintiff's foreman having testified that he would not have signed the slips and turned them in at the office unless he had known at the time that such slips, in their charges of hours of labor, were accurate.

Appeal from Angelina County Court; E. B. Robb, Judge.

Suit by the Lufkin Foundry & Machine Company against the Mardez Lumber Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Feagin, German & Feagin, of Livingston, and M. M. Feagin, of Lufkin, for appellant.

Mantooth & Collins, of Lufkin, for appellee.

**BROOKE, J.** This suit was instituted by appellee in the county court of Angelina county, being a suit upon an open account for material and labor set out in detail in exhibit attached to appellee's first amended original petition, on which it went to trial. The suit was for the sum of \$435.44, with interest thereon from January 10, 1918, at 6 per cent. Plaintiff alleged that the items of labor and material were furnished at the instance and request of appellant, and that the prices charged therefor were the reasonable and fair prices for said labor and material. Ap-

pellant answered by general denial, special and general exceptions, plea to the venue of the court, and by special exception that the account sued on was not a true and accurate account, and that the prices charged for the labor and material furnished were exorbitant and unreasonable. The case was tried March 24, 1919, before the court without a jury, and judgment rendered in favor of appellee for the full amount sued for, with interest from January 10, 1918. Appellant gave due notice of appeal, filed its supersedeas bond and assignments of error, and the case is properly before this court for review.

[1] It is contended in the first assignment of error that the court erred in overruling defendant's objections, and in admitting the testimony of Jack Dillworth as to said items of account sued on, as is shown by defendant's bill of exception.

The first proposition under this assignment is that it was error to admit and consider testimony which the witness' own testimony shows is merely a conclusion, and not a matter of personal knowledge.

The counter proposition is that where a foreman of a crew of workmen in a shop knew of and directed the entries of certain work done in said shop, which entries were made contemporaneously with and about the time the transaction was recorded, and of which entries he had personal knowledge, evidence of the foreman as to the correctness of said entries is admissible; it appearing that the entries and items thereof related to the business of the company, which company is a party to the litigation.

Appellant cites in support of this proposition the case of *Randle v. Barden*, 164 S. W. 1086. It appears that the objection urged to this testimony relates to the credibility of the witness. However, it is seen by the testimony of the witness that the time slips offered by appellee were received in evidence. It developed, according to the testimony of Jack Dillworth, that the records and entries were made by the said Dillworth under his direction and were made contemporaneous with or about the time of the transaction recorded; and it further appears that the witness Dillworth, according to his statement, had full personal knowledge of the facts recorded. The record shows that said Dillworth testified:

"I have no personal recollection of how much time any of these men put in. I cannot say of my own recollection how much any of them did on this job on any of the days named. The only information I have on it is from the statements contained in the time slips. I do know that I would not have O. K.'d these time slips and turned them in to the office unless I had known at the time that the amount of hours, as shown on these slips, had been put in by the workmen on that particular job."

In the case referred to above, the court held that testimony was inadmissible for the

reason that the person had no personal knowledge of said entries, not having been present at the time they were made, and not having known whether or not they were correct entries, he being located and officing in a distant city, far away from the locality where the matters were transpiring, and, of course, could not have had any knowledge whatever, except hearsay knowledge, of what the entries actually represented. In the present case, the witness Dillworth was a foreman employed by appellee and actually present in the discharge of his duties over said workmen, and did see and know about the entries mentioned and complained of, and in fact had absolute personal knowledge of what they meant and represented, and, having fully qualified in the matter, he was a competent witness to testify concerning the accuracy and correctness of the entries. We are not able to agree with the appellant in his contention, and this assignment must be overruled.

[2] The second assignment complains that the court erred in overruling defendant's objections and admitting in evidence certain time slips, as is shown by defendant's bill of exception No. 2.

The proposition under this assignment is that, in order to make the time slips objected to admissible in evidence, they should have been supported by the oath of those who made them that the entries were correct and accurate and made by them at the time the work was done.

Dillworth, the foreman, testified that, at the time order No. 52013 was filled out for the Mardez Lumber Company, he was foreman at the time, and as foreman he saw that the men were kept at work and put in full time. He further testified, on cross-examination:

"I have no personal recollection of how much time any of these men put in. I cannot say of my own recollection how much any of them did on this job on any of the days named. The only information I have is from the statements contained in the time slips. It was customary for these parties to sign the slips and turn them in to me."

He further testified:

"I do know that I would not have O. K.'d these time slips and turned them in to the office unless I had known at the time that the amount of hours as shown on the slips had been put in by the workmen on that particular job."

It is contended by appellee that, where regular entries are made in account books of a party to the litigation, they are admissible in evidence, provided the entries are original and were made contemporaneously with, or about the time of, the transaction recorded, and provided, further, the one making the entry, or directing the making of same, had personal knowledge of the facts recorded.

The testimony was admitted in evidence,

and was competent. The trial court was evidently satisfied with the testimony that was admitted, and there was sufficient evidence to enable the court to find in favor of the correctness of the charges made. The parties in controversy submitted the evidence to the court, without calling for a jury, and the finding of the court that no more was charged for the work done than was customarily charged by other persons doing similar work at the same time is supported by the evidence in the case. It is impossible, therefore, for this court to say that material error has been committed that would justify us in reversing and remanding this case.

The remaining assignments are overruled, and the judgment of the trial court is affirmed.

### HUFSTUTLER v. GULF, C. & S. F. RY. CO. (No. 6116.)

(Court of Civil Appeals of Texas. Austin.  
Nov. 5, 1919.)

#### 1. JUSTICES OF THE PEACE $\S$ 44(8)—AMOUNT IN CONTROVERSY AS AFFECTED BY INTEREST NOT ALLEGED.

In an action for value of steers killed by defendant's trains, in the amount of \$195, brought in justice court, interest thereon is not recoverable *eo nomine*, but only as an item of damages, and must be pleaded, or otherwise it is not a matter in controversy, to be added to the amount sued on in determining jurisdiction.

#### 2. JUSTICES OF THE PEACE $\S$ 173(3) — EVIDENCE OF JURISDICTION IN COUNTY COURT ON APPEAL, TRANSCRIPT NOT SHOWING FACT.

On appeal from justice court to county court, if the transcript did not conclusively show that the case was within the jurisdiction of the justice court as originally filed, it was error for the trial court to refuse to hear oral testimony as to what the oral pleadings were below.

#### 3. JUSTICES OF THE PEACE $\S$ 174(18)—AMENDMENTS ON APPEAL AS TO JURISDICTIONAL FACTS.

The right conferred by statute and rules on either party to amend pleadings extends to jurisdictional matters, so that, on appeal from justice court to county court, plaintiff had a right to amend his petition by reducing the amount of his damages, so as to cure the defect as to jurisdiction.

#### 4. JUSTICES OF THE PEACE $\S$ 164(4)—CORRECTION OF TRANSCRIPT ON JURISDICTIONAL MATTER.

While it would be a better practice to correct a transcript before the parties proceed to trial in county court on an appeal from justice court, such correction at such time is not imperative, and certainly not where the alleged jurisdictional defect is not pointed out specifically until the motion for a new trial is filed.

Appeal from Lampasas County Court; J. Tom Higgins, Judge.

Suit by T. J. Hufstutler against the Gulf, Colorado & Santa Fé Railway Company in the justice court, where plaintiff obtained a judgment against defendant, and on appeal to the county court a verdict and judgment were rendered for plaintiff. On motion for new trial, a plea to the jurisdiction was sustained, the verdict and judgment set aside, and the cause dismissed by the trial court, from which order and judgment plaintiff appeals. Reversed, with instructions.

H. F. Lewis, of Lampasas, for appellant.  
Word & Walker, of Lampasas, and O. B. Wigley, F. J. Wren, and Terry, Cavin & Mills, all of Galveston, for appellees.

BRADY, J. This suit originated in the justice court; appellant having sued for damages for the value of three steers, alleged to have been killed by appellee, of the total value of \$195. He recovered judgment for \$150, with interest at 6 per cent. from the date of the injuries. On appeal to the county court he recovered judgment, based upon the verdict of a jury, for \$170, with interest from the date of the injuries at the same rate. Upon motion for new trial, appellee urged a plea to the jurisdiction of the court, claiming that the appellant's cause of action showed upon its face that it was beyond the jurisdiction of the justice court, being for the sum of \$195, with legal interest from October 1, 1916; the suit having been filed in the justice court March 7, 1918. Appellant in a controverting answer denied under oath the facts alleged in the motion for new trial, and attached the affidavits of the justice of the peace, and his attorney who tried the case below, in support of the jurisdiction of the justice court. The court admitted evidence on the hearing of the motion, which included the transcript from the docket of the justice of the peace, the statement of the cause of action lodged with him, the citation served upon appellee from the justice court, and the affidavits attached to the controverting answer, but refused to admit oral testimony as to the state of the oral pleadings below. The plea to the jurisdiction was sustained, the verdict and judgment set aside, and the cause dismissed by the trial court, from which order and judgment this appeal was taken.

The transcript from the justice court shows the statement of appellant's cause of action as follows:

"September 30, 1916. To killing three steers, of the value of \$65.00 each, said steers being three or four years old, one being killed on September 2, 1916, the second killed September 12, 1916, and the third being killed on September 22, 1916, and being of the total value of \$195.00."

The memorandum on the justice's docket also shows this entry:

"Suit upon account for \$195.00, of date October 1, due October 1, 1916."

The citation introduced in evidence showed a claim for damages in the sum of \$195, and the prayer was for that sum, with legal interest from October 1, 1916. The affidavits introduced in evidence showed substantially that before the announcement of ready in the justice court, appellant's attorney orally stated that the amount of damages had been erroneously named in the citation, and that the damages claimed by appellant were only \$165; that the dates of the injuries and a brief description of the steers were noted on the back of a letter written by plaintiff's attorney to the justice of the peace, and was filed with the papers; that appellant never claimed more than \$165 in his pleadings in the justice court, and that the amount stated in the citation and upon the docket was due to the inadvertence of the justice of the peace; that on appeal the appellant increased his claim for damages to \$175, which fact is also shown by the record in the county court.

By several assignments of error appellant assails the action of the trial court in sustaining the motion for new trial and dismissing the cause for want of jurisdiction, and presents the question in several forms. It is not necessary to consider the assignments seriatim, and we will confine the discussion of the questions in this opinion to the point that the transcript from the justice court did not show on its face that said court was without jurisdiction, but showed the contrary, and to the further point that the trial court erred in refusing to hear evidence as to what the oral pleadings were in the justice court. We think both of these contentions by appellant should be sustained, and will briefly give our reasons.

[1] In the first place, we are of opinion that the justice's transcript shows that such court had jurisdiction. The amount of the damages was expressly stated to be \$195, which was within the jurisdiction of the justice court. It is true that appellant might have claimed the additional item or element of damage of 6 per cent. upon the value of the steers, but the transcript does not show that he claimed this additional sum. "It is not a case where interest is recoverable *eo nomine*, but if recoverable at all it is only recoverable as an item of damage. This item was not sued for, and was, therefore, not in controversy." This language is quoted from the opinion of the Supreme Court in *Ft. W. & R. G. Ry. Co. v. Matthews*, 108 Tex. at page 231, 191 S. W. at page 560. The Supreme Court further said in that case that a litigant may, at his election, omit to sue for

any item which is due him, and not thereby place such item in controversy, unless it is necessarily involved as a part of some other item of damage that has been placed in controversy. We think the above case is directly in point here, and also some of the other cases cited in that opinion, to which we refer as additional authority.

[2, 3] Upon the other question we entertain the view that, if the justice's transcript be treated as not conclusively showing that the case was within the jurisdiction of the justice court, as originally filed, it nevertheless was error for the trial court to refuse to hear oral testimony as to what the oral pleadings were below. Indeed, the evidence received by the court, which seems to have been introduced without objection, shows that before announcement of ready appellant reduced his damages to the sum of \$165, and this was clearly within the jurisdiction of the justice court, even if the element of 6 per cent. damages were added. Our statutes and rules confer the right upon either party to amend pleadings, and this right extends even to a jurisdictional matter. A plaintiff has the right to amend his petition so as to cure a defect of jurisdiction. *McDannell & Co. v. Cherry*, 64 Tex. 177; *Greer v. Richardson Drug Co.*, 1 Tex. Civ. App. 634, 20 S. W. 1129; *Miller v. Newbauer*, 61 S. W. 975. When such an amendment is made, the amount claimed upon the trial is the amount in controversy, and not the amount stated in the original pleading. *Peeples v. Slayden-Kirksey Woolen Mills*, 90 S. W. 61; *Burke v. Adoue*, 3 Tex. Civ. App. 494, 22 S. W. 825, 23 S. W. 91; *Watson v. Mirike*, 25 Tex. Civ. App. 527, 61 S. W. 540.

[4] The view most favorable to appellee's contentions is that the justice's transcript is silent upon whether or not appellant claimed 6 per cent. additional upon the amount of his damages, as originally stated. The entries upon the justice's docket will admit of no broader construction than this, and in such case it would be clearly the duty of the trial court to hear evidence as to what the oral pleadings were below. It may be, as suggested by appellee's counsel, that the better practice would be to have the correction of the transcript made before the parties proceed to trial in the county court. However, we do not think this is imperative, and certainly not where, as in this case, the alleged jurisdictional defect is not pointed out specifically until motion for new trial is filed.

It follows, from what has been said above, this case must be reversed, and it is remanded to the trial court with instructions to reinstate the cause. Reversed, with instructions.

Reversed, with instructions.

## BECK v. STATE. (No. 32.)

(Supreme Court of Arkansas. Dec. 8, 1919.)

## 1. CRIMINAL LAW §198—EVIDENCE OF FORMER CONVICTION OF SAME OFFENSE.

In prosecution for offense of selling intoxicating liquor, the fact that in a former prosecution of defendant for a similar offense based upon another sale at another time and place the principal witness was cross-examined as to his testimony in the mayor's court about the sale charged in subsequent prosecution, for the purpose of contradiction, did not make out a case of former conviction; such later sale not having been made an issue in the former trial.

## 2. CRIMINAL LAW §295—BURDEN OF PROOF OF FORMER CONVICTION.

In a prosecution for sale of intoxicating liquors, defendant, setting up former conviction, had burden of showing that the sale which formed the basis of the charge in the subsequent prosecution was made an issue in the former trial.

## 3. CRIMINAL LAW §1172(1)—HARMLESS INSTRUCTIONS.

In prosecution for offense of selling intoxicating liquor, where there was not sufficient evidence to warrant a submission of the question of former conviction, an instruction on former conviction could not have been prejudicial to defendant.

## 4. CRIMINAL LAW §1169(1)—HARMLESS ERROR IN ADMISSION OF EVIDENCE.

In prosecution for offense of selling intoxicating liquor, where there was not sufficient evidence to warrant submission of question of former conviction, evidence of jurors in the former trial could not have been prejudicial.

## 5. CRIMINAL LAW §295—EVIDENCE OF FORMER JURORS AS TO ALLEGED FORMER CONVICTION.

In a prosecution for offense of selling intoxicating liquor, where defendant set up plea of former conviction, evidence of jurors in the former trial that they had not considered the sale forming the basis of a subsequent prosecution held incompetent; it being unimportant what the jury actually considered.

## 6. INTOXICATING LIQUORS §146(1)—EVIDENCE OF "SALE" OF LIQUOR.

Where prosecuting witness laid money upon drug store counter, followed defendant into back room, took liquor out of barrel or box upon defendant lifting lid thereof, left store taking with him liquor and change which he found on counter, there was a "sale" of the liquor.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Sale.]

## 7. CRIMINAL LAW §507(1)—INTOXICATING LIQUOR §146(3)—CORROBORATION OF TESTIMONY OF ACCOMPLICE.

Where one party gave another money where-with to buy intoxicating liquor, and the latter took money and procured liquor and returned it to former, the latter was himself guilty of the sale, unless he acted only as former's agent

and as an accomplice of seller; if he was not such agent, his testimony was not sufficient to convict seller of offense of selling intoxicating liquor, unless corroborated.

## 8. CRIMINAL LAW §780(2)—INSTRUCTION AS TO ACCOMPLICE TESTIMONY ERRONEOUS.

In a prosecution for sale of intoxicating liquor, where there was a sharp conflict between testimony of accomplice and testimony for state, court's refusal to instruct that there could be no conviction upon testimony of accomplice unless corroborated by other testimony held reversible error.

## 9. CRIMINAL LAW §374—EVIDENCE OF OTHER SALES INCOMPETENT AS TOO REMOTE.

In prosecution for offense of selling intoxicating liquor, evidence as to sales by accused made many years before sale upon which the prosecution was based held incompetent; the sales being too remote in point of time.

## 10. CRIMINAL LAW §1137(5)—EVIDENCE OF OTHER SALES OF INTOXICATING LIQUORS INVITED ERROR.

In a prosecution for selling intoxicating liquors, where defendant, in response to question by his own counsel, stated that he had never at any time sold whisky, the admission of testimony as to sales made many years before that upon which prosecution was based held an error invited by defendant himself.

Humphreys, J., dissenting.

Appeal from Circuit Court, Logan County; Jas. Cochran, Judge.

Ion Beck was convicted of selling intoxicating liquor, and he appeals. Reversed and remanded, with directions.

Evans & Evans, of Booneville, for appellant.

Jno. D. Arbuckle, Atty. Gen., and Robert C. Knox, Asst. Atty. Gen., for the State.

MCCULLOCH, C. J. This is an appeal from a judgment of conviction of the offense of selling intoxicating liquor. Three indictments were returned against appellant at the August, 1918, term of the Logan circuit court, each charging the offense of selling whisky. One of the cases was tried at that term of court, and the trial resulted in appellant's conviction and sentence to the penitentiary. The present case was tried on one of the indictments at the August term, 1919. Appellant entered a plea of former conviction, as well as a plea of not guilty. To sustain the plea of former conviction appellant attempted to show in the trial of the present case that the alleged sale on which the state relies in the present case for a conviction was made an issue in the trial of the other case at the August term, 1918.

The sale of whisky charged in each of the indictments is shown to have been made to Ernest Powell, who was the principal witness in each of the trials. Powell testified that

in each of the cases he purchased whisky from appellant. In the present case the state relies on an alleged sale made by appellant to Powell at a drug store on a certain occasion. The other sales were made at another place.

The contention of appellant is that, although the state, in the former trial, first sought to convict appellant on proof of another sale, there was an issue introduced before the trial was completed concerning the sale at the Central Drug Store, which is the basis of the present trial. The testimony tends to show that a sale of whisky was made by appellant to Powell at the Central Drug Store, in Booneville, on or about April 7, 1918, and was sufficient to warrant the jury in so finding. Appellant was, according to the testimony, accustomed to stay in and about the Central Drug Store at that time. Powell testified, in substance, that he met Mathew Williams on the street in Booneville, and that Williams requested him to get some whisky for him, and gave him a \$5 bill to use in buying the whisky; that he took the money from Williams, went to the Central Drug Store, and accosted appellant on the subject of buying some whisky, and that appellant replied, saying: "I might find some." He testified that appellant led him through the storeroom into a back room and lifted the lid of a barrel or box, and that witness looked into the barrel or box, and, seeing bottles of whisky there, took out a bottle and carried it away with him. He testified that when he accosted Beck at the counter in the drug store he laid the \$5 bill down on the counter near the cash register, or that he gave it to Beck and that Beck laid it down on the counter, and that when he returned from the back room he found \$1.50 in change where he had previously left the \$5 bill. He testified that he returned the whisky and \$1.50 in change to Williams. Williams testified that he met Powell on the street and asked him to get whisky for him, and that he gave him a \$5 bill, but his statement is that Powell never brought him the whisky nor returned him his money, but came back a little later and told him that he had not been able to get any whisky. Appellant denied that he had sold whisky or had anything to do in procuring it for Powell.

Appellant introduced the record of the former trial in which appellant was convicted at the August term, 1918, of selling whisky, and in order to show that the sale to Powell at the Central Drug Store was an issue in the former trial Judge Evans, one of the attorneys for appellant, was introduced as a witness and testified that on the former trial he interrogated Powell on cross-examination as to his testimony in the mayor's court in which he had stated that he bought whisky from appellant at the Central Drug Store, and that Powell admitted that he had

so testified in the former trial. This examination, Judge Evans said, was for the purpose of impeaching Powell by showing contradictory statements, and that was the only attempt to show that there was any testimony introduced at the former trial concerning the sale at the drug store.

In the closing argument the prosecuting attorney referred to the testimony drawn out by Judge Evans and stated to the jury that, no matter what the jury might think about the other alleged sale, counsel for appellant had drawn into the case the alleged sale in which Williams was interested, and that appellant had not been called as a witness to testify about it, and that the jury should convict on that, if nothing else. Judge Evans' testimony on the subject is, according to appellant's own abstract, as follows:

"The state did not ask Powell about the alleged sale made to him in which Mathew Williams was a witness, but on cross-examination I asked Powell about that for the purpose of showing that he had sworn before the mayor about that sale and had sworn in that examination that he had had nothing to do with any liquor bought from Beck at any other time. I drew that out on cross-examination and did not put Mr. Beck on the witness stand to deny it. In the concluding argument to the jury Mr. Wofford, who represents the state, said to the jury in arguing the case: 'No matter what you think about these alleged sales on the night that Buster Kersey was at the restaurant with Powell, that I had drawn into the case this alleged sale in which Mathew Williams was in interest, and that the defendant Beck did not deny it, and Williams had not been called to testify about it, and the jury could convict on that and nothing else, and it went to the jury that way, and the jury convicted Beck. These three sales that Powell testifies about here were all before the jury in that case. The state did not elect any special case to rely upon, but relied upon these three sales and got a conviction in that case.'"

[1] It is conceded that Judge Evans' narrative is correct as to the manner in which, and the purpose for which, he drew out this testimony from Powell on the former trial, but there is a slight difference between his testimony and that of the prosecuting attorney as to the precise language used by the prosecuting attorney in his argument. Of course, those differences might have been settled by the jury, but we are of the opinion that, accepting the version of Judge Evans as correct, it did not make out a case of former conviction. The rule on this subject is clearly stated by Chief Justice Cockrill in the case of *State v. Blahut*, 48 Ark. 34, 2 S. W. 190, as follows:

"Each sale of liquor by the defendant to the minor was a separate offense, and there could be as many convictions as there were sales made. *Emerson v. State*, 43 Ark. 372. It is true the state may preclude the possibility of more than one conviction, even where there have been many sales, by taking a wide range

in the proof, putting all the guilty sales in evidence, and relying upon the whole proof for a single conviction. In that case the defendant can be convicted upon the proof of any one of the sales made within a year of the finding of the indictment, and it is the established rule that the former conviction is a bar to a subsequent indictment for any offense of which the defendant might have been convicted upon the testimony under the indictment in the first case."

This rule was followed in more recent cases. *Bryant v. State*, 72 Ark. 419, 81 S. W. 234; *Sanders v. State*, 115 Ark. 376, 171 S. W. 142.

[2] The burden was on appellant to show that the sale which forms the basis of the present charge was made an issue in the former trial. We do not think that the testimony shows that such an issue was made. There was no testimony at all as to that sale in the former trial. The witness Powell was merely interrogated on cross-examination as to what he had testified in the mayor's court about the sale for the purpose of contradiction, and a verdict of conviction for that sale would have been without evidence to sustain it. It is only where in such cases there is evidence introduced for the purpose of sustaining the charge that the judgment either for conviction or acquittal operates as a bar to further prosecution. *Turner v. State*, 130 Ark. 48, 196 S. W. 477; *Larkin v. State*, 131 Ark. 445, 199 S. W. 382.

Conceding that Judge Evans was correct in his statement concerning the remarks of the prosecuting attorney, they were not sufficient to introduce the sale now in question as an issue in the former trial, and, at most, the remarks of the attorney merely constituted error which should have been corrected in that case, and cannot be taken advantage of in the present case as a former adjudication of the issues now presented in this case.

[3] Objection was made to an instruction given on this subject, but, since we hold that there was not sufficient evidence to warrant a submission of the question of former conviction, no prejudice resulted from the instruction alleged to be erroneous.

[4, 5] The same may be said with reference to the introduction of some of the jurors in the former trial to prove that they had not considered in that case the sale made at the Central Drug Store. This testimony was not competent, for the reason that it was unimportant what the jury actually considered in the case, but the testimony could not have been prejudicial, inasmuch as it only related to the plea of former conviction.

Error of the court is assigned in the giving of instruction No. 3 by the court, which reads as follows:

"If you should find beyond a reasonable doubt from the evidence that the witness Ernest Powell went into the Central Drug Store and laid down \$5 on the counter, followed the defendant

into a back room, and there Beck raised up the lid of a barrel or box, and witness Powell got out of the barrel or box a pint of alcoholic liquor and went back through the drug store and found \$1.50 on the counter and picked it up and went out carrying the liquor with him, the court tells you that would be a sale of liquor by Beck."

[6] Counsel have not shown in the argument in what respect the recital of facts in this instruction falls short of constituting a sale of whisky by appellant, and we are unable to discover in what respect the elements of participation in a sale are lacking.

Counsel for appellant requested the following instruction, which the court refused to give:

"If witness Williams gave witness Powell \$5 with which to procure intoxicating liquors, and witness Powell took the money and procured the liquor and returned it to Williams, he himself was guilty of the sale, unless Powell acted only as the agent of the buyer. If the witness Powell was interested in the alleged sale which is made the foundation of this prosecution, other than as agent of the buyer, he is an accomplice, and defendant cannot be convicted unless his testimony is corroborated by other testimony, and the corroboration is not sufficient to convict if it only shows the commission of the offense and the circumstances thereof."

[7, 8] No other instruction submitting the question of Powell being an accomplice was given. It is the conclusion of the majority of the court that this instruction should have been given, and that it was error to refuse it. The first sentence in the instruction was undoubtedly correct. That is conceded by the Attorney General. The last sentence was also correct, and should have been given; for the circumstances proved in the case were sufficient to warrant the inference by the jury that Powell was a mere runner for appellant, and was in that way interested in the sale. It is unnecessary that it should have been a pecuniary interest, but if he was directly interested in helping appellant make the sale he was an accomplice, and there can be no conviction on his uncorroborated testimony. *Ellis v. State*, 133 Ark. 540, 202 S. W. 702. There was a sharp conflict between the testimony of Powell and Williams as to the former returning the whisky and the balance of the money to Williams, and the jury might have rejected the testimony of Powell as to his statement that he was not interested in the sale, and have drawn the inference from all the circumstances that he was soliciting for appellant. Appellant was entitled to an instruction on this subject, and, since no other instruction on the subject was given, the refusal of this one constituted prejudicial error which calls for a reversal of the judgment.

[9, 10] In view of another trial of the case, we mention another assignment of error

which relates to the ruling of the court in permitting the state to introduce witnesses who testified to sales of whisky made by appellant many years ago. The sales to which this testimony related were so remote in point of time that the testimony was incompetent, but it was invited by appellant himself, who, in response to direct questions propounded by his own counsel, stated that he had never at any time sold whisky. It therefore presents a case of invited error.

The judgment is reversed for the error indicated, and the case remanded for a new trial.

HUMPHREYS, J., dissents.

**BOOE v. ROAD IMPROVEMENT DIST. NO. 4, PRAIRIE COUNTY.**  
(No. 39.)

(Supreme Court of Arkansas. Dec. 8, 1919.  
Concurring Opinion, Dec. 22, 1919.)

**1. COURTS ⇨107 — LANGUAGE OF OPINION MUST BE GIVEN NATURAL MEANING.**

The language of an opinion, like that of any other writing, must be given its plain and natural meaning, except when used in a technical sense.

**2. CONSTITUTIONAL LAW ⇨35 — PROVISION THAT SPECIAL BILLS SHALL NOT BE PASSED WITHOUT NOTICE IS MANDATORY.**

The language of Const. art. 5, § 25, providing that notice of intention to apply to General Assembly for passage of a special law shall be given at least 30 days prior to introduction of bill, is mandatory.

**3. STATUTES ⇨283(2) — PRESUMPTION THAT LEGISLATIVE PROCEEDINGS ARE LEGAL.**

The presumption is always in favor of the legality of the legislative proceedings, and where the record of which the court can take judicial knowledge, does not show to the contrary, the proceedings are conclusively presumed to have been in accordance with the constitutional requirement as to notice.

**4. STATUTES ⇨283(2)—PASSAGE OF ACT CONCLUSIVE THAT CONSTITUTION WAS COMPLIED WITH UNLESS RECORD SHOWS OTHERWISE.**

The passage of Sp. Act Sept. 30, 1919, authorizing road improvement district to issue bonds, is conclusive that Const. art. 5, § 25, providing that notice of intention to apply for passage of special law shall be given at least 30 days prior to introduction of bill, was complied with, unless the record, of which the court may judicially take notice, shows otherwise.

**5. CONSTITUTIONAL LAW ⇨45—JURISDICTION OF LEGISLATURE CANNOT BE DETERMINED FROM PLEADINGS.**

It would not do to relegate to the courts the ascertainment of a jurisdictional fact for

the Legislature on admissions in pleadings, by agreement of the parties or by proof introduced of facts not required to be made a matter of record by the Constitution.

**6. STATUTES ⇨284—REGULARITY OF LEGISLATIVE PROCEEDINGS WILL BE DETERMINED FROM RECORDS ONLY.**

In determining whether passage of Sp. Act Sept. 30, 1919, was in compliance with Const. art. 5, § 25, testimony of the Governor cannot be considered, since it is no part of the record required to be kept by the Constitution, and of which the court may take judicial notice.

**7. EVIDENCE ⇨46 — JUDICIAL NOTICE OF PROCLAMATION CALLING EXTRAORDINARY SESSION OF LEGISLATURE.**

Proclamation of Governor, calling extraordinary session of General Assembly under Const. art. 6, § 19, when issued becomes a record of which the court may take judicial notice.

**8. EVIDENCE ⇨29—JUDICIAL NOTICE OF DATE WHEN SPECIAL ACT WAS PASSED AND APPROVED.**

The courts will take judicial notice that a bill in question was passed and approved on a certain date.

**9. STATUTES ⇨5—SPECIAL ACT AT SPECIAL SESSION UNCONSTITUTIONAL FOR WANT OF SUFFICIENT NOTICE.**

Since less than 30 days elapsed from the date of Governor's proclamation for extraordinary session, when Sp. Act Sept. 30, 1919, was approved by him, the record conclusively shows that Const. art. 5, § 23, was not complied with, and the act will be held unconstitutional and void.

Appeal from Prairie Chancery Court;  
John M. Elliott, Chancellor.

Suit by W. I. Booe against Road Improvement District No. 4, Prairie County. Complaint dismissed, and plaintiff appeals. Reversed and remanded, with directions.

W. I. Booe, a citizen and property owner within the limits of a road improvement district duly organized in Prairie county, Ark., under the Alexander Road Law, brought this suit in equity against the commissioners of said road improvement district to enjoin them from the issuing of \$65,000 in bonds authorized by a special act of the General Assembly passed at the special session held in September, 1919.

On the 15th day of September, 1919, the Governor issued a public proclamation calling the General Assembly to meet in extraordinary session on the 22d day of September, 1919. The record of the General Assembly shows that it convened on that day and adjourned on the 1st day of October, 1919. Its records also show that the special act in question was passed at the special session, and it was approved by the Governor on the 30th day of September, 1919.



The deposition of the Governor was taken by the defendant, and according to his testimony he wrote letters, more than 30 days before the special session convened, to nearly every member of the Legislature, telling him that it would be necessary to call the Legislature in extraordinary session to pass special road bills, and on the 18th of August, 1919, the Governor agreed with several persons interested that he would call a special session of the Legislature for the purpose of considering local improvement bills. In public speeches he made known that he intended to call the Legislature together again in special session, but no day was mentioned by him. His formal proclamation calling the Legislature together in extraordinary session under article 6, § 19, of the Constitution of 1874, was not issued until the 15th day of September, 1919.

At the hearing of the case the chancellor was of the opinion that the bill was a valid law, and it was decreed that the complaint be dismissed for want of equity. The plaintiff has appealed.

W. H. Gregory, of Hazen, for appellant.

R. W. Robins, of Conway, Evans & Evans, of Booneville, and Mehaffy, Donham & Mehaffy and J. I. Trawick, all of Little Rock, amici curiæ.

Coleman, Robinson & House, Rose, Hemingway, Cantrell & Loughborough, and Grover T. Owens, all of Little Rock, Emmet Vaughan, of Des Arc, Clyde Going, of Memphis, Tenn., Huddleston, Fuhr, & Futrell, of Paragould, S. W. Adams, of Helena, E. E. Hopson, of Arkansas City, J. R. Wilson, of Warren, Rowell & Alexander, of Pine Bluff, McMillan & McMillan, of Arkadelphia, Harry P. Dally, Holland & Holland and Vincent M. Miles, all of Ft. Smith, Roy D. Campbell, of Cotton Plant, Harry M. Woods, of Augusta, J. G. Sain, of Nashville, U. J. Cone, of Hamburg, and S. S. Hargraves, of Forrest City, for appellee.

HART, J. (after stating the facts as above). The General Assembly convened in special or extraordinary session on September 22, 1919, pursuant to a proclamation of the Governor issued on the 15th day of September, 1919. The special session lasted nine days, adjourning on the 1st day of October, 1919. The act in question in the case at bar contained the emergency clause, and was approved on the 30th day of September, 1919. The act is a special one, and was held valid by the chancery court. Its constitutionality is attacked on the ground that the notice required by article 5, § 26, of the Constitution of 1874, was not given, and the correctness of the decision of the chancellor depends upon the construction to be placed upon that provision of the Constitution and the decisions of this court relating to the subject. The provision of the Constitution is as follows:

"No local or special bill shall be passed, unless notice of the intention to apply therefor shall have been published in the locality where the matter or the thing to be affected may be situated, which notice shall be at least thirty days prior to the introduction into the General Assembly of such bill, and in the manner to be provided by law. The evidence of such notice having been published shall be exhibited in the General Assembly before such act shall be passed."

Two theories exist in the United States with regard to provisions of the Constitution similar to the one under consideration in this case. On the one hand, it is held that the behest of the Constitution is addressed to the Legislature itself, and should be obeyed by that body; but that the matter ends with that department, and courts are not allowed to annul acts of the Legislature in any case because of its failure to follow the requirement. In short, in some jurisdictions such provisions of the Constitution are held to be directory merely. On the other hand, in other states similar provisions of the Constitution have been held to be mandatory, and subject to judicial review where the record, which can be judicially noticed, shows that the Legislature failed to follow the requirement or disregarded it.

The first case construing the clause under consideration in this state is *Davis v. Gaines*, 48 Ark. 370, 3 S. W. 184, and this has since been called the leading case on the subject. In that case the court first had under consideration article 5, § 25, of the Constitution, which provides that, in all cases where a general law can be made applicable, no special law shall be enacted. The court said the act in that case was a special one, and that a general law could have been framed to apply to all portions of the state in like situation was demonstrated by the fact that there was such a law on the statute books at the time of the passage of the special act. The court further said that the Legislature was the sole judge whether provision by general law was possible, except in certain cases enumerated in the Constitution, and that the provision was merely cautionary to the Legislature. After concluding the discussion upon this branch of the case, the court said:

"The same remarks apply to the passage of the bill without the previous publication of notice of the intention to introduce it. Section 26 of article 5, Constitution of 1874, requires evidence of such publication to be exhibited in the General Assembly before the bill becomes a law. But if the General Assembly choose to disregard this requirement, and to enact a local or special law, without notice, no issue upon the subject of notice can be raised in the courts."

[1, 2] It is insisted by those seeking to uphold the act that the effect of the language just quoted is to hold that the provision of the Constitution is directory merely, and is

not subject to review by the court in any case. Of course, the language of any opinion, like that of any other writing, must be given its plain and natural meaning, except when used in a technical sense. The dictionary meaning of "disregard" is "to pay no heed to"; "to fail to notice or observe." The word "choose" implies election or choice. The words "no issue upon the subject of notice can be raised in the courts" mean that the action of the Legislature could not be reviewed by the courts. Therefore the plain and natural meaning of the words, "but if the General Assembly choose to disregard this requirement, and to enact a local or special law without notice, no issue upon the subject of notice can be raised in the courts," mean that if the Legislature should pay no attention to the requirement, and pass a special law without notice, its action is not subject to review in the courts. The court went further than it was necessary to do under the facts of that case. It was admitted in that case that no notice was given, and the special act was passed at a regular session of the Legislature. The language of the provision is mandatory. It provides that no special bill shall be passed unless notice of the intention to apply therefor shall have been published in the locality where the matter affected may be situated. The length of time the notice is to be published is provided for. It further provides that evidence of such notice having been published shall be exhibited in the General Assembly before such act shall be passed.

[3, 4] One object of the requirement was to prevent hasty and improvident legislation. Another purpose was to give the people of the locality to be affected an opportunity to be heard upon the proposed legislation affecting their interest. This is especially important in cases of special improvement districts, where the assessment of benefits is often made by the Legislature itself. It is important to the property owner that he be notified of the proposed legislation, in order that he may have an opportunity to be heard upon a matter which so vitally affects his interest. The right to petition and protest has ever been recognized as the right and privilege of every free people, and the framers of the Constitution intended that this right should be made available to them in a useful and practical manner. Of course, the presumption is always in favor of the legality of the legislative proceedings, and where the record, of which the court can take judicial knowledge, does not show to the contrary, the proceedings are conclusively presumed to have been in accordance with the constitutional requirement as to notice. It is provided that evidence of the publication of the notice shall be exhibited to the Legislature, so that it can know that every one affected has had an opportunity to be heard before the

bill is passed. The Constitution does not require that evidence of the notice shall be spread upon the journals, or otherwise preserved as evidence. Hence we hold that the passage of the act is conclusive of the fact that due notice was given, unless the record, of which the courts may judicially take notice, shows otherwise.

[5] As we have already seen in the case of *Davis v. Gaines*, supra, it was alleged in the complaint that the notice required by the Constitution was not given. A demurrer was interposed to the complaint, which had the effect to admit its allegations to be true. It would not do to relegate to the courts the ascertainment of a jurisdictional fact for the Legislature upon admissions in pleadings, by agreement of the parties or by proof introduced of facts not required to be made a matter of record by the Constitution. To hold otherwise would make the validity of special laws depend upon the action of the parties, and might make it valid as to one person and invalid as to another in the locality affected by it. Such a course would not only be ruinous to the people in such localities, but might unsettle every special act passed since the adoption of the Constitution.

Hence in the case of *Davis v. Gaines*, supra, the fact that it was shown by the pleadings that no notice was given amounted to nothing. The act was passed at a regular session of the Legislature. The time and place when the Legislature should convene in regular session is fixed by the Constitution. So far as the record of which the court could take notice was concerned, the notice might have been given for the time and in the manner prescribed by the Constitution, and evidence of the publication of the notice might have been exhibited to the Legislature before the act was passed. Hence the court should have held in that case that there was a conclusive presumption that the Legislature had found that the requirement of the Constitution had been complied with; there being nothing in the record, of which the courts could take judicial notice, to the contrary. It was not necessary, therefore, for the court to decide that the subject of notice could not be reviewed by the courts, or, what amounts to the same thing, saying that no issue upon the subject of notice can be raised in the courts. To the extent that the opinion in that case conflicts with the views herein expressed, it is overruled.

In the case of *Stevenson v. Colgan*, 91 Cal. 649, 27 Pac. 1089, 14 L. R. A. 459, 25 Am. St. Rep. 230, the Supreme Court of California, in discussing the right of judicial review of legislative proceedings in enacting laws, said:

"The authority and duty to ascertain the facts which ought to control legislative action are, from the necessity of the case, devolved by the Constitution upon those to whom it has given the power to legislate, and their decision that

the facts exist is conclusive upon the courts, in the absence of an explicit provision in the Constitution giving the judiciary the right to review such action. We therefore hold that, in passing upon the constitutionality of a statute, the court must confine itself to a consideration of those matters which appear upon the face of the law, and those facts of which it can take judicial notice. If the law, when thus considered, does not appear to be unconstitutional, the court will not go behind it, and by a resort to evidence undertake to ascertain whether the Legislature in its enactment observed the restrictions which the Constitution imposed upon it as a duty to do, and to the performance of which its members were bound by their oaths of office."

In *Green v. Weller*, 32 Miss. 690, the court said:

"It has been urged that it is the duty of the judiciary, in passing upon the constitutionality of acts of the Legislature, to preserve with strictness the limitations and safeguards provided in the Constitution against the undue exercise of power by the stronger department of the government. But the duty of strict confinement within its constitutional power is equally incumbent on each department of the government. It may be that legislative acts may be passed without a compliance with the requirements of the Constitution. If such defect or violation appear on the face of the act, or by that which constitutes the record, which can be judicially noticed, the power of the court to determine the question is indisputable. But if the proper record shows that the act has received the sanctions required by the Constitution, as evidence of its having been passed agreeably to the Constitution, and its provisions be not repugnant to the Constitution, the regularity and stability of government and the peace of society require that it should have the force of a valid law; for otherwise every act of the Legislature would be open to be impeached, upon an inquiry into the facts which took place at its passage, all confidence in legislative acts would be destroyed, these acts, instead of receiving the sanction of the community, would open the door to litigation, and confusion and anarchy would take the place of law and order. Hence the wise maxim of the law, that such are presumed to be duly and solemnly done, until the contrary be shown in proper form; and it is this presumption which protects the judgments of courts from impeachment collaterally."

The result of our present views is that the provision of the Constitution is mandatory, and should be obeyed by the General Assembly; but there is always a presumption in favor of the legality of the legislative proceedings, and that such proceedings are conclusively presumed to have been in accordance with the constitutional requirements, unless the record, of which the courts can take judicial notice, show to the contrary.

The question does not appear to have come up again before the same members who participated in that decision. It must be admitted that the later decisions of the court do not clear up the question. Some of them, as in the cases of *Caton v. Western*

*Clay Drainage District*, 87 Ark. 8, 112 S. W. 145, and *State ex rel. v. Woodruff*, 120 Ark. 406, 179 S. W. 813, seem to have followed closely the language of *Davis v. Gaines*, *supra*. Others, like *Waterman v. Hawkins*, 75 Ark. 120, 86 S. W. 844, and *St. Louis Southwestern Railway Co. v. State*, 97 Ark. 473, 134 S. W. 970, seem to have the view of the present opinion. All of the cases on the subject up to the present time arose from acts passed at regular sessions of the Legislature, and were properly held valid for the reasons stated above.

[6] This brings us to a consideration of the peculiar facts of the case at bar. For the reasons already given, the testimony of the Governor cannot be considered. It is no part of the record required or provided in the Constitution and cannot be considered. The confusion that would result, and the evils that might result, from such a course, are obvious. The uncertainty of memory and of life itself, and the frailties of human nature, make it impracticable for laws to rest upon such a foundation. Such a course would be fraught with evils too numerous and varied to be classified.

Article 6, § 19, of the Constitution of 1874, reads as follows:

"The Governor may, by proclamation, on extraordinary occasions convene the General Assembly at the seat of government, or at a different place, if that shall have become since their last adjournment dangerous from an enemy or contagious disease; and he shall specify in his proclamation the purpose for which they are convened, and no other business than that set forth therein shall be transacted until the same shall have been disposed of, after which they may, by a vote of two-thirds of all the members elected to both houses, entered upon their journals, remain in session not exceeding fifteen days."

The proclamation of the Governor under this clause of the Constitution was issued on the 15th day of September, 1919, calling an extraordinary session of the General Assembly to convene at the seat of government on September 22, 1919, and the act in question was approved September 30, 1919.

[7-9] The General Assembly could not be called into extraordinary session, except by proclamation issued by the Governor, under article 6, § 19, of the Constitution. When the proclamation was issued, it became a record of which the courts could take judicial cognizance. The courts will also take judicial notice that the bill was passed and approved September 30, 1919. Article 5, § 26, provides that the notice of the intention to apply to the General Assembly for the passage of a special law shall be given at least 30 days prior to the introduction into the General Assembly of such a bill. This notice was not required to be given until after the proclamation of the Governor calling the Legislature to meet in extraordinary session was

issued. Until that was done no one could know that it would be called, and no notice under the Constitution could be given. The Constitution provides the time and place for regular sessions of the General Assembly. Article 5, § 5, of the Constitution of 1874. The time and place for the extraordinary session are fixed by the proclamation of the Governor. Article 6, § 18, Constitution of 1874. Therefore, until the Governor's proclamation is issued, there is nothing upon which to predicate action in giving notice of an intention to apply for the passage of a special act. Less than 30 days elapsed from the date of the issuance of the Governor's proclamation until the date the bill under consideration was approved by him. Hence it was impossible that the requirement of the Constitution with regard to giving notice could have been complied with.

Therefore this is a case where the record, of which the court may judicially take notice, shows conclusively that the requirement of article 5, § 25, of the Constitution of 1874, could not have been complied with by the Legislature, and under the views above expressed it is the duty of the court to declare the special act under consideration unconstitutional and void.

It follows that the decree must be reversed, and the cause will be remanded, with directions to grant the prayer of the complaint.

McCULLOCH, C. J. I concur in the judgment declaring the special statute under consideration to be void, for the reason that the constitutional provision requiring notice of the introduction of the bill for such a statute is mandatory, and, after giving conclusive effect to the implied finding by the Legislature that such notice as could have been given was in fact given, we find from the consideration of public records, which we take judicial cognizance of, that the executive proclamation calling the Legislature in extraordinary session did not give sufficient time for the required notice, and that a notice given before the calling of the session was not valid.

But I am unwilling to treat the case of *Davis v. Gaines*, 48 Ark. 370, 3 S. W. 184, as being overruled by this decision. The language of the opinion in the case referred to

is a little ambiguous, and is open to either interpretation, that the constitutional provision in question is merely directory, or that the legislative determination as to the giving of notice is conclusive. I think, however, that the learned justice who wrote the opinion in that case had in mind that the legislative determination was conclusive as to the required notice having been given, and that he meant, by the language used, to express that view, rather than the view that the provision is directory. When he stated that "if the general assembly choose to disregard this requirement, and to enact a local or special law, without notice, no issue upon the subject of notice can be raised in the courts," he meant that, notwithstanding the Constitution required notice, yet the Legislature had the power to disregard it by a false or erroneous finding that the notice had been given, and that in such event the finding is conclusive, and an issue thereon cannot be raised in the courts for the purpose of defeating the statute. He did not say that the constitutional provision on that subject was directory, but, on the contrary, he referred to it as a "requirement," which means, of course, that it is mandatory. A requirement is not a direction. It is a mandate; an execution. The language of that opinion, in so far as it might appear to hold that the constitutional provision is directory, may well be disapproved for the sake of making the position of the court clear on this question; but I object to treating the case as being overruled.

The next case in which this court dealt with the subject, after *Davis v. Gaines*, was *Waterman v. Hawkins*, 75 Ark. 120, 86 S. W. 844, and we put the decision squarely on the ground that the Constitution required the giving of notice, but that the legislative finding as to the giving of notice was conclusive—that courts should "indulge the conclusive presumption that evidence of such publication was properly exhibited before the passage of the act," and *Davis v. Gaines* was cited as supporting that view.

The case of *Waterman v. Hawkins* has generally been cited in subsequent opinions with *Davis v. Gaines* as stating the position of the court with regard to this question.

Mr. Justice SMITH shares the views here expressed.

**STOCK v. HAZEN STREET & SIDEWALK  
IMPROVEMENT DIST. et al.**  
(No. 40.)

(Supreme Court of Arkansas. Dec. 8, 1919.)

**MUNICIPAL CORPORATIONS** §450(4)—**STREET  
IMPROVEMENT DISTRICT INVALID FOR VARI-  
ANCE BETWEEN PETITIONS.**

Where a first petition for a street and sidewalk improvement district designated it for the purpose of improving and constructing sidewalks and improving streets in the town, but the second petition, signed by a majority in value of the property owners, described the improvement by naming a less number of streets and sidewalks than those in the whole of the town or city, such substantial variance between the improvements described in the two petitions was fatal to the validity of the district.

Appeal from Prairie Chancery Court; John M. Elliott, Chancellor.

Suit by Clea Stock against the Hazen Street & Sidewalk Improvement District and others. From a decree dismissing the complaint, plaintiff appeals. Reversed, and cause remanded, with directions.

Clea Stock brought this suit in equity against the commissioners of Hazen street and sidewalk improvement district to enjoin them from proceeding further in making the improvement, on the ground that the district was not organized in the manner provided by statute, and on that account is invalid. The plaintiff alleges that he is a citizen and resident property owner of the town of Hazen. The complaint further alleges: That the first petition of 10 property owners prays that the whole of the town of Hazen be laid off into an improvement district, "for the purpose of improving and constructing sidewalks and improving the streets in the town of Hazen, Ark." That the ordinance passed by the town council of Hazen pursuant to said petition, in laying off the district, uses the same language as the petition in describing the improvement. That the second petition, signed by a majority of the landowners of the proposed district, specifies the sidewalks, crossing, and streets that were to be improved, and that such description showed them to be less than all the sidewalks and streets in the proposed district. The court sustained a demurrer to the complaint, and, the plaintiff declining to plead further, his complaint was dismissed for want of equity. The plaintiff has appealed.

Melbourne M. Martin, of Little Rock, for appellant.

C. B. Thweatt, of De Valls Bluff, and J. F. Holtzendorff, of Hazen, for appellees.

HART, J. (after stating the facts as above). The first petition, the foundation for the or-

ganization of the improvement district, designated it "for the purpose of improving and constructing sidewalks and improving the streets in the town of Hazen, Ark." The second petition which was signed by the majority in value of the property owners of the proposed district, described the improvements by naming the streets and sidewalks specifically, and a less number than those in the whole of the city was described. Indeed, there was a substantial variance between the improvement as described in the two petitions, and this was fatal to the validity of the district. *Meehan v. Maxwell*, 115 Ark. 594, 172 S. W. 1013, and *Less v. Improvement District No. 1 of Hoxie*, 130 Ark. 44, 196 S. W. 464.

The decree is sought to be upheld by a special act of the Legislature enacted for the purpose of curing this defect. The special act was passed at the extraordinary session of the Legislature in September, 1919, and was void for the reason given in *Booe v. Road Imp. Dist. No. 4 of Prairie County, Ark.*, 216 S. W. 500.

It follows that the decree must be reversed, and the cause remanded, with directions to grant the prayer of the complaint.

**JACKSON v. LADY. (No. 207.)**

(Supreme Court of Arkansas. Nov. 17, 1919.  
On Rehearing, Dec. 15, 1919. Dissenting  
Opinion, Dec. 22, 1919.)

**1. DEEDS** §120—**EFFECT OF WARRANTY DEED.**

A deed executed by an heir in a family settlement, joined in by grantor's husband, conveying "whatever interest" grantor might have, but reciting that such property was the sole property of the grantor, held a warranty deed conveying the grantor's title to the premises described, in view of Kirby's Dig. § 734.

**2. DEEDS** §90—**CONSTRUCTION AS WHOLE;  
FAVORING GRANTEE.**

In construing a deed, the court must ascertain, if possible, the intention of the parties, especially the grantor, looking to the whole deed, harmonizing all parts, and favoring the grantee.

**3. DEEDS** §93—**RELATIONS OF GRANTOR TO  
PROPERTY AS EVIDENCE OF INTENT.**

In ascertaining the intentions of the parties to a deed, the court will consider the relations of the grantor to the property conveyed.

**4. DEEDS** §97 — **CONTROLLING EFFECT OF  
GRANTING CLAUSE.**

If there is a repugnancy between the granting clause of a deed and the habendum, the former will control the latter so as not to defeat the grant.

**5. DEEDS** §97—**RECONCILIATION OF REPUG-  
NANT CLAUSES.**

The rule that, where the granting clause of a deed cannot be misunderstood, there is no

room for construction, never applies where reconciliation between it and other clauses is possible upon consideration of the whole instrument so as to carry out grantor's intention.

**6. DEEDS ¶100—BOND FOR TITLE AS AFFECTING CONSTRUCTION.**

If there is any ambiguity or uncertainty as to the intention of the parties to a deed when considered as a whole, where the deed itself or extraneous facts show that it was executed in compliance with a bond for title, such bond may be considered.

**7. DEEDS ¶94—MERGER OF CONTRACT FOR SALE OF LAND IN DEED.**

A deed, made in execution of a contract for the sale of land, merges the provisions of the contract and all prior negotiations in the deed.

**8. DEEDS ¶100—CIRCUMSTANCES ATTENDING EXECUTION.**

In construing a deed, the court must place itself as nearly as possible in the position of the parties when the instrument was executed, to construe its origin and source and all the attending circumstances.

**9. QUIETING TITLE ¶44(1) — BURDEN OF PROOF AS TO RIGHT TO INJUNCTION.**

Where plaintiffs in a suit to quiet title pray an injunction restraining defendant from taking possession of the land and interfering with their title, the burden is upon them to show that they are entitled to such relief.

**On Rehearing.**

**10. DEEDS ¶118—SUFFICIENCY OF EVIDENCE AS TO LAND CONVEYED BY AMBIGUOUS DEED.**

In a suit to quiet title to land, based upon a deed describing it as "part of the S. E. N. W. 9.23 A., section 21, township 16 north, range 1 west," evidence *held* to sustain a finding that grantors intended thereby to convey certain described lands, justifying a decree covering such lands.

McCulloch, O. J., dissenting.

Appeal from Lawrence Chancery Court; Lyman F. Reeder, Chancellor.

Suit by Mary F. Jackson and Victoria Phelps against H. L. Lady for an injunction and to quiet title. Upon the death of Victoria Phelps, the cause was revived in the name of her coplaintiff. A decree dismissing the complaint and for defendant was rendered, and plaintiff appeals. Affirmed.

W. A. Cunningham, of Walnut Ridge, for appellant.

W. M. Ponder and Ponder & Gibson, all of Walnut Ridge, for appellee.

WOOD, J. This action was instituted by Mary F. Jackson and Victoria Phelps against the appellee in the chancery court of Lawrence county on the 2d of October, 1917.

The plaintiffs alleged that they were the owners in common of certain tracts of land

in Lawrence county which they described in their complaint and which contained in the aggregate 89.26 acres more or less. They alleged that their father, Henson Kenlon, devised the land described to Emeline Owens, who immediately upon the death of her father entered into possession and remained in possession of the lands until her death; that at her death the plaintiffs entered into possession of the same claiming to be the owners thereof by inheritance from their sister; that the defendant Lady, claiming to have some kind of title or interest in the lands, had attempted to enter upon the same, and was now threatening by force or stealth to enter upon the lands for the purpose of taking possession thereof. They prayed that the defendant be enjoined and that their title be quieted.

The defendant answered admitting that Henson Kenlon was the father of the plaintiffs and that he had executed a will as set up in the complaint and that he had died. He admitted that Emeline Owens, later Lady, later Bush, had died; but he denied that plaintiffs were her sole heirs at law, and denied that plaintiffs had entered into possession of the lands claiming it as the heirs of their sister. He admitted that Emeline Owens went into the possession of the land after her father's death, but denied that her possession was adverse to him. He alleged that in the year 1870 J. M. Phelps and Henson Kenlon were in business as partners; that Kenlon died in 1877 never having settled the partnership accounts, and that Phelps brought suit against his administrator and heirs for \$8,100; that defendant, who in the meantime had married Emeline Owens, and J. M. Phelps, the husband of Victoria Kenlon, settled the lawsuit after the same had been discussed by all the parties and the desire had been expressed by them for such settlement; that by this settlement defendant contracted to buy the lands devised to Victoria Phelps by her father, including the lands in controversy and 60 acres more which had been devised to Emeline Owens; that in pursuance of the agreement Phelps and his wife, Victoria, on October 28, 1884, executed their bond for title which was made an exhibit to the answer, and defendant executed notes in the sum of \$3,600, the purchase money, as the consideration of the settlement; that Phelps was to dismiss and did dismiss, the lawsuit; that afterwards the defendant carried out the settlement on his part by making full payment of all the notes, and that Phelps and Victoria Phelps by their warranty deed duly conveyed to the defendant all the lands embraced in the settlement including the lands in controversy; that the deed from Phelps and wife was executed in pursuance of the terms of the title bond and

for the purpose of giving force and effect thereto; that by virtue of the execution of the instruments and the death of Emeline Bush, without bodily heirs, the defendant became the owner in fee of the undivided one-half interest in the lands in controversy and is entitled to the possession thereof.

Defendant further alleged that the heirs of Henson Kenion who were living at the time of the above settlement and of the execution of the bond for title and deed in pursuance thereof were fully advised of the purposes of the settlement which resulted in the dismissal of the lawsuit, and that by reason of the execution and delivery of the title, bonds, and deeds, and settlement of the lawsuit and family dispute, they are now in equity and good conscience estopped from making any claim to the lands in controversy.

The defendant prayed that plaintiffs be denied the relief sought; that the lands be partitioned; that his title be quieted; and "for all other proper, general and specific, legal and equitable relief."

After the institution of the suit, Victoria Phelps died intestate, leaving Mary F. Jackson her coplaintiff and sole heir at law and in whose name the cause was revived and proceeded to trial.

The cause was heard upon the pleadings and the exhibits thereto and upon depositions, and the court found that the defendant was the owner and entitled to the possession of the undivided one-half interest of that part of the S. E.  $\frac{1}{4}$  of the N. W.  $\frac{1}{4}$  of section 21, township 16 north, range 1 west, lying south and east of the private survey No. 36 and containing 9.28 acres more or less, and the S.  $\frac{1}{2}$  of the N. E.  $\frac{1}{4}$  of section 21, township 16 north, range 1 west, containing 80 acres more or less.

The court entered a decree dismissing the complaint for want of equity and in favor of the defendant according to the above finding, from which decree is this appeal.

The facts are substantially as follows: Henson Kenion died in 1877, leaving a will by which he divided his lands, amounting to 455 acres, among his three daughters, Emeline Owens, Mary F. Vinson, and Victoria Phelps. The devise to Mrs. Owens contained the clause:

"To have and to hold the same to her the said Emeline Owens, and unto her heirs and assigns and to their proper use and behoof forever; provided, however, that if the said Emeline Owens should die leaving no bodily heirs the above lands to revert to her sisters, Victoria Phelps and Mary Vinson or to their heirs."

The lands devised to Emeline consisted of 146.28 acres.

Appellee in 1881 married Emeline Owens formerly Kenion. At the time of this marriage a lawsuit was pending between J. M. Phelps and the estate of Kenion in which the

administrator and heirs of Kenion were made parties defendant.

J. M. Phelps had married Victoria Kenion. Phelps and Kenion had been engaged in a partnership business. For some reason Phelps left the state, and during his absence Kenion died. On Phelps' return to the state, he claimed that on an accounting of the partnership business the estate of Kenion was due him a balance of \$8,100, and this claim was disallowed by the administrator, and Phelps instituted a suit in the chancery court to recover that amount.

The appellee testified that this suit was discussed frequently among the Kenion heirs. They desired a settlement. Two or three years after the appellee's marriage with Emeline, the suit was settled by appellee and Jim Phelps. It was understood between Phelps and the appellee that if the appellee would buy out the interest of Phelps' wife in the estate he would dismiss the suit. By the terms of the settlement and agreement, Phelps was to buy 60 acres of the land which had been willed by Kenion to his daughter Emeline and deed the same to the appellee. Appellee was to pay \$3,600 as the consideration and was to get 180 acres of land that belonged to Victoria Phelps individually in addition to the 60 acres that had been willed by Kenion to his daughter Emeline and also the undivided one-half interest of Mrs. Phelps in the other land devised by Kenion to his daughter Emeline, which it was supposed belonged to Mrs. Phelps at Emeline's death.

Concerning the 60 acres, the understanding was that the appellee was to get an immediate fee title, and hence a deed to this 60 acres was executed to Phelps by appellee and his wife and by Mary Vinson and her husband, E. A. Vinson. The reason this was done they considered that all the land devised to Emeline belonged to her for her life and at her death it went to her sisters. The two sisters signed the deed to Phelps in order that, when he signed the deed to appellee, appellee would have the fee title to all the lands owned by Victoria Phelps, including the 180 acres willed to her in her own right and the one-half interest in remainder which they supposed she had in the lands devised to her sister Emeline for life.

On the same day that the deed to the 60 acres was executed by Emeline Lady and the appellee and Mary Vinson and her husband to Phelps, Phelps and his wife executed a bond for title to all the lands covered by the agreement except the 60 acres.

The bond for title recited that in consideration of the sum of \$3,600 evidenced by promissory notes to be paid by H. L. Lady, in four installments of \$900 each, to J. M. Phelps and Victoria Phelps, the latter upon the payment of said notes "would make and

execute to him, Lady, a good and sufficient deed of conveyance" to the lands described in the bond. Among other lands described in the bond are the lands in controversy. The deed to the 60 acres was of date October 21, 1884, and the bond for title was dated October 22, 1884.

Appellee paid the notes, and there was executed to him a warranty deed, of date September 30, 1889, by J. M. Phelps and Victoria Phelps. This deed recites that—

"We, James M. Phelps and Victoria Phelps, his wife, for and in consideration of the sum of \$3,600 paid and to be paid to use by H. L. Lady do by these presents bargain, sell, and convey to H. L. Lady the following lands lying in Lawrence county, Arkansas, viz."

Then after describing certain lands, is this further recital:

"Whatever interest the said Victoria Phelps may have in part of the S. E. of the N. W. (9.23 A.) and the S. ½ of the N. E. ¼ of section 21, township 16 N., range 1 west. The last five tracts being the sole property of the said Victoria Phelps and which she conveys as feme sole."

Then follows the habendum, "to have and to hold the same to the said H. L. Lady and to his heirs and assigns forever," and a covenant, "to warrant and defend the title to said land to him against the lawful claims of all persons whomsoever."

After the appellee's purchase of the land in controversy, no claim was made thereto by Victoria Phelps until the institution of this suit. Emeline Bush died in the fall of 1917, and this suit was instituted soon thereafter.

Mrs. Phelps testified that she was married to J. M. Phelps in her seventeenth year and never had any business to transact for herself until after his death. She did not know anything about land numbers and would not know from reading numbers anything about how much land was supposed to be conveyed nor where same was located. She knew that her husband claimed that her father's estate was indebted to him, but knew nothing about the settlement. She knew that her husband sold her interest in her father's estate to Lady, but she did not sell any interest in her sister's land. She did not know she had any interest in it while her sister lived; never thought of it. The first intimation she had that her interest in her sister's lands was embraced in the deed to Lady was after her sister's death. She signed the bond for title and the deed. Her husband never told her that Lady had paid for the land. If the deed had been read over to her, she would not have known about it, because she did not know anything about land numbers.

Mrs. Jackson, the appellant, testified that she and her sister Victoria Phelps were the only heirs at law of Emeline Bush; that

when Emeline Bush died the two of them were left; that she and her sister Victoria were in possession of the lands in controversy.

The appellant contends that, under the will of Henson Kenion, Emeline Owens at his death took the title in fee to the lands in controversy; that, at the time of the deed of Victoria Phelps to the appellee Lady, Emeline Lady was still living, and therefore Victoria Phelps had no title which she could convey; that the deed of Victoria Phelps to Lady "conveying whatever interest said Victoria Phelps may have" would not pass title which she acquired to the lands in controversy by inheritance from her sister Emeline Lady at her death; that the bond for title and all the transactions by which the lands in controversy were to be deeded to the appellee Lady merge in the deed, and therefore could not avail the appellee. Therefore appellant was not estopped by the deed and prior transactions from asserting title.

[1] It is immaterial whether Victoria Phelps acquired the lands in controversy through the will of her father or by inheritance from her sister Emeline, for a majority of us are convinced that the deed which she and her husband executed to the appellee, under the facts of this record concerning that transaction, should be construed as a warranty deed to these lands which under our statute and decisions conveyed all the title which Mrs. Phelps had or which she afterwards acquired. Section 734, Kirby's Digest; Cocke v. Brogan & Thorn, 5 Ark. 693; Watkins & Trapnall v. Wassell, 15 Ark. 73; Holland v. Rogers, 33 Ark. 251-255; Broadway v. Sidway, 84 Ark. 527, 107 S. W. 163; Colonial & U. S. Mort. Co., Ltd., v. Lee, 95 Ark. 253, 129 S. W. 84.

[2-4] In the construction of a deed, like any other contract, it is the duty of the court to ascertain, if possible, the intention of the parties, especially that of the grantor. The whole deed is to be looked to and every sentence and word of it made to take effect if possible. Deeds are construed most strongly against the grantor or most favorably for the grantee. A deed must be so construed that all of its parts may be harmonized and stand together if same can be done and carry out the manifest intention of the parties. Endeavoring to ascertain the intention of the parties, the court will not look only to the contents of the deed, but will consider relations of the grantor to the property conveyed. The intention is to be gathered from a consideration of the whole instrument, rather than from particular clauses; but, if there is a repugnancy between the granting clause and the habendum, the former will control the latter so as not to defeat the grant.

The above are but Hornbook rules of construction which have been announced and



uniformly adhered to by our court from almost its very beginning to the present time. See *Doe v. Porter*, 3 Ark. 18, 36 Am. Dec. 448; *Gullett v. Lamberton*, 6 Ark. 109; *Malin v. Rolfe*, 53 Ark. 107, 13 S. W. 595; *Jenkins v. Ellis*, 111 Ark. 220, 163 S. W. 524; *Mt. Olive Stave Co. v. Handford*, 112 Ark. 527, 166 S. W. 532; and other cases to like effect cited in 2 *Crawford's Digest*, Deeds, 3 Construction and Operation, 1639.

[5] Of course, it is also one of the cardinal rules of construction that, if the language of the granting clause is so plain that it cannot be misunderstood, then there is no room for construction and other clauses must harmonize with this or yield to it. See *Swayne v. Vance*, 28 Ark. 285. But this rule never applies where reconciliation between the clauses is possible upon consideration of the whole instrument so as to carry out the intention of the grantor in making the deed. See *Swayne v. Vance*, supra, and other cases cited supra; 13 Cyc. 618 and 619, Deed.

[6, 7] Another well-settled rule of construction is that, if there is any ambiguity or uncertainty as to the intention of the parties when the instrument is considered as a whole, then the court may consider, in connection with the deed, a bond for title where the deed itself or the extraneous facts show that the deed was executed in compliance with the bond. Undoubtedly, as a general rule a deed made in execution of a contract for the sale of land merges the provisions of the contract therein and all prior negotiations leading up to the execution of the deed. 2 *Devlin on Real Estate*, p. 1570, § 850, Deed. But if there is such uncertainty and ambiguity in the language of the instrument as to require construction in order to ascertain the meaning of the parties thereto, then a bond for title previously executed by the parties to the deed may be considered in determining the question of intention and to explain any uncertainty or ambiguity in the deed.

"The question of merger has also been declared to be one of construction to be gathered from a consideration of the entire contents of the instrument, and the agreement upon which the deed is founded may be admissible or referred to, to explain any uncertainty or ambiguity in the latter." 13 Cyc. 616-619.

Now applying the above rules to the deed under review, it will be readily seen that the deed is a warranty deed executed by J. M. Phelps and his wife, Victoria Phelps, conveying six different tracts of land to the appellee. The language of the granting clause is:

"We, James M. Phelps and Victoria Phelps, his wife, for and in consideration of \$3,600 paid and to be paid to us by H. L. Lady do by these presents grant, bargain, and convey unto the said H. L. Lady the following land."

Then follows a description of the tracts. The fifth tract is the land in controversy, and at the end of the deed is:

"And whatever interest the said Victoria Phelps may have in the S. E. of the N. W. (9.23 A.) and the S. ½ of the N. E. ¼, section 21, township 16 north, range 1 west."

Following the description of the lands is this recital:

"The last five tracts being the sole property of the said Victoria Phelps and which she conveys as feme sole."

The habendum is "to have and to hold the same to the said H. L. Lady and to his heirs and assigns forever." The warranty is, "to warrant and defend the title to said land to him against the lawful claims of all persons whomsoever."

The granting clause, it will be observed, conveys the lands, and the covenant of warranty is to defend the title to said lands, and furthermore the statement is made concerning the last five tracts that same are the sole property of Victoria Phelps, and she so conveys them. If the clause, "and whatever interest the said Victoria Phelps may have," etc., stood alone, there would be some plausible ground for upholding the contention of the appellant that Victoria Phelps only intended to execute a quitclaim deed because she was in doubt as to whether she had any interest at all in the lands, or, if any interest, what such interest was. But, as we have seen, the granting clause conveys the land, and the clause following the description is an unequivocal declaration that the five tracts including the lands in controversy are her "sole property."

In the acknowledgment, she again declares that the land which she conveys, as a feme sole, "relates to the land belonging to her."

There is certainly sufficient ambiguity in the various clauses of the deed to justify a resort to the bond for title and the facts connected with the transaction, as the source from which this deed sprung, to determine what was the intention of the parties in its execution.

[8] It is the duty of the court to place itself as nearly as possible in the position of the parties when the instrument was executed, to construe its origin and source and all the attendant circumstances. *Wood v. Kelsey*, 90 Ark. 272-277, 119 S. W. 258.

Appellant relies upon the case of *Reynolds v. Shaver*, 59 Ark. 300, 27 S. W. 78, 43 Am. St. Rep. 36, to sustain his contention that the words "whatever interest the said Victoria Phelps may have" constituted the deed, in suit, a quitclaim only. But the language of the granting clause in that case was, "do grant, bargain, and sell unto Dennis Reynolds all our right, title, claim and interest in and to the following described land," etc., and

the covenant of warranty was, "warrant and defend the same unto the said Dennis Reynolds." The deed in that case purported to convey only the "right, title, claim, and interest in and to the land," and "to warrant and defend the same," etc.

The court in the above case was called on to construe only the meaning of the words, "all our right, title, claim, and interest in and to the following described land." These words stood out alone with no other apparent conflicting or qualifying clauses or words that would render their meaning uncertain or ambiguous. The facts of that case thus clearly distinguish it from the case under consideration.

While Mrs. Phelps testified that she did not sell any interest in her sister's land and did not know that she had any interest while her sister lived, yet the bond for title which she and her husband executed to Lady flatly contradict her. Furthermore, the testimony of the appellee Lady and the conduct of the parties at the time the settlement was made, which was in the nature of a family settlement, show clearly that she did at that time believe that she had title in remainder of the lands devised to her sister, which title she afterwards intended to convey with full covenants of general warranty to the appellee. See *Cocks v. Simmons*, 55 Ark. 104, 17 S. W. 594, 29 Am. St. Rep. 28.

The finding of the court, therefore, that Victoria Phelps had deeded the land in controversy to the appellee, that appellee was the owner of the land, and that his title thereto should be quieted, is correct.

While Victoria Phelps and the appellant in their complaint set up title by adverse possession in their sister Emeline, yet this was denied in the answer, and appellant introduced no proof to sustain the allegation. True, the appellee testified that he took possession of it by reason of his marriage with Emeline Owens and about a year thereafter purchased the lands and kept possession as long as he lived with her, and when they separated he surrendered possession of that particular part of the land and had never had possession of the same since. But there is no affirmative evidence that, after the appellee surrendered possession of the land to Emeline, she had the open, continuous, and adverse possession thereof for a period of seven years prior to her death. Indeed, the appellant makes no claim here to title by adverse possession.

The plaintiffs below, Victoria Phelps and Mary Jackson, were asking affirmative relief to have their title quieted and to have an injunction against the appellee, restraining him from taking possession of the lands in controversy and interfering with their title.

[8] The burden was upon the plaintiffs to show that they were entitled to such relief.

We are convinced that a decided preponderance of the evidence shows that Victoria Phelps had no title to the lands in controversy and that the trial court ruled correctly in dismissing their complaint for want of equity, and in entering a decree in favor of the appellee, describing the lands as they are described therein, and quieting his title thereto. The decree is therefore affirmed.

McCULLOCH, C. J., dissents.

#### On Rehearing.

WOOD, J. In the original opinion we affirmed the decree of the chancery court, in which the lands were described as that part of the S. E.  $\frac{1}{4}$  of the N. W.  $\frac{1}{4}$  of section 21, township 16 N., range 1 W., lying south and east of private survey No. 36, containing 9.23 acres, more or less, and the S.  $\frac{1}{2}$  of the N. E.  $\frac{1}{4}$ , section 21, township 16 north, range 1 west. This is the same description as that contained in the complaint.

The appellant contends on rehearing that the deed under which the appellee claims described certain of the land as "part of the S. E. N. W. 9.23 A., Sec. 21, township 16 north, range 1 west"; that this description is void for uncertainty—citing *Graysonia National Lumber Co. v. Wright*, 117 Ark. 151, 175 S. W. 405.

[10] While the description of this tract as contained in the deed is void for uncertainty, the testimony of Lady, detailing the circumstances of the settlement and other testimony in the case, showed unequivocally that it was the intention of J. M. Phelps and Victoria Phelps by their deed to include in the deed the above tract of land. The testimony fully warranted the court in so finding, and in correctly describing the land in the decree. The testimony would have been sufficient to have justified the court in reforming the deed, so as to have embraced this tract.

The decree of the court was tantamount to granting such relief to the appellee, and it was upon that theory that we said in the opinion:

"The finding of the court, therefore, that Victoria Phelps had deeded the land in controversy to the appellee, that appellee was the owner of the land, and that his title thereto should be quieted, is correct."

McCULLOCH, C. J. (dissenting). I am wholly unable to find any distinguishing features between this case and the case of *Reynolds v. Shaver*, 59 Ark. 300, 27 S. W. 78, 43 Am. St. Rep. 36, with respect to the interpretation of deeds of conveyances involved. In the former case the deed purported to convey the "right, title, claim, and interest in and to the land" described, and concluded with a clause whereby the grantors

undertook to "warrant and defend the same." This court decided that the deed was only a quitclaim, and that the warranty applied only to whatever interest the grantee had at that time. In the present case the deed, so far as concerns the land in controversy, only purported to convey "whatever interest the said Victoria Phelps may have in part of the S. E.  $\frac{1}{4}$  of the N. W.  $\frac{1}{4}$  (9.23 A.), and the S.  $\frac{1}{2}$  of the N. E.  $\frac{1}{4}$  of section 21, township 16 north, range 1 west"; and according to the doctrine of Reynolds v. Shaver, supra, it ought to be decided that the warranty applied only to whatever interest Victoria Phelps had at that time. In fact, the present case is the stronger one of the two with respect to applying the

warranty to the interest conveyed, for there were four other tracts described in the deed, and they are conveyed absolutely, and the warranty clause can appropriately be applied to them, so as to give full effect to it.

The deed in question was only a quitclaim, and did not, under Kirby's Digest, § 734, carry an after-acquired title. Blanks v. Craig, 72 Ark. 80, 78 S. W. 764; Wells v. Chase, 76 Ark. 417, 88 S. W. 1030; King v. Booth, 94 Ark. 306, 126 S. W. 830. Under any interpretation of Henson Kenion's last will, Mrs. Phelps acquired no vested interest in the land prior to the death of Emeline Owens, and her deed to appellee conveyed no title to the land in controversy.

## CREWS v. LOMBARD. (No. 19559.)

(Supreme Court of Missouri, in Banc. Nov. 17, 1919.)

1. APPEAL AND ERROR  $\S$ 536(8)—SUFFICIENT INCLUSION OF EVIDENCE IN ABSTRACT OF RECORD.

In a suit to cancel a note and deed of trust given to a broker to secure a loan on land, where the broker's defense was that plaintiff, the borrower, failed to deliver an abstract showing good title, etc., the abstract of the record on appeal by the broker from an adverse judgment is sufficient if it sets out those parts of the abstract of title on which the controversy hinged. (Per Goode and Graves, JJ.)

2. CONTRACTS  $\S$ 305(1)—WAIVER OF TIME PROVISION IN CONTRACT FOR LOAN.

Where an application for loan on farm land provided that the applicant should accept the loan, if application was approved within 30 days, yet, if the parties continued to deal thereafter without objection from either side, such dealing constituted a waiver of the provision. (Per Goode and Graves, JJ.)

3. EVIDENCE  $\S$ 383(7)—EFFECT OF RECITALS IN DEED AS TO PAST EVENTS.

Recitals in a deed relating to past events, such as the source of the grantor's title, are insufficient to establish the truth of the facts recited. (Per Goode and Graves, JJ.)

4. BROKERS  $\S$ 61(2)—ACTION TO CANCEL COMMISSION NOTE GIVEN LOAN BROKER.

In an action to cancel a note and deed of trust given a broker to procure a loan on farm land, where the application signed by the plaintiff, the prospective borrower, required him to furnish an abstract showing perfect title, to the satisfaction of the prospective lender, *held* that objections by lender to the abstract tendered were reasonable and in good faith, and plaintiff was bound to supply such deficiencies before he was entitled to a return of the commission note, etc. (Per Goode and Graves, JJ.)

5. PRIVATE ROADS  $\S$ 2(5)—ORDERS OF COUNTY COURT NOT VALID UNTIL ENTERED.

A verbal order of a county court in reference to an easement, or a right of way on a section line, which would connect property to a public road is of no avail until entered of record. (Per Goode and Graves, JJ.)

6. BROKERS  $\S$ 86(3, 5)—FAILURE OF BORROWER TO COMPLY WITH AGREEMENT WITH LENDER SECURED BY BROKERS.

In an action by a prospective borrower to cancel a note given as commission to a loan broker, evidence *held* to show that the borrower did not comply with his agreement that the land should have access to the public road, while the lender procured by the broker was ready, able, and willing to make the loan whenever the borrower would comply with the requirements. (Per Goode and Graves, JJ.)

Walker, C. J., and Blair, J., dissenting.

Appeal from Circuit Court, Pemiscot County; Frank Kelly, Judge.

Suit by Gideon Crews against J. P. Lombard. From a decree for plaintiff, defendant appeals. Reversed and remanded, with directions.

This is a suit in equity, commenced by plaintiff on February 24, 1914, in the circuit court of Pemiscot county, Mo., to cancel a promissory note for \$750, dated November 1, 1912, in favor of defendant, secured by a deed of trust on about 140 acres of land located in said county and described in petition. It is alleged in the complaint that said note was delivered to defendant as his commission for obtaining a loan of \$5,000 from the Union Central Life Insurance Company of Ohio; that he kept plaintiff's papers for many months, and failed to secure said loan; that plaintiff was forced to obtain the money elsewhere; that defendant refuses to deliver up said note, or to satisfy the record of said county in respect to same; that plaintiff has sold said land, under a contract which requires him to have said \$750 note and deed of trust released and satisfied of record; that said note is without consideration, and should be satisfied of record.

The answer contains a denial of those facts alleged in petition which are not admitted to be true. It alleges that on or about October 19, 1912, plaintiff, claiming to be the owner of said real estate, employed defendant, as his agent, to procure a loan for \$5,000, on ten years' time, which was to be secured by first mortgage deed of trust on said land; that plaintiff agreed, in his application for said loan, that he would furnish to any lender an abstract of title, showing an unincumbered fee-simple title in him to said land, subject to the approval of the lender; that he would secure an easement or right of way upon or adjoining said lands as a condition precedent to said loan; that defendant, as such agent of plaintiff, procured for him a lender, to wit, the Union Central Life Insurance Company, an Ohio corporation, which agreed to loan plaintiff \$5,000, for a period of ten years, upon plaintiff complying with the covenants made in his application, namely, that of furnishing to said company an abstract of title to said lands, showing a perfect and unincumbered fee-simple title in plaintiff, to the satisfaction of said Union Central Life Insurance Company, and upon complying with said agreement relative to the public road; that the above insurance company, at the time it agreed to make said loan to plaintiff, was a financially responsible corporation; that it has been able and willing at all times since said date to carry out its obligations in this respect and in regard to making said loan. It is averred that plaintiff failed to comply with the aforesaid agreements and undertakings on his part; that, though frequently requested to furnish

a good and sufficient abstract of title, showing a perfect and unincumbered fee-simple title thereto in plaintiff satisfactory to said company, and to comply with said covenant in regard to the public road, plaintiff refused to do so, and borrowed the money elsewhere; that before declining to carry out said agreements plaintiff executed and delivered to said defendant, as his commission, the \$750 note and deed of trust securing same.

It appears from the evidence that plaintiff lived in Pemiscot county, Mo., and was engaged with his partner and brother-in-law, S. P. Reynolds, in drainage work in said county; that he was the owner of the land described in petition, which was incumbered by a deed of trust for \$3,000 in favor of Eva Minor Crews. This loan is designated as No. 33 on the abstract of title. Plaintiff was desirous of borrowing the money to take up this indebtedness. The Pemiscot County Abstract & Investment Company, through Charles W. Shields, its secretary, was advertising that said company had money to loan on farms. Plaintiff says he asked Reynolds to see Shields and arrange to get some money on above land. Shields says that Reynolds came in first, and made application for the loan for Crews on the land in question; that he (Shields) had a Union Central application blank, and figured that he could get the money there cheaper than anywhere else; that he filled it out and turned it over to Lombard; that the loan was finally approved; that he furnished the company an abstract, which was examined by its attorneys; that two or three months afterwards the abstract came back, on what he thought were technical requirements; that Crews got in a hurry for the money, and had him (Shields) go to St. Louis to see Lombard about getting the money.

The application for the loan was dated October 17, 1912, and was sworn to by plaintiff before Charles W. Shields, notary public. That part of the application pertinent to the present inquiry covers, in substance, the following propositions:

(1) The application was made to the Union Central Life Insurance Company for a loan of \$5,000 for ten years.

(3) Plaintiff was to give a first lien on said real estate to secure the loan.

(4) Under the head of Location, the application recites that "the land is situated on and is accessible from a public road named \* \* \*."

(17) That he purchased the land in February, 1902, and it was wild land at said date.

(22) That the indebtedness on said land was a \$3,000 deed of trust in favor of Eva Minor Crews.

(29) Under the head of Title, the application recites, that "the title in fee simple, perfect and undisputed, is vested in Gideon Crews."

(30) Under the head of Abstract, the application recites that:

"I hereby agree to furnish an abstract to the land described in this application, showing perfect title in me, and my mortgage to this company the first lien of record, *all to the satisfaction of the company*, and I agree to pay all expenses incurred in procuring and perfecting such abstract and title." (Italics ours.)

The defendant, J. P. Lombard, was appointed by plaintiff, Crews, as his agent in said application to procure said loan from the Union Central Life Insurance Company of Ohio. Defendant testified without contradiction that Shields informed him Crews wanted a loan; that he (witness) went over the property carefully before he received the application about one week later; that on October 10, 1912, he wrote Reynolds, at Caruthersville, Mo., among other things, as follows:

"As there is no open public road to your place (plaintiff's land), however, *it will be necessary before we can make a loan with the company*, to obtain an easement to the lane from the northeast corner, east, and I would suggest a deed bearing this clause: 'The intention of this instrument being to make a common-law dedication of the above-described tract for road purposes to run with and be appurtenant to the title to the south 140 acres of the S. E.  $\frac{1}{4}$  of 15, 18, 12.' *If this road matter* can be arranged with Mr. Marshall, I trust your brother-in-law will sign the application with Mr. Shields, in order that I may submit it with my report and obtain an answer as promptly as possible." (Italics ours.)

Plaintiff says he does not remember of seeing the above letter, but he might have seen it; that it was very likely Reynolds spoke to him about it. Reynolds says, he may have received this letter, but does not recollect whether he did or not. Defendant testified that the above letter of October 10, 1912, to Reynolds, was properly addressed, stamped, and mailed. We are satisfied from other circumstances connected with the case that this letter was received by Reynolds, and its contents made known to plaintiff and Shields.

After the application was signed, it was turned over to defendant.

Shields testified in behalf of plaintiff as follows:

"Mr. Crews, through Mr. Reynolds, made this application for loan first, then ordered an abstract. After making the abstract I sent it to Mr. Lombard; don't think I showed it to Mr. Crews. Thereafter I handled this deal entirely, because I was getting a commission out of it and it was to my interest to get the title straightened up."

The evidence is undisputed that defendant received from Shields for the first time the abstract on November 19, 1912; that defendant sent the abstract to the insurance company at its home office, and got it back within

7 days, with an opinion of title on it, and an opinion attached to abstract; that on November 28, 1912, defendant sent the abstract with said opinions to Shields, and they were returned to defendant on January 8, 1913, without the requirements having been met; that defendant returned the abstract to Shields because the requirements were not met, and wrote him. Afterwards the abstract was returned to Shields, with the second opinion as to the title. The first opinion was dated November 25, 1912, and is marked as Defendant's Exhibit No. 1. The second opinion is dated January 13, 1913, and marked as Defendant's Exhibit No. 2. Shields says he cleaned up these requirements as near as he could, and returned the abstract to Lombard; that a second notation was then made as to the title, and he tried to clean it up; that he then went to St. Louis at the instance of plaintiff to see defendant about closing the deal.

The evidence is undisputed that Shields sent the \$5,000 note and deed of trust, and the \$750 note and deed of trust, to defendant on January 2, 1913; and that this was after he had gotten the requirements of the general counsel of the Union Central Company in regard to the title. We are satisfied from the testimony that after the abstract was made Shields was the accredited agent of plaintiff to look after and take care of the requirements made as to the title by the Union Central Life Insurance Company through its general counsel.

The first opinion rendered by counsel for the Union Central Life Insurance Company as to the title to land in controversy reads as follows:

"Nov. 25, 1912.

"Gideon Crews.

"First. The deed of trust at 32 is to be satisfied and canceled upon the record.

"Second. At 22 is a deed acknowledged before a notary public and justice of the peace, Lake county, Tenn. We are not clear as to this. As a justice of the peace for Tennessee has no authority to take acknowledgment to a deed conveying land in Pemiscot county, Mo., if either one of the grantors acknowledged before a justice of the peace, a new deed must be had.

"Third. There is a clean break in the chain of title between 14 and 17, which we do not care to pass without some further showing. We are not unmindful of the suit to quiet title. The decree was had upon constructive service, and the time for opening same has not expired. Let it be shown by affidavit when Baker Gordon, the grantee at No. 14, died, whether he left a widow, and the names and ages of his children.

"Fourth. If this was Gordon's homestead and he died prior to 1874, as is recited at 17, it would go to the widow in fee. We must have a strong showing therefore. Mr. Crews was the grantee at this number, and he certainly satisfied himself, or his attorney did, that he got good title. We suggest that the caption be amended, so as to describe the  $\frac{1}{4}$  and S.  $\frac{1}{4}$

of the N.  $\frac{1}{4}$  of the S. E.  $\frac{1}{4}$ . Describing it as the south part is indefinite.

"Fifth. The abstract is to be continued to show the record of the deed of trust to the company.

"Maxwell & Ramsey, General Counsel."

It is conceded that the figures "32" in first clause of above opinion should read "33." Reference was there made to the deed of trust of Eva Minor Crews for \$3,000, which was to be canceled when the loan was completed. Clause 2 in said letter, in regard to an acknowledgment taken before a justice of the peace in Tennessee, seems to have been cleared up by Shields, as no further requirement was made by the Central Company in respect to this matter.

The abstract of title, as to Nos. 14, 15, 17, 34, 37, and 38, reads as follows:

"No. 14. William J. Ward and wife to Baker Gordon; W. D. Dated May 11, 1864. Filed and recorded April 22, 1868, Book C., page 238.

"No. 15. Pemiscot County to Isaac Oliver. Patent dated May 17, 1859. Replied and re-recorded July 16, 1885. Patent. Rec. 1, page 10.

"No. 17. Louis Houck and wife to G. Crews; W. D. Dated Feby. 28, 1898. Filed and recorded Mar. 25, 1898, Book 14, page 155. Among other things this deed recited: 'Being the land purchased by me at the administrator's sale of Baker Gordon in about 1871; William C. Ranney being the administrator and the land ever since being owned and possessed by me.'"

"No. 34. Gideon Crews v. Unknown Heirs, etc., of Isaac L. Oliver, Deceased, and Unknown Heirs, etc., of Baker Gordon, Deceased. Suit to determine title filed in the circuit court of Pemiscot county, Missouri, to the July term, 1912.

"No. 37. Answer of defendants by Von Mayes, attorney, reciting that he was duly appointed their attorney. Answer general denial, except that defendants admit interest.

"No. 38. Gideon Crews v. Unknown Heirs, etc., of Isaac L. Oliver and Unknown Heirs, etc., of Baker Gordon. Defendants default; decree Sept. 9, 1912, in favor of plaintiff, decreeing title in plaintiff," etc.

Requirements 3 and 4 in Defendant's Exhibit 1, supra, refer to said Nos. 14, 15, and 17 of abstract.

The second opinion rendered by the Union Central Life Insurance Company through its counsel as to the title in question reads as follows:

"January 13, 1913.

"Gideon Crews.

"First. The company approved this, conditioned that the right of way to the public road be included in the application, mortgage, and abstract. The abstract does not cover any right of way. All that is shown with reference to this is stated in the letter of Mr. Shields in his letter of January 6, 1912. It is for the company to decide whether it will accept this.

"Second. Before we pass this, we should like to have two or three affidavits showing when

Mr. Crews went into the actual occupation of the security offered. Is there no one that can make an affidavit showing when Baker Gordon died? It is recited that his administrator sold the land in 1871, but the deed in which this recital is made is dated February 28, 1898.

"Third. The first comment of our letter of November 25th remains.

"Maxwell & Ramsey, General Counsel."

The first clause of this opinion called plaintiff's attention to the fact that a public road to the land in controversy would have to be shown. Clause 2 of this opinion refers to same matters mentioned in requirements 3 and 4 of the first opinion. The third clause of the second opinion simply refers to the Eva Minor Crews deed of trust for \$3,000, which was to be paid off and canceled when the loan was completed.

It appears from the evidence that Shields was in St. Louis in behalf of plaintiff on January 28, 1913. He had already received both of the above opinions of counsel, and says he attempted to comply with same, except that relating to old lady Gordon having a dower interest in the land. While in St. Louis on above date he requested Lombard to close the deal and pay out the proceeds of the loan. Lombard testified that he told Shields he was ready to close the loan if the requirements were met; that Shields said all the material requirements had been met; that he asked Shields if he had procured a public road, and the latter answered he had not, but had secured an order of the county court giving an easement along the section line; that he said to Shields, "It is not shown on the abstract;" that Shields then said "No," but he could show it. Witness then asked him what he had to say about the requirements in regard to the time when Baker Gordon died; that Shields said: "I have learned that administration is of record in Cape Girardeau county." He was then asked why he hadn't gotten it, and replied, "Well, I have been too busy." Defendant said he then proposed to Shields that they should telephone Sam Vandivort, an abstractor at Jackson, and ascertain from him the facts in regard to the administration in Cape Girardeau county.

Defendant testified that neither Crews nor Shields ever furnished him any copy of any order made by the county court in regard to said road; that he was in condition to close the deal if the requirements had been complied with; that he was ready and willing to comply with the conditions mentioned in the contract; that the \$750 note represented his commission, and no part of same had ever been paid. Defendant testified that Crews did not do everything that was required of him to do about the title; that he had not obtained a showing as to when Baker Gordon died; that he did not show the administration in Cape Girardeau county; and that he

had not shown there was a public road to this land.

Shields testified, in regard to the conversation between himself and Lombard, in St. Louis, on January 28, 1913, as follows:

"Q. He (defendant) offered to give you \$3,000 provided you would agree to straighten up this abstract and then give you the other \$2,000 as soon as the abstract was fixed? A. Yes, sir. Q. You declined to do that? A. Yes, sir." (Italics ours.)

Defendant Lombard testified in respect to this matter as follows:

"I was anxious to close the loan either by paying out the entire proceeds with the requirements all met, or to take up this \$3,000 note and interest, which I was told was being foreclosed. Mr. Shields left the office, and I expected from what he said that he was going to come back and see me later as to whether Mr. Crews and Mr. Reynolds wanted me to take an assignment of this \$3,000 note under the circumstances or not, and he never came back."

Defendant says Shields took the abstract with him when he left the office. He concluded his testimony as follows:

"Q. I will ask you, Mr. Lombard, at the time Mr. Shields came to your office were you in a position and ready and willing to pay over this \$5,000 at that time, and so informed Mr. Shields, provided the requirements were complied with? A. Yes, sir."

The Eva Minor Crews deed of trust was released by Shields, about August, 1913.

No record entry of the county court in reference to the public road was ever shown to have been made while the foregoing negotiations were pending.

Such other matters, if any, as may be necessary, will be considered hereafter.

On August 5, 1914, the trial court found the issues in favor of plaintiff, and entered a decree cancelling said \$750 note and deed of trust. Defendant in due time filed his motion for a new trial, which was overruled, and the cause duly appealed to the Springfield Court of Appeals. The latter certified the case to this court on the ground that the title to real estate was involved.

E. R. Rombauer and Jos. T. Davis, both of St. Louis, for appellant.

R. L. Ward, of Caruthersville, for respondent.

RAILEY, C. (after stating the facts as above). [1] I. It is strenuously insisted by respondent that as this is a proceeding in equity it was necessary for appellant, in his abstract of record, to set out all of the abstract of title offered in evidence by plaintiff. We are not favorably impressed with this contention as applied to the facts before us. It is not claimed that any of the pleadings or the oral testimony are omitted, nor is it complained that any testimony has been omitted,

except such parts of the abstract of title as are not questioned. The defendant claims, he was able, ready, and willing to carry out the agreements made with plaintiff in respect to the loan, when the latter furnished an abstract showing that an easement or public road had been acquired to the land in controversy, and showing the date of Baker Gordon's death and as to whether he left a widow and children prior to 1874, etc. It is conceded that there is nothing in the abstract of title relating to the public road. The only other requirement as to the title which had not been satisfactorily settled, so far as defendant and the Union Central Life Insurance Company were concerned, related to the Baker Gordon matter supra, and which is fully covered by Nos. 14, 15, 17, 34, 37, and 38 of the abstract of title heretofore set out. Our rules were not intended to require of litigants the doing of an unnecessary or useless thing, even in equity cases, where all of the material evidence is generally expected to be set out. Counsel for appellant have printed that part of the abstract of title which they deemed sufficient to enable us to pass upon the issues in the case.

We are not advised by respondent's counsel as to any further light which the unprinted portion of the abstract of title might throw on the requirements made of plaintiff as to the matters relating to Baker Gordon transactions supra, or the public road heretofore mentioned. If plaintiff's counsel was not satisfied with that which appellant had printed, in respect to the abstract of title, he could have furnished a supplemental abstract of record, covering such portions as he deemed of importance, which had been omitted by defendant. Having failed to pursue the latter course, and being satisfied that the record is sufficient as printed, we overrule the foregoing contention of respondent.

[2] II. It is contended by respondent that the contract which he made with the Union Central Life Insurance Company cannot be enforced, because of that provision, in clause 32 of the printed application, which reads as follows:

"I hereby agree to accept the loan applied for provided this application is approved by you within thirty days from this date."

The application is dated October 17, 1912. Shields testified that the loan was finally approved. Defendant, Lombard, testified that the loan was approved October 31, 1912. Even if it had not been approved within the 30 days, yet, if the parties continued with the deal thereafter without objection from either side, as they did in this case, it constituted a waiver of said provision. *McAlister v. St. Joseph Street Const. Co.*, 181 S. W. 54.

[3, 4] III. Paragraph 30 of the application, signed by plaintiff, for the loan reads as follows:

"I hereby agree to furnish an abstract to the land described in this application, showing perfect title in me, and my mortgage to this company [Union Central Life Insurance Company, of Ohio] the first lien of record, *all to the satisfaction of the company*, and I agree to pay all expenses incurred in procuring and perfecting such abstract and title." (*Italics ours.*)

The abstract of title was first furnished defendant on November 19, 1912. On November 25, 1912, the Central Company, speaking through its general counsel, noted on the abstract, among other things, the following:

"Third. There is a clean break in the chain of title between 14 and 17, which we do not care to pass without some further showing. We are not unmindful of the suit to quiet title. The decree was had upon constructive service, and the time for opening same has not expired. *Let it be shown by affidavit when Baker Gordon, the grantee at No. 14, died, whether he left a widow, and the names and ages of his children.*

"Fourth. If this was Gordon's homestead and he died prior to 1874, as is recited at 17, it would go to the widow in fee. *We must have a strong showing therefore.* Mr. Crews was the grantee at this number, and he certainly satisfied himself, or his attorney did, that he got good title."

"(*Italics ours.*)"

Turning to No. 34 of the abstract, we find that this plaintiff, Gideon Crews, brought suit in the circuit court of Pemiscot county, returnable to the July term, 1912, on constructive process, against the unknown heirs of Baker Gordon, deceased, to divest said unknown heirs of any interest they may have had in said land. As shown by No. 38 of the abstract of title, a decree was rendered for this plaintiff, on above service, on September 9, 1912. Turning to No. 17 of the abstract of title, we find that Louis Houck, on February 28, 1898, conveyed the land in controversy to plaintiff, Gideon Crews. This deed, among other things, recited—

"being the land purchased by me at the administrator's sale of Baker Gordon in about 1871. William C. Ranney being the administrator and the land ever since being owned and possessed by me."

The above opinion of the Union Central Life Insurance Company, of date November 25, 1912, was sent to Shields immediately, and he returned it without complying with the requirements of the Central Company. The second opinion of the Central Company, dated January 13, 1913, calling for the same information in regard to Baker Gordon, was sent to Shields. The above requirements of the Central Company were not only reasonable and proper, but the above facts would indicate that plaintiff, acting through Shields, on account of above litigation, and the recitals in Houck's deed to plaintiff, was in a position to furnish the above information readily and without trouble. The information which the company sought was impor-



tant, in view of the fact that the recitals in the deed from Houck to plaintiff in regard to Baker Gordon related to past events, and are insufficient to establish the truth of such recitals. *Laclede Land & Imp. Co. v. Goodno*, 181 S. W. 413, 414.

We are satisfied from the evidence that defendant and the Union Central Life Insurance Company acted in good faith, and with promptness in dealing with said loan; that the above requirement was reasonable, and should have been complied with, "to the satisfaction of the company," as provided in paragraph 30 of the application. We are likewise satisfied from the evidence that defendant and the Central Company were financially able, ready, and willing to make said loan, and pay over the \$5,000 contracted for, had the plaintiff and his agent, Shields, complied with the requirements aforesaid, and shown by the record or abstract a public road to plaintiff's land.

[5, 6] IV. Was it a part of plaintiff's contractual duty to show that the land in question was situated on, and accessible from, a public road? On October 10, 1912, defendant wrote Reynolds, one week before the application was signed, as follows:

"As there is no open public road to your place, however, it will be necessary, before we can make a loan with the company, to obtain an easement to the lane from the northeast corner, east, and I would suggest a deed bearing this clause. \* \* \*

"If this road matter can be arranged with Mr. Marshall, I trust your brother-in-law [Crews] will sign the application with Mr. Shields, in order that I may submit it with my report and obtain an answer as promptly as possible."

Clause 4 of the application, signed on October 17, 1912, reads as follows:

"The land is situated on and is accessible from a public road named. \* \* \*

We have heretofore found that defendant's letter of October 10, 1912, to Reynolds was received by the latter, and its contents made known to plaintiff and Shields. So that, when Shields filled out the application for plaintiff to sign, instead of making it appear that an easement or public road to the land would be obtained, they treated it as an accomplished fact, made the above recital, italicized the words "public road," and depended upon the ability of Shields to obtain thereafter the easement of public road contemplated by the parties. As there was no easement or public road to the land when the application was signed, it was manifest that Shields, as well as plaintiff, expected to have that matter attended to before the loan was consummated.

On January 13, 1913, the Union Central Life Insurance Company, speaking through its counsel in the second opinion, addressed to plaintiff, said:

"First. The company approved this [loan], conditioned that the right of way to the public road be included in the application, mortgage, and abstract."

Shields says he went before the county court and got it, to make an order for a right of way out of this place. He further testified:

"Q. Did you ever supply Mr. Lombard with a certified copy of the order? A. No; I don't know whether that order has ever been wrote up yet or not. Q. You never supplied Mr. Lombard or the Union Central Life Insurance Company with anything like that? A. No, sir." (Italics ours.)

It is clear, that all the parties in interest understood that this easement or right of way was to be obtained, and no objection was made by either plaintiff or Shields, pending the negotiations, to obtaining same. The plaintiff, in carrying out his side of the agreements, was bound to make good his assertion in the application that the land was situated on and was accessible from a public road. Even if the county court had made a verbal order in reference to the easement or right of way, it would have been of no avail until entered of record. *Nodaway County v. Williams*, 199 S. W. loc. cit. 227, and cases cited. Neither plaintiff nor Shields ever entered upon the abstract of title anything in respect to the easement or public road called for in above requirement.

We find from the evidence that defendant and the Union Central Life Insurance Company of Ohio were financially able, ready, and willing to carry out their agreements with reference to said loan, and were ready, able, and willing to pay over the amount contracted for, whenever the plaintiff met the foregoing requirements. We are further of the opinion that plaintiff failed to comply with his said agreements in respect to the requirements aforesaid, and that by reason thereof he is not entitled to maintain this action.

V. In view of the foregoing, we are of the opinion that the \$750 note and deed of trust securing same are based upon a valid consideration, and should not be canceled. We accordingly reverse and remand the cause, with directions to the trial court to set aside its decree in favor of plaintiff, and to dispose of the cause in conformity to the views heretofore expressed.

BROWN, C., concurs.

PER CURIAM. The foregoing by RAILLEY, C., is adopted as the opinion of the court.

GOODE and GRAVES, JJ., concur.

WILLIAMSON and WILLIAMS, JJ., concur in result.

WALKER, C. J., and BLAIR, J., dissent. WOODSON, J., absent.

LOHMANN et al. v. LOHMANN et al.  
(No. 20522.)

(Supreme Court of Missouri, Division No. 1.  
Dec. 1, 1918.)

1. WILLS §119 — REQUEST BY TESTATOR'S  
ATTORNEY TO WITNESSES AS SUFFICIENT PUBLICATION.

Where attesting witnesses signed after attorney who had drawn will had stated in testator's presence and hearing that testator wished them to attest will, and after testator had himself signed will, there was a publication of will, there having been, in effect, a declaration by testator that it was his last will.

2. WILLS §119—SUFFICIENCY OF PUBLICATION.

If testator, either by words, acts, signs, or conduct, makes clear to the witnesses that he intends the paper signed to be his will, there is a publication.

Appeal from Circuit Court, Warren County; Ernest S. Gantt, Judge.

Proceeding to contest will by Henry Lohmann and others against Frank Lohmann and others. Judgment sustaining will, and contestants appeal. Affirmed.

Osmund Haenssler, of St. Charles, for appellants.

Emil P. Rosenberger, of Montgomery City, for respondents.

GOODE, J. I. This is a statutory proceeding to contest the will of William Lohmann, who died in Warren county, November 22, 1914, having devised and bequeathed his estate, real and personal, to his son, Frank Lohmann, the defendant, and named said son the executor of his will. He provided, however, that Frank should pay out of the estate so left to him certain sums to his brothers and sisters, the plaintiffs in the case.

The will was executed April 8, 1910, at the town of Warrenton, and was proved in the probate court of Warren county on January 4, 1915, a little more than two months after the death of the testator.

The facts stated in the petition as reasons why the instrument purporting to be the last will of William Lohmann was in truth not his last will were that he was not at the time of the making of the will of testamentary capacity, and that he was unduly influenced by the defendant Frank Lohmann.

The facts attending the execution are that the deceased went to Warrenton on April 8, 1910, the date of the will, for the express purpose of making his last will. At his request the defendant went with him, but there is scant, if any, evidence that he attempted in any way to influence his father.

The latter went to the office of Judge Hukreide, at that time prosecuting attorney of Warren county, and later its probate judge. William Lohmann stated to Judge Hukreide what disposition he wished to make of his property. Judge Hukreide wrote the will in accordance with the wishes of the deceased, read it over to the latter, and explained fully the effect of the instrument as drawn, and the deceased said "it was as he wanted it." Thereupon Judge Hukreide called into his office J. J. Wessendorf, circuit clerk and recorder of the county and C. E. Schroeder, the county clerk, to attest the will as witnesses. William Lohmann signed the instrument in their presence, Judge Hukreide having said to them in the presence and hearing of the testator, "Mr. Lohmann would like for you to witness his will." After this statement and the signing of the will by William Lohmann, Mr. Wessendorf and Mr. Schroeder signed as witnesses.

Such are the material facts of the case, upon which the jury returned a verdict that the instrument in question was the last will of William Lohmann, deceased. Judgment having been entered accordingly, the plaintiffs appealed.

II. The evidence in the case was directed to the issues of whether the testator was of testamentary capacity when he executed the will, and whether he was unduly influenced by the son Frank. There was scarcely a trace of evidence to support the contention of plaintiffs on either of these issues and, in fact, those grounds of contest have been abandoned in this court, the only point urged being that the will is invalid because it does not appear the testator published it by declaring to the attesting witnesses that it was his last will.

[1] Passing over the objection that the proposition relied on here is outside the pleadings, suffice to say, the facts proved regarding what transpired at the signing and attesting of the will were, in effect, a declaration by the testator that it was his last will. *Martin v. Bowdern*, 158 Mo. 379, 59 S. W. 227. In this case, as in the one cited, the testator knew the witnesses were called to attest the will, and he heard Judge Hukreide state to them in his presence that he, the testator, wished them to attest it. The will was then signed by him, and they signed as witnesses.

[2] As regards publication, allowing for present purposes that our statutes require it, if the testator, either by words, acts, signs, or conduct, makes clear to the witnesses that he intends the paper signed to be his will, this is a publication. 40 Cyc. 1117; *Schierbaum v. Schemme*, 157 Mo. 1, 57 S. W. 523, 80 Am. St. Rep. 604.

The judgment is affirmed.

All concur.

## VORDICK v. KIRSCH et al. (No. 20206.)

(Supreme Court of Missouri, Division No. 1.  
Dec. 1, 1919.)

## 1. HUSBAND AND WIFE ⇐6(4) — ANTENUPTIAL CONVEYANCE BY HUSBAND IN FRAUD OF WIFE.

Where a man who had property worth over \$75,000, after engaging to marry plaintiff and before the marriage, executed two trust deeds and two notes secured thereby to a daughter by a former marriage, one securing \$30,000 and the other \$45,000, such transaction constituted a fraud on the grantor's prospective wife.

## 2. DOWER ⇐20 — RIGHT OF WIFE TO SET ASIDE FRAUDULENT ANTENUPTIAL CONVEYANCE.

Where a husband on the eve of his marriage conveyed eight-tenths of his property to a daughter by a former marriage, in fraud of the dower rights of his prospective wife, the wife may maintain a suit in equity to place all the parties in statu quo, notwithstanding that the conveyances may have been valid as between grantor and his daughter.

## 3. DOWER ⇐20—PARTIAL VACATION OF ANTENUPTIAL CONVEYANCE IN FRAUD OF WIFE.

Where a husband, in anticipation of marriage and to defraud his prospective wife of her dower rights, executed two trust deeds to a daughter by a former marriage, equity may set aside both deeds, and is not limited to setting aside so much of the fraudulent transaction as would cover plaintiff's interest; the dower being dower in rem, and not dower in personam.

## 4. HUSBAND AND WIFE ⇐6(4) — RIGHT OF WIFE TO SET ASIDE FRAUDULENT ANTENUPTIAL CONVEYANCE.

Where a husband, in contemplation of marriage, has executed trust deeds to a daughter by a former marriage in fraud of his prospective wife, that he has promised his first wife to care for this daughter out of the property which was the result of their joint efforts does not affect the wife's right to have the conveyance set aside.

Appeal from St. Louis Circuit Court; John W. McElhinney, Judge.

Action by Alinda B. Vordick against George L. Kirsch and others. Judgment for plaintiff, and defendants appeal. Affirmed.

Action to cancel two deeds of trust and the notes secured thereby (aggregating \$75,000) on the ground that they were made for the purpose of defrauding the plaintiff (respondent here) as the intended wife of August H. Vordick out of her dower and other marital rights as his wife. The action was brought by plaintiff, as the wife of August H. Vordick, against the said Vordick, as also against the trustee and beneficiary in the two respective deeds of trust, and also against the married daughter of Vordick, Augusta Linn.

Vordick, who was a physician in the city of St. Louis, with accumulated property of the value of over \$75,000, was returning from a trip to the Orient in the spring of 1912 (according to his statement in a deposition taken), and whilst on the good ship Celtic he became acquainted with the plaintiff. He was born in March, 1849, and was then a widower of some 63 summers. According to his statements, in 1913 he renewed the acquaintance formed on the Celtic, by beginning a correspondence with plaintiff, then a resident of the state of New York. In June, 1913, he went to New York to press his suit, but received no definite reply. The correspondence continued, and finally in the early part of August the parties were engaged to be married.

Shortly before he started for New York, and on the 26th of August, 1913, he executed the two deeds of trust, and the two notes secured thereby. The trustee and beneficiary in each are the same. One covers two farms in St. Louis county and secures the \$30,000 note, and the other covers two lots in the city of St. Louis and secures the \$45,000. He says that his daughter, Mrs. Linn, and the trustee and beneficiary, were all in an office with him, and he explained that he was thinking of getting married, and wanted to make these deeds of trust and notes so as to protect the daughter, Mrs. Linn. Kirsch, the beneficiary in both deeds of trust and the payee in both notes, paid nothing. When the papers were duly executed, Kirsch immediately indorsed the notes, and Vordick handed them over to his daughter, Mrs. Linn, together with the deeds of trust securing them. Thinking the great bulk of his property was safe in the hands of his daughter, he shortly followed his wedding ring (sent the plaintiff upon the agreement to marry) to the state of New York, and there on September 11, 1913, married the plaintiff. Upon a trial, the chancellor nisi canceled the two deeds of trust and notes secured thereby, and enjoined Mrs. Linn from transferring said notes. From such judgment this appeal is taken.

Since the trial Dr. Vordick has died, and as we gathered from the argument, and from another case upon our docket, Mrs. Vordick (plaintiff here) had secured a divorce from him prior to his death. Further details will be left to the opinion.

Muench, Walther & Muench, of St. Louis, for appellants.

Homer Hall, of St. Louis, for respondent.

GRAVES, J. (after stating the facts as above). [1] I. That Dr. Vordick, in contemplation of marriage with plaintiff, undertook to curtail the rights of his promised wife in his property, is too plain for argument. The

record facts so speak. He was transferring at least eight-tenths of his property in anticipation of the marriage. This was a fraud upon the woman to whom he then was engaged. The daughter, the beneficiary of this fraud, together with the other defendants, were apprised of the facts when the conveyances were made. They knew that the conveyances were being made in anticipation of marriage to plaintiff. The conveyances were of such proportions that the parties were bound to know the fraudulent purposes of the grantor. The purpose was patent to one of common understanding. The grantor told them that he was contemplating marriage, and was making these conveyances in anticipation thereof. No other construction can be placed upon the facts in evidence. The acts of Dr. Vordick were in fraud of his prospective wife, and the other parties were apprised of the fraud, and knew it.

It is urged that a man engaged to be remarried may, prior to such remarriage, make conveyance of a part of his property to a child of the first marriage, if acting in good faith. Cases are cited in support of this theory. We need not discuss them. The evidence in this record does not show good faith, and the doctrine invoked needs no review. The proportion of the property conveyed by Dr. Vordick refutes the idea of good faith, and the doctrine which is invoked by learned counsel is not in the case. The record evidence shows a fraud on the intended wife, rather than a transaction, in good faith, to properly care for the daughter. Our courts are astute in the protection of dower as against frauds, whether such frauds are committed "in contemplation of marriage or during its existence." *Donaldson v. Donaldson*, 249 Mo. loc. cit. 245, 155 S. W. 791, and cases cited. The facts in the instant case conclusively show the fraud upon plaintiff and the participation therein by all the parties upon the other side of the case.

[2] In fact, it is not seriously urged that there was not fraud; but it is urged that the court should not have canceled both deeds of trust, because of the doctrine that the doctor had the right to make reasonable provisions for the daughter of the first marriage, without being guilty of fraud. To put the question differently, they urged that, although it be conceded that the transaction as a whole was fraudulent, yet the trial court should, by the invocation of the doctrine, *supra*, divide the whole into parts, and say that one deed should be canceled and the other sustained. To this we do not assent. A scheme concocted in fraud (participated in by all the parties as here) should fail as a whole. Fraud vitiates whatever it touches. But they urge that a fraudulent conveyance is good as between the parties and therefore, as between the doctor and the daughter the deeds of trust were good. This we might

concede as a general rule. A fraudulent grantee cannot (because of the doctrine of estoppel) defeat the fraudulent grantee. This, however, is not such a case. The grantor is not attacking those conveyances. He was helping the fraudulent grantee to sustain them. Here the attack comes from the wife, whose rights were (through the fraud) vitally affected. What her rights might be were not as yet determinable. The time for the assertion of the wife's property rights had not yet arrived. Under such circumstances the court was justified, through this action in equity, in placing all the parties in statu quo. This is what the decree did.

[3] II. As said, it is urged that the setting aside of the two deeds of trust should have been only to the extent of the plaintiff's interest, and not in full; this on the theory that the conveyances were good as between the father and daughter. In other words, they urge that the wife stands in the position of a creditor in a case of fraudulent conveyances. There are expressions to this effect in the books. However, they usually occur in the cases in mere generalities, and without discussion. That the rights are similar there can be no question. However, there is this difference to be observed: The creditor has his claim fixed by an adjudication as to amount. The time for fixing the liability is at hand. In cases like the present the liability has not been fixed, nor can it be fixed until a later period.

Actions like the present are allowed to protect a future right of action. Dower initiate, and not dower consummate, is involved. If this were an action involving dower consummate, then the action would more nearly parallel the creditor's action. If the doctor was legally obligated to protect his daughter, the question might be different. But there was no legal obligation to protect her. There might be a moral obligation, but this moral obligation would be fully fulfilled by permitting the law to take its course. In other words, the law of descent and distribution would protect both the daughter and the wife. She therefore, as to a fraudulent conveyance to her, did not stand in the same attitude as one taking a fraudulent conveyance as against creditors. In many of the conveyances there is no protection to the fraudulent grantee, save and except the estoppel that the law pronounces against the fraudulent grantor. In this case the daughter is left with full legal protection as to her rights, with the fraudulent scheme set aside. In such case we do not believe there is necessity upon the part of a court of equity to invoke the estoppel against the fraudulent grantor in the conveyances. For this and other reasons suggested we see no error in uprooting the whole fraudulent scheme. It is not inequitable so to do, because the daughter will be fully protected under the

law, at the proper time. She and the wife will each get what the law allows them.

[4] III. It is urged that the doctor promised his first wife to care for this daughter out of the property which was the result of their joint efforts. Such a promise does not change the situation. It was without consideration and void. *Rice v. Waddill*, 168 Mo. loc. cit. 116, 87 S. W. 605. In the *Rice Case* supra, speaking of such a promise, this court said:

"But that promise was utterly without consideration and incapable of enforcement, either in a court of law or a court of equity. Subsequently, and before he receives the estate from his brother, his wife dies, and he marries plaintiff. A new obligation is assumed. Whatever his duty to his first wife and his children, the law casts upon him the duty of supporting his second wife, and the law attaches her right of dower to his estate."

And in a case somewhat similar (*Weller v. Collier*, 199 S. W. 974), this court promptly set aside in toto (not in part) a conveyance in fraud of a wife.

Finding no error in the record, the judgment is affirmed.

All concur.

STATE ex rel. BRINKMAN v. McELHINNEY, Circuit Judge, et al. (No. 21567.)

(Supreme Court of Missouri, in Banc. Nov. 19, 1919.)

1. PLEADING  $\S$ 49—CHARACTER OF CASE DEPENDENT UPON ALLEGATIONS OF PETITION.

The character of a suit is determined by the allegations in the petition, the prayer constituting no part of petition for such purpose, though it may be resorted to in determining plaintiff's conception of the petition where language of allegations is doubtful and uncertain.

2. JOINT ADVENTURES  $\S$ 5(2)—ACTION ONE FOR ACCOUNTING AND NOT TO DECLARE CONSTRUCTIVE TRUST.

Petition alleging that plaintiff and defendant engaged in a joint venture to purchase land, that defendant misrepresented cost of land so as to acquire half interest for less than he should have contributed, that defendant sold a portion of the land representing price, to be less than he actually received, that plaintiff purchased defendant's interest in portion of land, and sold his (plaintiff's) interest in remaining portion to defendant, thinking defendant had paid his half of the joint purchase price, and that defendant is indebted to plaintiff for various sums, *held*, an action in equity for an accounting and not an action to declare and decree a constructive trust.

3. VENUE  $\S$ 5(1)—IN ACTION FOR ACCOUNTING NOT AFFECTING TITLE TO REAL ESTATE.

Where action was one in equity for an accounting, and not an action to declare and de-

crea a constructive trust, the action, where both parties lived in city of St. Louis, should have been brought therein, and not in the St. Louis county circuit court; the action being one in which the judgment would not affect the title to real estate within Rev. St. 1909, § 1753, as amended by Laws 1915, p. 224.

Original proceeding in prohibition by the State of Missouri, at the relation of Benjamin G. Brinkman, against John W. McElhinney, Judge of the Circuit Court of the County of St. Louis, Mo., and another. Preliminary rule made absolute.

Frumberg & Russell, of St. Louis, for relator.

Randolph Laughlin, of St. Louis, and E. McD. Stevens, of Clayton, for respondents.

GRAVES, J. Original action in prohibition. Respondent is circuit judge in St. Louis county. In the St. Louis county circuit court Ernst E. Rombauer instituted a suit against the relator, Brinkman. In that suit the relator appeared specially and raised the question of jurisdiction over his person. It stands admitted that both Rombauer and Brinkman are residents of the city of St. Louis, and the whole question turns upon the character of plaintiff's suit, as such character is evidenced by the petition filed. Relator claims it is an action for an accounting between the parties, and therefore a personal action which should have been brought in the city of St. Louis, whilst Rombauer claims it is an action to enforce a constructive trust. The petition in Rombauer's case is somewhat vague and veiled in its terms, and incumbered with a wealth of verbiage, some of which is useless. What a relief to the courts there would be, if lawyers would state their cases in short, concise terms. With some this appears to be a lost art. We shall not undertake to state in substance the petition, although we might adopt with safety the analysis made thereof by relator. The petition reads:

"Ernst E. Rombauer, Plaintiff, v. Benjamin G. Brinkman, Defendant. No. —, Room 1.

"Plaintiff alleges:

"(1) That heretofore, to wit, on or about the — day of September, A. D. 1917, he entered into an oral agreement with defendant which he has since fully performed.

"(2) That by the terms of said agreement plaintiff and defendant undertook to purchase on joint account a tract of land lying, being, and situated in the county of St. Louis and state of Missouri, and more particularly described as follows:

"A tract of land in southwest quarter of section 12, township 44, range 5 east, bounded north in part by Big Bend road and in part by property now or formerly of Tutt, east by the Denny road, south by the section line, and west in part by the Geyer road and in part by property now or formerly of Roschcoe, and property

now or formerly of Tutt, containing about 136 $\frac{1}{4}$  acres, more or less, and formerly known as Brownhurst.

"(3) That by the terms of said oral agreement plaintiff and defendant each agreed to furnish 50 per cent. of the purchase price of said Brownhurst, and in consideration thereof was to have a 50 per cent. interest in the property if and when purchased, and defendant agreed to act without charge or commission as fiscal agent or fiduciary of himself and plaintiff in the acquisition, handling, and sale of said property.

"(4) That at the time of the making of said oral agreement, and for long thereafter, plaintiff relied implicitly on defendant, his integrity, and his honor, and did whatever defendant called on him to do, as and when called, in the belief that defendant was acting and would continue to act in faithful discharge of his own obligations under said oral agreement, and was bearing and would continue to bear equally with plaintiff whatever burdens were necessary or proper for their joint account in the acquisition, handling, and sale of said property.

"(5) That after the making of said agreement, and during the months of October and November, 1917, the defendant called on plaintiff from time to time to advance and contribute moneys, and represented and pretended to plaintiff that he was himself advancing and contributing moneys in like amounts. That said representations were wholly false, but that plaintiff relied on them and believed them to be true, and in faith thereof advanced to defendant, from time to time during said months, moneys aggregating, to wit, \$25,500.

"(6) That defendant, as such fiscal agent or fiduciary, consummated the purchase and acquisition of said property on or about November 30, 1917, and thereupon and thereafter falsely represented and pretended to plaintiff that the real purchase price was, to wit, \$98,814.40, consisting of \$73,814.40 in cash and \$25,000 in the form of a joint note, signed by the plaintiff and defendant, and secured by deed of trust on a portion of said property. That said representation and pretense was false and fraudulent, in that the real purchase price of said property was about \$25,000 less than it was represented to be by said defendant. That as a matter of fact the defendant, in gross breach of the fiduciary relation resting on him as aforesaid, so handled and manipulated the transaction that he consummated the purchase of the property wholly with plaintiff's money, and not only that, but he called on plaintiff to advance, and plaintiff did advance, about \$5,000 more than was actually needed for the purchase of the entire tract, and defendant wrongfully secreted and misappropriated to his own use the overplus by him so obtained.

"(7) That at or about the time said property was so purchased and acquired, defendant, as such fiscal agent or fiduciary, sold a portion of said property to the Society of Mary, alias Chaminade College, and at the time and afterwards falsely represented and pretended to plaintiff that the consideration bargained for and, in fact, received from said sale was, to wit, \$28,726.40, and no more. That in truth and fact the defendant received from or in connection with such sale a sum of money which plaintiff is unable to specify further than this,

that it amounted to at least \$1,000 in excess of the purchase price so falsely represented and pretended by defendant, and plaintiff believes and alleges that it amounted to very largely in excess of that sum. That the excess sum received by him, whatever it was, was by him wrongfully secreted and misappropriated wholly to his own use.

"(8) That at or about the time said property was purchased as aforesaid, defendant induced and persuaded plaintiff to purchase from defendant defendant's interest in a portion thereof, and more particularly described as follows:

"Commencing at a point on the south line of section 12, township 44 north, range 5 east, where the same intersects the center line of Denny road; thence along the center line of Denny road, north 1 degree and 40 minutes east 1,286.5 feet to a point; thence north 88 degrees and 30 minutes west 1,253.33 feet to a point; thence south 1 degree and 54 $\frac{1}{2}$  minutes west 1,236.5 feet to a stone in the south line of said section 12; thence along said section line south 88 degrees and 30 minutes east 1,258.85 feet to the center line of Denny road, the place of beginning—containing 36.21 acres without the roads, no part of the roads above described being conveyed.

"(9) That plaintiff purchased defendant's undivided one-half interest in said property in the belief, induced by defendant's false representations as aforesaid, that defendant had contributed one-half to the purchase price of the entire tract, and therefore had an equitable as well as a legal title to the undivided one-half interest so sold by him.

"(10) That said purchase of said undivided one-half interest led to a controversy between plaintiff and defendant, and, thereafter, to a sale by plaintiff to defendant of plaintiff's interest in the entire tract, but said controversy and sale were both in the mistaken belief, entertained by plaintiff and induced by defendant's fraudulent representations and pretenses as aforesaid, that defendant had contributed one-half to the purchase price of said property, and was therefore entitled to a one-half interest therein.

"(11) That the defendant never at any stage contributed any real money of his own to the joint account in the acquisition of said property, and, while he did sign with plaintiff the \$25,000 note secured by deed of trust on a portion of said tract, he thereafter so manipulated the dealings and transactions between plaintiff and himself, touching the remainder of the property, that he caused plaintiff to assume and pay, and plaintiff did assume and pay, said \$25,000 note and all the interest notes accompanying the same, and all the burdens imposed by the \$25,000 deed of trust securing the same. That the net result of the transaction was that plaintiff bore all the burdens of the enterprises, and was by fraud induced to believe that defendant bore half the burdens thereof, and therefore consented to defendant taking the legal title to an undivided half interest in said tract.

"(12) That while plaintiff was the owner of that portion of said tract, which is more particularly described in paragraph 8 hereof, he expended for permanent improvements and betterments thereof sums aggregating about \$3,000. That upon the defendant's purchase of

plaintiff's interest in said property defendant had and received the benefit of said improvements, betterments, and expenditures.

"(13) That on or about October 4, 1918, defendant purchased of plaintiff plaintiff's interest in said tract, as aforesaid, and paid therefor, among other considerations, a check for \$10,000, drawn on the Lafayette Southside Bank, and signed by himself. That said check was dated, to wit, October 4, 1918, and was by plaintiff deposited on the same day to the credit of plaintiff's wife in said same bank. That thereupon the receiving teller of said bank entered a credit of \$10,000 in the passbook which accompanied said deposit. That said check was no good and that defendant knew it. That after plaintiff left the bank defendant, who is the vice president of said bank, and as such exercises a large control in its affairs, took from said receiving teller said check and the deposit slip accompanying it on some pretense which plaintiff is unable to specify further than this, that he believes it to be or to have been the pretense that defendant wanted to examine into the deposit. That defendant withheld said check for about two weeks, during which time he was able to and did raise money to make it good, and then, and not until then, did he permit it to be credited to the account of plaintiff's wife on the books of said bank. That the account to which plaintiff deposited said check was an interest-bearing account, and defendant knew it. That by said transaction the plaintiff was defrauded by defendant of interest on said \$10,000 for about two weeks. That had plaintiff known that said \$10,000 check was bogus at the time he received the same he would not have consented to take or to receive the same, nor to have made the deal in which it figured, nor to have sold to defendant his interest in said property. That at the time said bogus check was made good, about two weeks after it was given, plaintiff would not have made said sale at all on the basis on which he did make it.

"(14) That if defendant be required to account to plaintiff for all moneys received by him from plaintiff for joint account, and for all moneys received by him from and in connection with sales of said property on joint account, and be permitted to claim credit only for such real moneys or other things of value as he in fact paid to plaintiff or contributed to joint account, it will be found on such accounting that defendant is indebted to plaintiff in a large sum, the exact amount of which cannot be determined until such accounting is had, but which plaintiff alleges will thereupon appear to be in excess of \$30,000. That if, on such accounting, defendant be required also to charge himself with all benefits received by him, directly or indirectly, by reason of his connection with the transactions aforesaid, including profits on sales made by him of parcels of said Brownhurst after his purchase of plaintiff's interest therein, and including also betterments obtained by him at plaintiff's expense, and interest of which he defrauded plaintiff, it will be found that defendant is indebted to plaintiff in a much larger sum.

"(15) That after his purchase of plaintiff's interest in said Brownhurst, defendant sold portions of parcels thereof for large sums, from which he derived large profits; but plain-

tiff is unable to describe the portions so sold or to designate the amount of the profits so received.

"(16) That defendant still retains in his own name of record a substantial portion of said Brownhurst. That plaintiff is not able to fully, accurately, and precisely describe the portions so retained and owned by defendant, but, in so far as plaintiff is able to identify and describe the same, the said portions are described as follows, to wit:

"A tract of land in the southwest quarter of section 12, township 44 north of range 5 east, described as beginning at a point in the center line of the Denny road, distance south 1 degree 40 minutes, west 2,506.82 feet from the intersection of the center line of the Denny road with the center line of the Big Bend road; thence running south 1 degree 40 minutes, west with the center line to said Denny road 202.29 feet to the south line of said section 12; thence along the south line of said section 12, north 88 degrees 30 minutes, west 2,656.50 feet to the center line of Geyer road; thence along the center line of the Geyer road north 2 degrees 9 minutes, east 1,819.80 feet to the south line of the property now or formerly owned by Tutt; thence along said Tutt south line 88 degrees 30 minutes, east 1,187.65 feet to the west line of property of Chaminade College; thence along the west line of said Chaminade College property south 1 degree 54½ minutes, west 1,617.51 feet to the southwest corner of said Chaminade College property; thence along the southwest line of said Chaminade south 88 degrees 30 minutes, east 1,460.29 feet to the place of beginning—containing 55.524 acres more or less, exclusive of roads.

"(17) That plaintiff furnished all the consideration for the acquisition of said property, and that defendant obtained title thereto by fraud and trickery as aforesaid, and now holds said title as trustee of a constructive trust for plaintiff's benefit.

"Wherefore plaintiff prays the courts:

"(1) To try and determine, first, the preliminary issue tendered by this petition of whether or not the defendant is an accounting party to plaintiff, and thereupon to adjudge that the defendant was and is such accounting party, and to decree and order him to make, state, and file before a referee to be appointed for the purpose of taking the accounting his statement of account on a day certain, and to decree the general scope of such accounting, and to order the defendant to charge himself, in such account, with all moneys received by him from plaintiff for joint account, and with all moneys received by him and in connection with the sale to Chaminade College, and with all moneys obtained by him from plaintiff in excess of the moneys necessary to consummate the purchase of said Brownhurst, and with the value of all betterments obtained by him at plaintiff's expense, and with the proceeds of all sales made by him subsequent to his acquisition of plaintiff's record title to said property, and with the fair rental value of the property remaining in his possession during his tenure thereof, and with the fair and reasonable value of the property yet remaining in his possession, and with all interest and other sums of value of which he may be found to have de-

frauded plaintiff in connection with the transactions aforesaid, and with interest at the legal rate on plaintiff's moneys obtained by him through fraud, trickery, or misrepresentation; and permitting defendant to claim credit, item by item, with vouchers serially numbered and identified, for all moneys which he may claim to have paid to plaintiff or for plaintiff's account and benefit; and to grant plaintiff leave to surcharge and falsify such account on a day certain; and to order the referee to try and determine the issues to be raised by defendant's said statement of account, and by plaintiff's surcharges and falsifications thereof, and to make report thereon to the court with all convenient speed.

"(2) Upon the incoming of the referee's report, to try and determine such issues as may be raised by exceptions thereto, and thereupon to ascertain and determine the amount for which defendant is accountable to plaintiff, and to render judgment in favor of plaintiff and against defendant for the amount so ascertained.

"(3) To order the defendant to pay such amount to plaintiff on a day certain, and to decree, upon his failure so to do, that his title to the property so standing in his name as aforesaid, be divested out of him and well and truly vested in plaintiff, and thereupon that the amount of plaintiff's judgment against defendant be and stand credited with the reasonable value thereof to be fixed and determined by the court in its said decree.

"(4) To vacate and set aside all dealings and transactions by and between plaintiff and defendant relating to or growing out of the purchase of said Brownhurst on November 30, 1917, in so far as such vacation may be necessary to do full and complete equity between the parties.

"(5) To grant to plaintiff all further and proper relief, including the costs of this cause."

The sole question is: Does this petition show a case whereby the title to real estate may be affected, within the terms of section 1753, R. S. 1909, as amended by our act of 1915 (Laws of 1915, p. 224)? The amendment added in 1915 is not involved here. The old section 1753 contains all here involved. It reads:

"Suits for the possession of real estate, or whereby the title thereto may be affected, shall be brought in the county within which such real estate, or some part thereof, is situated."

[1] I. The character of this suit is dependent upon the allegations in the petition. For this purpose the prayer of the petition constitutes no part thereof, although at times we go to the prayer to assist us in determining the plaintiff's conception of the petition, where the language of the petition is doubtful and uncertain. The question is: Will a judgment which could be properly rendered upon this petition, "affect the title to real estate" within the meaning of section 1753, R. S. 1909. The amendment of 1915 only goes to the enforcement of special tax bills, and is not involved here. The question

can only be determined by a review of the allegations of the petition.

II. The petition charges a joint venture entered into between Rombauer and Brinkman. This is said to have been by a parol agreement, which has been fully performed by Rombauer. By this agreement each was to put in half of the money with which to purchase 146 acres of land, and each to share in the same ratio in the profits of the venture. From the petition it is gathered that the purchase is made, and the title placed in the two parties. We start then with the proposition that the title passed to and vested in the two individuals, as contemplated by the oral agreement.

However, it is averred that Brinkman said the land cost \$98,814.40, when in fact it cost about \$25,000 less than that sum. According to the petition, the land actually cost \$73,814.40, and \$25,000 of this purchase price was paid by a mortgage back on the land for that sum. This would leave as cash paid out for the farm the sum of \$48,814.40. Plaintiff charges that on the account of the purchase (in the months of October and November, 1917) he contributed \$25,500, and later the sum of \$5,000, or \$30,500 in all.

Yet we find the conclusion stated to the effect that the farm was purchased and paid for wholly with plaintiff's money. This mere conclusion is refuted by the specific statements in the petition: (1) By the two specific sums of money stated as aforesaid, and (2) by the joint obligation of the two for \$25,000.

Even under plaintiff's petition, Brinkman must have paid in cash the difference between \$48,814.40, and the \$30,500 that Rombauer says he turned over to Brinkman on account of the purchase. This would be over \$18,000 in cash. Besides, Brinkman was jointly obligated by note for \$25,000. So that upon its face the petition does not show the property to have been wholly paid for by the money of the plaintiff.

But the foregoing is largely explanatory. After all these transactions, the title to the property was actually vested in the two parties interested in the deal. If through fraud, deceit, or misrepresentation Brinkman got his interest in the title for less than he should have put in, he could be made, in equity, to account for his proportion; but this would not involve or affect the title. These facts would not make a constructive trust, upon which title in equity could be decreed in Rombauer.

So, also, if Brinkman actually procured such land for \$25,000 less than he represented the price to plaintiff in the circuit court suit, this might be a matter to be considered in the accounting. If the land cost \$98,814.40, as Brinkman said, then there would be \$73,814.40 cash and the \$25,000 note in the purchase price, and Rombauer, having



only paid \$30,500 of this cash amount, would be short on his part of the cash payment of one-half of the \$73,814.40. But all this would only be a matter for consideration in an action for an accounting between the parties to the joint venture. The judgment to be entered upon this issue would not affect title to real estate, any more than another money judgment.

III. Next it is said that the parties sold a part of this land, the title of which was in the two, to the Society of Mary, and that Brinkman represented the sale price to be \$1,000 less than it really was, and thus beat Rombauer out of one-half of such \$1,000. How this can affect title to real estate we do not see.

IV. Following this sale to the Society of Mary, it is averred that Brinkman induced Rombauer to purchase his (Brinkman's) half interest in a portion of this property. It is also averred that this purchase was made under the belief that Brinkman had paid his half of the joint purchase price of the whole tract, and that this purchase led to a controversy between the parties, "and, thereafter, to a sale by plaintiff to defendant of the entire tract." Here the title of what was left passed fully to Brinkman, but Rombauer says he might not have so deeded had he known that Brinkman had not paid his share of the investment. We have dealt with the investment feature in our paragraph 2, and more need not be said here. If the facts do not show a resulting trust, as we discussed it in said paragraph 2, then there can be no title affected by a proper judgment on this portion of the petition.

V. A further charge is that Brinkman so managed the joint enterprise that Rombauer did assume and pay the \$25,000 joint obligation of the two. Just how this was done is not stated; but, assume it to be true, Brinkman might in some way be liable for his portion of the obligation, but this liability does not involve or affect title to real estate.

VI. Another claim is that, whilst plaintiff was the owner of the tract above mentioned, and after he had purchased Brinkman's half interest therein, he placed \$3,000 in improvements thereon, and those improvements were on this portion of the land when he conveyed the whole of the tract to Brinkman. By some course of reasoning Rombauer thinks he is entitled to this \$3,000. If so, it can be had upon an accounting, but it affects no title to real estate.

VII. Then again it is averred that in the purchase of the entire tract by Brinkman, or rather in the purchase of Rombauer's interest in the entire tract, Brinkman gave a check for \$10,000 in part payment, which check was not placed to the account of Rombauer's wife for two weeks after the giving of the check, and, the account of the wife

being an interest-bearing account, interest for two weeks was lost. There is also a rambling statement to the effect that the check was not good when given, and, had Rombauer known this fact, he would not have sold his interest. The petition shows that Rombauer got \$10,000 on the check, and is holding on thereto like grim death. If he lost anything, it was interest for the alleged two weeks. An adjustment of this difference does not affect title to real estate. He does not ask to rescind the contract, nor has he placed himself in position to rescind it.

VIII. We next find an averment to the effect that if Brinkman is required to account to Rombauer for all moneys received by him from plaintiff, and for all moneys received by Brinkman on account of sales made by said property, the said Brinkman will be found to be indebted to Rombauer in a sum in excess of \$30,000.

Further allegations are that after Brinkman acquired full title he sold portions thereof for large sums, and presumably Rombauer wants a portion thereof; but the petition does not plainly so say. We find nothing here affecting the title to real estate.

IX. The last allegation of the petition is that Brinkman is now the holder of a portion of the whole tract, describing such portion, which is averred to be a fraction over 55 acres. This allegation is followed by these words:

"(17) That plaintiff furnished all the consideration for the acquisition of said property, and that defendant obtained title thereto by fraud and trickery as aforesaid, and now holds said title as trustee of a constructive trust for plaintiff's benefit."

This language must be considered in connection with what has gone before it. When so considered, it is insufficient to predicate a constructive trust thereupon. The specific facts pleaded show that Rombauer did not pay all the consideration for the tract, as we fully demonstrated in our paragraph 2, supra. Nor do the facts pleaded show a constructive trust, and the mere conclusions in the paragraph, quoted above, does not change the situation.

[2, 3] X. The foregoing covers the petition. The prayer of the petition is found in our statement, but need not be further considered. As we read the facts pleaded (excluding the mere conclusions of the pleader), the petition filed in the circuit court stated an action in equity for an accounting, and not an action to declare and decree a constructive trust. In other words, the petition fails to show an action in which the judgment therein might affect real estate. It stood admitted in the circuit court upon the special challenge to the jurisdiction that both parties lived in the city of St. Louis. The ac-

tion should have been brought there. No general appearance has been entered, nor was jurisdiction of person in any wise waived. The circuit court of St. Louis county is therefore without jurisdiction to further proceed.

Let our preliminary rule in prohibition be made absolute. It is so ordered.

WALKER, C. J., and BLAIR, WILLIAMS, GOODE, and WILLIAMSON, JJ., concur. WOODSON, J., absent.

# ESSTMAN v. UNITED RYS. CO. OF ST. LOUIS. (No. 20131.)

(Supreme Court of Missouri, Division No. 1. Oct. 10, 1919. Respondent's Motion for Rehearing Denied Dec. 1, 1919.)

## 1. TRIAL $\Leftrightarrow$ 252(9)—INSTRUCTION MISLEADING AS WITHOUT SUPPORT IN EVIDENCE.

In an action for injuries to a child whose foot was run over by a street car, instruction that if the jury found that the child ran from the east side of the street into the car "at or near the rear trucks thereof," etc., *hold* erroneous as misleading; there being no evidence that the child ran into the car at or near the rear trucks.

## 2. APPEAL AND ERROR $\Leftrightarrow$ 837(7)—RECOVERY ON FACTS SHOWN BY DEFENDANT.

Where a child injured by a street car pleaded the motorman failed to stop in the shortest time and space possible after he saw, or by vigilant watch could have seen, the first appearance of danger, and such ultimate fact is inferable from the facts shown by defendant as well as those attempted to be shown by plaintiff, and the jury accepts the former rather than the latter, plaintiff is entitled to the benefit and to recovery.

## 3. APPEAL AND ERROR $\Leftrightarrow$ 930(1)—INFERENCES FROM PROOF IN FAVOR OF VERDICT.

Plaintiff's case on verdict for him is entitled to every reasonable inference of fact arising on all the proof.

## 4. TRIAL $\Leftrightarrow$ 285—READING OF INSTRUCTION IN CONNECTION WITH EVIDENCE.

An instruction must be read in connection with the evidence.

## 5. STREET RAILROADS $\Leftrightarrow$ 95(3)—DUTY OF MOTORMAN ON DANGER TO PEDESTRIAN.

Under the vigilant watch ordinance of the city of St. Louis, it was the duty of a street railway's motorman operating through a street at an intersection, where he saw a child crossing the street, to have kept a vigilant watch for the first appearance of danger, and to have stopped the car on such appearance in the shortest time and space possible.

## 6. STREET RAILROADS $\Leftrightarrow$ 95(3)—DUTY OF MOTORMAN TO STOP TO SAVE CHILD.

Danger to a child, and the duty of the motorman of defendant street railway's car to stop

it in the shortest time and space possible, began the instant the child left the sidewalk to the knowledge of the motorman, bound headlong for the track, though it seemed he was headed directly for the center of the car rather than ahead of it.

## 7. STREET RAILROADS $\Leftrightarrow$ 117(13)—JURY QUESTIONS IN ACTION FOR INJURIES ON TRACK.

In an action for injuries to a child by a street car, questions whether the car was stopped by the motorman after the first appearance of danger within the shortest time and space possible, in view of the situation, and whether, had it been so stopped, the child would have been injured, *hold* for the jury under the evidence.

## 8. TRIAL $\Leftrightarrow$ 287(2)—REDRAWING OBSCURE INSTRUCTION.

An instruction obscure before modification by the court, and not materially aided by the modification, should be redrawn.

Appeal from St. Louis Circuit Court; Benj. J. Klene, Judge.

Action by Abraham Esstman, by his next friend, Fannie Esstman, against the United Railways Company of St. Louis. From judgment for defendant, plaintiff appeals. Reversed, and cause remanded.

Sterling P. Bond, of St. Louis, for appellant.

George T. Priest, of St. Louis, for respondent.

RAGLAND, C. On the 1st day of June, 1918, appellant, then a minor under four years of age, came into contact with one of respondent's electrically propelled cars while the same was being operated in a public street in the city of St. Louis, whereby one of his feet was so mangled that it was necessary to amputate a portion of the leg. He instituted this suit by next friend in the circuit court for said city to recover damages therefor, and, the trial resulting in a judgment adverse to him, he brings the case here for review by appeal.

The petition counts on the vigilant watch ordinance. The answer is a general denial.

The events leading up to and resulting in the injury occurred in that portion of North High street which lies between Biddle and Carr streets, both of which run east and west a block apart where they intersect High. On the day in question, respondent was operating its street cars on a single-track railway east on Biddle street to High, thence south on High to Carr street, and thence on south. On Carr street it was operating another line of railway running from west to east, and it always brought its cars proceeding south on High to a stop before entering upon and crossing Carr street. No exact measurements are given of the portion of High street lying between Biddle and Carr,

but from estimates given by witnesses it was approximately 300 feet long and 40 feet wide. The motorman on the car that caused, as it is alleged, appellant's injury, estimated that the sidewalk on the east side was 6 or 7 feet wide, and that the distance from the walk to the first rail of the street car track was 8 or 10 feet. Another witness for defendant (referring apparently to the distance between the walk on the east side and the first rail) estimated the same at 12 feet. The track was presumably in the center of the street. There was a continuous upgrade from Biddle to Carr, and at the time in question the street was open and clear and the rails were dry. The district referred to was a populous one. Appellant lived with his father and mother in rooms over a bakery conducted by the father in a building on the east side of High street, the second door north from Carr. He received his injury about 6 o'clock in the afternoon. The manner of his coming into contact with respondent's car is the subject of wide divergence of testimony between plaintiff's witnesses and defendant's. His mother testified that just prior thereto she and her husband were sitting out in front of the bakery, and that her son was crossing the street to play with other children on the sidewalk; that she and her husband then went inside, and she did not see her boy again until he was hurt. Four other witnesses for plaintiff, whose testimony as to essential matters is substantially the same, say that the appellant was crossing High street from the west to the east side, walking slowly; that when he reached a point 3 or 4 feet from the west rail one of respondent's cars going south was then 15 or 20 feet north of him running at the rate of 3 or 4 miles an hour; that both child and car continued to so proceed until the child was between the rails, but nearer the east rail, when he was struck and knocked down by the corner of the fender on the east side, his body falling for the most part east of the east rail, and one or more of the wheels of the truck on that side passed over his feet; that the point where the child was struck by the car was about 45 feet from Carr street.

The motorman who was operating the car, introduced as a witness by the defendant, testified, in substance, that when he turned off of Biddle street into High, he saw the child standing by himself on the sidewalk on the east side of High street about 70 feet north of Carr street with his face toward the wall of the adjacent building; that as the car proceeded down the street, running at the rate of about 6 miles an hour, he met a wagon going north; that just as the wagon passed the front trucks of the car, the child ran from the sidewalk immediately behind the wagon straight toward the center of the car; that he had kept his eye on the child

all the while, saw him turn around and start toward the car, and saw him when he left the sidewalk about the time the wagon passed the front trucks of the car; that when the child left the sidewalk he began to stop the car, and that he stopped in about 5 feet, but before he had it stopped the rear trucks passed over the child's foot; that the point where the child was run upon was about 70 feet from Carr street where he was going to stop; that he was running slower than 6 miles an hour at the time of the collision because he was approaching a regular stop; that the car was about 40 feet long; and that it was about 8 feet from the center of the back truck to the rear end. Asked specifically as to what point the boy ran into the car, he answered:

"I thought he would hit about the center of the car between the front and the back trucks."

Louis Kuntz, an engineer for a box company and a witness for defendant, testified in part as follows:

"I was about the third window back from the front end of the car. I was seated right next to the window. The window was open, and I was leaning against the open window, against the outside, those little bars there. Being tired, I was resting. My attention was first attracted to a boy about five or six feet away from the car, running as though he was to run right into the car opposite me, on the east side of the car. He continued going and seemingly as though he would strike the car right back of me, seemingly the seat back of me. I just tried to look at him until he just came about the car coming forward; passed out of my view just as I thought he was about to meet the car. With reference to where I was sitting, it was about one seat behind the first cross seat. I did not hear any scream immediately after that. After the accident had happened and the parents and the people came running to the track, some one screamed. The car stopped. I got off and picked the boy up myself. \* \* \* I didn't see the boy on the sidewalk. My attention was attracted to him running right directly toward the car, about five or six feet from the car."

Another employé of respondent, who was at the time standing on the rear end of the platform of a car passing east on Carr street, claimed to have seen the occurrence, and testified that he saw the child come from the sidewalk on the east side of the street and run almost to the car; that just before the child got to the car he fell, and his feet went first; the first wheel of the rear trucks passed over his foot; and that the accident happened about eight feet from the corner of Carr and Biddle. Other witnesses for the defendant who did not claim to have seen the collision testified to facts from which it is inferable that the child came from the east side of the street to the car and not the west side.

Plaintiff introduced expert witnesses who

testified as to the distance at which, in their opinion, the car in question could have been stopped. They varied in their estimates; if the car was running 3 miles an hour, according to these several estimates, it could have been stopped anywhere from instantly to within 3 or 4 feet; and if running 4 miles an hour anywhere from 1½ to 7 feet.

The principal instruction given by the court at the request of plaintiff in effect instructed the jury that if defendant's motorman saw, or by a vigilant watch could have seen, the first appearance of danger to the plaintiff in approaching the car, and he did not thereafter stop the car within the shortest time and space practicable under the circumstances, and if such failure directly caused plaintiff's injury, they should find for plaintiff.

At the request of defendant the court, among others, gave the following instruction:

"(3) The court instructs you that if you find and believe from the evidence that Abraham Esstman ran from the east side of High street into the car at or near the rear trucks thereof, while the same was in motion, and thereby received his injuries, your verdict must be for the defendant."

The jury returned a verdict for the defendant, and judgment was rendered accordingly. Appellant's principal assignment of error is the giving of said instruction No. 3.

[1-3] I. Upon what theory the court gave this instruction is not entirely clear. In the first place, it is unquestionably misleading. There is not a particle of evidence that the child ran into the car "at" the rear trucks, or that he ran into the car "near" the rear trucks unless the "center" of the car is meant. The only two witnesses for the defendant who testified as to this were the motorman who was operating the car and Kuntz. The motorman when he saw the child running from the sidewalk thought he would "hit the center of the car." Kuntz was sitting about the third window back from the front end of the car, and he first saw the child five or six feet from the car running as though he would strike the car opposite the seat just back of Kuntz.

Respondent suggests as a basis for the instruction that appellant presented his case on the fact theory that he walked from the west side of the street onto the car tracks in the front of the approaching car and was struck; that these supposititious facts were controverted and entirely overthrown by defendant's proof that he ran from the east sidewalk directly into the street car, in front of the rear trucks, was run over by said trucks, and received his injury in that manner; that appellant cannot abandon the case attempted to be made by him on the facts and recover upon the facts shown by defendant in denial. This contention is plausible rather than sound. The issues were

made by the "pleadings." The language of the petition is general. It is nowhere therein alleged that the plaintiff came from either the east or the west, or from what direction, or in what manner he approached and came onto the tracks. The gist of the negligence pleaded is that the defendant's motorman failed to stop the car in the shortest time and space possible after he saw, or by vigilant watch could have seen, the first appearance of danger to plaintiff in approaching the tracks. This was the ultimate fact to be proved by plaintiff. If this ultimate fact is inferable from the facts shown by defendant as well as the alleged facts attempted to be shown by the plaintiff, and if the jury accepted the former rather than the latter, then the plaintiff is entitled to the benefit thereof. The plaintiff's case is entitled to every reasonable inference of fact arising on all the proof. *Stauffer v. R.*, 243 Mo. loc. cit. 316, 147 S. W. 1032.

[4-7] II. A more substantial basis for the instruction is respondent's further suggestion that, if the child ran from the east side of the street into the car in front of the rear truck while it was in motion, there was no negligence on the part of the motorman. The instruction must, of course, be read in connection with the evidence. It declares as a matter of law that, if plaintiff ran from the east side of the street into the car near the rear trucks thereof while the car was in motion, defendant's motorman was not negligent regardless of any other fact in the case. This will bear analysis. To repeat, it was the duty of defendant's motorman, under the circumstances of the case, first, to have kept a vigilant watch for the first appearance of danger to appellant in approaching the car or tracks, and, second to have stopped the car on such first appearance of danger in the shortest time and space possible. He claims to have kept a vigilant watch, in that he kept his eye on the child from the time he first saw him standing with his face toward the east wall. He saw him turn around and leave the sidewalk headed, as he thought, directly for the center of his car. Assuming this to be true, he saw the first appearance of danger to the child in approaching the car. Danger to the child and duty on the motorman's part began the instant the child left the sidewalk, bound headlong for the track. *Simon v. Ry. Co.*, 231 Mo. loc. cit. 78, 79, 132 S. W. 250, 140 Am. St. Rep. 498; *Cytron v. Tr. Co.*, 205 Mo. loc. cit. 720, 104 S. W. 109.

At that instant it became the motorman's duty to thereafter stop the car in the shortest time and space possible under the circumstances. Did he do that? He was going upgrade and approaching a regular stop. He says the child was injured about 70 feet from Carr street. His car was approximately 40 feet long, and if the rear trucks ran over

him the car had to move but little more than 30 feet thereafter to have reached the point where it was to be stopped in any event. Four witnesses for the plaintiff said that the point of collision was about 45 feet from Carr street. One of defendant's witnesses said the car at the time was 8 feet therefrom. The motorman does not say just how fast he was running at the time the child started from the sidewalk, except that he was running less than 6 miles an hour, his speed just prior thereto, because of the immediateness of the regular stop. Evidently he was slowing down for the stop, and the car could not at that time have been running in excess of 3 or 4 miles an hour as estimated by plaintiff's witnesses, and if some of the experts are to be believed it could have been stopped instantly, or within a foot and a half.

The next question insistent for solution is whether, had the car been stopped within the shortest time and space possible, such stop would have been made before appellant came into contact with the wheels by which he was injured. Appellant was a child under four years of age. After leaving the sidewalk, he had to travel a space of at least 8 or 10 feet to reach the car track. According to the version of the testimony upon which the instruction is based, he was running. The signal of danger was flashed to the motorman's brain the instant he left the sidewalk, yet some appreciable fraction of time must have elapsed before a realization of the danger could have been fully formed and the thought transformed into action, and this must be added to the time required to make the stop after the action to that end had begun. The motorman says that he stopped in about 5 feet, but there is evidence in the case that the car could have been stopped instantly or within a foot and a half. The evidence does not disclose the exact width of the rear truck, but it is shown that the car was 40 feet long, and that from the center of the back truck to the rear end of the car was 8 feet, so that from the center of the rear truck to the center of the car was 12 feet. It is more than probable, therefore, that the car moved at least 8 or 10 feet after the child left the sidewalk before the first wheel of the rear truck could come to a point opposite where he left the walk; that is, the point of collision. If this be so, then it is within the range of reasonable

probabilities that, had the child been on the track under the center of the car, the car could have been stopped before the first wheel of the rear truck reached him. However, he was not opposite the center of the car when he left the sidewalk, but when he "reached" the car. Certainly then it cannot be dogmatically asserted that the car could not have been stopped within the time that it took the child to pass from the walk to the car, plus the time it took the car to move a distance equal to the distance between its center and the first wheel of the rear truck.

Conceding that appellant ran into the car from the east side of the street in the manner narrated by defendant's witnesses, as the jury must have found, yet it must be evident that from their testimony, when considered in connection with other evidence in the case not in conflict therewith and not controverted, reasonable minds would reach different conclusions as to whether the car was stopped after the first appearance of danger within the shortest time and space possible, the entire situation considered, and whether, had it been so stopped, the appellant would have received his injury. These questions, therefore, were for the jury to decide and not the court, and the giving of the instruction was error. *Turnbow v. Dunham*, 272 Mo. 53, 197 S. W. 103; *Bennett v. Railroad*, 242 Mo. 125, 145 S. W. 433.

[8] Appellant assigns as error the action of the court in modifying his principal instruction. The instruction before being modified was obscure, to say the least, and the change made by the court did not materially aid it. It should be redrawn.

Complaint is also made of some of the court's rulings on the admission and rejection of evidence; but, as they are of such a character that they can scarcely recur on another trial, they need not be considered.

For the error in giving defendant's instruction numbered 3, the judgment is reversed and the cause remanded.

BROWN and SMALL, CC., concur.

PER CURIAM. The foregoing opinion of RAGLAND, C., is adopted as the opinion of the court.

BLAIR, P. J., and WOODSON, J., concur. GRAVES, J., concurs in the result.

## In re WILHELMINA DRAINAGE DIST.

COLONIZATION REALTY CO. et al. v.  
SEELEY et al.  
(No. 20578.)

(Supreme Court of Missouri, Division No. 1.  
Dec. 1, 1919.)

1. DRAINS  $\S$ 14(3)—NO APPEAL FROM PRELIMINARY ORDER TO INCORPORATE DRAINAGE DISTRICT.

Under Laws 1913, p. 241, § 16, no appeal lies from a preliminary order to incorporate a drainage district, even though the jurisdiction of the court to make such an order is in question.

2. COURTS  $\S$ 37(2)—OBJECTION TO JURISDICTION AT ANY TIME.

If a court takes cognizance of a matter whereof it has no jurisdiction, an objection may be raised in the proper mode at any stage of the proceeding.

3. APPEAL AND ERROR  $\S$ 185(1)—QUESTION OF JURISDICTION RAISED FIRST ON APPEAL.

The objection that the trial court did not have jurisdiction may be raised for the first time on appeal.

4. APPEAL AND ERROR  $\S$ 1—RIGHT TO APPEAL STATUTORY.

An appeal lies only when the right is given by some statute, and only from such orders and judgment as the statute mentions.

5. APPEAL AND ERROR  $\S$ 86—APPEALS ONLY FROM FINAL JUDGMENTS.

The general rule is that an appeal lies only from final judgments, but statutory exceptions are made.

Appeal from Circuit Court, Dunklin County; W. S. C. Walker, Judge.

In the matter of the Wilhelmina Drainage District. From an order establishing the district on petition of Colonization Realty Company and others, Dominic Seeley and others, objectors, appeal. Appeal dismissed.

L. R. Jones, of Kennett, for appellants.

Smith & Seed, of Kennett, for respondents.

GOODE, J. On April 4, 1916, there were filed in the circuit court of Dunklin county articles of association for the formation of a drainage district, which included a prayer that the lands described in the application be incorporated into a drainage district pursuant to the act relating to the formation of such districts. The proposed district was to consist of 5,000 acres of land, and the petition for incorporation purported to be signed by the owners of 3,309 acres, or a majority of the acres.

The Colonization Realty Company, a corporation and one of the signers of the application, was stated to own 3,159 acres. This company had given contracts for the purchase of 700 acres of the lands the petition

stated it owned, and the holders of some of these option contracts filed objections to incorporating the proposed district, contending they were owners of the lands on which they held contracts of sale and purchase; that they had not signed the petition, and, if the number of acres owned by them was deducted from the number alleged to be owned by the Colonization Realty Company, it would appear the owners of a majority of the acres in the district had not applied for its incorporation. By reason of the terms of the contracts, the court below held the parties who were accorded the right to purchase were not owners of the lands within the meaning of section 39 of the Drainage Act (Laws 1913, p. 253), but that those lands were still owned by the Colonization Realty Company. An order (accompanied by findings that all the requisite steps for the formation of the district had been taken by the petitioners) was entered February 27, 1917, that the district be established under the name of the Wilhelmina drainage district. From this order the objectors, after motions for new trial and arrest had been overruled, appealed to this court.

[1] 1. The right to appeal, if any there is, must be found in the Acts of 1913, and it has been decided that under that act no appeal lies from the preliminary order to incorporate a drainage district. *Buschling v. Ackley et al.*, 270 Mo. 157, 192 S. W. 727. The reason for this conclusion and authorities in support of it are set out fully in the opinion in the cited case. Shortly stated, the reason is that the act of 1913 allows an appeal from the judgment of the circuit court for the determination of only two questions: First, where just compensation has not been allowed for the property in the district appropriated for drainage works; and, second, where proper damages have not been allowed for property prejudicially affected by the improvements. Laws 1913, p. 241, § 16. Those being the only matters for consideration on an appeal, plainly one cannot be taken from the preliminary order, for, as yet, no compensation for property taken has been allowed nor damages assessed for harm done by the improvements. In fact, property has not, so far, been appropriated nor improvements made. Appellants concede that no appeal lies from the preliminary order, except when the purpose of the appeal is to have determined whether the circuit court acquired jurisdiction of the proceeding, or whether its order was void for lack of jurisdiction, and supports the present appeal on the ground that the court below acquired no jurisdiction of the proceeding if the owners of the greater number of acres in the contemplated district did not sign the articles of association and petition to have it formed, and that appellants are entitled to a decision here as to whether the

evidence shows the owners of the larger number of acres had not signed; further insisting that the question of jurisdiction may be raised at any stage of a case, and, besides, that the present appeal is authorized by the following excerpt from the opinion in the case cited above:

"While it is true the objectors could have made the same defense in a suit on the tax bills, yet they were not compelled to do so, for the elementary reason that the lack of jurisdiction over the subject-matter may be shown at any time in any suit or proceeding involving that question, even in a collateral proceeding.

"It was not the design of the Legislature in limiting the right of appeal in drainage cases to deny to one affected thereby the right to question the jurisdiction of the district over the subject-matter thereof; and if that were the intention then clearly the statute to that extent, at least, would have been unconstitutional."

[2-5] Without deciding that a jurisdictional matter is raised by the appellants, we are clear this court did not say in the quoted excerpt that an appeal lies from a preliminary order of the circuit court if the jurisdiction of the court to make the order is contested. What was said in the excerpt had reference to the right of a party to deny the jurisdiction of a district, already incorporated, to assess his land for drainage when the district was, in fact, organized for levee purposes instead of drainage. It is true that, if a court takes cognizance of a matter whereof it has none, an objection may be raised in the proper mode at any stage of the proceeding; but it does not follow that it may be raised by an appeal from an interlocutory order entered at any stage. When the final judgment, or whatever order the statute may allow an appeal from, has been entered, then an appeal will lie, and in the court to which it is taken the objection may be raised that the lower court had no jurisdiction, and this is so whether it was raised in the lower court or not. Beyond doubt an appeal lies only when the right is given by some statute and only from such orders and judgments as the statute mentions, and the act in question neither expressly nor impliedly authorizes one from the preliminary order to incorporate a drainage district. The general rule is that it lies only from final judgments, but statutory exceptions are made. If an appeal taken from a preliminary order was considered in Birmingham Drainage District v. Railroad Co., 206 Mo. 60, 178 S. W. 893, it was because there was no suggestion to direct the court's attention to what order or judgment of the circuit court the appeal was from.

The appeal in the present case must be dismissed. It is so ordered.

All concur.

# DOODY v. CALIFORNIA WOOLEN MILLS CO. (No. 20297.)

(Supreme Court of Missouri, Division No. 1.  
Sept. 27, 1919. Motion for Rehearing  
Overruled Dec. 1, 1919.)

## 1. APPEAL AND ERROR $\S$ 237(3)—SUFFICIENCY OF EVIDENCE NOT CONSIDERED.

Where defendant did not ask an instruction in the nature of a demurrer to the evidence, and did not object to any instructions given by the court submitting the case to the jury, the court on appeal cannot pass upon the sufficiency of the evidence to take the case to the jury.

## 2. APPEAL AND ERROR $\S$ 232(3)—SUFFICIENCY OF EVIDENCE REVIEWABLE ON EXCEPTION TO INSTRUCTION.

Where an objection is made to an instruction and the point duly saved, the court on appeal may consider all reasons why the instruction should not have been given, including the reason, if it existed, that there was no evidence to justify the giving of any instructions or submitting the case to the jury at all.

## 3. APPEAL AND ERROR $\S$ 302(4)—GROUND OF ERROR IN MOTION FOR NEW TRIAL NOT TOO GENERAL.

A complaint, in motion for new trial, that "the court erred in refusing instructions offered by defendant over the objections by plaintiff," was not too general to preclude review thereof on appeal.

## 4. MASTER AND SERVANT $\S$ 228(1)—ASSUMPTION OF RISK NOT DEFENSE TO NEGLIGENCE.

Assumption of risk is not a proper plea to an action founded on the negligence of a master.

## 5. MASTER AND SERVANT $\S$ 262(4)—CONTRIBUTORY NEGLIGENCE MUST BE PLEADED IN ACTION FOR PERSONAL INJURIES.

In order that contributory negligence may be of any avail as a defense to an action by a servant for personal injuries, it must be properly pleaded in the answer, unless it appears from the plaintiff's own evidence as a matter of law.

## 6. MASTER AND SERVANT $\S$ 262(4)—PLEADING CONTRIBUTORY NEGLIGENCE.

A master's plea that servant's injuries "were caused solely by and are due directly to his own carelessness in moving and handling the carboy mentioned in plaintiff's petition, and all of which conduct of plaintiff contributed directly to his injury, if any," was only a plea of contributory negligence to the manner in which plaintiff handled the carboy, and was not a plea that plaintiff was guilty of contributory negligence in stepping into a hole in the floor.

## 7. MASTER AND SERVANT $\S$ 246(3)—ATTEMPT TO SAVE FELLOW SERVANT NOT CONTRIBUTORY NEGLIGENCE.

Where a servant was in imminent danger, his conduct in trying to save a fellow workman will not be attributed to him as culpable, or render him guilty of contributory negligence.

**8. MASTER AND SERVANT** ⇨291(14)—INSTRUCTION AS TO WHETHER INJURY WAS DUE TO ACCIDENT IMPROPERLY REFUSED.

In action by a servant for injuries caused by acid splashing from a carboy when a fellow servant helping plaintiff carry the carboy slipped or stepped into a hole in the floor, where there was evidence that the injury was accidental, it was error to refuse defendant's instruction submitting whether or not the injury was due to a pure accident.

**9. TRIAL** ⇨203(3)—INSTRUCTION NEED NOT BE REPEATED IN NEGATIVE FORM.

It was not error for the court to refuse to instruct the jury in a negative form, when it had already instructed them in an affirmative form.

Appeal from Circuit Court, Gasconade County; R. A. Breuer, Judge.

Action by Patrick J. Doodly against the California Woolen Mills Company. Judgment for plaintiff, and defendant appeals. Reversed and remanded.

R. M. Embury and S. C. Gill, both of California, Mo., and Robert Walker, of Hermann, for appellant.

F. M. Kennard, of Kansas City, N. C. Hickcox, of California, Mo., August Meyer, of Hermann, and Isaac B. Kimbrell and Martin J. O'Donnell, both of Kansas City, for respondent.

**SMALL, O.** The plaintiff was a laborer in defendant's woolen mills at California, Mo. On the 14th day of September, 1914, he was made blind by the splashing of sulphuric acid in his face and eyes from a carboy which he and a fellow workman, Waller, were attempting to move from defendant's warehouse to its mill about 150 feet away.

The plaintiff testified that he had been in the employ of defendant for something more than two years and had been in the warehouse four or five times; that on one occasion he took some of the acid from the carboy and carried it in a pitcher to the mill, there to be used in cleansing wool; but that he had never moved a carboy before and did not know how to do it. But of this fact he did not apprise the Superintendent Morganson, when he directed the plaintiff to help Waller move the carboy from the warehouse to the mill. The carboy was a large bottle about two feet high incased in a wooden box about 19 inches square. This box had wooden cleats or handles on the sides with grooves on the under side, to enable persons to catch hold of to move it. The carboy was about three-fourths full and weighed 180 to 220 pounds. Plaintiff was 54 years old and had for 27 years, before commencing work for defendant, been a telegraph operator and railroad agent. Waller was 23 years old and had worked for defendant for about 4 months. He had been to the warehouse frequently,

on an average of two or three times a day, and had frequently procured acid from the carboy and carried it over to the mill and used it with a mixture of water in cleansing the wool from vegetable impurities; but he testified that he had never moved a carboy before.

Plaintiff testifies that the warehouse was the old woolen mill and refers to it as old shack. Before he and Waller started to move the carboy, they discussed whether to take hold of it by the handles or cleats, and determined not to, because the cleats did not look good, were too narrow, and were without grooves, and they could not lift it that way. They decided to put their hands under the bottom of the carboy and raise it up and carry it in that manner. This brought the mouth of the carboy a foot to 18 inches closer to their faces than if they had lifted it up by the handles or cleats. It was much heavier than they anticipated, and they could not hold it nor carry it. The weight caused them to stagger, and they tried to let it down. They got it down to within 6 inches of the floor, when Waller fell, and the plaintiff's foot slipped, his face then being 2 or 3 inches from the mouth of the bottle, and the acid splashed out into his face and eyes. Waller says that, in the struggle to hold it and let it down, his left foot and leg went through a hole in the floor about 5 or 6 inches wide and a foot long. He did not see this hole and did not know it was there. It was within a foot or 18 inches of the carboy. It was light enough for him to see what he was doing, but the hole was behind the carboy. The hole was about 8 or 10 feet from the open door—a double door—on the east side of the building. It was about 8 o'clock in the morning, and the sun was shining. Plaintiff did not see the hole, nor see Waller's foot and leg in it, but saw him crouched down on the floor as the carboy fell. But he says that when the acid struck him he exclaimed: "Will, God! I am killed! It is going to my brain." Waller said: "God! Pat, I couldn't help it, I went through the floor." Both plaintiff and Waller testify that they did not move the carboy away from the place where they found it, but simply lifted it up and then let it down practically where it had been. Waller said that the floor had been eaten away and the boards made thin by the acid where the hole was. He also said that there was a cork in the carboy when they started to move it. There was no evidence how the cork got out, nor was there any evidence that the floor was greasy.

Plaintiff's witness Morganson, the superintendent, says: That he knew the hole was there a day or so before the accident. That he measured it after the accident, and it was only 3 inches wide for the length of 12 inches and then for 5 inches more it tapered down to a point. The floor was not eaten by acid,



but one of the boards had been broken where the hole was by moving heavy things over it. That it was impossible for a man of Waller's size to get his foot and leg into it; he could, however, get his heel or toe into it. That shortly after the accident he measured the distance from where the carboy fell to the hole, and it was 7 feet. That Doody had frequently been in the wareroom where the acid was. That the carboy had been moved about 9 feet from where it was when plaintiff and Waller went there to move it. That the hole was so near the double door that no one could fail to see it. That the proper way to move the carboy was by taking hold of the cleats or handles. That carboys are of a universal type and are handled that way in every state in the Union where acid is used. That defendant used eight or ten carboys of sulphuric acid a year, and that no one before was ever injured in handling them. That plaintiff right after his injury and repeatedly, during the year following it, stated to him that it was a pure accident and no one was to blame for it. Plaintiff, although recalled, did not deny making these statements to Morganson.

Waller told Morganson, right after the accident, in answer to the question as to how it happened, that plaintiff pushed him and he had to drop it. Waller signed a written statement, dated September 16, 1915, stating that—

When plaintiff "raised his side up, he didn't get a good holt, and he tried to get a better holt, and pushed me backward, and I fell through a hole in the floor."

Kaiser, a former employé of defendant, testified that his leg went through the same hole as Waller's did a day before the accident.

Waller also testified that he himself had taken out of the carboy all the acid that had been removed therefrom and that he fully understood its dangerous character; that he did not tie the cork in so as to keep it from coming out while being removed; or ask for anything to tie it on with.

The testimony of the defense tended to show that the hole in the floor was seven feet away from where the carboy fell; that there was no acid near the hole, but there was around the carboy where it splashed on the floor; that the carboy including the box and handles or cleats on it was of the usual type; that there was no defect in the box or handles or cleats; that the proper way to move the carboy was by taking hold of the cleats or handles, they were put there for that purpose; that both plaintiff and Waller had moved a carboy that way before the accident; that both of them knew the danger of handling sulphuric acid; that on the prior occasion, when plaintiff helped move the carboy, he and his fellow servant took hold of

it by the handles, and moved it along on the floor until they got to the wheelbarrow, and then lifted it by the handles onto the wheelbarrow and moved it in safety without any trouble.

The charge of negligence in the petition is that the defendant negligently permitted the hole to be in the floor, and that in carrying the carboy the leg of the plaintiff's fellow workman slipped through the hole, thereby causing the sulphuric acid from the carboy to splash into plaintiff's face and eyes; that said hole rendered the place of work not reasonably safe; also, that defendant negligently failed to cause a cover or cork to be placed in said carboy, and negligently permitted the floor to be greasy, by reason of which plaintiff's fellow workman slipped into said hole and the acid splashed out and injured plaintiff.

The answer was a general denial, that plaintiff was guilty of contributory negligence in moving and handling the carboy, and that injuries were due to risks assumed by him in his employment.

The court gave 15 instructions of its own motion submitting the case to the jury. Neither plaintiff nor defendant objected to or excepted to the giving of any of such instructions. Defendant offered no demurrer to the testimony, but it asked the court to give the following instructions, which the court refused, and the defendant excepted:

"A. The court instructs the jury that even though you may believe from the evidence that the floor in defendant's mill was greasy, and that said floor had the hole in it as alleged by plaintiff, and that by reason of the greasy condition of said floor, or by reason of the hole being therein, plaintiff met with injury, yet, if you further believe from the evidence that said floor had been in that condition for a sufficient length of time for plaintiff, as a reasonably prudent and observant man, to have discovered it, or that he did discover it, and continued his work for defendant without giving notice of the dangerous condition of the floor, but continued his work services for defendant with the floor in that condition, then your verdict should be against the plaintiff and in favor of defendant.

"B. You are further instructed, gentlemen of the jury, that if you believe from the evidence that plaintiff and a fellow workman were handling the carboy of acid mentioned in evidence, that plaintiff's fellow workman slipped or fell into a hole in the floor of said mill, and that plaintiff, by letting go of the carboy of acid, could have prevented the injury to himself, then it was his duty to do so; and if the jury so believe that plaintiff could thus have protected himself, but failed to do so, in order to protect a fellow workman from probable injury, then your verdict should be in favor of defendant.

"C. The court instructs the jury that, if you believe from the evidence that the injury to the plaintiff was the result of an accident which could not have been foreseen by an or-

dinarily and reasonable person, then your verdict should be in favor of defendant.

"D. The court instructs the jury that if they find from the evidence that the injury to plaintiff, if any, was not the result of the hole in the floor, then your verdict must be for the defendant."

The jury rendered a verdict for the plaintiff for \$10,000, on which judgment was entered.

Defendant duly filed a motion for new trial, among the grounds of which was:

"(8) The court erred in refusing instructions offered by defendant over the objections by plaintiff."

Defendant duly appealed to this court.

[1, 2] I. Respondent contends that we cannot consider the question urged by appellant that upon the evidence the cause should not have been submitted to the jury, for the reason that the defendant did not ask an instruction in the nature of a demurrer to the evidence. We rule this point in favor of the respondent. Defendant also failed to object to any instructions given by the court submitting the case to the jury. In such circumstances, to enable this court to pass upon the sufficiency of the evidence to take the case to the jury, defendant should have asked an instruction in the nature of a demurrer to the evidence. *Kenefick-Hammon Co. v. Norwich Ins. Co.*, 205 Mo. loc. cit. 312, 103 S. W. 957; *Boone County Lumber Co. v. Niedermeyer*, 187 Mo. App. 180, loc. cit. 186, 173 S. W. 57; *Heller v. Ferguson*, 189 Mo. App. 484, loc. cit. 492, 176 S. W. 1126; *Hansen v. Boyd*, 161 U. S. loc. cit. 451, 16 Sup. Ct. 571, 40 L. Ed. 746; *Hartford Ins. Co. v. Unsel*, 144 U. S. loc. cit. 451, 12 Sup. Ct. 671, 36 L. Ed. 496.

In *Kenefick-Hammon Co. v. Norwich Ins. Co.*, supra, 205 Mo. loc. cit. 312, 103 S. W. 961, this court after quoting from the decisions of the Supreme Court of the United States, supra, said:

"It would seem from the foregoing that the highest court in the land looks upon a failure of appellant to ask a peremptory instruction as equivalent to assuming that the case was a proper one for the jury on the facts—a theory he is bound by on appeal."

We are satisfied with the rule thus announced, in cases like the present, where defendant also failed to object to any of the instructions given submitting the case to the jury. If such objection had been made and the point duly saved, then it would be proper for us to consider all reasons why said instructions should not have been given, including the reason, if it existed, that there was no evidence to justify the giving of any instructions, or submitting the case to the jury at all.

[3] II. Learned counsel for respondent also contend that we cannot review the action of the lower court in refusing instructions asked by the defendant, because the ground of error

in that respect in the motion for new trial is too general. There has been some conflict of opinion on this point, but it must now be considered as settled that the ground, assigned in general language, such as used by defendant in its motion for new trial, is sufficient. *State ex rel. v. Reynolds et al.*, 213 S. W. 782, decided by the court en banc at this term of the court, but not yet officially reported.

[4] III. We must rule that defendant's instruction A was properly refused. It is settled law in this state that assumption of risk is not a proper plea to an action founded on the negligence of the master.

"The moment negligence comes in at the door it may well be said that the doctrine of assumption of risk goes out of the window." *Patrum v. Railroad*, 259 Mo. loc. cit. 121, 168 S. W. 624.

This instruction was therefore properly refused so far as it is based on the theory that assumption of risk was a defense herein. If the matter submitted to the jury constituted a defense, it was because it constituted contributory negligence. *Patrum v. Railroad*, supra, 259 Mo. loc. cit. 121, 168 S. W. 622; *Williams v. Pryor*, 272 Mo. 613, 200 S. W. 53; *Fish v. Railroad*, 263 Mo. 106, 172 S. W. 340, Ann. Cas. 1916B, 147.

[5, 6] But in order that contributory negligence may be of any avail as a defense, it must be properly pleaded in the answer—unless it appears from the plaintiff's own evidence as a matter of law—which, as has been seen, we are not permitted to inquire into on this appeal. Defendant's plea was as follows:

"The plaintiff's injuries, if any, he received at the time and place stated in his petition, were caused solely by and are due directly to his own carelessness in moving and handling the carboy mentioned in plaintiff's petition; and all of which conduct of plaintiff contributed directly to his injury, if any; and that the injuries, if any, to the plaintiff, were assumed by the plaintiff in his employment and work for defendant."

It is evident that the pleader intended to and did confine his plea of contributory negligence to the "manner" in which plaintiff and his coemployee moved and handled the carboy, and the other matters touching the plaintiff's conduct, such as those mentioned in this instruction, were intended to be embraced in the plea of assumption of risk. But however that may be, we hold they were not embraced within the plea of contributory negligence, and said instruction A was therefore properly refused. We do not decide one way or the other as to whether the matter sought to be submitted to the jury in said instruction would have constituted a good defense, had it been properly pleaded; but we leave that question wholly undecided, because it is not necessary to a disposition of this appeal. It

will be sufficient for us to examine and determine that question when it properly comes before us for decision.

[7] IV. Defendant's instruction B was properly refused. Plaintiff, at the time contemplated in this instruction, was in imminent danger, and his conduct in trying to save his fellow workman will not be attributed to him as culpable. *Kleiber v. Railway Co.*, 107 Mo. loc. cit. 247, 17 S. W. 946, 14 L. R. A. 613; *Underwood v. Railway*, 190 Mo. App. loc. cit. 418, 177 S. W. 724.

[8] V. Instruction O should have been given. There is abundant evidence that the injury might have been due to accident. The plaintiff and Waller both testify that the carboy was much heavier than they anticipated, and, after they raised it up, they found they could not carry it, and, in struggling to let it down, Waller stumbled or fell—he says, on account of an open hole in the floor which he had never seen and of which he knew nothing. Plaintiff did not see the hole nor see Waller's foot or leg in it. The defendant's evidence tends to show that they were seven feet away from the hole when they lowered the carboy and the accident happened. If so, Waller must have stumbled or fallen on the bare floor for some reason not shown. If he had not so stumbled, there is little doubt that, notwithstanding its weight, they would have safely lowered the carboy to the floor. If so, the injury to the plaintiff happened from an unforeseen and unknown cause and was an accident. *Henry v. Grand Ave. Ry.*, 113 Mo. 527, 21 S. W. 214; *Simon v. Met. St. Ry. Co.*, 178 S. W. 449, where the authorities are collected and reviewed. Furthermore, plaintiff's witness Morganson testifies that the plaintiff repeatedly, at the time of the accident and for a year thereafter, told him that it was a pure accident for which no one was to blame. This was, in itself, evidence that the injury was accidental. None of the instructions given covered the ground embraced in said instruction C.

[9] VI. There was no error in refusing instruction D asked by the defendant. The jury were required by instruction No. 3, given by the court, before they could find for the plaintiff, to find that the injury was caused by Waller's leg slipping through the hole in the floor. Instruction D is but the converse of said instruction No. 3.

"There was no error in the ruling of the court in refusing to instruct the jury on the same question in a negative form when it had already instructed the jury in an affirmative form." *McCaffery v. R. R.* 192 Mo. loc. cit. 159, 90 S. W. 816.

For the error above indicated, the cause is reversed and remanded.

BROWN and RAGLAND, CO., concur.

PER CURIAM. The foregoing opinion of SMALL, C., is adopted as the opinion of the court.

All the Judges concur, except BOND, J., not sitting.

STATE ex rel. SMITH, Tax Collector, v. WILLIAMS et al. (No. 20577.)

(Supreme Court of Missouri, Division No. 1. Dec. 1, 1919.)

TAXATION §421(3)—INSUFFICIENCY OF DESCRIPTION OF LAND.

A description of land as "11 acres more or less ne pt se nw 22—25—10 2500," is too uncertain to constitute a valid tax assessment and basis for a lien, since no boundaries are given, and judgment sale could convey no particular parcel of land.

Appeal from Circuit Court, Stoddard County; W. S. C. Walker, Judge.

Action by the State of Missouri, on the relation of R. J. Smith, collector of delinquent taxes, against Sibyl L. Williams and others. Judgment for relator, and defendants appeal. Reversed.

J. L. Fort, of Dexter, for appellants.  
J. M. Cook, of Dexter, for respondent.

GOODE, J. I. This is an action to recover delinquent taxes alleged to be due the city of Dexter, in Stoddard county, for the years 1914 and 1915, and to enforce a lien for the taxes against the land on which they were assessed.

The only evidence introduced for the plaintiff was the tax bill for those years; and the principal defense is that the description of the land in the tax bill (presumably the same description given in the assessor's books), is too indefinite to constitute a good assessment.

The land is recited to have been assessed against Lee Williams (one of the defendants) for both years by this description:

"Lot, Lots or parts of Lots  
"Block—Addition

"11 acres more or less ne pt se nw 22—25—10 2500."

The court rendered judgment for the plaintiff for the amount of the taxes, penalties, etc., shown to be due by the tax bill, to wit, \$87.15, and declared the judgment to be a first and paramount lien against the land. The tract against which the lien was declared was described in the judgment as indefinitely as it was described in the tax bill and petition, and it was ordered—

"that plaintiff's lien be enforced against said land, or so much thereof as may be necessary to satisfy this judgment, interest, penalties,

commissions, attorney's fees and costs, and that a special execution issue therefor, which said execution shall be executed as in other cases of special judgments."

II. We consider the description of the land too uncertain to constitute a valid assessment and basis for a lien. No boundaries are given of the 11 acres intended to be assessed, and although they are stated to be in the northeast part of the southeast quarter of the northwest quarter of the section, what part they constitute could not be ascertained from the description. It is obvious that tracts containing 11 acres, with various boundaries, might be taken out of the northeast part of the section, and that, if a sale occurred under the judgment, no particular parcel of land could be conveyed to the purchaser.

The case does not differ materially in its facts from *State ex rel. v. Linney*, 192 Mo. 49, 90 S. W. 844, and *State ex rel. v. Burrough*, 174 Mo. 700, 174 S. W. 610. In the former case it was said that assessments must contain an accurate description of the land to be taxed, and that if one is vague and uncertain in respect of description, it will not sustain a judgment for taxes.

The judgment is reversed. /

All concur.

#### BOYERS v. LINDHORST. (No. 20424.)

(Supreme Court of Missouri, Division No. 1.  
Dec. 1, 1919.)

##### 1. MALICIOUS PROSECUTION §59(4)—GENERAL REPUTATION OF PLAINTIFF ADMISSIBLE.

In an action for malicious prosecution, proof of the general bad character of plaintiff, if known to defendant at the time of the prosecution, is admissible in evidence on the issues of malice and want of probable cause; but the reputation of plaintiff sought to be shown must be bad in respect to such matters as naturally would be calculated to effect the probability of the plaintiff's having committed the crime with which he was charged.

##### 2. MALICIOUS PROSECUTION §63—PROOF OF PLAINTIFF'S BAD CHARACTER ADMISSIBLE TO MITIGATE DAMAGES.

In an action for malicious prosecution, proof of the general bad character of the plaintiff is admissible on the measure of damages, where damages for mortification and disgrace are sought; but the reputation sought to be shown must be bad in the same respect in which his reputation was, or otherwise would have been injured by the malicious prosecution.

##### 3. MALICIOUS PROSECUTION §59(4)—EVIDENCE OF PLAINTIFF'S GENERAL BAD REPUTATION.

In an action for malicious prosecution, plaintiff having been arrested for tearing down a fence belonging to defendant, proof that plain-

tiff had a general reputation, known to defendant at the time of the arrest, of being a disturber of the peace, quarrelsome, turbulent, and violent in his behavior, was admissible on the questions of malice and probable cause.

##### 4. MALICIOUS PROSECUTION §3—ACTS OF POLICE OFFICERS NOT ATTRIBUTABLE TO DEFENDANT.

Liability of defendant, who had plaintiff arrested for tearing down a fence, cannot be predicated on the action of the police in prosecuting plaintiff on the technical charge of trespassing, a matter of which defendant was ignorant and which was not attributable to any fault of his.

##### 5. WITNESSES §248(2)—UNRESPONSIVE ANSWER IMPROPER.

Answer of a police officer in an action for malicious prosecution, upon being asked concerning the general reputation of the plaintiff for peace and quiet in the community in which he lived, that it was bad among the officers of the district, was not responsive and was improper.

##### 6. TRIAL §90—WAIVER OF OBJECTIONS BY FAILURE TO MOVE TO STRIKE.

An objection that an answer was not responsive and was improper was waived, where no motion was made to strike it out.

##### 7. TRIAL §76—WAIVER OF OBJECTIONS TO EVIDENCE.

Where no objections in such respects were made at the time, that questions asked witnesses on reputation were not in proper form, and that some of the witnesses stated that plaintiff's general reputation was bad without first having qualified by stating that they knew his reputation, they were waived.

Appeal from St. Louis Circuit Court; William T. Jones, Judge.

Action by John A. Boyers against Frank Lindhorst. Judgment for defendant, and plaintiff appeals. Affirmed.

James T. Roberts, of St. Louis, for appellant.

O. J. Mudd and Charles H. Franck, both of St. Louis, for respondent.

RAGLAND, C. An action for damages in the sum of \$10,000. The petition counts respectively on false imprisonment and malicious prosecution. Plaintiff being cast on the trial to a jury has in due course prosecuted his appeal to this court.

Defendant was the holder of a note secured by a deed of trust on a lot owned by the plaintiff in the city of St. Louis which was fenced but otherwise unimproved. Plaintiff defaulting in the payment of interest, a foreclosure sale was had under the deed of trust, through which and a mesne conveyance defendant acquired the full title. After some specious efforts to redeem, the plaintiff began tearing down and removing the fence inclosing the lot. According to defendant's version, which the jury seem to have accepted,

on knowledge of plaintiff's action coming to him, he went to plaintiff for an explanation of his conduct and to expostulate with him. Having previously learned from plaintiff's neighbors that plaintiff was reputed amongst them to be a dangerous man, he took a police officer with him to the interview for protection against any violence that the plaintiff might exhibit. No particular altercation took place, but plaintiff told defendant in effect that the foreclosure sale was invalid, that he (defendant) had no title, and that he could not stop plaintiff from taking the fence down. Thereupon defendant requested the officer to arrest plaintiff for tearing down the fence. Pursuant to the request, plaintiff was placed under arrest, a police patrol wagon was called, and plaintiff was therein conveyed to the police station. There the officer, without the knowledge or consent of the defendant, then or thereafter, preferred a charge of trespassing against the plaintiff. Plaintiff was locked up, but later released on bond. On the trial a few days afterwards he was acquitted.

In the trial of this cause the court, over the objection of the plaintiff, admitted in evidence the testimony of several witnesses offered by the defendant to the effect that the general reputation of plaintiff for peace and quiet in the community in which he lived was bad. This is assigned as error and is the sole matter preserved by the motion for a new trial for consideration on this appeal.

[1, 2] 1. Appellant's chief contention is that his reputation was not put in issue by the pleadings, in that he did not ask for compensation for injury to his reputation. Whatever construction may be put upon the petition in that respect, it is indubitably true that the essential issues tendered by the count on malicious prosecution were malice and want of probable cause. On these it was unquestionably admissible for the defendant to introduce in evidence in chief proof of the general bad character of the plaintiff, if known to him at the time of the prosecution. *Stubbs v. Mulholland*, 168 Mo. 47, 67 S. W. 650; *Peck v. Choteau*, 91 Mo. 138, 3 S. W. 577, 60 Am. Rep. 236; *Gregory v. Chambers*, 78 Mo. 294; *Warren v. Flood*, 72 Mo. App. 199.

But the count on malicious prosecution avers that by reason of such prosecution the plaintiff "was subject to great pain of mind, humiliation, mortification, and disgrace," and for these he asks compensation. From the use of the terms "humiliation" and "mortification," it may be inferred that the plaintiff claimed that he had suffered either in his own esteem, or in that of others; but by the use of the term "disgrace" he necessarily charged that he had been brought into disrepute, so that the proof of general bad reputation was admissible on the measure of damages. *Peck v. Choteau*, supra.

[3, 4] 2. Appellant next makes the point that, even though evidence of the general bad reputation of plaintiff was admissible under

the pleadings, the inquiry should have been confined to general reputation for integrity and moral worth, or to conduct similar in character to that with which he was charged by defendant. It must be conceded that on the question of damages the general bad reputation of plaintiff sought to be shown, if admissible, must be bad in the same respect in which his reputation was, or otherwise would have been, injured by the malicious prosecution, and on the questions of malice and probable cause it must be bad in respect to such matters as naturally would be calculated to affect the probability of the plaintiff's having committed the crime with which he was charged. There must be some logical relation between the two. The question here, in concrete terms, is whether the general bad reputation of plaintiff for peace and quiet, considered in connection with the other facts and circumstances in evidence, would have any effect in inducing a belief of plaintiff's guilt of the statutory crime of malicious destruction of property in the mind of a reasonable and cautious man. As shown by the evidence, the fence was the property of defendant. The plaintiff had no interest in it, and in tearing it down either he was acting under the honest belief that he had such an interest in it as gave him the right to do so, or else he did it maliciously. If the act was done under an honest claim of right, it was not a crime; if it was not so done, it was malicious and criminal. If the latter, it was because plaintiff was evilly disposed toward the owner, not the property itself, and by his action he invited retaliatory measures on the part of the owner and a possible breach of the peace. Is it then more probable that he was actuated by malice, if he was a man who was a disturber of the peace and who was quarrelsome, turbulent, and violent in his behavior towards others than if he had been a man who respected the tranquility of his community and conducted himself in a quiet, orderly, and peaceable manner towards its members. Under the circumstances shown, it seems to us that it is, and we rule that the evidence was admissible on the questions of malice and probable cause, at least. We have not overlooked the fact that the plaintiff was prosecuted on the technical charge of trespassing, but the only complaint that defendant made against plaintiff and for which he requested his arrest and prosecution was that of tearing down the fence. He supposed that the prosecution was based and conducted on that complaint. His liability cannot be predicated on the action of the police of which he was ignorant and which was not attributable to any fault of his.

[5-7] 3. A police officer, being asked concerning the general reputation of the plaintiff for peace and quiet in the community in which he lived, replied that it was bad among the officers of the district. The answer was not responsive and was improper; but, as

plaintiff made no motion to strike it out, his objection to it was waived. Appellant also complains that the questions asked the witnesses on reputation were not in proper form, and that some of the witnesses stated that plaintiff's general reputation was bad without first having qualified by stating that they knew his reputation. No objections in any of these respects were made at the time, and consequently they were waived.

Finding no error in respect to the matters preserved for review, the judgment is affirmed.

BROWN and SMALL, CC., concur.

PER CURIAM. The foregoing opinion of RAGLAND, C., is adopted as the opinion of the court.

All the Judges concur.

### CITY OF PLATTSBURG v. SMARR. (No. 12318.)

(Kansas City Court of Appeals. Missouri.  
Dec. 1, 1919.)

#### 1. MUNICIPAL CORPORATIONS ¶642(3) — ORDINANCE VIOLATED MUST BE SHOWN IN BILL OF EXCEPTIONS.

On appeal from a conviction in the circuit court of violation of a municipal ordinance, the ordinance cannot be reviewed, where it was not included in the bill of exceptions.

#### 2. MUNICIPAL CORPORATIONS ¶642(3) — SCOPE OF REVIEW WHERE VIOLATED ORDINANCE WAS NOT IN BILL OF EXCEPTIONS.

Where ordinance under which plaintiff was convicted was not included in the bill of exceptions, the information cannot be held on appeal not to state an offense, unless the complaint on which information was based described acts which could not be made subject to punishment by municipality.

#### 3. BREACH OF THE PEACE ¶1 — IMPROPER PROPOSAL TO WOMAN "BREACH OF THE PEACE."

Breach of the peace includes all violations of public peace or order and acts tending to disturbance thereof, and may consist of such acts as tend to excite violent resentment; the use of improper language or the making of an indecent proposal to a woman may constitute a breach of the peace, amounting to a violation of an ordinance of a municipality, which was authorized to enact ordinances to prohibit disturbances of the peace.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Breach of the Peace.]

#### 4. MUNICIPAL CORPORATIONS ¶641 — ESTOPPEL TO COMPLAIN THAT TERMS OF VIOLATED ORDINANCE WERE NOT DEFINED.

Where defendant's own instructions failed to define terms used, he cannot complain that instructions given in behalf of the municipality,

an ordinance of which he was convicted of having violated, also failed to define the terms.

#### 5. MUNICIPAL CORPORATIONS ¶639(1) — PROSECUTION FOR VIOLATION OF ORDINANCE CIVIL PROCEEDING.

A prosecution for violation of a city ordinance being a civil proceeding, the sufficiency of the complaint is to be determined by the rules applicable to pleadings in other cases.

#### 6. MUNICIPAL CORPORATIONS ¶639(2) — SUFFICIENCY OF COMPLAINT CHARGING VIOLATION OF ORDINANCE.

A complaint charging a violation of a municipal ordinance, in that plaintiff was guilty of a breach of the peace, which specified his act, consisting of an indecent proposal to a woman, as well as the ordinance, is sufficient, where the act committed and the ordinance violated were so clearly identified as to bar another prosecution.

Appeal from Circuit Court, Clinton County; Alonzo D. Burnes, Judge.

"Not to be officially published."

Hampton Smarr was convicted of violating an ordinance of the city of Plattsburg, and on appeal to the circuit court he was again convicted, and again appeals. Affirmed.

F. B. Ellis, of Plattsburg, for appellant.

W. S. Herndon, of Plattsburg, for respondent.

BLAND, J. Defendant was convicted in the mayor's court of the city of Plattsburg, Mo., for the violation of an ordinance of that city. He was again convicted on his appeal to the circuit court. The facts show that on the night of September 6, 1918, the prosecuting witness, a girl 15 years of age, with another girl, had been to a picture show in Plattsburg. They left the show between 8:30 and 9 o'clock. The defendant, who was but little more than a stranger to the girls, followed them, and at a dark place in the street passed them, and, standing in front of the prosecuting witness, while holding out his hand with some money therein, asked her "if she wanted to make some money." She replied, "No, sir; I don't; if I did, I would make it;" and told him, "What do you want to stop a girl like me for on the street?" and defendant replied that "he didn't have any sense." To this the girl stated, "You surely don't, or you wouldn't try to get me to take money." She told him that she would have him arrested that same night, and she and her companion looked up a police officer, resulting in defendant's arrest.

On the following day the prosecuting witness swore to the following complaint, upon which he was tried:

"Rose Simpson, aged 15 years, being sworn, on her oath states that on the 6th day of September, 1918, at the county of Clinton and state of Missouri, and within the corporate lim-

its of the city of Plattsburg, one Hampton Smarr did then and there unlawfully and willfully disturb the peace and quiet of this affiant by then and there using to her, the said affiant, indecent, insulting, and offensive language, and by then and there making an indecent proposal to this affiant, in violation of the provision of section 143 of the Revised Ordinances of the City of Plattsburg, 1910, the same being section 17 of General Ordinance No. 131 of the said city, and against the peace and dignity of the city of Plattsburg."

[1] Plaintiff is a city of the fourth class. By virtue of sections 9371, 9372, R. S. 1909, it has the right to enact ordinances to prohibit disturbances of the peace. It is urged by the defendant that the ordinance is invalid, defendant contending that the things therein made unlawful do not constitute a disturbance of the peace within the meaning of the statute. The ordinance was introduced in evidence, but is not preserved in the bill of exceptions; therefore it is not before us for review. *City of Billings v. Brown*, 106 Mo. App. 240, 80 S. W. 322.

[2] Defendant urges that the court erred in not sustaining his motion to quash the information on the ground that the information failed to state any offense. The ordinance not appearing in the bill of exceptions, the point made is not well taken, unless the complaint is plainly defective in describing an act or acts that could not be made subject to punishment by the municipality. *City of Billings v. Brown*, supra.

[3] We think there is no question but that the city could make the things described in the complaint and the act of which defendant was guilty a disturbance of the peace such as the city was authorized to punish under the provisions of the sections of the statute, supra. It is contended that there can be no disturbance of the peace unless the language was used in a loud voice. We think there is nothing in this contention. "Breach of the peace" is a generic term, and includes all violations of public peace or order, and acts tending to a disturbance thereof. \* \* \* It may consist of such acts as tend to excite violent resentment." *St. Louis v. Slupsky*, 254 Mo. 309, 318, 162 S. W. 155, 157 (49 L. R. A. (N. S.) 919. It is held in the same case that by statute abusive and insulting language that does not excite even immediate violence may be made to constitute a breach of the peace. The language used by this defendant to a respectable woman or girl was highly offensive and indecent, and would tend to excite immediate violent resentment on the girl's part to the extent of her physical capabilities. The claim that the language used was not indecent, insulting, or offensive is clearly without merit. Under the circumstances the language used could be construed as nothing more than an indecent proposal,

and it need not have been made in a loud or boisterous manner to constitute a disturbance of the peace of the prosecuting witness.

[4] It is insisted that plaintiff's instruction was erroneous for the reason that it did not define what was meant by the words "indecent language" or "offensive language." We find that defendant's instruction No. 2 failed to define the same terms, although it uses them by reference to the complaint.

[5, 6] Attack is made on the complaint for the reason that it fails to state what the indecent proposal consisted of. The complaint is sufficient, regardless of form, if it notifies the defendant of the particular ordinance he is charged with violating and is sufficiently definite to bar another prosecution for the same offense. The prosecution for violation of a city ordinance is not a criminal proceeding, but a civil one, and for that reason the sufficiency of the complaint is to be determined by the same rules as are applicable to other civil cases. The complaint notified the defendant of the particular ordinance he was charged with violating, and is sufficiently definite to bar another prosecution for the same offense. For this reason we think the complaint was sufficient, and the motion to quash was properly overruled. *City of Mexico v. Harris*, 115 Mo. App. 707, 92 S. W. 505.

The judgment is affirmed.

All concur.

#### ALLEN v. JACKSON. (No. 13372.)

(Kansas City Court of Appeals. Missouri.  
Dec. 1, 1919.)

#### 1. JUSTICES OF THE PEACE $\S$ 174(17), 208(2)— AMENDMENT OF COMPLAINT IN UNLAWFUL DETAINER.

On certiorari or appeal to circuit court from the justice court in unlawful detainer action under Rev. St. 1909,  $\S$  7726, the complaint may be amended so as to obviate the defects of uncertainty and indefiniteness in the description of the land, or in any other respect not involving a change in the cause of action originally stated.

#### 2. LANDLORD AND TENANT $\S$ 291(8) — DE- SCRIPTION OF LAND IN UNLAWFUL DETAINER COMPLAINT.

Great strictness and accuracy of description is not essential in unlawful detainer complaints against a tenant.

#### 3. JUSTICES OF THE PEACE $\S$ 174(17) — AC- TION; AMENDMENT OF COMPLAINT IN UNLAW- FUL DETAINER IN CIRCUIT COURT.

In unlawful detainer action, plaintiff, on appeal from justice court under Rev. St. 1909,  $\S$  7726, properly amended complaint so as to more definitely and specifically describe the land under section 7660, such amended complaint not stating new cause of action, though specifically mentioning ten-acre tract not referred to in

original complaint, where such tract was a part of land described in original complaint.

**4. LANDLORD AND TENANT ⚡291(16)—SUFFICIENCY OF VERDICT IN UNLAWFUL DETAINER.**

In unlawful detainer action against tenant, verdict finding defendant guilty in manner and form as charged, finding the damages sustained to be no dollars and the value of the monthly rents and profits to be no dollars, is not illogical, arbitrary, or unjust, since the gist of such action is the unlawful detainer.

**5. APPEAL AND ERROR ⚡1033(9)—FAVORABLE ERROR IN AMOUNT OF RECOVERY.**

Generally a party cannot complain because the verdict against him is not as large as it should have been.

**6. LANDLORD AND TENANT ⚡288—GIST OF UNLAWFUL DETAINER ACTION.**

The gist of unlawful detainer action is the unlawful detainer; the damages and rents being merely incidental, and not unalterably fixed, as in an express contract.

Appeal from Circuit Court, Saline County; Samuel Davis, Judge.

"Not to be officially published."

Action by M. F. Allen against S. P. Jackson. Judgment for plaintiff, and defendant appeals. Affirmed.

William H. Meschede and Robert M. Reynolds, both of Marshall, for appellant.

R. S. Edmonds, of Miami, and Harvey & Bellamy, of Marshall, for respondent.

**TRIMBLE, J.** This is an action in unlawful detainer. It originated, of course, in a justice court; was transferred by change of venue to another justice, where it was tried resulting in a judgment for defendant, from which plaintiff appealed to the circuit court. From a judgment there in favor of plaintiff, for the restitution and possession of the premises together with costs, the defendant has appealed.

Plaintiff was the owner of a 340-acre farm, and for a number of years had been leasing the same to the defendant under leases running at times for three years, and at other times for one year. The last lease was entered into on September 22, 1917, wherein the land was let for a term ending February 28, 1919. The lease described the land as follows: 160 acres more or less, being the northwest quarter of section 2, township 51, range 22, and about 180 acres in sections 34 and 35 in township 52, range 22. By the terms of the lease the west half of the 160 acres in section 2 was to be sown in wheat, and lessee was to give lessor peaceable possession of this 80-acre tract and of all the lands in sections 34 and 35 described in the lease on the last day of July, 1918. The east half of the 160 acres in section 2 was to be planted in corn

in the spring of 1918, and possession thereof was to be given on the last day of February, 1919.

After July, 1918, defendant refused to give possession of the said wheat land and the lands in sections 34 and 35, and this suit in unlawful detainer was instituted in the latter part of August, 1918.

The complaint, as filed with the justice, described the lands sued for as the west half of the northwest quarter of section 2 in township 51, range 22, and about 180 acres in sections 34 and 35 in township 52, range 22, in Saline county, Mo. When the case reached the circuit court plaintiff was permitted to amend her complaint as to the description of the land sued for. The amended complaint described the land leased to defendant as the west half of the northwest quarter of section 2, township 51, range 22, and about 180 acres in sections 34 and 35, township 52, range 22, said 180-acre tract of land consisting of 90 acres off the south end of the east half of the east half of said section 34, and 90 acres off the south end of the west half of said section 35, said 180 acres being the same land described in the written contract of lease entered into on the 22d day of September, 1917, by and between plaintiff and defendant, and being the only land in section 34 and 35 owned by plaintiff. The amended complaint then charged that the plaintiff, ever since the last day of July, 1918, was entitled to, and the defendant willfully and unlawfully detained possession of, the following described part of the aforesaid premises, to wit: A tract of land containing 10 acres, more or less, on which is situated a one-story four-room frame dwelling, also a frame barn with shingle roof, and a small frame smokehouse, said 10 acres consisting of a yard lot fenced with posts and wires, a barn lot fenced with posts and planks, and a feed lot fenced with posts and wire, said 10-acre tract of land being in the southeast corner of the said 180-acre tract of land. The defendant did not live on the farm in question, but resided upon his own farm. The dwelling house and other buildings on the 10 acres in question were used by him to house the hands he had at work upon the leased farm. Defendant claimed that at the time he signed the lease he did not understand that he was to give up the house and lots on the premises on the last day of July, 1918, but thought he had to give up only the wheat land. However, his testimony shows that he was familiar with the lands and with the buildings situated thereon; that he read over the contract at the time it was signed and knew that the lots and buildings were not a part of the 80 acres that he was to plant, and did plant, in corn, and it was only the corn land he was entitled to hold until the last day of February, 1919. In other words, the lease



provided that he was to give possession of all lands in July except the 80 acres in corn.

The statute (section 7660, R. S. 1909), requires the complaint in the justice court to specify the lands unlawfully detained. The cause must originate in the justice court, as the circuit court has no original jurisdiction in such cases; and no amendment can be made in the circuit court on appeal which changes the cause of action. In the original complaint the 180-acre tract alleged to be detained was described as about 180 acres more or less in sections 34 and 35, township 52, range 22, Saline county, Mo., while in the amended complaint said 180 acres was more definitely and specifically described, and the defendant was charged with having unlawfully detained a part of said 180-acre tract, to wit, 10 acres in the southeast corner thereof on which was situate a one-story four-room frame dwelling, also a frame barn with shingle roof, and a small frame smokehouse, said 10 acres consisting of a yard lot fenced with posts and wires, a barn lot fenced with posts and planks, and a feed lot fenced with posts and wire. For these reasons the defendant says the amendment was not permissible.

[1-3] Section 7726, R. S. 1909, of the unlawful detainer act, provides that, when such cause shall be removed to the circuit court by certiorari or appeal, the court shall proceed to hear, try, and determine the same anew, as if it had originated in said court, without regarding any error, defect, or informality in the proceedings of the justice. Under this section the complaint may be amended so as to obviate the defects of uncertainty and indefiniteness in the description of the land, or in any other respect not involving a change in the cause of action originally stated. *Schworer v. Christophel*, 72 Mo. App. 116, 119. Great strictness and accuracy of description is not essential in these complaints. *Silvey v. Summer*, 61 Mo. 253. In *Thiemann v. Meier*, 25 Mo. App. 306, 307, it was held that a description in the complaint which only specified "the 'cultivated portions' of the northeast quarter of section 14," etc., was sufficient to confer jurisdiction on the justice; in other words, it was such a complaint as could be amended. See, also, *Tipton v. Swayne*, 4 Mo. 98; *Naylor v. Chinn*, 82 Mo. App. 160. As the 10-acre tract described in the amended complaint was a part of the land contained in the original complaint, there was no change in the cause of action. That remained the same, but the amount of land alleged to have been detained was less than that alleged in the original complaint. *Berry v. Fortney*, 81 Mo. App. 284, 286.

[4-6] Both the original and amended complaints placed the damages for unlawful detention at \$75. The value of the monthly

rents and profits was placed at \$102 in the original, and at \$4 in the amended, complaint. The verdict found the defendant guilty in manner and form as charged, but found the damages sustained to be no dollars, and the value of the monthly rents and profits to be no dollars. We do not see how defendant can rightfully complain of this. The general rule is that a party cannot complain because the verdict against him is not as large as it should have been. *Crigler v. Duncan*, 121 Mo. App. 381, 383, 99 S. W. 61. The gist of the action herein is the unlawful detainer; the damages and monthly rents are merely incidental, and are not unalterably fixed, as such matters are in an express contract. Hence the verdict of the jury is not illogical, arbitrary, or unjust. *Crigler v. Duncan*, supra, *Western States, etc., Cement Co. v. Bruce*, 160 Mo. App. 246, 255, 142 S. W. 783; *Blakely v. Miller*, 180 Mo. App. 389, 391, 167 S. W. 1136.

The judgment is affirmed.

All concur.

ENGLE v. BROWN et al. (No. 13369.)

(Kansas City Court of Appeals. Missouri.  
Nov. 1919.)

BILLS AND NOTES §52—RELEASE OF NOTE  
MUST BE IN WRITING OR NOTE MUST BE DELIVERED TO MAKERS.

In an action on promissory note given as a part of purchase price of a store building and secured by trust deed, although the evidence was sufficient to show a novation by which another was accepted in the place of defendants on the note, such defense cannot stand, where the renunciation of rights against defendants was not in writing nor was the note delivered to defendants, as required by Rev. St. 1909, § 10092.

Appeal from Circuit Court, Lafayette County; Samuel Davis, Judge.

Suit by Cuthbert B. Engle against Clayton H. Brown and another. Judgment for defendants, and plaintiff appeals. Reversed and remanded.

Willard P. Cave, of Moberly, for appellant. Lyons & Ristine, of Lexington, and M. C. James, of Higginsville, for respondents.

BLAND, J. This is a suit on a negotiable promissory note made, executed and delivered by defendants to plaintiff, in the sum of \$3,750, dated, Corder, Mo., February 27, 1917, due two years after date. The note was given as part of the purchase price of a store building in Corder, Mo., and was secured by a deed of trust given by defendants to plaintiff on said building. Before the note became due defendants sold and conveyed the store building to one William A. Lobdell, who assumed the note and mortgage as part of the purchase price of said property, and agreed to pay the

same. Before and after said sale plaintiff, through his agent, one Arnold, orally agreed with defendants that he would release the defendants from liability on the note, and would accept the purchaser of the property in their stead. One of the defenses was that there was a novation; that is, that defendants were released from liability on the note, and Lobdell was substituted for them. On behalf of plaintiff the court instructed the jury that if they found the facts as set forth above, their verdict should be for the defendants. The jury returned a verdict in favor of the defendants, and plaintiff has appealed.

We think that the agreement whereby the defendants were released and Lobdell accepted in their place on the note would be sufficient to show a novation (*Brown v. Kirk*, 20 Mo. App. 524; *Garrison v. O'Donald*, 73 Mo. App. 621), if it were not for the provisions of section 10092, R. S. 1909, which provides as follows:

"The holder may expressly renounce his rights against any party to the instrument before, at or after its maturity. An absolute and unconditional renunciation of his rights against the principal debtor made at or after the maturity of the instrument discharges the instrument. But a renunciation does not affect the rights of a holder in due course without notice. A renunciation must be in writing, unless the instrument is delivered up to the person primarily liable thereon."

It is held that the renunciation mentioned in the negotiable instrument law is equivalent to a release. *Baldwin v. Daly*, 41 Wash. 416, 83 Pac. 724; *Pitt v. Little*, 58 Wash. 355, 359, 108 Pac. 941; *Leask v. Dew*, 102 App. Div. 529, 92 N. Y. Supp. 891. As the statute expressly provides that before there can be any renunciation on the part of the holder of any rights against any party to the instrument such renunciation must be in writing, or the instrument delivered up to the person primarily liable thereon, and as the defendants were not released from liability in writing, nor was the note delivered up to the person primarily liable thereon, there can be no defense on the ground that there was a novation, or, in other words, a release of defendants from liability on the note and a substitution of Lobdell in their place.

The judgment will be reversed, and the cause remanded.

All concur.

**SHELLENBERGER v. HILL.** (No. 13319.)  
(Kansas City Court of Appeals. Missouri.  
Dec. 1, 1919.)

**1. JUDGMENT §250 — NECESSITY OF CONFORMITY TO PETITION.**

Where a petition seeking to replevin a heating furnace alleged a mere bailment, judgment

for plaintiff cannot be supported, where the proof showed that the furnace was sold to defendant's vendor, under a conditional sale arrangement that if it should prove unsatisfactory plaintiff would remove it from the building, and that before removal the building was sold to defendant, who knew of plaintiff's rights.

**2. REPLEVIN §69(3)—EFFECT OF AVERMENTS IN PETITION AS TO TITLE.**

Where plaintiff in replevin alleged how he became invested with title to the property sought to be recovered, he is confined in proof to the allegations of the petition, regardless of whether it was necessary for him to have averred with particularity his title.

Appeal from Circuit Court, Holt County; Alonzo D. Burnes, Judge.

"Not to be officially published."

Replevin by E. D. Shellenberger against William R. Hill. From a judgment for plaintiff, defendant appeals. Reversed, and remanded.

Wm. E. Bissett, of Mound City, and Randolph & Randolph, of St. Joseph, for appellant.

A. M. Tibbels, of Mound City, for respondent.

**ELLISON, P. J.** This action is in replevin for a residence furnace heater. The judgment in the trial court was for the plaintiff.

One Melvin owned a residence, and after it was built employed plaintiff to furnish and install the furnace. It was set in cement in the basement floor. The contract of sale was that if it did not prove satisfactory to Melvin there was no sale, Melvin need not pay for it, and plaintiff would take it out. It proved unsatisfactory, plaintiff was notified, and he was to take it out, but delayed in doing so. At about this time Melvin sold the house by warranty deed to defendant, informing the latter of all these matters concerning the furnace. During the negotiation for the sale of the house to defendant, plaintiff met with him and told him of his contract with Melvin, and that the furnace belonged to him (plaintiff), and that he would "take it out," when defendant asked him not to do so, that he would take it. It was shown by other witnesses that defendant thoroughly understood that the furnace was plaintiff's and that he would "settle" with plaintiff for it. After defendant obtained his deed from Melvin, which contained no reservation of the furnace, he refused to pay for it or to surrender it to plaintiff, and this action followed.

[1] The defense is altogether along technical lines, but nevertheless we are compelled to reverse the judgment. The petition does

not support the case made by the evidence; in other words, the proof took a wider range than is embraced within the allegation of the pleadings. A mere bailment is alleged in the petition, whereas the proof was of a conditional sale, or "a sale and return." It is alleged in the petition that the furnace in a dwelling house belonging to one Melvin, where it had been temporarily placed and installed by plaintiff under an agreement with Melvin, "that the title and ownership of said heating plant should remain in plaintiff, and that he could remove the same therefrom at some future date according to his convenience"; that afterwards defendant purchased the residence from Melvin after being notified that the furnace "was the property of plaintiff"; and that defendant "well knew the plant was the property of plaintiff and not a part of the real estate conveyed to defendant."

The proof was that plaintiff sold the plant to Melvin for a certain price by conditional sale, to the effect that if after a trial it proved unsatisfactory Melvin would so notify plaintiff, the sale stood annulled and plaintiff was to remove it. As we have said, no such case is stated in the petition, and, under the law as laid down by the Supreme and Appellate Courts that the proof and instructions must not be broader than the pleading, the judgment must be held to be erroneous. *De-gonia v. Railroad*, 224 Mo. 564, 589, 123 S. W. 807; *State ex rel. v. Ellison*, 270 Mo. 645, 653, 195 S. W. 722; *State ex rel. v. Ellison* (Sup.) 176 S. W. 11; *Collins v. Hutchings*, 194 S. W. 733.

[2] But it is claimed by plaintiff that there need not be averments of how a plaintiff in replevin became invested with the title to the property sued for, and that therefore the allegations of that character here may be rejected as surplusage, thus leaving the petition simply alleging title and right to possession in the ordinary form. We think plaintiff having alleged the character of his title cannot at the trial prove some other. That is, having alleged he was the owner of the furnace, entitled to, but not in possession, by reason of a bailment, without price, to be terminated at his more convenience, he cannot be allowed to show by evidence a wholly different thing, viz., that he was not in possession by reason of having made a conditional sale, nullified by dissatisfaction of the purchaser. *Grocery Co. v. McDonald*, 118 Mo. App. 471, 475, 95 S. W. 279; *Dunlap v. Kelly*, 105 Mo. App. 1, 78 S. W. 664.

In our opinion there was failure of proof, and defendant's demurrer to the evidence should have been sustained.

The judgment therefore is reversed, and the cause remanded that plaintiff may amend if he so desires.

All concur.

## STRONG v. STRONG. (No. 13822.)

(Kansas City Court of Appeals. Missouri.  
Nov. 10, 1919. On Motion for Re-hearing, Dec. 1, 1919.)

## 1. APPEAL AND ERROR ¶511(1)—BILL OF EXCEPTIONS NOT SHOWN TO HAVE BEEN SIGNED OR PART OF RECORD.

Where the record proper does not show that the bill of exceptions was signed by the judge or filed or made a part of the record, the purported bill of exceptions will not be considered.

## 2. APPEAL AND ERROR ¶511(1)—FAILURE TO SHOW THAT BILL OF EXCEPTIONS WAS FILED.

The words, "Marked filed, July 15, 1909," indorsed on the bill of exceptions itself are insufficient to show that the bill of exceptions was filed, since a bill of exceptions cannot prove itself.

## 3. APPEAL AND ERROR ¶584—COMMINGLING OF RECORD PROPER AND EXCEPTIONS IN ABSTRACT.

Where matters of record proper and exceptions are so commingled in the abstract that the appellate court is not able to distinguish one from the other, the bill of exceptions will not be considered; the record being defective.

## 4. APPEAL AND ERROR ¶590—CORRECTION OF DEFECTS IN ABSTRACT OF RECORD BY ADDITIONAL ABSTRACT.

Defects in the abstract of the record cannot be corrected by the filing of an additional abstract without consent of respondent.

## On Motion for Rehearing.

## 5. DIVORCE ¶203 — PETITION MUST SHOW CAUSE OF ACTION TO PERMIT TEMPORARY ALIMONY AND SUIT MONEY.

In order for the court to allow temporary alimony and suit money, the petition must state a cause of action.

## 6. APPEAL AND ERROR ¶518(1)—PETITION PART OF RECORD.

The petition is a part of the record proper, and not a matter of exception.

## 7. APPEAL AND ERROR ¶518(1) — SHOWING OF PETITION IN BILL OF EXCEPTIONS AND RECORD.

When petition is introduced in evidence, it is proper to show it in the bill of exceptions, which does not, however, dispense with the necessity of printing it as a part of the record proper.

## 8. APPEAL AND ERROR ¶679(2)—FAILURE OF PETITION TO STATE CAUSE OF ACTION.

Where petition was not shown as a part of the record proper, appellate court cannot consider contention that petition fails to state a cause of action.

Appeal from Circuit Court, Buchanan County; Thomas B. Allen, Judge.

"Not to be officially published."

Action by Vera Marie Strong against Louis L. Strong, Jr.- From an order allowing plaintiff temporary alimony and suit money defendant appeals. Affirmed.

A. L. Perry, of Troy, Kan., and Randolph & Randolph, of St. Joseph, for appellant.

Mytton & Parkinson, Barney E. Rellly, and W. B. Norris, all of St. Joseph, for respondent.

PER CURIAM. This is an appeal from an order allowing temporary alimony and suit money. Respondent has called our attention to the fact that the record proper does not show that the bill of exceptions was signed by the judge or filed or made a part of the record.

[1, 2] This point is well taken. The record proper nowhere shows these things, but appellant insists that because following the signature of the judge to the bill of exceptions itself appear the words: "Marked filed, July 15, 1909. E. J. Cruse, Clerk, by Charles A. Redfern, D. C."—that there is a sufficient recitation in the record proper to show the filing of the bill of exceptions. However, there is nothing in the record proper to show that the judge signed the bill of exceptions, nor do we think that the words quoted are sufficient to show that the bill of exceptions was filed. It is apparent that these words are indorsed on the bill of exceptions itself. It has repeatedly been held that a bill of exceptions cannot prove itself. *Pabst Brewing Co. v. Howard*, 211 S. W. 720; *Houston v. Mahoney*, 209 S. W. 585; *Harding v. Bedoll*, 202 Mo. 625, 100 S. W. 638; *Keaton v. Weber*, 233 Mo. 691, 136 S. W. 342.

[3] There is another reason why we cannot consider the bill of exceptions in this case. Matters of record proper and exceptions are so commingled in the abstract that we are not able to distinguish one from the other. First appearing in the abstract is the petition, then a recitation as follows:

"Proceedings were then had as shown by the following bill of exceptions, and pleadings and the record entries hereinafter set forth."

Then follows the style of the case, and under this in large letters, "BILL OF EXCEPTIONS." After this is shown various pleadings, motions, and rulings; then the testimony introduced. The abstract does not distinguish matters of exceptions from matters of record proper. For that reason the record is defective. *Keaton v. Weber*, supra; *Barham v. Shelton*, 221 Mo. 66, 70, 119 S. W. 1089.

[4] After respondent in her brief called attention to the defects in the abstract of the record, appellant filed an additional abstract, attempting to correct such defects. It is well established that defects cannot be corrected in this manner without the consent of respondent. *Hopper v. Fulbright*, 174 Mo. App.

499, 160 S. W. 840; *Harding v. Bedoll*, supra, 202 Mo. 636, 100 S. W. 638; *Everett v. Butler*, 192 Mo. 564, 569, 91 S. W. 890; *Barham v. Shelton*, supra.

Finding no error in the record proper, the judgment is affirmed.

#### On Motion for Rehearing.

Appellant states in his motion for rehearing that everything appearing after the original petition to and including the signature of the judge to the bill of exceptions is intended to be the bill of exceptions, and that the amended petition appears in the bill of exceptions for the reason that it was introduced in evidence. Nothing is said as to why the demurrer to the amended petition as amended by interlineation also appears in what appellant says is the bill of exceptions.

[5-8] In order for the court to allow temporary alimony and suit money the petition must state a cause of action. *Cope v. Cope*, 103 Mo. App. 260, 77 S. W. 92. It is also well settled that the petition is a part of the record proper, and is not a matter of exception. However, when the petition is introduced in evidence it is proper to show the same in the bill of exceptions. This, of course, does not dispense with the necessity of printing it as a part of the record proper. Appellant admits that the only petition that is printed as a part of the record proper in this case is the original or abandoned petition. It is therefore apparent that we cannot pass upon appellant's contention that the petition fails to state a cause of action. It is true that pages 137 to 142, following the signature of the judge to the bill of exceptions contain entries of record, but these entries do not contain the petition; they include only the affidavit of appeal, various orders, and the judgment of the court. When we said in the original opinion in this case that there was no error in the record proper we had in mind the fact that all of the record proper that was properly before us contained no error.

Owing to the fact that the amended petition, either in its original form or as amended by interlineation, nowhere appears in the abstract of the record filed in this case except in the bill of exceptions, where the demurrer also is set out, we were under the impression, when writing the original opinion in this case, that the record proper and the bill of exceptions were so commingled that it was impossible to distinguish matters of exception from record proper. However, appellant in his motion for rehearing states that it was his intention to print the amended petition as a part of the bill of exceptions, and he, in effect, admits that he has printed no record proper containing the petition upon which the case was pending at the time the motion was heard and disposed of; that

is, the amended petition as amended by interlineation. As the record proper does not show that the bill of exceptions was signed by the judge, or filed, or made a part of the record, we are unable to consider the bill of exceptions; and, as the amended petition as amended by interlineation is not printed in the abstract of the record proper, we are unable to pass upon the question as to whether it states a cause of action.

The motion for rehearing is therefore overruled.

### MELLY v. HILL (No. 13053.)

(Kansas City Court of Appeals. Missouri. Dec. 1, 1919.)

#### 1. FRAUD $\S$ 62—VERDICT INADEQUATE IN ACTION FOR MISREPRESENTATION AS TO LAND BOUGHT.

In action for misrepresentation as to character and location of farm land, inducing plaintiff to enter into farm exchange contract with defendant, where jury found facts to be as evidence in plaintiff's behalf tended to prove them, verdict for \$1 for plaintiff held grossly inadequate.

#### 2. APPEAL AND ERROR $\S$ 1004(1)—ERROR IN VERDICT FOR INADEQUATE DAMAGES CORRECTED ON APPEAL.

Grossly inadequate damages constitute an error which may be corrected on appeal.

Appeal from Circuit Court, Johnson County; Ewing Cockrell, Judge.

"Not to be officially published."

Action by M. B. Melly against John M. Hill. From judgment for plaintiff, giving him insufficient relief, he appeals. Reversed and remanded.

M. D. Aber, of Warrensburg, for appellant. Nick M. Bradley, of Warrensburg, and James A. Kemper, of Independence, for respondent.

ELLISON, P. J. This action is for damages alleged to have resulted to plaintiff by reason of alleged misrepresentations of the value of defendant's land in Texas, made in an exchange of such land for plaintiff's land near Warrensburg, Mo. The verdict and judgment were for the plaintiff in the sum of \$1 and, among other reasons of complaint, conceiving that such sum was grossly inadequate he appealed to this court.

It was admitted that the exchange of lands was made. The agreed value of plaintiff's land near Warrensburg was \$6,000, and it was subject to an incumbrance for \$2,000, which defendant assumed. Defendant was to give his 40 acres in Texas to plaintiff for his Warrensburg land, plaintiff assuming a

lien thereon for \$1,000. On account of the incumbrances on each of the properties and the consideration moving between the parties as referred to in the contract and in his testimony and in his statement of the case as found on pages 15, 24, and 75 of the abstract, it is difficult to set out just how the contract was carried out. But that can make no difference in the way the case should be determined, for everything now between the parties turns on the question of defendant's representations as to the character of the land, in Texas, its value, productivity, and what kind of crops it would produce, as well as the distance it was from markets and towns, etc.

Under the instructions as applied to the evidence, the jury found the facts to be as the evidence in plaintiff's behalf tended to prove them. In so doing they determined plaintiff to be in the right, and that he had been wronged by the defendant. But in assessing compensation for such wrong they have departed from the evidence, and fixed upon the grossly inadequate sum of \$1. This is an error that may be corrected on appeal; *Watson v. Harmon*, 85 Mo. 443; *Chouquette v. Southern Electric Ry. Co.*, 152 Mo. 257, 53 S. W. 897; *Morris v. Railroad*, 136 Mo. App. 393, loc. cit. 399, 400, 117 Pac. 687; *Noble v. Kansas City*, 222 Mo. 121, 120 S. W. 779; *Dorset v. Chambers*, 187 Mo. App. 276, 173 S. W. 725; *Cole v. Armour*, 154 Mo. 333, loc. cit. 353, 55 S. W. 476; *Bock v. Rinderknecht*, 200 Mo. App. 496, 207 S. W. 245, loc. cit. 247.

No brief was filed by defendant, and we cannot well discuss other points of objection to the trial.

The judgment is reversed, and cause remanded.

### STATE v. WRIGHT. (No. 2513.)

(Springfield Court of Appeals. Missouri. Dec. 6, 1919.)

#### 1. INTOXICATING LIQUORS $\S$ 39—BURDEN OF PROOF OF ADOPTION OF LOCAL OPTION LAW.

Proof of the adoption of the local option law by the county or city within which the alleged violation thereof was committed is essential to a conviction, and the burden is on the state to plead and prove such fact.

#### 2. INTOXICATING LIQUORS $\S$ 39 — MINIMUM AMOUNT OF PROOF TO SHOW ADOPTION OF LOCAL OPTION LAW.

The minimum amount of proof necessary to show the adoption of the local option law in the county of its alleged violation is the order of the county court, declaring the result of such election and ordering notice of such result to be duly published.

3. CRIMINAL LAW  $\Leftrightarrow$ 304(9) — JUDICIAL NOTICE OF ADOPTION OF COUNTY LOCAL OPTION LAW.

The courts will not take judicial notice of the adoption of the local option law by Laclede county, which is necessary to put it into force there.

Appeal from Circuit Court, Laclede County; L. B. Woodside, Judge.

Drew Roy Wright was convicted of violation of the local option liquor law by the sale of intoxicating liquors in Laclede county, Mo., and he appeals. Reversed and remanded.

I. W. Mayfield & Son, of Lebanon, for appellant.

J. E. MacKesson, of Lebanon, for the State.

STURGIS, P. J. The defendant was convicted of violating the local option law by the sale of intoxicating liquors in Laclede county, Mo. It is alleged in the information that such law was adopted and put in force in said county on September 13, 1907, and was in force when the alleged sale was made in June, 1918. At the trial no proof whatever was offered of the adoption of the local option law in Laclede county. For this reason the case must be reversed and remanded.

[1] It has been the law of this state ever since the enactment of the local option law in 1887 that proof of the adoption of such law by the county or city within which the alleged offense was committed is essential to a conviction, and that the burden is on the state to plead and prove such fact. *State v. Prather*, 41 Mo. App. 451, 455; *State v. Mackin*, 41 Mo. App. 99, 103; *State v. Hall*, 130 Mo. App. 170, 172, 108 S. W. 1077; *State v. Macy*, 72 Mo. App. 427, 431.

[2] Many cases have discussed and decided the quantum of proof sufficient to make a prima facie case showing the adoption of the local option law in a county or city, resulting in the holding that the minimum amount of proof necessary is the order of the county court, declaring the result of such election and ordering notice of such result to be duly published. *State v. Workman*, 194 S. W. 525, and cases there cited.

[3] No case is cited, and we are sure none will be found holding that no proof of such fact is necessary, since such holding would mean that courts will take judicial notice of the adoption of a law by a municipality when such adoption is necessary to put it in force in a particular locality. This the courts do not do. *State v. Cleveland*, 80 Mo. 108; *State*

*v. Hays*, 78 Mo. 600, 606; *State v. Macy*, 72 Mo. App. 429, 431; *Rousey v. Wood*, 47 Mo. App. 465, 469.

The learned trial judge in overruling the motion for new trial and in arrest recognized that such had been the ruling of the appellate courts of this state, but sought to distinguish this case on the ground that the adoption of the local option law in Laclede county had been proven in other cases originating in that county, and which had been affirmed by the appellate court, citing *State v. Farrar*, 146 Mo. App. 282, 129 S. W. 1029, and *State v. Manuel*, 204 S. W. 555. A reading of those cases indicates that no point was made as to the adoption of the local option law. Rev. St. 1909, §§ 7238-7246, as amended by Laws 1913, p. 388. Nor are we advised as to what proof of such adoption was offered therein. Such fact may have been admitted at those trials. But, however that may be, we know of no case holding that, when such fact has once been duly proven in one case, the court taking such proof and the appellate court can thereafter take judicial notice of such fact in all similar cases. On the contrary, this court, in *State v. Kimmell*, 156 Mo. App. 461, 137 S. W. 329, had before it the record of the county court of Dade county, showing the result of the local option election in that county and ordering notice of such result duly published, and solemnly held that such proof was sufficient to show the adoption of and putting in force the local option law in that county. Yet the same court at the same term reversed and remanded the case of *State v. O'Kelley*, 156 Mo. App. 493, 137 S. W. 332, solely because the proof in that record failed to show the adoption of the local option law in Dade county. The present case is certainly much stronger than that one, for there the court merely held the proof of such fact as set forth in the record insufficient, while here it is conceded that no proof whatever of such fact was in evidence. What this court said in *State v. Workman*, supra, recognized that it was the province of the Legislature rather than the courts to declare that courts should take judicial notice of the adoption of the local option law.

We need not inquire into the sufficiency of the evidence to prove the venue of the offense, as any deficiency in that respect will doubtlessly be supplied at another trial. The case is therefore reversed and remanded.

FARRINGTON and BRADLEY, JJ., concur.

## KERSHNER v. KERSHNER. (No. 13379.)

(Kansas City Court of Appeals. Missouri.  
Dec. 1, 1919.)1. DIVORCE ~~§~~324—PARENT AND CHILD ~~§~~3  
(1) — FATHER MUST SUPPORT CHILDREN  
THOUGH AWARDED TO CUSTODY OF MOTHER.

It is the primary duty of a father to support the children, and, where a decree of divorce does no more than award the custody and care of them to the mother, that duty is not absolved.

2. DIVORCE ~~§~~310—FATHER MUST SUPPORT  
CHILDREN THOUGH MOTHER AGREED TO SUP-  
PORT THEM.

On divorced wife's motion for modification of divorce decree under Rev. St. 1909, § 2375, so as to require husband to support children the custody of whom had been awarded to wife, it was no defense that wife had, under section 8304, made property settlement with husband whereby she "agrees to keep, maintain and care for said children, heretofore named, until they arrive at the age of maturity"; such agreement being merely wife's personal agreement, not affecting children's right to father's support.

Appeal from Circuit Court, Bates County;  
C. A. Calvird, Judge.

Divorce action by Elsie Kershner against Louis Kershner, in which divorce decree was granted. On plaintiff's motion for allowance for support of children. Motion granted, and defendant appeals. Affirmed.

C. A. Denton, of Butler, for appellant.  
T. W. Silvers, of Butler, for respondent.

ELLISON, P. J. Plaintiff and defendant were husband and wife. Their relations became strained and unhappy, and they separated, leaving her with three minor children, two little girls and one boy 17 years old. Shortly before separating, they entered into written contract "for the purpose of adjusting and settling all questions as to rights of property, both real and personal, all marital rights, personal obligations, and marital obligations as husband and wife," whereby he conveyed to plaintiff 60 acres of land for her life, the remainder to the three children, and she released her dower to defendant in 100 acres of real estate, "during his life, remainder in fee to the children." It was further provided in said agreement that defendant was to pay her \$200 in money and release to her certain personal property in consideration of release of her dower, or right of inheritance or other interest in his other property if he should die first. It was further agreed that plaintiff release defendant from all obligation to support and maintain her, or any claim for alimony under any legal proceeding. And as a further consideration "she (plaintiff) agrees to keep, maintain and care

for their said children until they arrive at the age of maturity."

A few months after the execution of this contract, plaintiff instituted an action for divorce from defendant, and was granted a decree in which she was given the custody of the children and in which it was recited:

"That the plaintiff and defendant have had a property settlement, so that neither can hereafter claim an interest in the property of the other, or any right to support or maintenance from the other, or right growing out of the marital relations, except as is covered by the property settlement."

After the lapse of about 18 months, to wit, on the 14th of April, 1919, plaintiff filed a motion in the divorce cause asking an allowance against defendant for support of the children, reciting that she had been granted a divorce with the care and custody of the children and that their property rights had been adjusted between them. It was then stated in such motion as cause for the application that she was without the means of support for the children, and that defendant had abundant money and property with which he could provide for their support and comfort. The motion closed as follows:

"She prays the court to make an order on the defendant to pay to her, *for the use and benefit of the aforesaid children* a reasonable monthly amount for the year 1919 and until further orders of the court." (Italics ours.)

A trial was had, both parties appearing, and the court granted the motion allowing to plaintiff \$40 per month for the support of the two girls and nothing for the boy, then about 17 years of age. The evidence showed, and the court found, that defendant was receiving a salary of \$150 per month, and that he was also possessed of ample funds with which to support himself and these children, and that he had no one dependent upon him.

This finding as to defendant's financial situation was well justified by the evidence. As to the condition of plaintiff and the two girls, the evidence showed them to be reduced to bare necessities of life. They were illy clad, and, but for aid extended by relatives, would have been in a condition of want and suffering. It is true that on defendant's part there was evidence tending to show that he had, at times, come to their assistance, but not in keeping with what they should have, nor with his ability to supply.

The ground of defense to the motion is based on the contract of settlement with plaintiff wherein she was to have the children, and also the confirmation thereof in the decree of divorce. It is claimed that this contract of settlement is binding under the terms of section 8304, R. S. 1909, and that the Supreme Court has declared that the wife "is to be deemed a feme sole, even as to her hus-

band, with whom she may deal at arm's length as with a stranger." *Mueller v. Becker*, 263 Mo. 165, 172 S. W. 322. He concedes that by force of section 2375, R. S. 1909, the circuit court, after a decree has been granted, may alter the decree as to maintenance of children. But he meets this with the contract whereby—

"Neither party can hereafter claim any interest in the property of the other; or any right to support and maintenance, or any other right growing out of the marital relation except such as is covered by the property settlement."

[1] Now it seems to us that no part of this defense meets the case presented. While this proceeding is in the name of the wife, it is not in her behalf. No property rights as between her and defendant are involved. It is, in reality, in the interest of the children for whom she speaks as their custodian. It is the primary duty of the father to support the children, and, where a decree of divorce does no more than award the custody and care of them to the mother, that duty is not absolved. *Robinson v. Robinson*, 268 Mo. 703, 186 S. W. 1032; *Keller v. St. Louis*, 152 Mo. 596, 54 S. W. 438, 47 L. R. A. 391. The decree in this case awards the custody of the children to the mother, but does not devolve upon her the duty to maintain them.

[2] Defendant, however, again goes back to the contract between him and plaintiff in which appears the following stipulation, viz.:

"As a further consideration she agrees to keep, maintain and care for said children, heretofore named until they arrive at the age of maturity."

It will be seen that this is no more than plaintiff's personal agreement; and, as such, it cannot be allowed to dispose of the right of the children for subsistence from the father. Infant children, in want, cannot be put off by the father by the claim that he contracted with another for their support, and that that other has breached the contract. This is aptly illustrated in *Wier v. Marley*, 99 Mo. 484, 495, 496, 12 S. W. 798, 6 L. R. A. 672, and *Ex parte Scarritt*, 76 Mo. 565, 43 Am. Rep. 768. Those cases have recently been approved in *State ex rel. v. Ellison*, 271 Mo. 416, 196 S. W. 1140.

Defendant dwells on the right of contract between husband and wife as sanctioned by our statute, and cites *O'Day v. Meadows*, 194 Mo. 588, 92 S. W. 637, 112 Am. St. Rep. 542, validating a marriage settlement. But we repeat that children, in wedlock, are born with rights of their own to support from the father, and, when they are in need of the necessities of life, they may call upon him, through the proper channel, to perform that duty.

In our opinion the learned trial court took the right view of the case, and the judgment will be affirmed.

All concur.

Ex parte WEINHAUSE. (No. 13296.)

(Kansas City Court of Appeals. Missouri.  
Dec. 1, 1919.)

1. HABEAS CORPUS  $\Leftrightarrow$  85(2)—DETERMINATION AS TO WHETHER ACCUSED IS A FUGITIVE FROM JUSTICE.

While the requisition from the Governor of a foreign state and compliance therewith by the Governor of the state where the prisoner is apprehended is prima facie sufficient to justify extradition, it is not conclusive, and on habeas corpus evidence to determine the substantive fact whether accused is a fugitive from justice may be considered.

2. EXTRADITION  $\Leftrightarrow$  30—ACCUSED AS FUGITIVE FROM JUSTICE.

Where one arrested under extradition proceedings based on a charge of larceny in a foreign state had, under agreement with the prosecuting attorney and the person from whom the property was stolen, made restitution and was released by consent of the probation officer under the laws of the foreign state, accused was not a fugitive from justice.

3. EXTRADITION  $\Leftrightarrow$  28½—VIOLATION OF PAROLE AS BASIS.

One convicted of a crime who has been paroled and violates such parole by escape into another state may be extradited therefrom.

Original proceeding in habeas corpus by Samuel Weinhouse directed to John F. Mitchell. Prisoner discharged.

John T. Barker, of Kansas City, for Weinhouse.

Illus M. Lee, of Kansas City, for the State.

ELLISON, P. J. The relator herein was indicted in the superior court of Boston, Mass., for the crime of larceny. He afterwards left that state and came to Kansas City, Mo. Afterwards, on the 2d day of June, 1919, the Governor of Massachusetts made requisition upon the Governor of Missouri that he cause relator to be apprehended and delivered to John F. Mitchell to be by him returned to the state of Massachusetts, there to be dealt with according to law.

In compliance with such requisition the Governor of Missouri, on the 13th of June, 1919, issued his warrant and caused relator to be apprehended and placed in the custody of Mitchell, and the latter was about to convey him to the state of Massachusetts, when he applied to this court for a writ of habeas corpus, in which application he stated that he was illegally restrained of his liberty and set up facts which it is claimed show that



the Governors of Massachusetts and Missouri were without authority to take the action just recited. A writ was duly issued directing Mitchell to produce the body of relator before the court, that the cause of his detention and restraint could be inquired into.

Mitchell produced relator in court with a return reciting why and by what authority he was detaining him, and that he was intending to take him to the state of Massachusetts. It is set up in this return that relator was indicted by a grand jury for the county of Suffolk, Mass., on the 9th day of March, 1918, "upon the charge of having committed larceny from a certain conveyance, to wit, the wagon of one James Cavanaugh, on the 14th day of February, 1918, the same being a felony in the state of Massachusetts"; that relator was arrested under a warrant issued on such indictment; that there were certain continuances, when finally, on the 25th day of June, 1918, he pleaded guilty to said indictment; that afterwards, on the 19th of February, 1919, relator "was called to come in said court and answer further to said indictment," but that he "did not appear, but made default." This is followed by an allegation that application was made for a requisition on the Governor of Missouri, as already stated.

Relator having asked that a commissioner be named to take testimony in the cause, we appointed James T. Aylward, Esq., of the Kansas City bar. Mr. Aylward heard the evidence offered, and made due return thereof, from which it appears that relator was indicted for larceny, and that he pleaded guilty, and that this was his first offense. But the following was also shown, and was uncontradicted: There is a statute in Massachusetts providing a probation system in that state, applicable to persons prosecuted for larceny. Probation officers with prescribed duties are provided for. By the laws of that state (Laws 1902, p. 1833, c. 217, § 84) each probation officer is required to examine into the nature of every criminal case, and may recommend that any one convicted be placed upon probation, and that such person may be released on probation. It is also provided in that statute (page 1756, § 52) that, if upon first conviction it is shown that the act of stealing was a simple larceny, and the convicted party makes restitution to the person injured to the full value of the property stolen, he shall not be imprisoned in the state prison.

It was further shown that by the Laws of Massachusetts of 1907 (chapter 335, p. 289), if a person is placed on probation upon condition that he make restitution to the person injured, and payment is not made at once, the court may order that it be paid to the probation officer, who shall give receipts and keep a record and shall pay the money to the person injured.

It appears from the testimony that the probation officer, the state's attorney, the

relator, and the injured party agreed that relator should make restitution in the sum of \$1,000; that he paid \$550 of that sum to such officer on the 25th of June, 1918, and took his receipt; such payment was made in court-room while court was in session; that he was then on bond or bail, but that he was allowed to go without bond, with the understanding between the probation officer, the state's attorney, the injured party, and relator that upon payment of the balance of \$450 he would be finally released from all further prosecution; that on the 4th of December following he came into court, paid the proper probation officer \$450, the balance due, and took his receipt, as in the instance of the first payment. He was then released.

Relator had the receipts above referred to in his possession, and they were filed here as exhibits. Their genuineness has not been disputed; and though the application for this writ was made more than three months ago, in which substantially the facts above recited were set out, no denial has ever been made. We therefore accept as true that relator was released and advised that he was at liberty to go his way without further claim or restraint.

The Constitution of the United States (clause 2, § 2, of article 4) provides that every person charged with a felony or other crime "who shall flee from justice, and be found in another state, shall, on demand of the executive authority of the state from which he fled," be delivered, etc. The federal statute (section 5278, R. S. [U. S. Comp. St. § 10126]) provides for the delivery of "any person as a fugitive from justice." It will be noticed that in the Constitution the expression is any person "who shall flee from justice," while in the statute it is "any person as a fugitive from justice." But the meaning is the same. Either to flee or be a fugitive would ordinarily mean that the accused had run away to avoid prosecution. But it seems not to have been interpreted that way. So that, though one had no thought of an escape or of avoiding a prosecution, if he be found in a state other than the one in which he committed the offense charged, he may be extradited under either the wording of the statute or the Constitution. *Roberts v. Reilly*, 116 U. S. 80, 6 Sup. Ct. 291, 29 L. Ed. 544; *In the Matter of Voorhees*, 82 N. J. Law, 141. So, therefore, the mere fact that the relator came "voluntarily" to this state to reside would not affect the question whether he is a fugitive from, or has fled from, justice in the other state (*McNichols v. Pease*, 207 U. S. 100, 108, 28 Sup. Ct. 58, 52 L. Ed. 121), and we proceed to inquire from other considerations whether he is subject to extradition.

[1] While the requisition from the demandant Governor and compliance therewith by the Governor of the other state is *prima facie* sufficient to justify extradition, they are not conclusive, and on habeas corpus we

may take testimony to determine the substantive fact whether the accused is a fugitive from justice. And if the testimony showing him not to be such fugitive is uncontradicted, it is controlling. *Hyatt v. Corkran*, 188 U. S. 691, 711, 23 Sup. Ct. 456, 47 L. Ed. 657. In *McNichols v. Pease*, 207 U. S. 100, 109, 28 Sup. Ct. 58, 61 (52 L. Ed. 121), the following among other matters are said to be settled:

"A proceeding by habeas corpus in a court of competent jurisdiction is appropriate for determining whether the accused is subject, in virtue of the warrant of arrest, to be taken as a fugitive from the justice of the state in which he is found to the state whose laws he is charged with violating.

"One arrested and held as a fugitive from justice is entitled, of right, upon habeas corpus, to question the lawfulness of his arrest and imprisonment, showing by competent evidence, as a ground for his release, that he was not, within the meaning of the Constitution and laws of the United States, a fugitive from the justice of the demanding state, and thereby overcoming the presumption to the contrary arising from the face of an extradition warrant."

[2] From the testimony it clearly appears that the relator was not amenable to further punishment. It is manifest that such was the understanding of the probation officer and the state, through its attorney. We can give no other interpretation to the evidence than that the prosecution for the offense had come to an end by the proceeding we have recited. If a person commits an offense in the demanding state and is afterwards apprehended in another state, no one would say that he should be extradited if it appeared he had paid the penalty assessed for such offense by suffering the punishment therefor; yet that is, in effect, what relator has done in this instance.

[3] We have not overlooked the matter of parole of a prisoner pending the execution of his sentence, and readily concede that, if one charged and convicted of a crime is paroled, and he violates such parole by escape into another state, he may be extradited. *Drinkall v. Spiegel*, 68 Conn. 441, 36 Atl. 830, 36 L. R. A. 486; *Re Ridley*, 3 Okl. Cr. 350, 106 Pac. 549, 26 L. R. A. (N. S.) 110. But we have not such facts. In the first of these cases the prisoner was convicted in New York, and then paroled and directed to go to the state of Michigan, where work had been engaged for him. But, instead of going to Michigan, he violated his parole by going to Connecticut. The court says that he used his parole to practice a fraud and thereby escape his imprisonment in New York. But the court added (68 Conn. 449, 36 Atl. 832, 36 L. R. A. 486) that—

"If he had gone to Michigan and it had been sought to secure his return from that state by a requisition upon the executive, a different question might have been presented."

At page 446 of 68 Conn. (36 Atl. 831, 36 L. R. A. 486) it is said that—

"A man is still a fugitive from justice so long as he has departed leaving its demands unsatisfied."

That is but another way of saying that if, before departing, he had satisfied the demands of the law, he could not be returned.

In our consideration of this application we have not found a case fully in point, but counsel has cited us to *Ex parte Kuhns*, 36 Nev. 487, 137 Pac. 83, 50 L. R. A. (N. S.) 507, where it was held that a husband not in arrears in payments for support of his wife in Pennsylvania at the time he leaves that state is not subject to extradition as a fugitive from justice for failure to support in case he subsequently becomes delinquent.

The prisoner should be discharged.

All concur.

#### STATE v. STEPHENS. (No. 13380.)

(Kansas City Court of Appeals. Missouri.  
Dec. 1, 1919.)

#### 1. WITNESSES ~~§~~246(1) — EXAMINATION BY COURT.

In prosecution for selling intoxicating liquor, where member of city council had testified for defendant as to bad reputation of prosecuting witness, who had been until recently a member of the city police force, court's conduct in questioning witness as to why appointment was made, if reputation of prosecuting witness was bad, held not improper.

#### 2. CRIMINAL LAW ~~§~~1036(2), 1054(1)—FAILURE TO OBJECT OR EXCEPT TO IMPROPER QUESTIONS BY COURT.

Defendant, who did not object or except to alleged improper questions asked witness by court, cannot rely thereon on appeal.

#### 3. CRIMINAL LAW ~~§~~656(2) — CONDUCT OF COURT IN EXAMINATION OF WITNESS.

In prosecution for selling intoxicating liquor, where witness who had suggested prosecuting witness to prosecuting attorney as a good man to help him ferret out liquor violations testified as to bad reputation of prosecuting witness, and on examination by the court as to purpose in suggesting such a man stated that the witness' bad reputation had been acquired since, the court's remark, "So he has acquired that since," held not ground for reversal.

#### 4. WITNESSES ~~§~~357—EVIDENCE AS TO REPUTATION OF PROSECUTING WITNESS.

In prosecution for selling intoxicating liquor, where defense had made an attack on reputation of prosecuting witness for truth and veracity, and where a witness, in answer to question of whether he knew what reputation of prosecuting witness was, answered, "I have never heard it called into question," court's refusal to strike out answer was proper where it did not appear at time of such refusal that

witness was not well acquainted with prosecuting witness.

**5. CRIMINAL LAW §729 — WITHDRAWAL OF IMPROPER REMARKS OF COUNSEL.**

Where prosecuting attorney, in commenting upon testimony of defendant's witness from city of S., who had impeached reputation of prosecuting witness, and who had testified that he had got out of a sick bed to testify, said, "I wonder if S. is so small that they were unable to find any other man than one who was sick in bed and who had to be brought from a sick bed down here to testify," but upon objection withdrew remark, and where court stated that "the remark is withdrawn," there was no ground for reversal.

Appeal from Circuit Court, Benton County; C. A. Calvird, Judge.

"Not to be officially published."

R. A. Stephens was convicted of the offense of selling intoxicating liquor, and he appeals. Affirmed.

T. C. Owen, of Warsaw, and C. C. Kelly, of Sedalia, for appellant.

D. Brunjes, of Warsaw, for the State.

**TRIMBLE, J.** Defendant was indicted, tried, and convicted of and fined for an alleged sale of intoxicating liquor; and from a judgment on the verdict he has appealed.

The matters of which defendant complains, and for which he seeks a reversal, relate to the conduct of the trial judge during the examination of witnesses, and of the prosecuting attorney in the course of his argument.

[1, 2] It is claimed that the court manifested great impatience with the defendant's attack upon the general reputation of the prosecuting witness, asking questions of witnesses and commenting upon their testimony in a manner which plainly showed the court did not believe them, and thought the prosecuting witness' reputation was good. We have carefully read the record, and find that it falls to sustain such a serious charge. If impatience was shown, it does not appear in the record or in the language used by the court. Nor did the court indicate in any way what it thought of the impeaching witness' testimony or of the reputation of the prosecuting witness. One of the instances cited in support of such complaint occurred during the examination of a witness who was a member of the city council of Sedalia. He testified that the reputation of the prosecuting witness was bad in that community, and then disclosed that the prosecuting witness had been, until recently, a member of the police force of that city. Toward the close of the witness' testimony the court asked him if the council of that city appointed the prosecuting witness to the police force, and the witness said it did. The court then

asked the witness if the latter knew how the appointment came to be made if the appointee bore a bad reputation. The witness replied he knew of no particular reason for it. The court then asked if the council had the same means of knowing the appointee's reputation as he, the witness, did, to which the latter replied by saying he did not know whether they did or not. The court then asked if the appointee had been on the force "until here lately," and the witness answered "Yes." We see no reason why the court should not in proper manner ask the questions above set out. But, however this may be, the defendant cannot rely upon them, since the record does not show any objection made or exception saved thereto.

[3] Another witness, who said that he had suggested the prosecuting witness to the prosecuting attorney as a good man to help him ferret out liquor violations, swore that the prosecuting witness' reputation was bad in Sedalia; and the court asked him what was his purpose in suggesting to the prosecutor a man whose reputation was bad. The witness replied that at that time he bore a good reputation, but that his bad reputation had arisen since then. "By the Court: So he has acquired that since that." To this last remark counsel for defendant for the first time said: "We except to the remarks of the court."

[4] The state put on several witnesses in rebuttal who testified to the prosecuting witness' good reputation. One of these witnesses, the cashier of a bank in Sedalia, after testifying that he had lived there nearly four years and had known the prosecuting witness during that time, and knew his general reputation for truth and veracity, was asked what that reputation was, whether good or bad. He replied, "I never heard it called in question." Defendant's counsel asked to have the answer stricken out. During the course of the court's ruling on this the court remarked to counsel that the Supreme Court has said it was the best evidence of good reputation that could be had. Defendant's counsel objected and excepted to the remarks of the court. The suggestion was made that the trial court was merely quoting an opinion of the Supreme Court. See *State v. Brandenburg*, 118 Mo. 181, 185, 23 S. W. 1080, 40 Am. St. Rep. 362. Thereupon the court overruled the objection. The point made by appellant here is, not that the remark was prejudicial, but that such ruling of the Supreme Court, quoted by the trial court, had reference to those witnesses who were "well acquainted with" the one whose reputation was in issue, whereas the witness in this instance was not well acquainted according to defendant's contention. We do not think survey of the witness' testimony as a whole discloses that he was not well ac-

quainted with the one whose reputation he was testifying about. But, whatever room there may be for contending that he was not, it did not appear until developed on cross-examination afterward. But the defendant made no effort to renew his request when the witness' alleged lack of acquaintance was brought out. Under the evidence as it existed at the time the court refused to strike out the witness' answer, the court was justified in such refusal.

[5] In the course of his argument the prosecuting attorney, in commenting upon the testimony of one of the defendant's impeaching witnesses from Sedalia who had said he got out of a sick bed to come, said, "I wonder if Sedalia is so small that they were unable to find any other man than one who was sick in bed and who had to be brought from a sick bed down here to testify?" Objection was made, and defendant's counsel stated that the witness took sick only the night before the trial and after he was subpoenaed; whereupon the prosecuting attorney withdrew the remark. The court remarked, "Well, the remark is withdrawn." We see nothing in this to call for a reversal of the case.

The above are the strongest instances of the so-called improper remarks and rulings upon which defendant relies. There are other instances of less importance referred to in the statement of the case, but the above are all that are specifically pointed out in the brief. We have gone through the entire record, however, and find nothing therein to justify us in reversing the judgment. It is therefore affirmed.

All concur.

#### HART v. BROWN et al. (No. 13210.)

(Kansas City Court of Appeals. Missouri.  
Dec. 1, 1919.)

#### 1. TRIAL $\S$ 149—CONCEDING CASE FOR JURY BY FAILING TO DEMUR TO EVIDENCE.

Defendant appellant is not in a position to assert that plaintiff failed to make a case for the jury where he conceded otherwise by joining in submitting the case without demurring to the evidence.

#### 2. APPEAL AND ERROR $\S$ 1050(1)—IN ACTION ON NOTE GIVEN TO STIFLE CRIMINAL PROSECUTION EVIDENCE OF CRIME ADMISSIBLE.

In a suit by plaintiff payee against her grandfather as maker of a note, the validity of which depended upon its being given in payment of damages, and not to stifle the prosecution of maker as the father of plaintiff's illegitimate child, and he testified, "I knew I wasn't guilty," the admission of plaintiff's rebuttal testimony that defendant had sexual intercourse with her and was her child's father could not have prejudiced the jury more than the necessary implica-

tions from other testimony and defendant's own admissions, and was not reversible error.

#### 3. APPEAL AND ERROR $\S$ 882(8)—STOPPEL TO ALLEGE ERROR IN ADMISSION OF EVIDENCE.

Defendant cannot complain that plaintiff witness was allowed to detail her life at his house, where he first testified thereto fully.

#### 4. CONTRACTS $\S$ 128(1) — PRINCIPAL AND AGENT $\S$ 175(2)—RATIFICATION OF AGENT'S ACT IN SECURING NOTE CHARGES PRINCIPAL WITH AGENT'S WRONGDOING.

A principal, upon ratification of agent's contract, is bound by whatever promises, frauds, or representations the agent made to obtain the contract, whether or not authorized by or known to the principal, so that, if payee's father or the prosecuting attorney, who as her agents, procured the note, had an express or implied understanding with the maker that the latter should not be prosecuted for her seduction, then the note would not be collectible, even though the prosecution was started and dropped before they became her agents, since it might be started again.

#### 5. EVIDENCE $\S$ 99—RES INTER ALIOS ACTA.

In an action on a note defended on the ground that it was given by defendant to plaintiff, his granddaughter, to stifle prosecution of defendant, and not for civil damages growing out of defendant's being the father of plaintiff's illegitimate child, as plaintiff claims, evidence of transaction between plaintiff and her agents, her father, and the prosecuting attorney, which did not include statements of guilt, or innocence nor attempt to evade her agent's acts, but merely showed plaintiff did not want to prosecute, but did want damages, objected to as *res inter alios acta*, was held admissible.

#### 6. TRIAL $\S$ 48—MIXING OF COMPETENT WITH INCOMPETENT EVIDENCE IN OFFER AND COURT'S REJECTION OF THE WHOLE.

Where an offer of evidence was mixed up with matters clearly incompetent, the court was not required to sort out the competent from the incompetent, but could reject the whole.

Appeal from Circuit Court, Vernon County; B. G. Thurman, Judge.

"Not to be officially published."

Suit by Ollie E. Hart against D. C. Brown and another. Judgment for plaintiff, and defendants appeal. Affirmed.

M. T. January and W. M. Bowker, both of Nevada, Mo., for appellants.

W. H. Hallelt, of Nevada, Mo., for respondent.

TRIMBLE, J. This is a suit on a promissory note for \$1,900. The defense was that it was given in settlement of a criminal prosecution. The issue was submitted to the jury upon instructions of which no complaint is made. The jury found for plaintiff, and the defendant appealed; the only grounds relied upon consisting of alleged errors in the admission of testimony.

The note is a companion to the one sued on in *Atkins v. Brown*, 208 S. W. 502, being the \$1,900 note mentioned therein; and the circumstances out of which it originated are practically as stated in that opinion. For the purposes of convenience and ready understanding, however, we again outline them as shown by the record in this case.

The plaintiff, Ollie Hart, an unmarried girl, lived with her maternal grandfather, D. C. Brown, in Grundy county, Mo., from the time she was 14 years old. Her grandfather became a widower, and in 1914, when she was about 17 years of age, he began having sexual intercourse with her, with the result that she became pregnant. He testified that she was complaining of her eyes, and he agreed that she should go to St. Joseph to consult a physician who was the grandfather's nephew; that she went, and the next day telephoned to him, and he immediately went to her, where he learned from her and the physician what was the matter; that he made arrangements for the care of her and the child when it should be born, he agreeing to pay the expenses thereof; that he also agreed with his granddaughter that she should visit her father and other relatives and then return to St. Joseph for the birth of the child, and he agreed to pay her expenses for this, and sent small sums of money to her when she wrote for same. Her condition was to be kept secret from her relatives. Shortly after this arrangement was made, the grandfather, in June, 1914, went to Vermont and married. While there he wrote letters to his granddaughter, sending her money and saying he would be so glad when she got all right, for her to tell him in code how soon "it will be over" and to be very careful, as "I do want us to be carefull to keep every close secrete." In other letters he wrote he was sorry "you are so dissatisfied. Wont you stand it the best you can. If you will, I will see that you have a better time when you get through with this." He also urged her not to let the doctor "pump you to tell him," and hoped it would "all be over soon" so she could come home and go to school. Plaintiff says that, when it was learned she was pregnant, the grandfather first went to St. Joseph himself to make arrangements for her to go up there, and that he came back and sent her up there, and that she went for the purpose of having an abortion performed, but the doctor refused to perform it, and telephoned for her grandfather, who came and made the arrangements hereinbefore stated; also that it was agreed between them that she should go back with him and stay until he went to Vermont, when she would go to visit her relatives as long as possible, and then come back to St. Joseph for the birth of the child.

In August, 1914, plaintiff was compelled by her advancing pregnancy to terminate

her visit with her relatives, so she returned to St. Joseph as agreed upon, and remained there till the birth of her child, November 20, 1914. In the arrangement between the grandfather and the girl it was agreed that the child should be placed in a home, but after its birth the mother's natural instincts asserted themselves, and she determined not to give it up. She sent a telegram to her grandfather in Vermont to come at once. Upon receipt thereof he immediately started, sending her, it seems, a telegram saying he was coming through Trenton.

In the meantime, shortly after the child's birth, the girl's father, who lived in Texas county, Mo., came to St. Joseph, and for the first time learned of his daughter's situation and condition. He went to Trenton, where he consulted the prosecuting attorney on the evening of the 3d of December with reference to a prosecution. The attorney told him he would have to see the girl, and the two went to St. Joseph the next morning. The father told of the telegram from Brown saying he was coming through Trenton, and the attorney that same evening ordered the officers to detain him upon his arrival. No information was filed and the attorney says he does not think an affidavit was either, but, anyway, a justice the next morning issued a warrant for Brown's arrest.

When the father and the attorney saw the plaintiff at St. Joseph, she refused to prosecute her grandfather; what she wanted, and all she wanted, was for him to take care of her and the child. This was on December 4th. While the plaintiff's father and the attorney were in St. Joseph Brown got off the train at Trenton and was arrested at the station by one of the sheriff's deputies. He was taken to the sheriff's office, where he and the warrant were turned over to the sheriff, who, upon Brown's promise to appear at any time, allowed him to go, and Brown went to his hotel.

When the attorney returned from St. Joseph on the evening of the 4th of December, having learned from the plaintiff that she would not prosecute, he ordered the sheriff to let him go, as there would be no prosecution. No return of any kind was ever made on the warrant, nor was the warrant itself ever returned to the justice.

On the next day, December 5th, the plaintiff's father came down to Trenton about noon, and, as agent for his daughter, entered into a written contract employing the attorney to bring a civil suit for damages. After the contract was signed, the father and the attorney went over to the hotel and saw Brown. The latter, according to his own testimony, told them he was "willing to do what I think is right in anything." According to the testimony in plaintiff's behalf, Brown was shown the contract whereby the attorney was employed to bring a civil suit

for damages. Brown said he wanted to settle it, as he expected to do something for the girl, anyway, and in his will expected to make provision for her and the child. The interview between the father and grandfather of the girl became so stormy that the attorney advised them to postpone matters until they were in a better humor. Whereupon the interview was terminated till the next day. Brown and the father left Trenton the next day and went over into Harrison county to relatives and friends they had over there. In three or four days they came back to Trenton, and met at the office of the attorney, where a settlement of the granddaughter's claim for damages was made by the giving of the note in suit and the other note and cash mentioned in *Atkins v. Brown*, supra. The testimony of both the father and the attorney is that no settlement of the criminal features of the case was made, nor did that element enter into the matter. It was solely the daughter's claim for damages that was settled, and no promise or intimation, express or implied, was given concerning what was to be done in reference to immunity from prosecution or that it should be stifled.

[1] However, although defendant argues that the admitted facts show that a settlement of the criminal prosecution did enter into and form a part of the consideration for the note, yet no distinct point is made that plaintiff failed to make a case for the jury. Indeed, he is not in a position to assert such a claim, since he conceded that the case was one for the jury by joining in submitting the case without a demurrer being offered. *Kenefick-Hammond Co. v. Norwich Ins. Society*, 205 Mo. 294, 312, 103 S. W. 957; *Hansen v. Boyd*, 161 U. S. 397, 402, 16 Sup. Ct. 571, 40 L. Ed. 746; *Hartford Ins. Co. v. Unsell*, 144 U. S. 439, 451, 12 Sup. Ct. 671, 36 L. Ed. 496; *Boone County Lumber Co. v. Niedermeyer*, 187 Mo. App. 180, 186, 173 S. W. 57.

[2] The drift of defendant's argument, if we understand it, is that, as the evidence is so close to showing that a stifling of the criminal prosecution did enter into the agreement for the giving of the note, the case should be scrutinized carefully to ascertain the slightest imperfection in the admission of testimony. And it is urged that error was committed in permitting the plaintiff to testify that her grandfather had sexual intercourse with her and was the father of her child. In *Cheltenham Fire Brick Co. v. Cook*, 44 Mo. 29, it was held that in a case where a prosecution has been started it is not material, in order to establish the defense that the obligation sued on was given to stifle a criminal prosecution, to inquire whether the party was guilty of the offense or not, and hence it was not necessary to allege in the answer that a crime had been committed, but that, where no prosecution

has been instituted, it is necessary to allege that. The court did not hold that the mere admission of evidence that the crime was committed was reversible error. The only holding of that kind was with reference to declarations and admissions of Theodore F. Cook as to the amount he owed, made prior to the execution of the bond and outside of the presence of Isaac Cook which were not admissible against the latter, who was the sole defendant. In the case of *McCoy v. Green*, 83 Mo. 628, the holding was merely that in order to constitute a defense it is not necessary to allege that a crime had been committed or a prosecution commenced. It nowhere held that, if evidence of the crime itself happened to be admitted in evidence, such would be reversible error. It cannot be successfully contended that the girl's statement that Brown had carnal knowledge of her and was the father of her child prejudiced the jury any more than they would already be by the necessary implications arising from the testimony and admissions of defendant himself. The execution of the note was admitted, and hence defendant's evidence in chief was introduced first, and then plaintiff's was offered in rebuttal. While he made no direct or specific denial of his guilt to offset the damning inferences to be drawn from his conceded acts and conduct, yet, in testifying concerning the negotiations in reference to the settlement which he claims was to stifle prosecution, he said, "I knew I wasn't guilty." Under these circumstances, it does not seem to us that the admission of testimony by the girl in rebuttal that he was guilty should be treated as reversible error. As he had thus indirectly said he was not guilty, thereby tending to create the impression that the note was not given in settlement for any damages done to the girl but only to avoid the shame of such a charge and the exposure of a public prosecution, it would appear that it was then not improper for plaintiff to testify that he was guilty in order that the jury might be in a better position to properly determine whether any element of the settlement of a criminal prosecution entered into the consideration for the note, or whether the settlement was made only for the damages accruing to the girl. The jury were instructed that, if the note was given with the understanding that it was in settlement of a criminal prosecution, then the note was illegal and void, "whether defendant was guilty or innocent." We cannot see how, under all the circumstances, the admission of the testimony could constitute reversible error.

[3] The complaint that plaintiff was allowed to detail her life at her grandfather's cannot be sustained in view of the fact that the defendant himself, the first witness on the stand, went into this fully. Besides, the

plaintiff did not go into any detailed statement of her life there.

[4, 5] There is no question but that, when a principal ratifies a contract made by his agent, then he is bound by whatever promises, frauds, or representations the agent made to obtain the contract, no matter whether the principal authorized them or even knew of them. *Morgan County Coal Co. v. Halderman*, 254 Mo. 596, 163 S. W. 828; *Millard v. Smith*, 119 Mo. App. 701, 95 S. W. 940. So that, if either the girl's father or the attorney had an express or implied understanding with Brown that the prosecution would be stopped or not brought up again, then the note was affected by that taint, and is not collectible. But they both testify that nothing of that kind was done, and only Brown himself testifies to the contrary. According to the evidence in plaintiff's behalf, there was no thought of a civil suit for damages at the time the father consulted the prosecutor and the latter ordered Brown's arrest. That was done before they learned the girl was unwilling to prosecute her grandfather, but only wanted support for herself and child, and as soon as the prosecutor learned this he told the officers there would be no prosecution and to let Brown go. It was not until after this that the father came to Trenton, and, as the agent of his daughter, engaged the attorney to bring a civil suit. According to this, the prosecution was both originated and dropped without plaintiff's knowledge and before she made her father and the attorney her agents to obtain support for her or for any other purpose. Of course, even if the prosecution was instituted and dropped before the agency was created, yet if these agents, or either of them, thereafter had an agreement, express or implied, with Brown that no prosecution would be had, the validity of the note would nevertheless be tainted thereby, and plaintiff's rights would be affected, since the prosecution could have been reinstated. But defendant says the evidence as to plaintiff's desires and the authority she gave her agents, including the contract made with her attorney, were not admissible, since they were matters not transpiring in the presence of the defendant, and the contract was *res inter alios acta*. The evidence as to the transactions between plaintiff and her agents did not include conversations, declarations, or statements concerning the guilt or innocence of the defendant nor as to the purpose for which the note was given. It merely showed that she did not want to prosecute and what she did want. The evidence was not offered for the purpose of escaping the effect of anything her agents did by showing they had no authority to that effect from her. And the jury could not have so understood it, since they were instructed, at defendant's request, that if any agreement for the stifling

of the prosecution was made or understood with Brown, it was the act and agreement of plaintiff herself. As defendant was insisting that the note was given for the illegal purpose of settling a criminal prosecution, we think it was competent for the plaintiff to meet this by showing the purpose for which it was given and why there was no prosecution. And in doing so she could show all the facts, including the authority of her agents, particularly where it appears that such authority was shown the defendant prior to the making of the settlement. As said before, it was not offered for the purpose of escaping the results of her agents' acts by showing a limitation of authority, but as a circumstance for whatever it was worth tending to show the claim that was being pressed and the settlement that was, in fact, made. The plaintiff was, under the circumstances, entitled to lay all of these matters before the jury so as to enable them to have a perfect picture of the whole situation. And if the defendant wanted to prevent all possibility of the jury's taking that testimony as exempting plaintiff from the effect of her agents' acts, he should have made his instruction more specific if it was not specific enough.

[6] It is urged that the court erred in excluding an offer of evidence to prove matters that happened two years after the note was given. This offer was to the effect that in February, 1917, plaintiff and her father went before Kavanagh, the then prosecuting attorney of Grundy county, and told him to either make Brown pay the note or else prosecute him on the charge of having carnal knowledge of the plaintiff; that the prosecutor told them he would not make a collection agency of his office, but that they could file an information before a justice of the peace and have him arrested and he would then prosecute; that Ollie Hart did go before a justice of the peace and file an affidavit charging Brown with having carnal knowledge of her in 1914; that they employed special counsel to assist; and that after a full hearing and trial on said charge the justice discharged the defendant.

Now, if any part of this offer was material, it was only that part showing that plaintiff then wanted the note paid or her grandfather prosecuted, and that she did institute such prosecution. It could only be competent as an admission by conduct contradictory of the testimony that, when the note was given, she did not want him prosecuted and did not take the note in settlement of the prosecution. If competent, its competency is on the theory that it disclosed a state of mind in plaintiff which might be fairly found to relate back to the time of giving the note, and was a circumstance for the jury to consider in determining what was in fact then

done. We need not decide whether it was competent or not, since the offer was mixed up with matters which clearly were not competent, and the court was not required to sort out the competent from the incompetent. 1 Thompson on Trials, p. 551, § 678; Williams v. Chicago, etc., R. Co., 169 Mo. App. 468, 475, 155 S. W. 64.

We are of opinion that the judgment should be affirmed; and it is so ordered.

The other Judges concur.

**BERKSHIRE et al. v. HOLCKER et al.**  
(No. 12314.)

(Kansas City Court of Appeals. Missouri.  
June 16, 1919.)

**1. MECHANICS' LIENS §71—CLAIMANT MUST CONNECT THE OWNER OF THE LAND WITH THE IMPROVEMENTS.**

Where contract for improvements was made with husband of owner, it was necessary for mechanic's lien claimants, under Laws 1911, p. 314, §§ 8235a-8235g, to show some agency connection in the nature of a moving cause reaching from the improvements back to the owner of the land.

**2. MECHANICS' LIENS §289—INSTRUCTION AS TO HUSBAND ACTING AS AGENT FOR WIFE PROPER.**

In an action under Laws 1911, p. 314, §§ 8235a-8235g, to establish materialman's lien, on question whether husband entering into a contract in his own name for the construction of a house on wife's land was her agent, an instruction that the sole issue was whether the contract was entered into by the husband for and on behalf of himself or on behalf of his wife, and, if the contract was on behalf of himself and as his own individual contract, then verdict should be that the husband was not the agent of the wife, was not improper as narrowing the issue or as withdrawing from consideration of the jury evidence covering the general aspects of the question.

**3. APPEAL AND ERROR §856(5) — ORDER GRANTING NEW TRIAL APPROVED FOR ERROR NOT MENTIONED BELOW.**

Advantage may be taken, on an appeal from an order granting a motion for a new trial, of any error in the trial of which complaint was made in the motion for a new trial, even though it was not mentioned by the trial court.

**4. TRIAL §260(1)—INSTRUCTION COVERED BY INSTRUCTION GIVEN PROPERLY REFUSED.**

Court did not err in refusing a requested instruction fully covered by another requested instruction which was given.

**5. MECHANICS' LIENS §289 — INSTRUCTION ERRONEOUS AS MISLEADING.**

In an action to establish a materialman's lien, question being whether husband in erecting a house was acting as agent for his wife, an instruction that jury should find that the

husband was agent for the wife if he "was authorized by his wife to erect or cause to be erected the building," etc., was properly refused as misleading, where there was no question that the wife knew that the husband was building the house and was passively willing to allow him to do so.

**6. MECHANICS' LIENS §71—PASSIVE CONSENT BY WIFE NOT GROUND FOR LIEN.**

Mere passive permission and consent of wife where husband contracts for a building upon her land does not render the husband an agent for the wife within the meaning of the lien statute (Laws 1911, p. 314, §§ 8235a-8235g), as there must be an active and moving cause on the part of the owner to procure the erection of improvements in order to subject the land to a lien.

**7. TRIAL §267(1) — STRIKING PARTS OF INSTRUCTION.**

Where a requested instruction was full and complete as given by the court, it could not be said that the court erred in striking out part of the instruction as requested.

**8. MECHANICS' LIENS §288(2) — AGENCY OF HUSBAND FOR WIFE QUESTION FOR JURY.**

In an action under Laws 1911, p. 314, §§ 8235a-8235g, to establish a materialman's lien, whether husband in contracting for the erection of a building on wife's land was acting as her agent *held* for the jury, although she knew that he was building the house on her land and at his request looked over the plans and made suggestions, and unknowingly signed a deed of trust to raise money to defray the expense of construction.

**9. MECHANICS' LIENS §309 — FINDINGS OF JURY ON CONFLICTING EVIDENCE CONCLUSIVE ON TRIAL COURT.**

Although the lien act of 1911 denominates a suit to establish a mechanic's lien "an equitable action," findings of fact of the jury on conflicting evidence cannot be disturbed by the court, in view of Laws 1911, p. 316, § 8235f.

**10. TRIAL §149—FAILURE TO DEMUR TO EVIDENCE AN ADMISSION OF SUFFICIENCY.**

In an action to establish a materialman's lien, claimants conceded that the matter of husband's agency for wife was a question for the jury, where they did not offer a demurrer to defendants' evidence nor ask a peremptory instruction, but joined in asking instructions on the disputed issue and without objection submitted it on the evidence to a jury called at their request under Laws 1911, p. 316, § 8235f.

**11. ESTOPPEL §107 — NOT IN ISSUE UNLESS PLEADED.**

The question of estoppel is not in issue unless pleaded.

**12. MECHANICS' LIENS §288(2)—WIFE'S ESTOPPEL TO DENY HUSBAND'S AGENCY.**

Facts showing that a wife passively consented to the construction of a building by the husband in his own name on her land *held* not sufficient as a matter of law, to create an estoppel to deny that he was acting as her agent



in an action under Laws 1911, p. 314, §§ 8235a-8235g, to establish a materialman's lien.

**13. MECHANICS' LIENS ⇨76—ESTOPPEL TO DENY HUSBAND'S AGENCY.**

In an action under Laws 1911, p. 314, §§ 8235a-8235g, to establish a materialman's lien, the owner of the land in question was not estopped to deny that she knowingly executed a trust deed on the land in question; such document being introduced in evidence as tending to show that her husband, who contracted for the construction of the building in his own name, was acting as her agent.

**14. APPEAL AND ERROR ⇨82(14)—ASSUMPTION OF CONTRARY POSITIONS ON APPEAL.**

A litigant who in the trial court asked that a certain question be submitted to the jury and made no objection to its submission to the jury, submitting instructions on the question, cannot on appeal assume a position directly contrary and claim that there was no question for the jury.

**15. APPEAL AND ERROR ⇨714(4) — STATEMENTS OF FACT BY COUNSEL ON APPEAL.**

Counsel's mere statement on appeal as to when a certain deposition was taken cannot be accepted as true.

**16. CONTRACTS ⇨97(2)—NO RATIFICATION IN ABSENCE OF KNOWLEDGE.**

There can be no ratification of a contract, where the one who has the power of ratification is ignorant of the facts, and in such case the doctrine of constructive knowledge has no application.

**17. NEW TRIAL ⇨70 — GRANTING OF NEW TRIAL FOR INSUFFICIENCY OF EVIDENCE.**

Where there was no error in a trial where-in case was submitted to the jury, an order granting a new trial will be reversed on appeal, where it cannot be said as a matter of law that the verdict of the jury was not sustained by the evidence.

Appeal from Circuit Court, Jackson County; O. A. Lucas, Judge.

Action by John H. Berkshire and others against Irma H. Holcker and others. Verdict for defendants. From an order granting a new trial, defendants appeal. Reversed and remanded, with directions.

Scarritt, Scarritt, Jones & Miller, of Kansas City, for appellants.

Numa F. Heitman and Ellis, Cook & Dietrich, all of Kansas City, for respondents.

**TRIMBLE, J.** Plaintiffs are a copartnership engaged in business under the name of the Berkshire Lumber Company. The firm, as one of several lien claimants, brought this action under sections 8235a to 8235g, Laws 1911, p. 314, to establish a materialman's lien against real estate owned by defendant Irma H. Holcker, wife of the defendant Otto Holcker. The other lien claimants were made

parties and filed their respective petitions, wherein each of them, like plaintiffs, set up a right to a lien against the property on the ground that they furnished material to one Brown, who had a written contract with the husband, Otto Holcker, for the erection of the improvements involved.

[1] In order to establish their liens, it was necessary for the lien claimants to show some agency connection, in the nature of a moving cause, reaching from the improvements back to the owner of the land; and, as the only right or authority Brown had from any one to go upon the land and erect the improvements was the written contract signed by himself and Otto Holcker, and as none of the lien claimants had any basis or authority whatever for the furnishing of material except their contracts with Brown, the only way in which any connection reaching back to the owner could be established was to show that Otto Holcker in making the contract with Brown was acting for and on behalf of his wife and as her "agent" within the meaning of that term as used in the lien statutes. The various lien claimants, therefore, charged in their respective petitions that Otto Holcker, in contracting with Brown for the erection of the improvements, did so as the agent of his wife. This was denied by each of the Holckers. On the contrary, they assert that Otto Holcker made the contract in fact, as it appears to be on its face, for himself individually.

Thereupon all of the lien claimants, pursuant to section 8235f, Laws 1911, p. 316, filed a joint motion, alleging that "there is an issue of fact in this case which is common to all the mechanic's lien claimants who are parties to this action," and that the issue of fact referred to was whether or not Otto Holcker was the agent of Irma Holcker, his wife, in the erection of the building described in the pleadings, and moved the court to frame said question into an issue of fact and submit it to a jury.

This motion the trial court sustained, and an issue was written and submitted whereby the jury was required to find whether the husband was the wife's agent to erect, or cause to be erected, the improvements in controversy. After a trial, the jury returned said issue with their verdict, stating that they "find the issues for the defendants and answer said question, 'No.'"

The lien claimants' motions for new trial were sustained by the court on the sole ground that error was committed in giving instruction No. 6 for defendants, and they have appealed from that order.

[2] Said instruction No. 6 told the jury that the sole issue (submitted by the court as above stated) for their determination was whether the contract in evidence between

Otto Holcker and Brown (the contractor) was entered into by Otto Holcker for and on behalf of himself, or by said Otto Holcker for and on behalf of his wife, Mrs. Irma Holcker, and, if the jury believed from the evidence that the contract between Otto Holcker and said Brown was made and entered into by said Otto Holcker for and on behalf of himself and as his own individual contract, then the verdict should be that said Otto Holcker was not the agent of Mrs. Irma Holcker. It is said that this instruction narrowed the issue. We think it did not. It states the very issue formulated by the court at the request of the lien claimants and to which no objection was offered either to its scope or form. None of the lien claimants make any claim that they furnished any labor or material directly to either Mr. or Mrs. Holcker, but all claim that they furnished it to Brown, the general contractor. It is undisputed and beyond question that the only right or authority Brown had from any one to go upon the land and erect the improvement was the written contract in evidence signed by himself and Otto Holcker. As hereinbefore stated, there was no connection of any sort between Mrs. Holcker and the general contractor, Brown, or between her and any of the lien claimants; there was no connection between Otto Holcker and any of the lien claimants giving them authority, even from him, to furnish material for the improvements, save and except the contract he made with Brown. Consequently the only route, by which any possible connection between the lien claimants and the owner could be traced, lay through the contract between Otto Holcker and Brown. This being so, then unless it was shown that Holcker, in contracting for said improvements, did so for and in behalf of his wife, there was no relationship of any kind established between the lien claimants and the owner, Mrs. Holcker. It cannot be said that the effect of the instruction upon the minds of the jury was to withdraw from their consideration the evidence covering the general aspects of the question whether or not the husband was acting in his wife's behalf—i. e., with her active volition and consent as a moving cause in procuring him to erect the improvements for her—because the instruction in no way deals with the evidence to be considered by the jury in order to determine the issue submitted; and the jury were told in plaintiffs' instruction No. 4 that in arriving at their verdict they were not required to find that there was any formal written authority from the wife to the husband to enter into a contract with Brown for the erection of the improvements, "but in determining whether the defendant Otto Holcker was authorized by his wife, Irma Holcker, to erect or cause to be erected the building and garage upon the real estate in question, you shall take into

consideration all of the facts and circumstances in evidence." So that we are unable to perceive any error in said instruction No. 6.

[3] But it is true, as stated by claimants, that if there is any other error in the trial, of which complaint has been made in their motions for new trial, advantage may be taken of it to justify the granting of the new trial, even though it was not mentioned by the trial court. *State ex rel. v. Thomas*, 245 Mo. 65, 149 S. W. 318.

[4-6] Among these other alleged errors is the one that the lien claimants' refused instruction No. 1 should have been given. The refusal, however, is fully justified because said instruction 1 is wholly covered by lien claimants' instruction No. 4 hereinabove mentioned. Besides, instruction No. 1 submitted solely the bare hypothesis whether the husband "was authorized by his wife to erect or cause to be erected the building and garage upon the real estate in question," and, if so, then the jury should answer the question submitted to them in the affirmative; and the court could well have refused the instruction on the ground that, under the peculiar state of the evidence as to the wife's knowing that the husband was building the house and was passively willing to allow him to do so, the instruction should not have used the word "authorized," standing alone and unexplained, as though it meant an agency even within the meaning of the lien statutes, which at least requires that some active element in the nature of a moving cause should emanate from the owner to the one making the improvements before the owner's land can be affected by a lien. By the wife's passive permission and consent the husband would be "authorized" in the sense that he would not be a trespasser, and yet there would be no element of agency, within the meaning of the lien statute, emanating from the wife to the husband, as an active and moving cause on her part, to procure the erection of the improvements. And unless there was at least this sort of an agency existing between the owner and the husband, there is no ground for a lien on the owner's land under our statute, as we will hereinafter show in dealing with the question of whether the lien claimants were entitled to a directed verdict, as is now asserted by them on appeal. There was no question but that the wife did passively allow the husband to build the house, he using his own property and means to pay therefor; and therefore the court might as well have given a peremptory instruction as to have given the one under consideration, for the jury would have been led to believe that, as the husband was authorized by his wife's mere passive consent, this was sufficient to afford foundation for such agency as is necessary and requisite to the establishment of a lien. Lien claimants

cite *Holland v. McCarty*, 24 Mo. App. 112, where the word "authority" was held a proper word without explanation of what it meant. But the word was there used in connection with the question whether an architect ordered the plaintiff to do some extra work "without authority" from McCarty, the owner. In that connection, and as applied to that evidence, the word was plain, with but one meaning, and with no possible ground of misunderstanding; but, as applied to the evidence in the case at bar, it was susceptible also of the meaning hereinbefore noted.

[7] It is also claimed that the court erred in striking out a part of lien claimants' instruction 5 before giving it. The instruction was to the effect that although Otto Holcker paid out nearly \$9,000 of his own money on account of the building, and although the contractor may have failed to use some of the money which was paid him for the building, yet you are instructed that such facts of themselves do not constitute any defense as against the lien claimants. In the instruction, as offered, there were also the words, "and you will not let such facts influence you one way or the other in answering the questions submitted to you"; but the court in the presence of the jury struck them out. There was no error in this. The instruction as given was full and complete without such addition, and the action of the court in no way tended to prejudice the jury.

In addition to the complaint as to defendants' instruction No. 6, each of the others given for them is objected to. They relate principally to the fact that knowledge and no objection by the wife to the erection of the house by the husband, standing alone, did not make him an agent. These objections are sufficiently disposed of in what we have written and in what is hereinafter said upon the subject of whether lien claimants are entitled, as a matter of law, to a finding and judgment that the husband was the wife's agent, which the lien claimants now contend for and assert we should direct.

Upon this feature of the case, it is to be observed that there was no attempt to show any express agency; there was no evidence of any original authority emanating from the wife, as a moving cause, to the husband or to any one else, to erect the improvements. The agency attempted to be shown and relied upon is an agency implied from facts and circumstances. For the purposes of this case, we may concede that, notwithstanding the contract purports on its face to be made by the husband for himself, there is evidence tending to show that he made it for his wife as her agent. This consisted of facts showing that the wife knew the house was being built on her land, that she visited it in the course of construction, that at his request she looked over the plans and made suggestions, and that she signed a note and deed

of trust securing a loan on the land which the husband obtained to be used on the house, and that finally upon the abandonment of the job by the contractor, and after the husband had with his own funds completed the house, he with his wife and family moved into and occupied the house as a home. However, according to the evidence in defendants' favor, the wife did not know she was signing a deed of trust on her land, but thought she was signing some papers in her husband's business.

On the other hand, there was the evidence of the contract itself and the defendant's evidence that no agency existed between them in reference to the house; that, on the contrary, the husband was, himself, building the house as a residence, putting in his own property in payment thereon (which fact appears on the face of the contract), and also putting in more money than he borrowed; and, as stated, that the wife did not knowingly sign a deed of trust on her real estate.

[8] On account of the peculiar nature of the relation between husband and wife and the commonly performed duty of the husband to provide a house for their home and joint occupancy, it by no means conclusively follows that she has made him her agent to build a house for her because she knows he is building the house on her land, and that she shows interest in the construction of the house and, at his request, looks over the plans and makes suggestions. Anything short of that wifely interest would be unnatural, and it can all exist in entire consistency with her disclaimer of having made him her agent to build the house for her. It may aid the jury along with other things in making up a verdict, but that is all. *Kuenzel v. Stevens*, 155 Mo. 280, 56 S. W. 1076; *Planing Mill Co. v. Brundage*, 25 Mo. App. 268; *Cement Co. v. Elser*, 156 Mo. App. 291, 137 S. W. 626. In the first of these cases the Supreme Court, at page 287 of 155 Mo., 56 S. W. 1078, said that—

"Undoubtedly a husband may make a contract in his own name and on his own credit to improve his wife's property without rendering it subject to a mechanic's lien for the cost. But when a party has furnished materials towards the building, and the question as to his right to a lien depends on the fact as to whether the husband undertook the work on his own credit or that of his wife for whose benefit the improvement inures, there is no reason why the question should not be settled by a fair preponderance of the evidence; the burden of proof, of course, being upon him who asserts the agency, and due caution being observed to distinguish between wifely deference and business conduct, when inferences from her acts are to be drawn."

[9] So, therefore, since there was evidence tending to show either way on the question of agency, we think it was proper to submit

the question to the jury to determine. And this course is authorized by section 8235f, Laws 1911, p. 316, which also provides that—

The court "shall be bound by the findings of the jury thereon in the further proceedings in said cause, subject to the power of the court to grant new trial of such issues."

Of course, this provision of the statute does not forbid the setting aside of the jury's verdict if the evidence shows, as a matter of law, that there was an agency existing between the wife and the husband. And the above-quoted provision of the statute is cited only for the purpose of answering the suggestion that, since the 1911 act denominates the suit "an equitable action," we may treat the jury's verdict as advisory only, and pass upon the weight and credibility of the evidence for ourselves as we are permitted to do in the case of a suit in equity purely. Under this statute, however, unless the evidence does show, as a matter of law, that an agency existed between the wife and the husband, we have no more authority to disturb the verdict than in any other law case.

[10] Upon the question of whether the evidence shows agency as a matter of law, it is to be observed, in the first place, that the lien claimants at the trial conceded that the matter of the husband's agency was a question for the jury, for they did not offer a demurrer to defendants' evidence nor ask a peremptory instruction, but joined in asking instructions on the disputed issue, and without objection submitted it on the evidence to the jury, called at their request. *Kenefick-Hammond Co. v. Norwich, etc., Ins. Society*, 205 Mo. 294, 312, 103 S. W. 957; *Hansen v. Boyd*, 161 U. S. 397, 402, 16 Sup. Ct. 571, 40 L. Ed. 746; *Hartford Ins. Co. v. Unsell*, 144 U. S. 444, 451, 12 Sup. Ct. 671, 36 L. Ed. 496; *Boone Lumber Co. v. Niedermeyer*, 187 Mo. App. 180, 186.

But aside from, and in addition to, this admission, we cannot bring ourselves to agree with lien claimants' contention that we should now declare, as a matter of law, that the husband was acting as agent for his wife and with her authority, established by implication arising on the facts. Such claim is, in effect and as applied to the evidence, that if Mrs. Holcker knew of the erection of the house by her husband, and merely permitted it and consented thereto, she thereby made him her agent with such power in him which, while it would not bind her personally to pay for the improvements, nevertheless was sufficient to bind her property to the payment of a mechanic's lien. In some states, the statute makes consent of the owner sufficient (*Ziegler v. Galvin*, 45 *Hum* [N. Y.] 44, 48), but that is not our statute. And we do not understand the authorities to hold that under our statute, or under statutes similar to ours, mere consent or acquiescence will furnish the necessary agency connection to sup-

port and uphold a lien. *Kuenzel v. Stevens*, 155 Mo. 280, 56 S. W. 1076; *Planing Mill Co. v. Brundage*, 25 Mo. App. 268; *Hallwell Cement Co. v. Elser*, 156 Mo. App. 291; *Hoffman v. McFadden*, 56 Ark. 217, 19 S. W. 753, 35 Am. St. Rep. 101; *Gilman v. Disbrow*, 45 Conn. 563; *Conway v. Crook*, 68 Md. 291, 7 Atl. 402; *Jones v. Walker*, 63 N. Y. 612; *Campbell v. Jacobson*, 145 Ill. 389, 34 N. E. 39; 2 *Jones on Liens*, §§ 1262, 1263, 1265.

In support of the contention that we should declare that an agency existed as a matter of law, the cases of *Ward v. Nolde*, 259 Mo. 285, 168 S. W. 596, and *Boeckeler Lumber Co. v. Wahlbrink*, 191 Mo. App. 334, 177 S. W. 741, are cited; the decision in the latter case bearing the approval of the Supreme Court after certification to that tribunal from the St. Louis Court of Appeals. 208 S. W. 840.

Clearly, the case of *Ward v. Nolde*, 259 Mo. 285, 168 S. W. 596, is not applicable to the case at bar. In that case the owner of the property bound the tenant, by bond and a written lease, to make improvements for him (the owner), which improvements were specified and approved by the owner. But more than that, that case (pages 302 and 303 of 259 Mo., 168 S. W. 596), decides that mere acquiescence by the owner in the act of the party making the improvement whereby he contracted with the builder for extras will not establish an agency, and that, too, where there was evidence which tended to show the owner knew of the extras before they were put in. Again, at pages 297 and 298 of 259 Mo., 168 S. W. 599, of said *Ward Case*, the Supreme Court held that, even in a case where there was no marital interest to consider, these things would be circumstances which "would no doubt have an important bearing upon the case as throwing some light upon the character of the relationship between Delany and Nolde [owner and alleged agent] and would therefore be circumstances that should be taken into consideration in determining whether Nolde was his agent within the meaning of the statute." And at page 300 of 259 Mo., 168 S. W. 596, the court quotes with approval from the opinion of Johnson, J., in *Curtin-Clark H. Co. v. Churchill*, 126 Mo. App. 462, 104 S. W. 476, that mere consent of the owner to an improvement by the tenant will not make him an agent.

The *Boeckeler Case*, on the facts there disclosed, is not in conflict with our decision in this case, because of a substantial difference in the evidence. In that case the "wife testified" that she "knowingly assisted" in borrowing the money "for the purpose of finishing the building," while in the case before us there was strong testimony that the wife "had nothing to do with the plans, and never talked with the contractor; that the house was her husband's"; that "it was my lot and Mr. Holcker's money;" that her husband did not ask her permission or consent; that she

did not know she was signing a deed of trust to obtain money; that she signed some papers without knowing what they were, because she was asked to do so and had every confidence in her husband.

[11, 12] Again, it is manifest that the Boeckeler Case was not only decided upon different evidence, but on different issues from those presented by and involved in the trial of this case. The holding in the Boeckeler Case was that—

“On the facts here in evidence and which we have summarized, it is clear, as a matter of law, that the wife is *estopped from denying the agency* of her husband in the erection of the house.” (Italics ours.) 191 Mo. App. loc. cit. 343, 177 S. W. 743.

In the case at bar the question of estoppel was not in issue, since estoppel was never pleaded. In addition to this, the facts are not sufficient to create an estoppel, as a matter of law, against Mrs. Holcker. Furthermore, the court, in the Boeckeler Case (pages 341 and 342 of 191 Mo. App., 177 S. W. 742), in speaking of the wife having made the husband her agent, notwithstanding her denial that she had, says:

“She went with her husband to the bank to sign the notes and deed of trust, *knowing* that they were to be used to raise money to finish the building. Her husband *told her* that that was the purpose for which he was raising the money, and she made no objection to pledging her property \* \* \* to the bank to raise this money.” (Italics ours.)

[13] In the Boeckeler Case the testimony as to the wife's conduct and knowledge came largely from her own lips. They were admissions, and for this reason the court could pass upon her conduct as a matter of law. The wife's knowledge in the Boeckeler Case was more than the mere knowledge that her husband was building a house on her lot; it was the knowledge that she was pledging her property for the funds with which it was to be built. In the case at bar, no such knowledge on the wife's part was shown. At the time Mrs. Holcker signed the deed of trust, the construction of the house had not begun, and the record does not show that she knew at that time that her husband had entered into a contract with Brown to erect the house. We note plaintiff's contention, in the last typewritten suggestions filed, that she did know. But it is manifest that it is only by taking widely separated statements relating to different matters, and combining them as if they were closely connected, that plaintiffs can even draw an “inference” that she did know of the contract at that time. Certainly it does not conclusively appear that she did. She was not told and did not know what papers she was signing, or the purpose thereof, or that her husband intended to use the proceeds to help build the house. It was urged at the oral argu-

ment that a person will not be allowed to deny the execution of a document they have signed, on the ground that they did not read it and did not know its contents. No doubt this is true under many circumstances, but this is not a case where the other party to the instrument is seeking to enforce it.

[14] Although plaintiffs never pleaded estoppel, and in spite of the fact that, by failing to demur to defendant's evidence or to ask a peremptory instruction on the issue involved, plaintiffs conceded at the trial that the question of agency was for the jury, nevertheless they now insist that the husband's agency for the wife was conclusively shown, and that Mrs. Holcker is, as a matter of law, estopped from denying agency. It is a well-established rule that litigants cannot, on appeal assume a position directly contrary to that taken at the trial. *Hopkins v. Modern Woodmen*, 94 Mo. App. 402, 409, 68 S. W. 226. But aside from this consideration, we are unable to see wherein we would be justified in holding that Mrs. Holcker is concluded as a matter of law. As heretofore stated, there were no dealings, relationship, or connection of any sort between Mrs. Holcker and Brown or between her and any of the lien claimants in any way. Nothing of that sort is shown. No witness claims that he was misled or deceived by her conduct in any way. The contention now urged by plaintiffs is that Mrs. Holcker's acts are so directly contrary to her claim that she did not know she signed a deed of trust on her property and did not make her husband her agent to build the house, that this court should now say, as a matter of law, that she shall not be heard to make such a defense. That there may be no room for thinking that we have overlooked any of the grounds for such contention, we here set forth the following facts in addition to those contained in what we have already said: The contract between Brown and Mr. Holcker provided that the former was to build the house for \$9,000; that Mr. Holcker was to convey to Brown the equity in his (Holcker's) residence at 3418 Prospect avenue on the contract price; that Brown was to secure for Holcker a loan of \$6,000 on the lot (6200 Morningside Drive) on which the house was to be built, the expense of obtaining the loan to be paid by Holcker, and the proceeds of the loan to be assigned by Holcker to Brown and to be drawn by him as advances met with the approval of the loan company. Brown began the house the middle of October, 1913.

The deed of trust involved herein was dated October 27, 1913, and acknowledged October 28th. It was from the Holckers to Pratt & Thompson Investment Company, beneficiary, securing to said company a note for \$6,000 due five years after date. At the same time the deed of trust was signed, the

Holckers also signed an order, dated October 27, 1913, addressed to Pratt & Thompson Investment Company to pay the proceeds of the loan to Brown. This order is known in the record as plaintiffs' "Exhibit 1." The evidence is clear and explicit that Mrs. Holcker, at the time she signed these papers, was not told what they were, but was merely informed by her husband that here were some papers that he wished her to sign, and that she immediately did so at his request, not knowing what they were. No one testifies to the contrary. Out of the proceeds of the loan, the sum of \$216.53 was used to pay the expenses of obtaining same and for insurance on the house during construction, and thereafter the investment company paid to Brown on October 31, 1913, the sum of \$2,000, on November 11, 1913, \$1,500, and on November 22, 1913, \$500, making in all \$4,000 paid to Brown out of said loan. In December, 1913, or at least by the first of January, 1914, Brown abandoned the job without paying his bills, except possibly those of the men who had performed manual labor thereon. Mr. Holcker thereupon borrowed money, purchased materials, and completed the house himself, at an additional expense of nearly \$5,000. The house was completed June 20, 1914. None of the liens herein claimed are for materials or labor thus contracted for by Holcker himself in completing the house. Just how Brown succeeded in getting the investment company to advance him money on the loan to the extent of \$4,000 without paying his bills is not disclosed.

Mrs. Holcker's evidence is that her husband, Mr. Holcker was "very sore" at Brown for having "fixed him" by "using up his money," and when asked by one of plaintiffs, whose money did she understand Brown had used, she said it was Mr. Holcker's money, and when asked further if she understood that "all" of the money Mr. Holcker put into the house was money of his own, she said it was his own money. She was then asked if she knew anything about the mortgage on the house, or what became of the money that was raised by the mortgage, and she replied that she did not. No witness went on the stand and contradicted this evidence. After Brown had obtained \$4,000 of the loan from the investment company without paying his bills, another order addressed to the investment company was obtained, dated April 13, 1914, signed by Mrs. Holcker, directing said company to pay the proceeds of a loan, No. 2149, to Mr. Holcker. This is known in the record as plaintiffs' "Exhibit No. 2." The investment company also required and obtained a paper dated July 16, 1914, signed by both of the Holckers acknowledging receipt of \$6,000, the amount of the loan, which receipt also stated that all sums due for labor and materials used in the erection of improve-

ment on S. E.  $\frac{1}{4}$  of N. W.  $\frac{1}{4}$  Sec. 5, Tp. 48, R. 33, Kansas City, Jackson county, Mo., known as No. 6200 Morningside Drive, had been paid, and that there were not due and outstanding any sums of money or claims for labor or materials used in the erection of the improvements on said land which could by law be or constitute a lien thereon, except as stated on the back thereof. The record does not disclose that any lien claims were stated on the back, nothing being shown as to what was on the back of the receipt. This receipt is known in the record as plaintiffs' "Exhibit No. 3."

These Exhibits 1, 2, and 3, or at least the first two, were required by the investment company for the purpose of protecting it in the payment of the money due on the deed of trust. Under the first one, \$4,000 was paid to Brown, and after the second one was given on April 13, 1914, the company, on May 4, 1914, paid \$1,000 to Mr. Holcker, and a little later the remainder of the proceeds of the loan in the hands of the investment company, to wit, \$783.47, was also paid to Mr. Holcker. He deposited these two last-named sums to his account in the bank and used it for general purposes, drawing against his account in the course of his business and also in making payments for the completion of the house after the contractor, Brown, had defaulted as hereinbefore stated. All of Mrs. Holcker's evidence is contained in a deposition taken by plaintiffs at some date not disclosed by the record, but, of course, after the suit was filed, but before the day of trial. This deposition was read during the presentation of plaintiffs' side of the case. Desiring to prove that the name Irma H. Holcker, to Exhibits 1, 2, and 3, was her signature, the plaintiffs placed Mrs. Holcker on the stand and had her identify her signature, which she did, nothing more being asked her, and she left the stand with no other evidence of hers in the record save her deposition. As Exhibit 1 was signed at the same time the deed of trust was acknowledged, of course her deposition, wherein she says she signed some papers at her husband's request, not knowing or inquiring what they were, certainly covers the deed of trust and Exhibit 1. But it is now claimed by plaintiffs, in their latest briefs and suggestions, that the evidence of Mrs. Holcker in said deposition, wherein she denied knowledge concerning the papers she signed, cannot be regarded as applying to Exhibits 2 and 3, and that therefore we must regard her as having never denied knowledge of what was in those two exhibits, and must hold, as a matter of law, that her attempted defense is unavailing. We are unable to agree to this contention. In the first place, the deposition of Mrs. Holcker was offered and read in evidence and constitutes a part of the record in the case, and we cannot treat the

case as if there was no such evidence in it.

[15] In the next place, we cannot accept counsel's mere statement as to when the deposition was taken, nor assume it was taken before July 16, 1914, the date of Exhibit 3. Of course, it was not taken before Exhibit 2 was signed, since that was dated April 13, 1914, and suit was not instituted until June 17, 1914, and trial was not had until in May, 1916. It is true, in her deposition she makes no specific mention of any of said exhibits, nor was any specific mention of them made to her in any way. But she was asked about signing papers, and she clearly and positively stated that, while she signed some papers as requested by her husband, yet she did not know what they were nor how many there were. There is no doubt but that this evidence certainly covered the deed of trust and Exhibit 1; and, if it does not also cover the other two exhibits, they would seem to be met and covered by her other evidence hereinbefore referred to, namely, that she knew nothing of a mortgage on the house or of what became of the money raised thereby. Clearly, if she had known the contents of Exhibit 2, she would have known that her husband obtained the proceeds of the loan therein designated. Under all the circumstances, we do not see how we would be justified in treating the case as if her deposition was not in the record and deal with her as if she had admitted signing Exhibits 1, 2, and 3 without further explanation or denial. Again, Exhibits 2 and 3 said nothing whatever about any contract with Brown or about any improvements made by him or liens created by him. Indeed, Exhibit 2 said nothing about improvements whatever. Both of these exhibits were signed long after Brown had defaulted and abandoned the job. Exhibit 2 was merely a direction to pay proceeds of a loan (designated as No. 2149, covering property known as 6200 Morningside Drive) to her husband; while Exhibit 3 was a mere receipt for the proceeds of the loan, with a statement therein that there were no outstanding claims for which a lien could be claimed.

There is no contradictory testimony as to her lack of knowledge in reference to the above matters; but, even if there was, unless the contradictory evidence was conclusive upon her, it is not for this court to ignore the verdict of the jury or to ignore the testimony supporting it, and declare as a matter of law that she did know what she was signing and did make her husband her agent to erect the improvements.

[16] This element of the wife's knowledge, in this case, is directly opposite to what it was in the Boeckeler Case, and it is a vital and crucial difference, and especially so if it is sought to hold the wife's property upon any theory of subsequent ratification of the

husband's acts. It is well settled that there can be no ratification where the one who has the power of ratification is ignorant of the facts. *Winsor v. Lafayette County Bank*, 18 Mo. App. 665; *Pitts v. Steele Mercantile Co.*, 75 Mo. App. 221; *Citizens' Savings Bank v. Marr*, 129 Mo. App. 28, 107 S. W. 1009. And such knowledge must be actual knowledge. Mrs. Holcker could not be held, on the principle of ratification, by what she might have learned had she made inquiry which, if properly prosecuted, would have brought knowledge. The doctrine of constructive knowledge has no application here. *Brown v. Bamberger*, 110 Ala. 342, 355, 20 South. 114; *Haswell v. Standring*, 152 Iowa, 291, 132 N. W. 417, Ann. Cas. 1913B, 1326; *United States v. Beebe*, 180 U. S. 343, 354, 21 Sup. Ct. 371, 45 L. Ed. 563.

[17] Viewing the case from every angle, we are unable to declare, as a matter of law, that there was an agency connection between Mrs. Holcker and her husband with reference to the erection of the improvements either under his contract with Brown or otherwise, and, as there was no error in the trial wherein the case was submitted to the jury, we cannot uphold the granting of a new trial, and hence the verdict of the jury must stand.

It is therefore ordered that the judgment be reversed, and the cause remanded, with directions to reinstate the verdict and enter judgment in accordance therewith.

All concur.

# TINES v. TINES. (No. 15298.)

(St. Louis Court of Appeals. Missouri. Nov. 4, 1919.)

## 1. DIVORCE $\S$ 298(1) — PRESUMPTION THAT CUSTODY OF PARENTS IS FOR BEST INTEREST OF CHILD.

There is a presumption in the law that it is to the best interest of the child to be in the custody of its parents, and the law imposes upon the parents the duty of care and protection.

## 2. DIVORCE $\S$ 298(1)—AWARD OF CUSTODY TO GRANDPARENTS INSTEAD OF PARENTS.

To justify a court, which granted divorce to parents, in awarding the custody of minor child of the marriage to its maternal grandparents, it must appear that neither parent is competent or able to care for the child.

## 3. DIVORCE $\S$ 298(6)—RIGHT OF FATHER TO CUSTODY OF CHILD.

Where mother of an infant child had obtained a divorce, and thereafter to support herself became a waitress in a hotel, held that, on the father's remarriage to a woman of refined character, it was improper to award custody of the child to the maternal grandparents, who were aged and impoverished; it appearing that father was able to care for the child, and that

the mother was not and it also not being to the child's best interest, as it had reached school age, to award custody alternately to each parent, as had previously been done.

Appeal from Cape Girardeau Court of Common Pleas; John A. Snider, Judge.  
"Not to be officially published."

Action by Cora Tines against James E. Tines, in which plaintiff was granted a divorce. From a subsequent order, awarding custody of minor child of the marriage to his maternal grandparents, defendant appeals. Reversed and remanded, with directions.

T. D. Hines and Frank Hines, both of Jackson, for appellant.

A. M. Spradling, of Cape Girardeau, for respondent.

BECKER, J. The respondent, Cora Tines, had obtained a decree of divorce from her husband, James E. Tines, appellant here, some time in 1914. The decree awarded the custody of the son born of the marriage, James Ova Tines, at that time aged three years, for three months to the father, and at the expiration thereof "the custody of said child is to be delivered to the plaintiff at Cape Girardeau, Mo., for a like period of 3 months, and the possession and custody of the said child is to alternate at the end of every 3 months period at the same place, from the date of this decree until such possession, care, and custody is changed by further order of this court."

In February, 1916, the father remarried, and in June of the same year the former wife, Cora Tines, filed a motion to modify the decree theretofore rendered, asking that the full care and custody of the said child be given her. The father thereupon filed his motion, asking for a modification of the decree awarding him the sole custody of the child. These two motions were heard together, resulting in the court awarding the custody of the minor child to Mary F. Stone, its maternal grandmother, and ordering the father to pay the sum of \$8 per month to Mrs. Stone for the support and maintenance of the child.

Respondent in her motion charged that the appellant was a man of bad repute and unfit to have the custody of the child, and further alleged that during the periods when the custody of the child had been in him the child had been neglected, had not been sufficiently clad in cold weather, and that the boy had not been given that watchful care which an infant of his years required, and that appellant had frequently mistreated the child.

Appellant's motion charged that respondent was an unfit person to raise the child, or even to have its custody for any period of time whatsoever, and that during the period

when the child was supposed to be in her custody she gave him no attention whatsoever, but left him with said respondent's mother, Mrs. Stone, a woman 64 years of age, whilst the respondent herself lived 10 miles away in another town, where she worked as a waitress in a hotel, and only saw the child at stated intervals.

The testimony adduced in support of the wife's motion is to the effect that the father was 33 years of age; was a locomotive fireman earning \$108 per month; that the hours of his employment were such that he would leave the house at 5 o'clock a. m., and work until 11 o'clock p. m., and then the following day he would not have to report for duty; that appellant had been married three times, his first wife and respondent having obtained divorces from him; that a little girl, then about eight years old, one of the children born of his first marriage, was in the custody of the appellant; and that, at the time of hearing the motions to modify, the appellant lived with his third wife and said infant daughter in a small home which he owned, the home being of the value of \$1,600, and all but \$250 of the purchase price having been paid; that for a period of time after respondent obtained her divorce from the appellant he continued to live in his home, having with him his infant daughter by his first marriage, and his son, James Ova Tines, and that he had in charge of his household a housekeeper; that this condition obtained until his remarriage, as above set out.

There was also testimony that the boy, while in the custody of his father, on one or two occasions had been seen playing with some negro children who lived in the neighborhood; that once the boy had been seen climbing on the back of a grocery wagon; that several times the boy had come into the home of his maternal grandmother, who lived across the street from his father, and asked for something to eat; that on one occasion the boy was seen walking in the gutter in water over his shoe tops, and that several times during the winter the boy had been seen out of doors too thinly clad. There was also testimony that the mother had purchased most of the clothing for the boy after the divorce.

It was further shown that after the divorce the mother obtained employment and lived in the city of Jackson, Mo., some 10 miles from Cape Girardeau, where she worked in a hotel as a waitress at a salary of \$5 per week; that at the hotel she shared, with another girl, "two little rooms, with a dresser, washstand, and chairs, and in one room a bed"; that each time the three months period came for her to have the custody of the child she "would take him to Jackson for a couple of weeks, but for the remainder of the three months he would stay with my father and mother"; and when the boy was



with her "she kept him in the hotel, in my room and in the office and kitchen, and around the hotel, but not in the yard, for there is none."

It further appears that respondent's mother is 64 years of age, and her father is 74 years of age and has a chronic cough, which he had had for the last 20 years. The grandparents have no property, and are dependent solely upon a pension of \$30 per month.

The testimony in support of the father's motion to modify is to the effect that the mother has a quick and ungovernable temper, and when angry oftentimes uses profane language; that once since the divorce, at a time when the child was in her custody, on an occasion when she had permitted the father to take the boy to the fair at Cape Girardeau, the mother, who had also gone to the fair, met the father and the boy, accompanied by the father's two little daughters by a former marriage; that she became angry because of the boy being at the fair in the company of the two girls, and insisted upon taking the boy away with her; and that she used vile language and applied to the little girls a disgusting, vulgar epithet, loud enough for all three of the children to have heard. Several witnesses testified as to the irascible temper of the respondent and to her use of profanity. We refrain from setting forth that testimony in detail, as unnecessary in light of the other facts in the case.

There were several witnesses who were permitted to testify that in their judgment the mother was not a suitable person to have the custody of the child, among them being Dr. George W. Walker, a physician who had known both the father and mother of the child for some three or four years, and at one time had been their family physician. Another such witness was Lon W. Tines, a cousin of the appellant. Still another, a Mrs. Hattie Harper, who testified she lived in Jackson and had worked at the same hotel with respondent for four or five months, and had slept in the same room with her, and saw her daily and observed her conduct. There was also testimony to the effect that while the boy was with the father he was properly clad, suitable to the weather conditions, and given sufficient to eat.

Appellant offered as a witness Mrs. Nettie Tines, the father's present wife, but on objection of counsel for respondent that the witness was incompetent, being the wife of the appellant, she was not permitted to testify. However, several witnesses testified as to the age, character, and habits of the said Mrs. Nettie Tines, all of which was to the same effect, namely, that she was a young woman of excellent character, and had a kind, loving disposition, and was fond of children; that she came of a good Christian family, and herself taught a class in Sunday school; that she had experience in rearing

small children, her mother being a widow, and there being several brothers and sisters in the family younger than herself, whom she had assisted in bringing up.

The record in this case shows that since the granting of the divorce there has been a material change in the status of the case. The mother had taken a position in order to earn a livelihood for herself and for her son, and by reason of the character of her employment is unable to devote that time and attention to the moral, mental, and physical welfare of her son which a child of his years necessarily should have; the boy has now reached an age where he should attend school regularly, and should not be shunted from one home to another every three months, an arrangement which will not stimulate an attachment of companionship and intimate friendship, which is necessary to the existence of unrestrained and unreserved confidence between parent and child, which is so essential in the proper guidance and control of a child. Then there is the fact that the father remarried, and according to the testimony in this case to a refined young woman of good education and of a loving and kind disposition, who it is to be hoped will prove of considerable aid to the father in seeing that the necessary care and attention are given to the boy.

In light of the record in this case we are of the opinion that there should be a modification of the original decree with respect to the custody of the child. A divided custody, alternating each three months, is clearly not for its best interests. The boy should be permitted to be in the custody of either his father or his mother, unless there exists some special or extraordinary reason, or the welfare of the child requires some other disposition. The custody alternating every three months results in a complete change in the method of the boy's bringing up, in his mode of living, and in his environment, to which, in our judgment, he should not be subjected.

[1-3] This contest is one between the parents for the custody of their child, and not a contest between some relative or friend for the custody of the child as against one of the parents, and yet the learned trial judge, in light of this record, has in his judgment thought it necessary and proper to take the guardianship of this child from the parents, and each of them, and to place it with the maternal grandmother. In order that such action may be justified, it is necessary to be convinced that neither the father nor the mother is a competent person to have charge of the child. A child's welfare normally is to be in the custody of its parents, and this is so because of the natural ties of love and the innate parental desire to protect and care for ones children; and so there is a presumption in law that it is to the best interest

of a child to be in the custody of its parents, and the law imposes upon the parent the duty of such care and protection. What, then, is there in this record which will warrant placing the custody of this child in some one other than one of its parents?

As to the mother, we find that of necessity she must work to earn her own livelihood; that her work as waitress requires her to live in the hotel where she is employed, making it impossible for her to have the child with her. Under these circumstances the giving of the custody of the boy to her would not assure him the benefit of her love and care and training. We purposely refrain from discussing the question as to her high-strung temperament and her alleged use of profane language, because we are of the opinion that the other facts in the case make it clear that the best interest of the child would not be conserved in awarding the custody to his mother.

The record discloses nothing detrimental to the father's character, nor that he is incompetent to be given the custody of his son. The record shows him to be a man who has for many years been at work continuously at his vocation of locomotive fireman; that he has saved out of his earnings sufficient to buy a modest home. He testifies to his love for his son, and his desire to bring him up in proper manner and have him with him, and there is no testimony offered on the part of the mother but that the father does love the boy and the boy love the father. The father is at home for the entire day every other day, and should therefore be in a position to give more than the usual amount of attention to the careful training of his son. The young woman whom he has recently married should, according to this record, make a kind, loving, and conscientious stepmother, not alone aiding in the boy's proper upbringing, but aiding in instilling in the boy love and respect for each of his parents.

In light of what we have stated above we do not deem that the welfare and best interest of the child demand that its custody should be given to some one other than either of its parents, but we conclude that he should be placed in the custody of his father. It is to be understood as a matter of course that, if the respondent shall at any time be able to show, upon proper motion to the court, that conditions have so changed that the welfare and best interest of the child would be better conserved by his being given into the custody of the respondent than leaving him in the custody of the appellant, then the court may award his custody to the respondent.

The judgment and decree, as entered by the learned trial judge, is hereby reversed, and the cause remanded, with directions to the trial court to enter a decree granting the custody of the child to the father, the mother

to have the privilege of seeing the boy at reasonable times and hours, and the mother also to have the privilege of having possession and control of the child twice in each calendar month, if she so desires, from 6 o'clock p. m., Saturday, until 6 o'clock p. m., Sunday.

REYNOLDS, P. J., and ALLEN, J., concur.

### FORE v. RODGERS. (No. 2493.)

(Springfield Court of Appeals. Missouri. Dec. 6, 1919.)

#### 1. EVIDENCE $\S$ 123(11) — DECLARATIONS OF AGENT AFTER ACCIDENT.

In an action for damages for injuries received by plaintiff when his team was scared by defendant's jitney car, evidence of statements made by the driver after he reached his destination and some time after the accident is inadmissible, the declarations not having been made so near the time of the accident as to be part of the res gestae.

#### 2. APPEAL AND ERROR $\S$ 1050(1)—ADMISSION OF HEARSAY PREJUDICIAL ERROR.

In an action for injuries suffered by plaintiff whose team was scared by defendant's jitney, the admission of declarations by defendant's driver after he had reached his destination and a considerable time after the accident is prejudicial error.

#### 3. TRIAL $\S$ 260(1) — REFUSAL OF REQUESTS COVERED BY THOSE GIVEN.

The refusal of requests covered by instructions given is not improper.

Appeal from Circuit Court, Texas County; R. A. Breuer, Judge.

Action by George Fore against George P. Rodgers. From a judgment for plaintiff, defendant appeals. Reversed and remanded for new trial.

Hiett & Scott and Barton & Impey, all of Houston, for appellant.

J. A. Watson, of Rolla, and Lamar, Lamar & Lamar, of Houston, for respondent.

FARRINGTON, J. The plaintiff recovered a judgment against defendant for personal injuries received on account of an alleged negligent handling of an automobile by one of defendant's agents on a public road, and defendant appeals from the judgment alleging errors in the giving and refusal of instructions and admission of certain testimony.

Appellant has made such a fair statement of this case that the respondent accepts it in

his brief as being correct, and we adopt it in this opinion.

The plaintiff is a farmer and lives in Phelps county, Mo., on the Rolla and Houston road. Defendant lives in Texas county, Mo., and at the time of the accident complained of was operating a jitney over said road, between Licking and Rolla. Glenn Rodgers, or Penny Rodgers, was the driver of defendant's jitney on the day of the accident. The jitney was a Ford car. The accident happened on the 5th day of September, 1916, and no suit was filed by the plaintiff until the 14th day of June, 1918.

The plaintiff was going north, driving a team of mules hitched to a mowing machine, and plaintiff was sitting in a seat attached to said mowing machine. The plaintiff was going down a hill, sloping to the north, known as Pilot Knob. The grade was about a half mile long, and plaintiff was near the top of the grade, when he was passed by the defendant's jitney. At the time the plaintiff was passed by defendant's jitney, he was on the right-hand side of the road and the defendant's automobile ran around him on the left-hand side of the road, but the plaintiff did not know how close the machine was to the left-hand side of the road. The road was only 30 feet wide. The team showed no evidence of fright until after the car had passed them, but scared instantly after the car passed. The plaintiff did not hear any horn sounded or any other signal to announce to him that a car was approaching. The plaintiff fell off the machine, and his arm was torn to the bone and his hip was injured; he sent for a doctor. The doctor took three or four stitches in the injury on the plaintiff's arm and dressed his wounds. The plaintiff carried his arm in a sling for over a month; he never slept any for two nights, and his wound pained him two weeks. The driver of the defendant's car did not stop the same at the time of the injury; but, after he saw that the plaintiff's team was running away, he increased the speed of the car. The car was running about 30 miles an hour at the time it passed the plaintiff.

The testimony on the part of the defendant shows that the defendant's car at the time of the accident was proceeding on its way to Rolla, loaded with passengers. In the car were two women, two boys, and a man, also the driver of the car. That the driver of the car sounded the horn as he approached the plaintiff and the plaintiff turned to the right of the road. The driver of the car turned to the left of the road, and passed around the plaintiff. Both the plaintiff's team and the car were going north at the time of the accident. As the defendant's car approached the plaintiff's team and passed it, the plaintiff's team exhibited no manifestations of

fear, and did not become frightened until after the defendant's car had already passed it. The driver of the defendant's car increased the speed of the car after he had ascertained that the plaintiff's team was running away and approaching the car. Then the driver of the car increased its speed to secure the safety of himself and passengers. The defendant's car at the time of the accident was running 12 or 15 miles per hour.

Under points and authorities, the appellant first challenges the testimony of a witness by the name of Stogstill, introduced by the plaintiff, purporting to detail a conversation he had with Penny Rodgers concerning the transaction out of which plaintiff was injured. Such conversation was shown to have taken place several hours after the alleged act of negligence took place, Penny Rodgers being the driver of the automobile and the agent of the defendant.

There is a sharp conflict in the testimony concerning the speed at which the automobile was traveling before it reached the plaintiff in the road as it passed him, and after it had passed him. There was also some question whether the driver of the machine knew that plaintiff was injured, after he had passed plaintiff and continued on his journey without stopping. The place where the injury happened was about 10 miles south of Rolla, on a public road, and occurred some time during the middle of the afternoon on September 5, 1916. The evidence, without contradiction, shows that the driver of the automobile did not stop when the plaintiff's team ran away, but proceeded on his journey, with passengers bound for trains out of Rolla. It shows that he arrived in Rolla in time for passengers to take a train leaving about 4 o'clock in the afternoon.

[1] The evidence objected to was that detailed by one of plaintiff's witnesses, in which he undertakes to say what the driver of the machine told him that night about dark when he had driven back to or near the place where the injury occurred and talked to this witness introduced by plaintiff. The testimony of such witness was that the driver of the car, defendant's agent, asked him who it was that got hurt in the runaway and how badly he was hurt, what kind of man he was, and stated that he wanted to see him and make it right with him. He also stated that he (the driver) said "the reason he did not stop there was that he had some passengers, and that he had to meet the train."

This testimony was clearly inadmissible, as it could in no sense be thought of as a part of the *res gestæ*. The law is well settled that declarations of agents are not admissible unless they constitute a part of the

res gestæ, and that they cannot be received, unless they are contemporaneous with the acts which they illustrate and of which they form a part. Jones, Commentaries on Evidence, vol. 2, § 256, p. 448. See, also, sections 357, 347 and 348, p. 826, by the same author, where it is stated that if sufficient time has elapsed to give an opportunity for deliberation, the declarations cannot be deemed as a part of the res gestæ.

The testimony introduced shows that it was a mere historical recital, made after an opportunity for reflection had been afforded to the narrator. Such evidence is clearly hearsay. See *Dunlap v. Chicago, R. I. & P. R. Co.*, 145 Mo. App. 215, loc. cit. 221, 129 S. W. 262; *Ruschenberg v. Southern Elec. R. Co.*, 161 Mo. 70, 61 S. W. 626; *Koenig v. Union Depot R. Co.*, 173 Mo. 698, 73 S. W. 637; *Redmon v. Met. St. R. Co.*, 185 Mo. 1, 84 S. W. 26, 105 Am. St. Rep. 558; *Frye v. St. L., I. M. & S. R. Co.*, 200 Mo. 377, 98 S. W. 566, 8 L. R. A. (N. S.) 1069; *Carson v. St. Joseph Stockyards Co.*, 167 Mo. App. 443, 151 S. W. 752.

[2] The admission of this testimony by the trial court constituted reversible error under the rule announced in the foregoing opinions.

Appellant calls our attention to instruction No. 4, requested by plaintiff and given by the court. In defining what excessive rate of speed is, the instruction tells the jury that it is such speed as an ordinarily careful prudent man would travel, etc. This was clearly a typographical or technical error in omitting the word "not" between the words "would travel."

[3] There seems to be a misnumbering of instructions in appellant's abstract on page 34 of the abstract of record. There are two instructions, Nos. 1 and 2, requested by defendant, which were given by the court. On page 37 of the abstract are defendant's instructions numbered 1 and 2, and which are shown to have been refused by the court, and it is to the latter two instructions that appellant is now complaining, because they were not given to the jury by the trial court. On reading these instructions, we find no particular error contained within them, but the same information which these instructions seek to convey to the jury is sufficiently covered by other instructions which were given for the plaintiff and defendant.

On account of the error in permitting William T. Stogstill to testify relating a conversation which he had with Penny Rodgers, defendant's agent, who was in charge of the automobile, the judgment must be reversed, and the cause remanded for a new trial.

STURGIS, P. J., and BRADLEY, J., concur.

### HODGES v. RAMSEY. (No. 2587.)

(Springfield Court of Appeals. Missouri.  
Dec. 6, 1919.)

#### 1. BROKERS ⇐56(3)—COMPENSATION FOR FURNISHING BUYER.

Where broker took a prospective buyer to his principal, and the prospective buyer decided that he would not purchase and thereafter approached the principal and entered into an agreement with him to furnish a purchaser, and returned the next day with a friend as purchaser, and disclosed that he had been bargaining for this friend instead of himself from the beginning, and a sale was made, the broker was entitled to his commission.

#### 2. BROKERS ⇐53—ENTITLED TO COMPENSATION ALTHOUGH NOT PRESENT AT SALE.

A broker is entitled to his commission, where he was the means of finding a purchaser and bringing about negotiations leading up to the sale of land, though he was not present or partaking in the actual sale.

#### 3. BROKERS ⇐65(1) — COMPENSATION NOT WAIVED.

A broker who was the means of finding a purchaser and bringing about negotiations leading up to a sale of land was entitled to recover compensation, although he told his principal that he would not claim his commission; such statement having been made after the sale had in effect been closed, and the principal not having been prejudiced or led to act differently than he would otherwise have acted by reason of such statement.

#### 4. APPEAL AND ERROR ⇐212 — OBJECTIONS NOT RAISED BELOW.

A plaintiff appealing from an adverse judgment cannot complain that he is entitled to a verdict and that the court should have given a peremptory instruction to find for him, where no such instruction was asked for and no ruling of the trial court was made thereon.

Appeal from Circuit Court, Dent County; L. B. Woodside, Judge.

Suit by H. L. Hodges against J. D. Ramsey. Judgment for defendant, and plaintiff appeals. Reversed and remanded.

McGee & Bennett, of Salem, for appellant. Wm. P. Elmer and G. C. Dalton, both of Salem, for respondent.

STURGIS, P. J. This is a suit to collect a commission alleged to be due to plaintiff for procuring a purchaser for defendant's farm in Dent county, Mo. There is no question as to the commission contract or as to the land being sold to one Welsh, then living in the state of Illinois. The answer of J. D. Ramsey states as his only defense that he employed one Williams to sell this farm, and that Williams procured the purchaser, Welsh, and that he has paid the commission to Williams. The case largely turned on the question

whether, after plaintiff's employment to sell the farm for a commission, such contract was by agreement canceled or terminated before the farm was sold to Welsh. This theory was presented by defendant's first instruction, and the jury doubtless found for defendant on that theory. This, we think, was an erroneous theory, and this instruction, under the facts presented, should not have been given.

Plaintiff is a real estate broker residing in Dent county, where the defendant lives and the farm in question is situated. The sale of this farm grew out of plaintiff's efforts to sell another farm in that county known as the Heller farm. The purchaser, Welsh, was first attracted to Dent county by plaintiff's advertisement of the Heller farm. On inspecting that farm at plaintiff's instance, he agreed to buy it and put up a forfeit of \$500 to bind the bargain. Williams, who might well be termed the villain in the play, resided in the same county in Illinois as the purchaser, Welsh, and was something of a real estate agent himself. Just how he got into the deal is left to conjecture, but some two weeks after Welsh had agreed to purchase the Heller farm, for which plaintiff would have received a commission, Williams came with Welsh to Dent county and looked over the Heller farm, and they returned to Illinois without closing that deal. Something more than a month later, Williams returned to Dent county alone. He at once gave it out that Welsh would not or could not take the Heller farm and would rather lose the \$500 forfeit. While Williams was there, plaintiff received from Welsh a letter to this effect. Welsh, who testified for defendant, admitted with much reluctance that he knew Williams was going to Dent county at that time, and that they had talked of his not taking the Heller farm, though he would lose the \$500 forfeit, and admitted that the real purpose of Williams coming at that time was to secure a reduced price on the Heller farm by threatening that Welsh would quit the deal. Williams offered to buy the Heller farm himself at a reduced price, \$17,000, and offered to put up \$1,000. Williams, however, was really acting for Welsh, as Welsh admitted in his evidence that there was an understanding between him and Welsh "that he (Williams) was to come down here and see if he could get the farm cheaper." Heller, however, refused to reduce the price, and that deal ended. On this same trip, Williams learned that defendant's farm was for sale by plaintiff as agent. Plaintiff took Williams to see this farm, and Williams, pretending that he wanted to buy for himself, made defendant an offer of \$13,000 for the farm, which defendant agreed to accept. Williams, however, wanted two weeks within which to close the deal and was not willing to put up any forfeit or part payment on this farm. Plaintiff says he knew at this time that Wil-

liams was bargaining this (defendant's) farm for Welsh in place of the Heller farm, as Williams had wanted a commission to put through the Heller deal, and subsequent evidence proved this correct.

It is at this point that defendant claims that the agency contract of plaintiff was terminated, and this claim is based on the fact that, because Williams refused to make part payment or put up a forfeit, both plaintiff and defendant "declared the deal off." By this, however, these parties merely meant to decline to tie up defendant's land or to bind themselves to make a future deal when Williams refused to bind himself. They did not mean that if Williams returned within two weeks or at any time, and the land was still unsold, they would refuse to sell to him on the terms specified. Nor did defendant act on such theory, for when Williams did return in a few days and went to see defendant, he at once supposed he had come to take the farm and was willing to close the deal on the terms previously agreed upon. Defendant in his brief admits that, if Williams had then taken the land for himself, plaintiff by reason of having procured him as a purchaser would have earned his commission. Plaintiff's agency was not terminated, therefore, so far as a subsequent deal with Williams would entitle him to a commission. At this time, however, Williams openly disclosed to defendant that he was not wanting the land for himself, but asked defendant if he would pay him a commission to find a buyer. On defendant's assenting to do so, Williams disclosed that his man was close at hand, and the next day produced Welsh as the purchaser. Welsh admits that he and Williams went to Dent county together to purchase this farm. A deal was therefore easily arranged by which Welsh purchased the farm for \$13,500, or \$500 more than defendant had agreed with Williams. No other explanation of this is made, other than that defendant paid Williams a commission which left him substantially the \$13,000 he wanted for his farm. Welsh also bought the defendant's personal property on the farm, but that seems to be immaterial.

[1] It seems to us that as, if Williams had returned and taken the land for himself, defendant would be liable for plaintiff's commission, so too would he be when Williams returned with his friend Welsh as a purchaser and disclosed that he was bargaining for him instead of himself. Defendant then knew that Williams' acquaintance with him and with this land was brought about by plaintiff, and that Williams' proposition to find a purchaser instead of becoming one himself was a mere sham, since such purchaser was already at hand. We must, of course, look at the situation from defendant's viewpoint; but he knew that Williams was

plaintiff's customer and any sale to him would carry a commission to plaintiff, and he must be held to know that this would be true as to any one Williams chose to substitute for himself as purchaser, even without plaintiff's knowledge. *Weidmeyer v. Woodrum*, 168 Mo. App. 716, 720, 154 S. W. 894. The issue of the contract of agency being canceled or terminated before the sale to Welsh is not supported by the facts in the case, and defendant's instruction No. 1 should not have been given. The plaintiff's second refused instruction accords with our views and should have been given:

[2] That defendant was liable for the commission when plaintiff was the means of finding the purchaser and bringing about the negotiations leading up to the sale, though he was not present or partaking in the actual sale, is clearly the law. *Weidmeyer v. Woodrum*, 168 Mo. App. 716, 721, 154 S. W. 894; *Park v. Culver*, 169 Mo. App. 8, 11, 154 S. W. 806; *Tyler v. Parr*, 52 Mo. 249, 251. Plaintiff might properly criticize defendant's instructions for requiring plaintiff to be the procuring cause of the sale rather than merely the procuring cause of finding the purchaser, but plaintiff's second instruction contained the same error.

[3] The record discloses that, on the day the sale was really made to Welsh, plaintiff telephoned to defendant to know if "those fellows" came to see him yesterday. Defendant replied: "Yes, and also to-day." Defendant says, though plaintiff denies this, that he then said, "Mr. Hodges, if I made a deal with them, you would not think of claiming a commission on that deal, would you?" to which plaintiff replied: "Oh, no; go ahead and make it." Plaintiff says that, when he first phoned, he was ignorant of Welsh being in the country and only asked defendant if he was dealing with Williams, and defendant said that he was not. However this may be, it is admitted that in a few minutes thereafter plaintiff again called defendant and told him that, if he was dealing with either Williams or Welsh, he would claim a commission, and that defendant then said that the deal was already closed. As held in *Weidmeyer v. Woodrum*, 168 Mo. App. 716, at page 720, 154 S. W. 894, defendant was not prejudiced or led to act differently than he would otherwise by this telephoning, for defendant had in fact on the previous day agreed to pay Williams a commission and had in effect already closed the sale. Defendant himself disclaims that his theory of a cancellation or termination of the plaintiff's agency before the sale was made is based on this subsequent telephone conversation.

[4] The plaintiff now claims that under the stated facts he is entitled to a verdict, and that the court should have given a peremptory instruction to find for plaintiff. No such instruction, however, was asked for, and no ruling of the trial court made thereon.

Because of the errors above mentioned, the case will be reversed and remanded.

FARRINGTON and BRADLEY, JJ., concur.

FARRINGTON, J. (concurring). I concur in reversing and remanding this judgment, because, as I read the record, there is sufficient evidence to support a finding that Williams was Welch's agent all through the negotiations, and that, when plaintiff was calling Williams' attention to defendants' land, he was in fact calling the attention of Welch to that land through his agent, Williams. The plaintiff therefore procured the purchaser, Welch, through his (Welch's) agent, Williams.

#### MISSOURI REAL ESTATE & LOAN CO. v. BURRI et al. (No. 13320.)

(Kansas City Court of Appeals. Missouri. Dec. 1, 1919.)

#### 1. MUNICIPAL CORPORATIONS $\S$ 975—PRIORITY OF TAX BILL LIENS.

As between two or more general city tax bill liens, the last one in point of time is the superior in point of claim for satisfaction.

#### 2. TAXATION $\S$ 510—PRIORITY OF TAX LIENS.

As between two or more liens for general taxes due city or state, the last one in point of time is the superior in point of claim for satisfaction.

#### 3. MUNICIPAL CORPORATIONS $\S$ 975—PRIORITY OF GENERAL TAX LIEN AS AGAINST TAX BILL LIEN.

Lien founded on general taxes levied for the support of the city held superior to special improvement tax bill lien, though subsequent in point of time.

Appeal from Circuit Court, Buchanan County; Thos. B. Allen, Judge.

Action by the Missouri Real Estate & Loan Company against Albert L. Burri and others, to enforce lien of a special tax bill. One Landis answered, claiming superior lien, and, from adverse judgment, he appeals. Reversed and remanded, with directions.

Spencer & Landis, of St. Joseph, for appellant.

J. E. Dolman and O. C. Hathway, both of St. Joseph, for respondent.

ELLISON, P. J. Plaintiff's action was instituted to enforce a lien of a special tax bill against lot 23, block 19, Brookdale addition, issued by the city of St. Joseph and dated January 20, 1916. There was a sale for delinquent taxes due the city, held on the 16th of November, 1916, following the issuance of the tax bill, at which defendant Landis purchased this lot and received from the city treasurer and ex officio collector a certificate of purchase. Landis filed an answer,

setting up the claim that his lien, being founded on general taxes levied for the support of the city, was a superior lien to the tax bill, though subsequent in point of time.

There was no contest over the legality of the proceedings by which the tax bill was created. It was admitted that the tax bill "was issued \* \* \* in all respects according to law and for the proper amount as stated therein." The only contest was over the question whether the lien of Landis, as the holder of his certificate of purchase under the delinquent tax sale, was superior or inferior to the lien of the tax bill.

[1, 2] For present purposes, we may say that as between two or more tax bill liens, the last one in point of time is the superior, in point of claim for satisfaction. And the same is true between liens for general taxes due city or state. *Jaicks v. Oppenheimer*, 264 Mo. 693, 175 S. W. 972; *Construction Co. v. Ice Rink Co.*, 242 Mo. 241, 146 S. W. 1142, 40 L. R. A. (N. S.) 119, Ann. Cas. 1913C, 1200.

But it will be noticed that the present is a contest between the lien of a subsequent general city tax, levied for the support of the city government, and the lien of a prior special tax bill issued to a private party. They are both referable to the power of taxation, but they compose two different classes. Which is the superior?

Neither of the two cases just cited are like this. The first involved the question whether the lien of the last tax bill was superior to prior tax bills. The second involved the question, Which was the superior lien, a prior deed of trust, or a subsequent tax bill? The decision in each was in favor of the superiority of the subsequent lien, but neither decide the case before us.

[3] It must be conceded that a general tax, which has primarily for its object the support of the government, whereby the government may exist, and lives and property may be protected and the pursuit of happiness guaranteed, is of greater dignity and more importance than a tax bill issued for public improvements. It is true that a general tax is frequently levied for public improvements. But it is not feasible to levy a special tax, of the nature here involved, for what we understand to be meant by the expression, "support of the government." We can subsist without the special tax, but no civilized government could be organized and maintained without the general tax. So we conclude that the general tax, being first in vital importance, should be allowed first place in the means of payment.

And this, we think, is more or less recognized in each of the cases cited above. As already stated, the point here was not involved in those cases. Nevertheless, the discussion of them naturally covered a reference to the question we are now considering. The *Jaicks Case* was decided by this court (168 S. W. 216), but certified to the Su-

preme Court by reason of our conclusion being contrary to that of the St. Louis Court of Appeals found in *Parker-Washington Co. v. Corcoran*, 150 Mo. App. 188, 129 S. W. 1031. The Supreme Court took our view as expressed by Trimble, J., who wrote the opinion. In that case (264 Mo. 700, 175 S. W. 972) Judge Trimble said that—

"It is true, general taxes are levied for the support of the government, and in that sense general taxes are the more important of the two, and ought to take precedence over special taxes, so that the lien of a general tax ought to be prior to the lien of a special tax, even though the latter be prior in point of time."

So it was said in *McCollum v. Uhl*, 128 Ind. 304, 308, 27 N. E. 152, 154, that—

"The lien of the state for taxes is paramount and is superior to the lien of the ditch assessment."

In *State v. Kilburn*, 81 Conn. 9, 69 Atl. 1028, 129 Am. St. Rep. 205, it was held that a special sewer tax assessment by a city could not be given preference over a prior school fund mortgage authorized by the state. At the close of the opinion (81 Conn. 13, 69 Atl. 1030, 129 Am. St. Rep. 205) the court in referring to special assessments, said:

"They are imposed by authority of the state, and by a political agency of the state, which, so far forth, participates in the exercise of its sovereignty. But because a city to that extent shares in the privilege of a sovereign to command a preference over ordinary creditors, it does not follow that it can command it *as against the sovereign itself*." (Italics ours.)

As the lien for the subsequent general city tax is superior to that of the prior special tax bill, the judgment should be reversed in so far as it finds that the lien of plaintiff's special tax bill "is superior to the tax certificate of said defendant W. A. Landis," and adjudges that the special lien created by plaintiff's tax bill is "superior to any lien of the defendants herein." On the contrary, the court should find and adjudge that plaintiff's lien is inferior to Landis' lien. Accordingly it is ordered that the judgment be reversed and the cause remanded, with directions to enter judgment in accordance with this opinion.

The other Judges concur.

#### STATE v. MILLER. (No. 2522.)

(Springfield Court of Appeals. Missouri.  
Dec. 6, 1919.)

INDICTMENT AND INFORMATION  $\Leftarrow$  191(4) —  
CONVICTION OF ASSAULT UNDER CHARGE OF  
ASSAULT TO KILL.

A conviction of common assault, as defined in Rev. St. 1909, § 4484, will be sustained under an information charging assault with intent to kill.

Appeal from Circuit Court, New Madrid County; Sterling H. McCarty, Judge.

Robert J. Miller was convicted of common assault, and he appeals. Affirmed.

O. A. Cook, of Portageville, and Geo. H. Traylor, of New Madrid, for appellant.

S. J. Smalley, of New Madrid, for the State.

FARRINGTON, J. This is an appeal by defendant from a judgment of conviction for common assault. The only matter that is brought before us is the record proper; appellant having failed to bring a complete transcript of the evidence and instructions had in the lower court. The information is in due form, charging the offense as defined in section 4481, R. S. 1909; that is, assault with intent to kill. The cause was tried before a jury. The names of the state's witnesses are properly indorsed on the back of the information which was filed by the Prosecuting Attorney of New Madrid county. Defendant waived arraignment and entered a plea of not guilty.

The record shows that the jury returned a verdict finding defendant guilty of common assault, assessing his punishment at \$100. Judgment of sentence was imposed on the defendant, and an order that he be committed to the county jail until the fine and costs were satisfied. While a copy of a motion for new trial is in the record before us, none of the evidence or instructions are here for us to examine. It has been held repeatedly that a conviction of common assault, as defined in section 4484, R. S. 1909, will be sustained under an information charging assault with intent to kill. State v. Wilson, 126 Mo. App. 302, 103 S. W. 110.

Finding no error in the record before us, the judgment will be affirmed.

STURGIS, P. J., and BRADLEY, J., concur.

#### TULL v. KANSAS CITY SOUTHERN RY. CO. (No. 13052.)

(Kansas City Court of Appeals. Missouri. Dec. 1, 1919.)

##### 1. MASTER AND SERVANT §288(16) — ASSUMPTION OF RISK OF INJURY FROM INSUFFICIENT HELP QUESTION FOR JURY.

Where from the evidence jury could say that plaintiff fell by reason of not having sufficient help to carry a tie up a steep and slippery embankment in obedience to his foreman's order, he did not assume the risk as a matter of law.

##### 2. MASTER AND SERVANT §226(1)—RISK OF INJURY FROM MASTER'S NEGLIGENCE NOT ASSUMED.

A servant does not assume the risk of the master's negligence.

##### 3. MASTER AND SERVANT §222(2)—ASSUMPTION OF RISK OF INJURY FROM OBEDIENCE TO ORDER.

If the danger of carrying a tie to top of a steep and slippery embankment with insuffi-

cient help was not such as to threaten immediate injury, and the servant by reason of his foreman's order was led to believe that he could carry his part by the use of care, and he proceeded to do the work with the exercise of care, he is not barred from recovering.

Appeal from Circuit Court, Cass County; D. C. Barnett, Special Judge.

"Not to be officially published."

Action by W. F. Tull against the Kansas City Southern Railway Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Cyrus Crane, of Kansas City, John A. Davis, of Harrisonville, and Hugh E. Martin, of Kansas City, for appellant.

T. N. Haynes, of Harrisonville, for respondent.

BLAND, J. This is an action for damages for personal injuries. Plaintiff recovered a verdict and judgment in the sum of \$200, and defendant has appealed.

[1, 2] The only point raised is that the court erred in refusing to sustain defendant's demurrer to the evidence. The facts show that plaintiff was employed by defendant as a section hand, and on the day in question he and his foreman were engaged in picking up and piling ties along defendant's roadbed. They had handled about 30 ties that day, prior to the accident, when they came to the last tie, which was located farther down the embankment than any they had previously handled and was larger than the others. The embankment was steep, and snow and ice had accumulated at the point where the tie was lying. It was lying about 16 feet below the top of a 30-foot embankment. This tie was of oak, and was a little over 8 feet 1 inch in length, 11 inches across, 10 inches thick and weighed from 280 to 300 pounds. The foreman told plaintiff that they had to bring this tie to the top of the embankment and pile it up with the rest. Plaintiff testified that when he picked up his end he said, "This is awful heavy; I don't believe I can get up the hill with it." The foreman then said, "We have to." They then started up the embankment with it, and plaintiff slipped and fell, injuring himself, and the foreman said, "A 14 year old boy could carry that."

Plaintiff had worked some time as a section hand, and was more or less experienced in the work of handling ties. He weighed 187 pounds, and was a reasonably stout man. After the foreman told plaintiff that they could carry the tie up the hill, plaintiff thought that they could safely do it, although he had expressed doubt about it before. They had not proceeded far before plaintiff was thrown by reason of the weight of the tie and of the steep and slippery embankment.

The negligence alleged in the petition was that defendant negligently failed to furnish a sufficient number of men under the circum-



stances to assist in carrying the tie up the embankment, and that the foreman negligently ordered plaintiff to carry the tie up without the assistance of a sufficient number of men; that by reason of the great weight of the tie, the slippery and dangerous condition of the embankment, and the lack of sufficient help, plaintiff fell, resulting in his injury.

It is urged that under the circumstances plaintiff as a matter of law assumed the risk. We think there is nothing in this contention. From the evidence the jury could say, although there was no evidence as to the number of men that were usually furnished for the work, that under the circumstances shown in evidence plaintiff fell by reason of not having sufficient help to carry the heavy tie up the embankment. The negligence of the master having been shown, the rule that the servant never assumes the risk of the master's negligence applies. "If his master furnishes him unsafe implements and he uses them, knowing them to be unsafe, a question of contributory negligence arises, but not of assumption of the risk." *Cole v. St. Louis Transit Co.*, 183 Mo. 81, 94, 81 S. W. 1138, 1142; *Garner v. K. C. Bridge Co.*, 194 S. W. 82, 85; *Bowman v. K. C. Electric Light Co.*, 213 S. W. 161, 164.

[3] It is not enough that plaintiff had reason to believe that there was an insufficient number of men to do the work, and that his strength was not equal to the task. For if the danger or risk of doing the work was not such as to threaten immediate injury, and plaintiff by reason of the order of his foreman was led to believe that he could carry his part of the load by the use of care and caution, and he proceeded to do the work with the exercise of such care, he is not barred from recovery from the master for the injury received. *McMullen v. M., K. & T. R. Co.*, 60 Mo. App. 231, 241; *Thorpe v. Mo. Pac. Ry. Co.*, 89 Mo. 650, 663, 2 S. W. 3, 58 Am. Rep. 120; *Stoddard v. St. Louis, K. C. & N. R.*, 65 Mo. 514, 520, 521; *Devore v. St. L. & S. F. Ry. Co.*, 86 Mo. App. 429; *Bollmeyer v. Eagle Mill & Elevator Co.*, 206 S. W. 917, 918; *Bowman v. Light Co.*, supra.

The judgment is affirmed.  
All concur.

#### CATES v. CATES. (No. 13386.)

(Kansas City Court of Appeals. Missouri. Dec. 1, 1919.)

#### DIVORCE — 167—SUIT TO SET ASIDE JUDGMENT MAINTAINED ON PERSONAL SERVICE OUTSIDE STATE.

Where, after husband and wife had each obtained a separate domicile in another state, husband came into the state of matrimonial domicile, and by fraud obtained a judgment of

divorce, a suit by the wife in the same court to set aside the judgment may be maintained upon notice and service by delivery of copy of petition and summons in state of separate domicile pursuant to Rev. St. 1909, § 1778; the marital status or relation being a "property right."

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Property Rights.]

Appeal from Circuit Court, Gasconade County; R. A. Bruer, Judge.

Suit by Dora M. Cates against Edward M. Cates. Judgment for plaintiff and defendant appeals. Affirmed.

H. Sanders and Robt. Walker, both of Hermann, for appellant.

E. E. Hairgrove, of Kansas City, for respondent.

TRIMBLE, J. This is a suit in equity brought in the circuit court of Gasconade county, Mo., by a wife to set aside a judgment of divorce which was rendered and procured therein through her husband's fraud. Defendant being a nonresident of the state, but residing within the United States, to wit, in the state of Illinois, summons was made by delivery to him in that state of a copy of the petition and summons, ordinarily termed substituted service provided for by section 1778, R. S. 1909. The case is before us on a second appeal by the defendant. The first was disposed of by this court in an opinion by Bland, J., reported in 209 S. W. 551, wherein the judgment was reversed, and the cause was remanded for further proceedings on the ground that the petition and summons were delivered to the defendant less than "20 days before the commencement of the term" at which the defendant was required to appear, and therefore the statute was not complied with.

Upon the remanding of the cause, plaintiff procured new process to be issued, and the same was personally served upon defendant in Illinois in proper time, and return thereof was made under the provisions of said section 1778.

The petition discloses that plaintiff and defendant were married in Missouri, and lived in this state for a number of years, when the defendant deserted his wife and went to Wayne county, Ill., and took up his residence there; that plaintiff followed him and took up her residence there also; that defendant refused to support plaintiff, and she thereupon brought a suit to compel him to do so; that defendant was served with process therein, and at his instance the case was continued from time to time; that while plaintiff and defendant were both residents of Wayne county, Ill., each having a separate, but not a matrimonial, domicile therein, the defendant surreptitiously and without plain-

tiff's knowledge went into the circuit court of Gasconade county, Mo., and by constructive service based on publication fraudulently procured a judgment of divorce in his favor on the ground of desertion and indignities, he claiming that she had absconded, and that he did not know of her whereabouts, and also that he was a resident of Gasconade county, and had been for a whole year next before the filing of his petition; that all of the allegations and statements made, both in obtaining the order of publication and in procuring the judgment, were false, were known by him to be false and perjured, and were made with the intent to deceive, and did deceive, the court into assuming jurisdiction and ordering said publication and rendering said judgment which the defendant thus fraudulently procured without the knowledge of plaintiff. The petition further discloses that plaintiff and defendant were then, and are now, residents of Wayne county, Ill., and that plaintiff has and had a meritorious legal defense to the pretended cause of action alleged, and asked that the judgment of divorce thus fraudulently procured be set aside and declared null and void.

Defendant appeared specially and moved to quash the summons, which was overruled. The defendant made no other appearance, and the court, after hearing plaintiff's evidence, found the facts as alleged in the petition to be true, and that the judgment for divorce was fraudulently procured, and adjudged that it be set aside, and the plaintiff restored to all marital rights she had as the wife of defendant.

The contention of appellant is that the suit is not one of those in which service of the character mentioned is authorized by the statute, and that consequently the service obtained herein is void.

Section 1778, R. S. 1909, authorizing such service upon nonresident defendants, provides that it may be done "in any of the cases mentioned in section 1770." Said last-named section specifies or mentions "suits in partition, divorce, \* \* \* and \* \* \* all actions at law or in equity, which have for their immediate object the enforcement or establishment of any lawful right, claim or demand to or against any real or personal property within the jurisdiction of the court." The argument of the defendant is that the suit is not one for divorce, and plaintiff, a nonresident, is not seeking to enforce or establish any lawful right to any real or personal property within the jurisdiction of the court; therefore the suit does not come within the purview of those actions in which the statute says such service can be had; that is to say, in effect, that after the defendant has secretly come into this state and fraudulently deceived the court into assuming jurisdiction when in fact it had none, and has fraudulently procured a judgment declaring that the marital status is dissolved, the plaintiff can-

not, upon discovery of the fraud, come into that same court, and, upon the notice and service as was herein obtained, have the court undo what it was induced and procured to do by that fraud. We are unwilling to so say. The statute authorizes divorce to be obtained on such foreign service where the court is otherwise possessed of jurisdiction. Can it be said that after a judgment of divorce has been secretly and fraudulently sought and obtained in a court which, in fact, has no jurisdiction, the statute will not permit or allow the other party to come into the same court and have it undo what it was induced by fraud to do? Aside from any theory as to whether the word "in" appearing in the phrase "suits in \* \* \* divorce," as used in section 1770, may be given one of the dictionary meanings of "involving" or "with reference to," we may say that the court wherein the fraudulent judgment was rendered is a proper court to set it aside; that the rem upon which the judgment of divorce operated was the marital status or relation; and that such status or relation is of itself a property right. *Dorrance v. Dorrance*, 242 Mo. 625, 626, 148 S. W. 94. Such right to the marital status is one which the wife is entitled to enjoy in Missouri, and to protect from fraudulent disturbance there, as well as anywhere else. The abstract right to the status or condition of being a married woman instead of a divorcee is of itself a valuable and important right without regard to whether she is or is not thereby enabled to lay hold of a horse or a farm. And such right is a personal right which goes with her wherever she goes. As it had been fraudulently attacked and adjudged dissolved, we think she had the right to come into the court where that was done and have the judgment annulled, and that the aforesaid statutes, under which she obtained service upon her husband, are broad enough to include such suit in the circumstances of this case. This we think she could do without regard to whether under the rule announced in *Haddock v. Haddock*, 201 U. S. 562, 26 Sup. Ct. 525, 50 L. Ed. 867, she could, in a suit in Illinois against her husband and upon personal service there, have vindicated her marital rights despite the Missouri judgment. There was no matrimonial domicile in Illinois, only separate and individual domicile. The only place where matrimonial domicile ever existed was in Missouri. Plaintiff was therefore not required to shoulder the risk of an Illinois judgment, even if obtained on personal service, not being regarded as entitled to full faith and credit in Missouri. She had the right to go to the fountain source, the very court in which the fraudulent judgment was rendered, and, by undoing it there, obliterate it everywhere. And we think the statute authorizes the service upon which it was done.

The judgment is therefore affirmed.

All concur.

## LOMAX v. CRAMER et al. (No. 13356.)

(Kansas City Court of Appeals. Missouri.  
Dec. 1, 1919.)1. HUSBAND AND WIFE  $\S$ 14(2)—CHARACTER OF ESTATE BY THE ENTIRETY.

When a husband and wife take an estate by the entirety they hold, not as separate individuals and by moieties, but as one person, each holding the whole of it, and on the death of either the entire estate belongs to the survivor.

2. HUSBAND AND WIFE  $\S$ 14(2)—ESTATE BY ENTIRETY IN PERSONAL PROPERTY.

There can be an estate by the entirety in personal property as well as in real property.

3. WILLS  $\S$ 439—INTENTION OF TESTATOR CONTROLS.

A will must be construed in conformity with the intention of testator.

4. WILLS  $\S$ 627(5)—ESTATE BY THE ENTIRETY.

Will bequeathing "to my brother \* \* \* and wife \$5,000" held to entitle brother, upon wife's death before testator, to the entire legacy; it having been testator's intention to give brother and wife the legacy as one person, and to create an estate by the entirety.

5. WILLS  $\S$ 627(5)—ESTATE BY ENTIRETY.

A testator is presumed to have known that a gift to husband and wife creates an estate by the entirety.

6. WILLS  $\S$ 777—LAPSE ON DEATH OF CO-LEGATEE.

Where under a will donees are to take as joint tenants or as a class, there is no lapse on account of the death of one or more, but the entire gift goes to the survivor.

Appeal from Circuit Court, Linn County; Fred Lamb, Judge.

Action by E. M. Lomax, executor of the estate of Samuel Milton Robinson, deceased, against Oliver Cramer, executor of the estate of Alice E. Robinson, deceased, Minnie Stambach, and others. From judgment rendered, defendant Minnie Stambach appeals. Affirmed.

Bresnehen & Burns, of Brookfield, for appellant.

Bailey & Hart, of Brookfield, and D. A. Robinson, of Dallas, Tex., for respondent.

TRIMBLE, J. This is an action brought to obtain the proper construction of the fourth clause of the will of Samuel M. Robinson, deceased. Said clause reads as follows:

"4th. I will and bequeath to my brother D. A. Robinson and wife five thousand dollars."

The will was executed December 22, 1914, and testator died April 4, 1918. He died without issue, owning a large amount of property and leaving a widow, Alice E. Robinson, who had two children by a former

husband, one of whom is the appellant Minnie Stambach. The will made about 17 devises and bequests all of which have been paid or turned over to the beneficiaries therein except the bequest mentioned in clause 4. It is this bequest that is the sole matter in controversy here.

After making the various bequests mentioned, the will gave one half of the residue of his estate to his wife, Alice E. Robinson, and the other half in equal amounts to his brothers, naming them. Each one of said brothers received a specific bequest among the 17 hereinabove mentioned.

The wife of D. A. Robinson, mentioned in the fourth clause of said testator's will, was named Sarah J. Robinson. She died some time after the will was executed, but several years before testator died. Testator knew of her death, but never changed the fourth clause of his will. After testator died in April, 1918, his widow, Alice E. Robinson, died in August of that year, leaving a will in which she made appellant, Minnie Stambach, residuary legatee of her estate. In other words, Minnie Stambach takes whatever Alice E. Robinson would have taken under the residuary clause of Samuel M. Robinson's will had she continued to live.

The fourth clause of testator's will having given \$5,000 to "D. A. Robinson and wife," and said wife having died prior to the death of testator, appellant contends that the legacy provided for in said fourth clause lapsed, or at least that one-half thereof did so. This is the only question in the case.

[1] There is no question but that, in this state, when a husband and wife take an estate by the entirety, they hold, not as separate individuals and by moieties, but as one person, each holding the whole of it. For this purpose they are a unit, and upon the death of either the entire estate belongs to the survivor. *Stifel's, etc., Brewing Co. v. Saxy*, 273 Mo. 159, 201 S. W. 67, L. R. A. 1918C, 1009; *Ashbaugh v. Ashbaugh*, 273 Mo. 353, 357, 201 S. W. 72.

[2] It is also well established that there can be an estate by the entirety in personal as well as in real property. *Ryan v. Ford*, 151 Mo. App. 689, 132 S. W. 610; *Johnston v. Johnston*, 173 Mo. 91, 73 S. W. 202, 61 L. R. A. 166, 96 Am. St. Rep. 486. In such an estate the husband and wife each owns, not a part or a separable interest, but the whole; and therefore the death of one leaves the other still holding the whole as before with no one to share it. *Wilson v. Frost*, 186 Mo. 311, 319, 85 S. W. 375, 105 Am. St. Rep. 619, 2 Ann. Cas. 557; *Frost v. Frost*, 200 Mo. 474, 480, 98 S. W. 527, 118 Am. St. Rep. 689.

[3-5] Now, wills are to be construed in conformity with the intention of testator if such intention can be properly ascertained. It is manifest from the language used that

testator intended to treat D. A. Robinson and wife as one person, and to give the whole legacy to them as one. He did not mention the wife's name, nor give her any specific part thereof. Testator is presumed to have known the legal effect of a husband and wife thus receiving property so bestowed upon them. And although, technically speaking, the will did not create an estate by the entirety in D. A. Robinson and wife, for the reason that the latter died before the will took effect, yet such is the estate the will would have created had she lived until the will did take effect. In other words, it is that kind of an estate which the testator intended should be created.

[6] Again, where under a will donees are to take as joint tenants or as a class there is no lapse on account of the death of one or more, but the entire gift goes to the survivor. 40 Cyc. 1980; *Jackson v. Roberts*, 14 Gray (Mass.) 546, 550.

We think the trial court properly construed the will, and hence the judgment is affirmed. All concur.

#### ASCHER v. ASCHER. (No. 16841.)

(St. Louis Court of Appeals. Missouri. Argued and Submitted Nov. 20, 1919. Opinion Filed Dec. 2, 1919.)

#### 1. DIVORCE $\Leftrightarrow$ 212—ALIMONY ALLOWED ALTHOUGH HUSBAND ASSERTS INVALIDITY OF MARRIAGE.

Under Rev. St. 1909, § 2375, allowance of temporary alimony may be made, although husband in defense offers matter that might make prima facie showing of invalidity of the marriage, the plaintiff being entitled to hearing in court, reasonable attorney's fees, and alimony pendente lite in such sum as court deems proper.

#### 2. DIVORCE $\Leftrightarrow$ 215, 227(2)—ALIMONY AND SUIT MONEY NOT EXCESSIVE.

Allowance of \$60 per month alimony pendente lite and \$350 suit money, \$250 of which was for counsel fees, held not excessive in view of defendant's financial resources, where wife was without means of her own.

Appeal from St. Louis Circuit Court; Victor H. Falkenhainer, Judge.

Action for divorce by Birdie Ascher against Henry Ascher. From an order for alimony pendente lite and suit money and denying motion for rehearing defendant appeals. Affirmed.

John A. Hope, of St. Louis, for appellant.  
Charles G. Revelle and Lew R. Thomason, both of St. Louis, for respondent.

REYNOLDS, P. J. On May 16th, 1919, respondent, Birdie Ascher, filed her petition for divorce from defendant, in the circuit court

of the city of St. Louis, in which she alleged that she and defendant were lawfully married in Bellville, Illinois, on October 27th, 1911, and lived together from and after that date until May 1st, 1919, when she then left him for stated indignities. Defendant, being duly summoned, was granted, on June 3, 1919, ten days additional time to plead. On June 5th, 1919, plaintiff filed a motion for alimony pendente lite and for suit money. A hearing was had on this and, on June 10, 1919, the court entered an order sustaining plaintiff's motion for alimony pendente lite and suit money, and ordered defendant forthwith to pay plaintiff the sum of \$350 for suit money, \$100 of which to be deposited to secure the costs of the action, and the remaining \$250 as counsel fees, and that defendant also pay to plaintiff as and for her alimony pendente lite the sum of \$60 a month until the further order of the court, the first payment to be made and to become due and payable forthwith. On June 13, 1919, and after the entry of the above order, defendant, on his motion, was allowed five days additional time to plead. On June 14th, 1919, defendant filed a motion to set aside the order of June 10th, awarding plaintiff alimony and suit money. On June 23, 1919, defendant filed an answer and cross bill, and on that date defendant's motion of June 10th, to set aside the order for alimony, etc., coming up for hearing, was considered and the motion for rehearing overruled. Taking proper steps, defendant thereupon took his appeal to our court.

On the hearing of the motion for alimony pendente lite there was evidence on the part of plaintiff tending to show that she and the defendant were residents of St. Louis when going through the marriage ceremony in Illinois, and afterwards lived together in St. Louis as husband and wife for some seven years and up to the time of the separation; that plaintiff was the mother of a child by her former marriage, a girl ten years of age at the time of this trial, who had lived with her and her husband during the time she and defendant lived together; that she was without means of her own; that defendant was owner of a large apartment house and other valuable property situated in this state from which he derived rentals; that defendant had told plaintiff that he had paid off \$25,000 in the last five years on property he owned in the city of St. Louis and on which there was a mortgage; that he had not contributed anything to her support since the separation and had notified persons with whom she did business not to give her credit and had refused to pay for articles of wearing apparel. On cross-examination plaintiff stated that her marriage to defendant was not her first marriage; that she had been married some years ago to another man.

Counsel for defendant asked her if she had not been divorced from this man on May 6, 1911. This was objected to by counsel for plaintiff, and the court said: "Wait one minute. We are not going into that now." Counsel for defendant replied, "It may be we have an absolutely void marriage here. Maybe this marriage is void and I propose to follow this up and bring out this." The court asked how that would help, and counsel for defendant said that it was "an important thing, because lawful marriage is alleged in this petition." The court then said, "Go ahead, if that is the purpose. \* \* \* He (counsel for defendant) states he is going to follow that up. If it is not followed up, why, then I am going to strike it out." In answer to a question from counsel for defendant, plaintiff said she was divorced from her former husband on May 6, 1911, and on October 27th, 1911, had been married to the defendant at Bellville, Illinois, by a justice of the peace. Asked if the justice had not asked her whether she had been divorced, plaintiff said "Yes," but denied any recollection of the justice having told her on that occasion that the Illinois law prohibited any one who had been divorced from marrying again within a year subsequent to the divorce; did not remember telling him when she had been divorced or that he asked her the date of the divorce. Whereupon counsel for plaintiff objected to that line of questioning as not tending to show whether there was or was not a legal marriage there. The court said: "No, I don't think so. Possibly we may get at something. I will have to let it stand, though, for what it is worth. \* \* \* It doesn't prove anything at this time." The court followed this with the statement that he did not intend to pass on the question at the time; that he would take this testimony with some reservation. The plaintiff further testified that while she did not know exactly what papers she had signed at the instance of defendant, she had signed a number of documents which she understood to be mortgages or deeds. On re-direct examination plaintiff testified that defendant had procured the marriage license for them in Illinois and that the marriage was performed there by a magistrate; that they returned immediately to Missouri, she taking his name (Ascher), and from that date to this she had gone by the name of Mrs. Ascher; had lived and cohabited with him as his wife from that day until the day of the separation, and that he had held her out to other people as his wife. Counsel for defendant objected to this line of testimony on the ground that it was an effort to show a common law marriage and that was not the position assumed by the petition. Counsel for plaintiff replied that it was not material so long as a marriage was alleged; that even if there was an irregularity about the marriage that would

have made it at the time absolutely void, the ceremony followed by cohabitation and by recognition on the part of the other party to the marriage, constituted in law a valid marriage, to which the court remarked, "I think so." Plaintiff further testified that defendant had taken her before officers to make acknowledgments as his wife and represented her as his wife.

There was evidence given on this motion, partly by plaintiff and a witness, and partly by defendant, tending to show that defendant was the owner of a large amount of valuable income yielding property in St. Louis, receiving as rental therefrom a net income of four or five thousand dollars a year; that he retained out of this the sum of \$150 a month for his own individual expenses, applying the balance to the reduction of the deeds of trusts on the property, and that he had other valuable property.

On cross-examination defendant stated that he had given his wife over \$10,000 during the time they had lived together. He was asked if he was taking the position that plaintiff was not his wife. He answered, "No," qualifying it afterwards, however, by saying that he did not know whether she was or not; that since he had found out a couple of years before this hearing something about their marriage in Illinois that made him doubt whether that marriage was legal, he did not know how he stood about it; that up to that time he had never had any doubt as to her being his wife but had continued to live with her as her husband; had held her out to his friends and acquaintances as such and had done that even in the last two years. Counsel for defendant objecting to this line of questioning on the ground that the petition was not based on a common law marriage, the court announced that he would not go into that question; was not going to take a position on that at the time. Whereupon counsel for plaintiff suggested that this would be heard on the divorce matter itself. It was at the conclusion of this hearing on the motion for alimony that the court entered the order before stated.

Thereafter, on June 14, 1911, and during the same term of court, defendant filed a motion to set aside the order made June 10th, allowing the alimony pendente lite on five grounds. First, that alimony, whether permanent or pendente lite, can be allowed only where there is an existing valid marriage; that on plaintiff's own showing the alleged marriage between her and defendant, held in Illinois, was null and void. Second, on the face of the record the order of June 10th, allowing plaintiff alimony, was invalid and without any foundation in law. Third, that the allowance of alimony pendente lite is contrary to the law. Fourth, that such allowance is contrary to the evidence introduc-

ed at the hearing of the motion. Fifth, the allowance was grossly excessive.

This latter motion coming on for hearing counsel for defendant offered a certified copy of the proceedings in the Wisconsin Circuit Court, authenticated according to the act of Congress. Counsel for plaintiff objected to its introduction or to any other like matter, on the ground that the motion is merely one in connection with which can be considered only evidence as heard by the court at the time the order was made, except the evidence be on the ground of newly discovered evidence, which was not alleged. The court sustained this objection, whereupon counsel for defendant offered in evidence a duly certified copy of a record of the Wisconsin court in the divorce case referred to. This was excluded on objection of counsel for plaintiff as not germane to the matter before the court but as relevant in the trial on the divorce. Counsel for defendant then offered in evidence certain sections of the Wisconsin law. These were objected to by counsel for plaintiff as before, defendant duly saving exceptions to these rulings. At the conclusion of the hearing the court overruled the motion for rehearing, whereupon, as before stated, defendant appealed.

[1, 2] We do not think there is anything in this appeal. It is true that in *Carroll v. Carroll*, 68 Mo. App. 190, our court said that the doctrine of the cases relied on by defendant's counsel in resisting allowance for maintenance and alimony applies only where the husband denies that the marriage relation exists. "In such cases," says our court (loc. cit. 193) "temporary alimony will be denied unless the wife produces satisfactory proof of the marriage. If the law were otherwise a man would have no protection against an adventuress." This, as we have seen, hardly fits the facts here. There was evidence that such relation existed here. In *Cope v. Cope*, 103 Mo. App. 260, 77 S. W. 92, a case where the wife in her testimony referred to the defendant by name as her husband, and the defendant did not testify, the Kansas City Court of Appeals said (loc. cit. 262 of 103 Mo. App., 77 S. W. 92):

"Admitting that it was necessary to prove the marriage, we think the testimony of the

wife, the allegations of the petition, and the silence of the husband when called upon for alimony, were sufficient to justify the court in rendering the decree." We have a somewhat similar condition here.

In *State ex rel. Gercke v. Seddon*, Judge, 93 Mo. 520, 6 S. W. 342, our Supreme Court held that an appeal would lie from an order allowing maintenance, it being a final and definite order disposing of the merits of that proceeding in the circuit court, and that the order allowing counsel fees and suit money pending the appeal is largely in the discretion of the circuit judge and will not be interfered with by the appellate court unless it is made clearly apparent that such discretion had been abused. It further held that the power of the court to order and enforce an allowance for alimony pendente lite is not dependent upon the merits of the issue in the divorce suit, although the proceeding is an adjunct of the action for a divorce. Citing that case in *Dowling v. Dowling*, 181 Mo. App. 675, loc. cit. 679, 164 S. W. 643, in which the trial court had refused the wife a decree, but had allowed counsel fees to the unsuccessful wife pending the appeal, we held that it presented a case that in our opinion fully warranted that action. Our statute (section 2375, Revised Statutes 1909) expressly provides that the court may decree alimony pending the suit in all cases where the same may be just. So we hold here. Notwithstanding the fact that the matter offered by the defendant in defense might make out a prima facie case against the wife, going to the validity of the marriage of the parties, yet the wife was entitled to be heard in court, to be allowed the assistance of counsel and a reasonable counsel fee as well as alimony pendente lite in such sum as the court might deem proper. See also *Libbe v. Libbe*, 166 Mo. App. 240, 148 S. W. 460; *Scism v. Scism*, 184 Mo. App. 543 (167 S. W. 455), and cases cited at pages 547 and 548. It is said that the allowance is excessive. Conceding the financial condition of the defendant, we do not think that it is.

The judgment is affirmed.

ALLEN and BECKER, JJ., concur.

KENTUCKY TRACTION & TERMINAL CO.  
v. ROSCHI'S ADM'R.(Court of Appeals of Kentucky. Nov. 14, 1919.  
Rehearing Denied Jan. 7, 1920.)1. RAILROADS ⚡386—ACCIDENTS ON TRACK;  
CONTRIBUTORY NEGLIGENCE.

One who went upon an interurban railroad track to back his team off, without looking in the direction of an approaching car, which sounded its whistle continuously for some distance before it struck him, was guilty of contributory negligence.

2. RAILROADS ⚡400(14)—QUESTION FOR JURY;  
LAST CLEAR CHANCE.

In an action for death on interurban railroad, evidence on the issue of motorman's negligence after discovering deceased's peril caused by his efforts to save his team held insufficient to warrant the submission of the question to the jury.

3. RAILROADS ⚡390 — LAST CLEAR CHANCE  
DOCTRINE.

A motorman of an interurban line, on discovering a person on the track in a perilous position, is only required to exercise such reasonable care in stopping as persons of ordinary prudence and presence of mind would exercise under like circumstances, and is not required to exercise the utmost care possible, by immediately comprehending the whole situation and losing not a second in the performance of every duty imposed upon him by a sudden emergency.

4. APPEAL AND ERROR ⚡1066—PREJUDICIAL  
ERROR; INSTRUCTIONS NOT SUSTAINED BY  
EVIDENCE.

In action for death on track, it was prejudicial to include, in an instruction presenting the last clear chance rule, "or could by the exercise of ordinary care, after being aware of decedent's presence on or in dangerous proximity to the track, have seen his peril," where there was no evidence decedent's peril existed or could have been discovered sooner than it was seen by the motorman.

Appeal from Circuit Court, Woodford County.

Action by Roschi's administrator against the Kentucky Traction & Terminal Company. Judgment for plaintiff, and defendant appeals. Reversed, with directions to grant a new trial.

Wallace Muir, of Lexington, and Wallace & Harris, of Versailles, for appellant.

Franklin & Talbott and A. H. Nuckols, all of Lexington, for appellee.

CLARKE, J. On December 28, 1916, about noon, plaintiff's intestate was struck and killed by one of defendant's interurban traction cars, and his administrator has recovered in this action a verdict and judgment for \$12,900, which defendant seeks to reverse for several alleged errors.

Decedent was walking beside his team and wagon loaded with tobacco on the turnpike going from Versailles to Lexington, when for some reason not explained in the evidence the team turned abruptly from the pike onto the tracks of defendant, which parallel the pike, and stopped with the front wheels of the wagon in the ditch which separates the roadway from the railroad tracks. The horses' heads and parts of their bodies were on the track, upon which a car was approaching in plain view at 25 to 35 miles an hour from the opposite direction and down grade. Decedent, in an effort to save his team, got in front of it on the track, took hold of the horses' bits or bridles, and tried to back them off the track, never once looking in the direction of the approaching car and seemingly oblivious of his own danger. The car sounded its whistle continuously for some distance before it struck decedent, and stopped in about a car length thereafter.

[1, 2] That decedent was guilty of negligence is plain, but whether or not the defendant is nevertheless liable for his death under the last clear chance doctrine is the main question involved. The motorman introduced by plaintiff stated that he saw decedent's team, when it turned on the track ahead of him, and immediately sounded the danger signal by blowing his whistle in continual short blasts, put his brakes in emergency, and reversed the motor on the car; that he did everything he could with the appliances at hand to stop the car before a collision. Whether or not there is any contradiction of this evidence is determinative of whether or not defendant is liable, because, under a long line of decisions, unless there was evidence to prove that defendant after discovering decedent's peril could have stopped the car with the appliances at hand, it was guilty of no negligence, and entitled to the asked-for peremptory instruction. *L. & N. v. Stokes' Adm'r*, 166 Ky. 142, 179 S. W. 47; *Lapp v. L., H. & St. L. Ry. Co.*, 178 Ky. 647, 199 S. W. 799; *Creager's Adm'r v. I. O. R. Co.*, 134 Ky. 543, 121 S. W. 458; *O., N. O. & T. P. R. R. v. Webber*, 178 Ky. 171, 198 S. W. 756; *L. & N. R. Co. v. Welser's Adm'r*, 164 Ky. 23, 174 S. W. 734.

There is no evidence whatever that decedent was in a position of peril before the motorman sounded the distress signal, whatever the position of the car when that was done, although there is quite a difference in the testimony of the several witnesses as to how far the car was from the place of the accident when the distress signal was first sounded. Every witness who testified upon this question had his attention attracted to decedent's peril by the sounding of this signal, except the motorman and two witnesses, the conductor and J. L. Childers, and these three witnesses agree that just as soon as decedent's team turned onto the tracks the

signal was given; so not only is it proven without contradiction that the motorman gave the signal as soon as he discovered decedent's peril, but that he could not have sooner discovered it because it did not sooner exist. If, therefore, immediately thereafter the motorman, as both he and Childers testified, turned off the current of electricity, put the brakes on in emergency, and reversed the motor, which he stated, and no one denied, was all he could do to stop the car with the appliances at his command, not claimed to have been defective, it is quite immaterial whether this occurred at about 1,000 feet, or 300 feet, or some intervening point, from the place of the accident, as variously fixed by witnesses, or that three experts testified for plaintiff that the car could have been stopped in less than the distance between the place of the accident and where some of the witnesses say the car was when the signal was first given. *L. & N. v. Stokes' Adm'r*, supra; *C., N. O. & T. P. R. v. Webber*, supra; *Ky. Traction & Ter. Co. v. Humphrey*, 168 Ky. 611, 182 S. W. 854.

We may therefore disregard entirely the conflict in the evidence about where the distress signal was first sounded, and direct our attention at once to the evidence as to what the motorman did to stop the car at the time and after he sounded the distress signal, which alone fixes the time when he should have acted to stop the car as quickly as was possible, having due regard for decedent's peril and the safety of his passengers. And if he so acted the defendant is not liable for the death of decedent, notwithstanding some expert evidence that the car could have been stopped in a less distance than intervened between the place the signal was given, as fixed by some witnesses, and where the accident occurred, because the expert evidence is insufficient to contradict the certainly established physical fact that the car would not stop, provided everything was done that could have been done to make it do so, and is effective only to prove that the signal was not given at the greater distance from the place of the accident, and to corroborate other witnesses, who fixed the place of the car when the signal was given much nearer the place of the accident.

Seven witnesses were questioned as to what the motorman did toward stopping the car to avoid the accident, and as this is the vital question in the case, we shall quote this evidence rather fully; and, as only two of the witnesses profess to have seen and understood his actions, we shall begin with them, although one was the motorman, introduced by plaintiff, and the other John L. Childers, introduced by the defendant:

Joe Speaks, the motorman:

Q. When you first saw the first movement of this team turning toward the track, what, if anything, did you do? A. I commenced trying to stop. Q. Did you do anything else? A. I

put the brakes in emergency. Q. Did you do anything with the whistle? A. I blew the whistle. Q. How long did you continue to blow the whistle? A. Until the collision. Q. When did you cut off your current? A. As soon as I seen the horses turn into the track. Q. Explain to the jury, to put your car in emergency, what do you have to do? A. Push a brake lever over into emergency. Q. What kind of an instrument is it? A. Just a little handle about six or seven inches long. Q. How long does it take you to push that over and set the brakes in emergency? A. Just an instant—that quick (demonstrating). Q. When you have pulled that over as far as it will go, is that all you can do? Does that set the brake as tight as it can be set? A. Yes, sir. Q. Is there anything else you can do, other than setting that brake by pushing that little lever over? A. No, sir. Q. And when do you say you did that, with reference to when you first saw the horses turn toward the track? A. I cut the current off and set the brake in emergency. Q. Did you do that before those horses were on the tracks? A. Yes, sir. Q. You said, as you saw this team make its first turn toward the track, you cut off the current and set the car into emergency, and continued to blow the whistle until the collision? A. Yes, sir. Q. Did you do anything else toward reversing the car? A. Yes, sir. Q. When did you do that? A. After I set the brakes. Q. That was what distance from the point of the accident? A. About 300 or 325 feet. Q. At the time when you first saw this team turn into the track, you say your car was running about 30 to 35 miles an hour? A. Yes, sir. Q. Could you, with the means at your command, stop that car, running at the speed at which it was running, in the distance from the time you first saw it to the point of the accident? A. No, sir.

John L. Childers:

Q. What is your business? A. Agent for the Fleischman Yeast Company. Q. Have you any connection with the traction company? A. None whatever. Q. On December 28th, last year, were you on an interurban car which struck Mr. Roschi and his team of horses on the Versailles pike? A. I was. Q. What part of the car were you in? A. In the smoker, standing to the left of the motorman. Q. Do you know this motorman, Joe Speaks? A. Yes, sir. Q. Which way were you looking? A. Straight forward. Q. As this car was coming down this hill did you notice any one, or see any wagons—any tobacco wagons? A. I noticed two. Q. Where were the wagons when you saw them? A. Coming down the (opposite) hill from stop 20. Q. They were meeting the car? A. Yes, sir. Q. State to the jury what was the first thing that attracted your attention to that wagon out of the ordinary, or changing its course. A. The team suddenly swerved to the right. Q. To the right? A. I meant to the left. Q. In the direction of the car track? A. Yes, sir. Q. Which way were you looking at the time? A. Straight forward. Q. At the time you saw this team make its first movement to the left, and toward the track, state to the jury, if you saw, what, if anything, the motorman was doing. A. He shut off his current, and applied his brakes, and then began blowing his whistle. Q. What did the motorman do, if



anything, with reference to the whistle, from the time he first began blowing it until he reached the point of the accident? A. He blew it continuously.

James Adams:

Q. Mr. Adams, were you on the car of the Kentucky Traction & Terminal Company going from Lexington to Versailles on December 28, 1916, which car struck and killed Adam Roschi? A. Yes, sir. Q. When you got on the car, in what part of same did you take your seat? A. In the front part of the car, in the smoker. Q. Is the smoking compartment of the car the same place where the motorman stands that runs the car? A. Yes, sir. Q. Was any one sitting on the same seat with you? If so, state whom. A. Guy Bartlett was sitting beside me. Q. What, if anything, first attracted your attention to anything being wrong, or anything being on the track? A. It was Mr. Bartlett stated to me—says, "There must be something on the track;" and I looked up and I seen Mr. Roschi and his team on the track. He had hold of each horse's bit, trying to shove them back off of the track. Q. In order to avoid any confusion, please state to the notary again what first attracted your attention to something being wrong on the track. A. It was the whistle was blowing, and I looked up, and I saw Mr. Roschi and his team on the track, and he had hold of each horse's bit, trying to push them back off the track. Q. What was the nature of the blowing of the whistle which you refer to? A. He kept jerking the whistle as fast as he could. Q. When you first heard the blowing of the whistle which you have spoken of, where was the car at that time with reference to the man on the track? A. Well, it was coming around—going down the hill. Q. Please state to the notary, if you know, what was the condition of the track approaching and near the point of the accident. A. Well, it was down grade, a valley, and then up a hill. Q. Where was the car when it commenced blowing the whistle, in reference to the valley which you have spoken of? A. Well, it was near the valley. Q. Describe the conduct of the motorman from the time the whistle first commenced to blow up until the man was struck by the car, and immediately afterwards. A. Well, he was blowing the whistle, and he seemed to put the brakes on after we were near the flat, and kept blowing the whistle, and when he seen he was going to hit the man, after he hit him, he jumped up and down, and says, "My God, why did not that man get out of the way?"

Cross-examination:

Q. I will ask you if you did not say: "I saw the motorman apply his brakes, and, after he seemed to do all he could to stop the car, he jumped up and down and hollered, 'My God, why did not that man get out of the way?'" A. I saw him put on the brakes, but it did not jar the car. Q. Now, then, there was something said to you about the motorman being excited. You do not mean to infer by that, by your answer in the direct examination, that the motorman did not do all he could to stop his car? A. Well, did not I state to you that the motorman was excited; he put the brakes on; he did

not jar the car any—throw anybody out of the seats. Q. You did see him apply his brakes? A. I did. Q. You did see him do several things, did you not, to stop his car? A. I seen him apply his brakes; I'll say that.

Redirect examination:

Q. Mr. Becker several times asked you the question if the motorman did not do all in his power to stop the car; you do not mean to say by that statement that he could not have commenced earlier to stop the car than he did, do you? A. Well, he did not commence right at the time; no, he did not.

Recross-examination:

Q. You were not looking at the motorman? A. Oh, I was watching the motorman, yes; I seen the man on the track and was watching the motorman, too. Q. How do you know that the motorman did not immediately attempt to stop the car? A. Well, I know that he didn't put the brake on at first, because he had an idea, at least I did, that the man was going to get off the track. Q. Do you mean to say the motorman couldn't have applied his brakes, the handle of his air brake, and you not notice it? A. I was noticing that; I could see him, you know, if he did that at first, right at the time. Q. Are you judging that the motorman did not apply his brakes at once, because you felt no slowing up of the car? A. Well, if he did, I did not see him.

Guy W. Bartlett:

Q. How far was the car from the man and team when you first saw it on the track? A. One hundred and fifty yards, I guess. Q. I will ask you, Mr. Bartlett, whether or not your best judgment in the matter then was, and is now, that the distance was 150 yards? A. 150 yards, or more. Q. After first seeing Mr. Roschi and his team on the track, please state what the motorman did from that time up until the car struck them. A. I wasn't noticing the motorman at all; I do know the whistle blew continuously until just before we struck them. Q. Did you see the motorman do anything other than blow the whistle? A. No, sir; I didn't notice him at all. I didn't see him doing anything. Q. Did he put on the brake? A. I couldn't say, if I didn't see him, and I did not see him. Q. Please state if you felt any jar on the car from the time you first saw Mr. Roschi on the track until the car struck him. A. Yes, sir; I did. Q. If so, describe what kind of a jar that was. A. Why it was like a sudden stopping. Q. Where was that sudden stopping with reference—how far away from the man and team was this sudden stopping that you describe? A. About 50 yards. Q. Do you know what caused that sudden stopping? A. I thought the brakes were being applied. Q. Had you noticed anything of that kind before the car reached the point 50 yards from Mr. Roschi? A. No, sir; I had not. Q. The only thing which you know about the stopping of the car is that you say at 50 or 75 yards back you felt the stopping of the car? A. Yes. Q. As to whether or not the brakes had been put on or not, you don't know. A. I don't know whether the brakes had ever been put on then or not.

● C. F. Barber:

Q. After these signals commenced to be given, and which you have called distress signals, tell the jury whether or not you felt any jarring of the car. A. No, sir; I never felt no jar. Q. Did you see the motorman apply his brake? A. I don't know his brakes from anything else. Q. Did you see him do anything there at all? A. Yes, sir. Q. What did he do with his hands? A. He was moving them around there. Q. Did you see him working his reverse? A. No, sir. Q. What was he doing with them, moving them around—what kind of moving around? A. I never paid no attention. Q. Did you see him doing anything with his hands with reference to anything of this kind? A. I don't know whether he put on his brakes or not. Q. You said he was doing something with his hands; what was that? A. Pretty often I see a motorman moving around and back; but what they do I don't know. Q. Did you see him doing that on that occasion? A. Yes, sir. Q. He was moving some of those levers? A. Yes, sir. Q. Was that down at the bottom of the hill? A. Yes, sir. Q. Just about the time he began to blow his whistle, you saw him moving these levers? A. Yes, sir.

Edgar Sousley, the conductor, had left defendant's employment and was not present, but an affidavit of what he would testify was admitted, and is in part as follows:

That he was facing forward, and saw a team of horses turn toward the track; at that time the car was not more than 250 feet from the place of the accident; that he then turned and walked back, and the car was running at that time between 30 and 35 miles per hour; that the motorman immediately blew his whistle, and continued to blow same until the accident occurred; that by the movement of the car he could tell that the motorman had placed his air in the emergency, and a short distance before the accident he felt the reverse; that as the decedent came upon the track he had his back to the car, and never looked at any time towards the car while he was looking forward.

W. L. Smith:

Q. Were you on this car on the day of the accident last December? A. Yes, sir. Q. Where were you in the car that day? A. In the colored compartment on the left-hand side of the car coming this way. Q. Did you at any time see this wagon and team of Mr. Roschi's? A. No, sir; the first time I noticed it was when Mr. Speaks began to blow his whistle, and kept blowing, and ringing his bell, and I raised up in the seat. Q. What did you see then? A. The horses were on the track, and the gentleman was at the head of the horses, trying to hold them off. Q. Did you feel anything on the car? A. After he blew his whistle several times, you could feel the brakes on the car.

All of this evidence, with the possible exception of a part of that of Adams and Bartlett, is clearly corroborative of the testimony of the motorman that he did everything he could, and as rapidly as possible, to give deceased warning and to stop the car, just as,

or immediately after, deceased's team turned off the pike into a position of peril, and even the statements of Adams and Bartlett are not in conflict therewith. Adams' statement that the motorman did not commence to stop the car right at the time the distress signal was given must necessarily be considered in connection with his other testimony that his attention was not attracted to either the motorman or the danger ahead of the car until after the distress signals were given, and that he had an idea, as he supposed the motorman did, "that the man was going to get off the track"; and he does not deny that the motorman applied the brakes and did everything he could to stop the car as soon as the true situation was apparent to him. Moreover, since from his and Bartlett's evidence the witness Adams was not looking and did not see what the motorman did when he began to give his distress signals, and when the motorman and Childers say he turned off the current and put the brakes in emergency, it is apparent that it was the action of the motorman in reversing the motor that the witness had reference to, when he said that the motorman did not commence to stop the car immediately. But even this was done, according to his evidence, as soon as he, and as he supposed the motorman as well, realized deceased was not going to get off of the track in time to avoid a collision. Bartlett's statement, too, that the car was within 150 yards or more of the accident when the whistle began blowing, and he felt a sudden stopping within 50 or 75 yards of the accident, shows that the motorman, in the distance of 75 or 100 yards, sounded the alarm and had taken such steps as made the car suddenly begin stopping, which is certainly no evidence of a want of ordinary care, when we remember the car was going approximately 30 miles an hour, or 100 yards in less than 7 seconds, as some little time at least must necessarily be allowed to the motorman for doing the several things it was necessary for him to do to give the alarm and stop the car, and for such action to become noticeable from the sudden stopping of the car. *L. & N. v. Stokes' Adm'r, supra.*

[3] As regrettable as is the death of this man, to avoid the consequences of his negligence, the defendant, through its motorman in charge of the car, was only required to exercise such reasonable care as persons of ordinary prudence and presence of mind would have exercised under like circumstances, and to hold that this evidence shows any negligence upon the part of the motorman would be necessarily upon the hypothesis that the company was liable if he failed in any degree to exercise the utmost care possible by immediately comprehending the whole situation and losing not a second in the performance of every duty imposed upon him by a sudden emergency. Such presence of mind and efficiency is not possessed by

ordinary men, nor available to the defendant, and hence plaintiff was not entitled to protection in that extreme degree, and the trial court erred in refusing to direct a verdict for the defendant.

[4] The only other error complained of that we need notice is the inclusion, in that part of instruction No. 2 presenting the last clear chance rule, "or could by the exercise of ordinary care, after being aware of decedent's presence on or in dangerous proximity to the track, have seen his peril," which was error, since it was superfluous, and may have been confusing to the jury, and prejudicial to defendant, as there was no evidence decedent's peril existed or could have been discovered sooner than it was seen by the motorman.

Wherefore the judgment is reversed, with directions to grant defendant a new trial in conformity herewith.

### PRINDIBLE v. PRINDIBLE.

(Court of Appeals of Kentucky. Dec. 16, 1919.)

#### 1. WILLS $\Leftrightarrow$ 439—TESTATOR'S INTENT GOVERNS CONSTRUCTION.

Where testator's intention is plainly expressed, no technical rule of construction will be permitted to defeat it.

#### 2. WILLS $\Leftrightarrow$ 602, 608(5)—DEVISE IN FEE TO BE DEFEATED BY REMARRIAGE OF DEVISEE.

Where testator gave his wife all of the property "feeling confident that she will make a fair allowance to" his children, and added the words, "I make no restrictions on her remarrying except in case she does she shall at once make proper provision for my children," the wife took an absolute estate subject to be defeated to the extent of a proper provision for testator's children in case she remarried.

Appeal from Circuit Court, Johnson County.

Suit by Ada Hager Prindible, individually and as administratrix with will annexed, against John F. Prindible, Jr., and others. Judgment for plaintiff, and named defendant appeals. Reversed and remanded, with directions.

W. H. Vaughan, of Paintsville, for appellant.

Hager & Stewart, of Ashland, for appellee.

CLAY, J. John F. Prindible died testate and a resident of Johnson county on January 11, 1918. He was survived by his widow, Ada Hager Prindible, and three children, of whom Loretto Hager Prindible and John Prindible, an infant over 14 years of age, were born of his marriage with Ada Hager

Prindible, and Hazel A. Prindible, now Hazel A. Justice, the wife of Frederick C. Justice, was the issue of a former marriage. At the time of his death, John F. Prindible was the owner of certain real estate of but little value and of personal property of the value of about \$48,000, against which there was an indebtedness of about \$5,441. The widow, Ada Hager Prindible, qualified as administratrix with the will annexed.

This suit was brought by Ada Hager Prindible in her representative and individual capacity against her children, Loretto Hager Prindible and John Prindible, and against Hazel A. Justice, the daughter of the testator by his former marriage, and her husband, for a construction of the will. The chancellor adjudged that the widow took an absolute estate in the property devised and bequeathed. John Prindible by his guardian ad litem appeals.

The will, which is wholly in the handwriting of the testator, is as follows:

"Paintsville, Ky., Feb. 9th, 1914.

"I, the undersigned, having complete confidence and that she was largely instrumental in accumulating the entire amount of my estate, do hereby bequeath to my wife, Ada Hager Prindible, all of my personal and real property, feeling confident that she will make a fair allowance to my daughter, Hazel A. Prindible, of Washington, D. C., and properly provide for Loretto Hager Prindible, my daughter, and John Prindible, my son, both the latter children by her.

"I make no restriction on her remarrying except in case she does she shall at once make proper provision for my children. In other words, I want my brother, George E. Prindible, of Patton, Pa., to be made administrator, and in case he would not serve for him to have a proper one in his judgment to be appointed. Said administrator to allow Ada Hager Prindible a sum not to exceed \$600 per year, if she wishes same, and said administrator to pay Hazel A. Prindible the sum of three thousand dollars in cash or good securities.

"[Signed] J. F. Prindible. [Seal.]"

[1, 2] The widow relies upon the rule that where property is devised absolutely, with unlimited power of disposition, a subsequent limitation over of such portion of the property as may remain undisposed of is void. Trustees Presbyterian Church, Somerset, Ky., v. Milze, 181 Ky. 567, 205 S. W. 674, 2 A. L. R. 1237; Becker v. Roth, 132 Ky. 429, 115 S. W. 761. In support of this position it is argued that the first clause of the will gave the widow the entire fee to the property devised and bequeathed, and that the subsequent clause requiring her to make proper provision for the testator's children was invalid as being inconsistent with the fee. It must not be forgotten, however, that the sole purpose of construing a will is to arrive at the intention of the testator as disclosed by the entire instrument, and, where that intention

is plainly expressed, no technical rule of construction will be permitted to defeat it. *Watkins et al. v. Bennett et al.*, 170 Ky. 464, 188 S. W. 182. Hence, if upon a consideration of the whole will it clearly appears that the testator intended not to devise the entire fee but a less estate, there is no place for the application of the rule that a subsequent limitation over is void because repugnant to the fee. *Phelps v. Stoner's Adm'r*, 184 Ky. 466, 212 S. W. 423. Looking at the will in question, we find that the testator gave his wife all of his property, "feeling confident that she will make a fair allowance to my daughter, Hazel A. Prindible, of Washington, D. C., and properly provide for Loretto Hager Prindible, my daughter, and John Prindible, my son, both the latter children by her." Of course, these words are mere expressions of confidence and impose no restrictions on the estate devised. But the testator did not stop there. He added the words:

"I make no restriction on her remarrying, except in case she does she shall at once make proper provision for my children."

Language could not be plainer. The testator clearly intended that his wife should have an absolute estate if she remained unmarried, but, if she remarried, she should make proper provision for the testator's children. In other words, he gave her an absolute estate in his property subject to be defeated to the extent of a proper provision for his children in case she remarried. The case is one where the testator had implicit confidence in the fact that his wife would do the right thing by the children so long as the property was under her management and control, but felt it proper to protect his children against the rights, claims, and influence of a second husband, who, as experience shows, would not be so considerate of their rights, and the construction adopted by the chancellor cannot be sustained without doing violence to the language of the will.

If, at any time, the widow desires to marry, she should ask the chancellor to construe the will and determine what is a suitable provision for the children.

Judgment reversed, and cause remanded, with directions to enter judgment in conformity with this opinion.

#### COMMONWEALTH v. ROBERTA COAL CO. (Court of Appeals of Kentucky. Nov. 28, 1919.)

##### 1. ATTORNEY GENERAL §2—AUTHORITY TO EMPLOY OTHER COUNSEL.

Under Ky. St. § 112-15, subsecs. 1, 5, it is the Attorney General's duty to attend to all litigation and business in which the common-

wealth or its officers may be officially interested, and they may not employ or be represented by other counsel at state expense, unless such counsel be appointed by the Governor upon request of the Attorney General, so that suits to escheat property can only be brought by and in the name of the Attorney General, and a suit not brought by him, or by special counsel duly authorized by him, should be dismissed.

##### 2. ATTORNEY AND CLIENT §71—INQUIRY AS TO AUTHORITY OF PLAINTIFF'S ATTORNEYS.

The defendant in any suit may question, by motion supported by affidavit the authority of counsel representing the plaintiff to institute or prosecute the action, and when such an affidavit is filed the court may issue a rule against plaintiff's attorneys of record to show by what authority, if any, they brought suit, and if they fail in responding to the rule to show sufficient authority therefor, the court may dismiss the cause without prejudice.

##### 3. ATTORNEY GENERAL §2—ACTION BY ATTORNEY GENERAL ASSOCIATED WITH OTHER COUNSEL.

If a suit was brought for the state by the Attorney General, that other attorneys not connected with his office joined with him as counsel for the plaintiff would not authorize dismissal of the suit as by unauthorized counsel, since such a suit would be by the Attorney General, although other counsel not employed in the manner authorized by Ky. St. § 112-15, subsec. 5, should be associated with him, since such statute does not prohibit other counsel from voluntarily serving the state without state expense.

##### 4. DISMISSAL AND NONSUIT §71—UNCONTESTED AFFIDAVIT OF LACK OF AUTHORITY TO SUE.

Where defendant's counsel by affidavit charged upon information and belief that suit was instituted for the commonwealth by attorneys, without the authority or direction of the Attorney General, the court should have permitted special counsel for the commonwealth to file counter affidavit; but where the court, for reasons that do not appear in the record, refused to grant time to prepare and file such affidavits, held that, on the uncontested affidavit of defendant's counsel, the action was properly dismissed.

##### 5. ATTORNEY GENERAL §2—RIGHT OF SPECIAL COUNSEL TO SIGN ATTORNEY GENERAL'S NAME AS RELATOR.

Special counsel employed by the commonwealth under a contract with the Governor, whether the contract be valid or void, where they believe such contract was valid, had the right to use the Attorney General's name in any legitimate way in connection with the litigation, and will not be censured for signing his name as relator.

##### 6. ATTORNEY GENERAL §2—EMERGENCY REQUIRING SPECIAL COUNSEL FOR COMMONWEALTH.

Whether an emergency exists that will warrant employment of special counsel to institute suits to recover property, under Const. § 192, and Ky. St. § 567, as escheated, is to be determined by the Attorney General, and when his

request falls within reasonable bounds of Ky. St. § 112-15, the court will not interfere with the employment, if it is legally made by the Governor.

**7. ATTORNEY GENERAL ↔2—APPOINTMENT OF SPECIAL COUNSEL MUST DESIGNATE SPECIFIC SUIT.**

Such emergency must arise in respect to some particularly named suit or proceeding, and does not contemplate the general employment of special counsel to perform general legal services, which in the opinion of the Attorney General might benefit the state, and the request for employment must specify the nature of the suit or proceeding; otherwise the employment will be declared void by the courts.

**Appeal from Circuit Court, Letcher County.**

Petition by the Commonwealth against the Roberta Coal Company. From a judgment dismissing the petition, the Commonwealth appeals. Affirmed.

M. M. Logan, of Louisville, Chas. H. Morris, of Frankfort, Clayton B. Blakey, of Louisville, and T. B. Blakey, of Beattyville, for the Commonwealth.

Hager & Stewart, of Ashland, Morgan & Harvie, of Whitesburg, and W. O. Davis, of Versailles, for appellee.

Humphrey, Crawford, Middleton & Humphrey and Charles W. Milner, all of Louisville, amici curiæ.

**CARROLL, C. J.** This appeal is prosecuted by the commonwealth from a judgment of the Letcher circuit court, dismissing a petition filed by it against the Roberta Coal Company to escheat real estate owned by the company, upon the ground that the attorneys who brought the suit had no authority to institute or prosecute the action. The facts appearing in the record are these:

On July 19, 1919, a petition in equity styled "Commonwealth of Kentucky, on relation of Charles H. Morris, Attorney General, and Theodore B. Blakey and Clayton B. Blakey, Special Counsel," was filed against the Roberta Coal Company. The petition set out that the plaintiff was the "Commonwealth of Kentucky, on the relation of Charles H. Morris, Attorney General, and Theodore B. Blakey and Clayton B. Blakey, special counsel," and that the defendant, the Roberta Coal Company, a foreign corporation, had acquired the fee-simple title in June, 1914, from different vendors, to two separately described tracts of land in Letcher county, and on July 2, 1914, the coal, oil, gas, salt water, mineral, stone, timber, and mineral, mineral rights, and interests in four separately described tracts of land in Letcher county from the Hamilton Realty Company; that in February, 1913, it had acquired from T. P. Craft the coal, oil, gas, salt water, min-

erals, stone, and timber, mineral rights, and interests in a described tract of land in Letcher county; that in March, 1911, it had acquired from S. S. Willis the coal, oil, gas, salt water, stone, mineral, timber, mineral rights, and interests in six separately described tracts of land; that in December, 1912, it acquired from Lee Craft the coal, oil, gas, salt water, mineral, stone, timber, mineral rights and interests in a described tract of land.

It was further averred that the Roberta Coal Company had been the owner and in possession of the described tracts of land since the respective dates of the deeds to each made to it, and for a period of more than five years before the institution of the action; that "none of said tracts of land are now used by defendant, or have been used by the defendant during any portion of the five-year period preceding the filing of this suit, in connection with or for the purpose of carrying on the legitimate business which the defendant is, or was, authorized to carry on"; that "none of said tracts of land are now, or have been during any of the five-year periods preceding the filing of this suit, proper or necessary for carrying on the legitimate business of the defendant corporation"; that "each and all of said tracts of land are subject to escheat under the Constitution and laws of the state of Kentucky, and have under the Constitution and laws of the state of Kentucky escheated and reverted to the state of Kentucky, and that the plaintiff is now entitled to have it so adjudged and is further entitled to the possession of said lands"; that "notwithstanding the foregoing facts the defendant is now claiming title to said lands, and is exercising the rights of ownership therein, to the detriment of the commonwealth of Kentucky, and is committing waste thereon."

The prayer of the petition was that "a judgment be entered herein, adjudging and decreeing that each of the tracts of land herein described have escheated and reverted to the commonwealth of Kentucky, and for a further order adjudging and decreeing that the commonwealth of Kentucky is entitled to the possession of same, and further adjudging that the defendant herein has no interest, right, or title in any of said tracts of land." The petition was signed by "Charles H. Morris, Attorney General, Theodore B. Blakey and Clayton B. Blakey, Special Counsel for the Commonwealth," and verified by Clayton B. Blakey.

When the case came up for hearing in the Letcher circuit court, the Roberta Coal Company, by its counsel, Morgan & Harvie, moved the court in writing "to require Theodore B. Blakey and Clayton B. Blakey, special counsel for the plaintiff, the commonwealth of Kentucky, in the above-styled case, to

produce and file as part of the record in this case their authority, or any authority either one of them may have, for bringing or filing of and the prosecution in the way and manner it is signed and verified, under the penalty of having the petition dismissed unless said authority is filed," and in support of this motion filed the following affidavit made by its counsel, Mr. Harvie:

"The affiant, Lewis E. Harvie, having been duly sworn, states as follows:

"That this suit purports, in the petition, to have been brought on behalf of the commonwealth of Kentucky by Charles H. Morris, Attorney General, and Theodore B. Blakey and Clayton B. Blakey, special counsel, as relators.

"That, as affiant is informed and believes and now charges, this suit has in fact been instituted by Theodore B. Blakey and Clayton B. Blakey alone, and without the knowledge, authority, or direction of Charles H. Morris, Attorney General, and that the use of the name of said Charles H. Morris, Attorney General, as one of the relators in the petition, and also as one of the attorneys for the commonwealth therein, was wholly unauthorized by said Morris, and such use was made without his knowledge or consent.

"That Theodore B. Blakey and Clayton B. Blakey, described as special counsel and relators in the petition, and who appear as attorneys for the commonwealth in the signature to the petition and in the verification thereof, were without legal authority to institute or prosecute this action, either as relators or special counsel, or in any other capacity; that, as affiant is advised, said Blakeys have never been lawfully retained or lawfully employed to bring this suit, and are utterly without any legal authority to maintain the same, and their action in filing this suit and in assuming to proceed therein in the name of the commonwealth of Kentucky against this defendant is wholly illegal and without any warrant of law whatsoever.

"That the attorneys named in the petition, who are attempting to prosecute this suit, are without any sufficient warrant of attorney so to do, and the use by them of the name of the Commonwealth of Kentucky as plaintiff is unauthorized.

"That this affidavit is filed in support of a motion for a rule heretofore filed herein, praying that Theodore B. Blakey and Clayton B. Blakey produce and file their authority, or any authority they may have, for the prosecution of this suit."

Upon the filing of the motion and affidavit the court "ordered and adjudged that a rule be granted against the said Theodore B. Blakey and Clayton B. Blakey, returnable Friday, August 29, 1919, at 10 o'clock a. m., requiring said attorneys and each of them to file their contract of employment and warrant of attorney for instituting and prosecuting this action, \* \* \* under the penalty of having this rule made absolute and the petition dismissed for failure to produce said authority."

On a subsequent day of the term Theodore B. Blakey, for response to the rule, acting

for himself alone, and under protest, filed the following certified copies from the office of the secretary of state, showing his contract of employment and authority to represent the commonwealth:

"Frankfort, Ky., April 11, 1919.

"Hon. A. O. Stanley, Governor of Kentucky, Frankfort, Ky.—My Dear Governor Stanley: I am advised that there are large tracts of land in this state which have escheated to the commonwealth or are subject to be escheated it. An extended investigation and the expenditure of a considerable sum of money would be required, if this department should undertake to investigate whether this information that has come to me is correct, and this office is not prepared to undertake the investigation of these matters with its present force, or the prosecution of such suits as may be necessary to recover the property subject to escheat. It has been the practice of the Attorney General's department for a good many years, where attorneys of the commonwealth in good faith believed there is property subject to escheat to the commonwealth, and who call the same to the attention of this department, that they have been employed on a contingent basis to make the investigation and to file suit to recover such property.

"In the present instance, the tracts believed to be subject to escheat have been called to my attention by Messrs. Theodore B. Blakey and Clayton B. Blakey, attorneys at law. Inasmuch as this department, on account of the pressure of other business, cannot investigate whether these properties are subject to escheat, I am of the opinion that such an emergency exists as is contemplated by the statute which authorizes and requires the employment of other counsel on a contingent basis, in order to properly protect the interest of the commonwealth, and to recover for it any property that has been escheated to it. I therefore request that you employ counsel for the purpose indicated above, and that their employment be limited to suits brought during the present year, 1919, which they shall be expected to prosecute to a final determination.

"Very truly yours,

"Charles H. Morris, Attorney General."

The contract of employment is as follows:

"Frankfort, Ky., April 12, 1919.

"This agreement, made this day and date above written, by and between A. O. Stanley, Governor of the commonwealth of Kentucky, party of the first part, and Theodore B. Blakey and Clayton B. Blakey, parties of the second part, witnesseth:

"That whereas, the Attorney General has this day, because of an emergency existing, requested the employment of counsel for the prosecution of certain suits for the recovery of lands which have been escheated to the commonwealth, or are subject to escheat to the commonwealth, a copy of which request is attached hereto and made a part hereof:

"Now, therefore, the premises considered, the first party does hereby employ the second parties, pursuant to section 112, subsection 5, of the Kentucky Statutes, to institute and prosecute to completion such suits or proceedings in the name of the commonwealth as may be necessary to recover for the commonwealth of Ken-

tucky any property which, under section 192 of the Constitution of Kentucky, and section 567 of the Kentucky Statutes, has escheated to the commonwealth of Kentucky, or which is now subject to be escheated to it, or which may be subject to escheat during the current year 1919. This contract shall apply only to such suits as may be brought by the second parties during the year 1919.

"The second parties agree to investigate, prosecute, and attend to all such claims in a careful, diligent, and skillful manner, and as full compensation for all services rendered by them to the commonwealth, under this employment, they shall receive and be paid by the commonwealth of Kentucky a sum equal to 30 per cent. of whatever may be recovered and paid into the state treasury under any suit or proceedings had under this employment.

"The second parties shall receive nothing for any investigation they may make or prosecution of any suit or proceeding unless recovery is had.

"In testimony whereof, witness the signatures of the parties hereto this day and date above written. A. O. Stanley, Governor of the Commonwealth of Kentucky. Theodore B. Blakey. Clayton B. Blakey.

"I, Charles H. Morris, Attorney General of the commonwealth of Kentucky, approve the above contract, as set out upon its terms and conditions.

"This April 12, 1919.

"Charles H. Morris, Attorney General."

It also appears in the record that counsel for the commonwealth, who was present, "being unable to file counter affidavits, at the hearing of the motion for a rule to show cause why the case should not be dismissed, moved the court for time in which to communicate with absent counsel for plaintiff, and to prepare and file counter affidavits, before the motion for a rule was passed on by the court," but the court overruled this motion and refused further time to prepare and file counter affidavits.

Thereafter the Roberta Coal Company by its counsel filed a general demurrer to the response of Blakey, and the court, adjudging the response insufficient, made the rule absolute and dismissed the petition, to which ruling "Theodore B. Blakey and Clayton B. Blakey objected and excepted, and prayed an appeal to the Court of Appeals, which was granted." It is, however, agreed that the granting of the appeal in this manner should have the same effect as if the commonwealth had prayed and been granted an appeal. Following this, this record was filed in the clerk's office of this court by the appellee, Roberta Coal Company.

[1] On this record the opinion will be confined to a consideration of the correctness of the ruling of the lower court in dismissing the petition upon the ground that the suit was filed by special counsel, who had no authority to institute or prosecute it. We will not in any manner determine the rights of the case, or express any opinion as to when or under what circumstances property owned

by this or other corporations may be escheated in a suit by the commonwealth.

Thus limiting the question before us, the applicable law may be found in section 112—15 of the Kentucky Statutes, in which it is provided in subsection 1 that—

"The Attorney General shall be the chief law officer of the commonwealth, and all its departments. The Attorney General shall appear for the commonwealth in the trial and argument of all cases, civil and criminal, in the Kentucky Court of Appeals whenever the commonwealth is directly or indirectly interested; he shall also appear in behalf of the commonwealth in any court or tribunal in or out of this state in any case or proceeding in which the commonwealth is a party in interest, except where it is made the duty of the commonwealth's attorney or county attorney to represent the commonwealth. He shall institute all actions and proceedings necessary to cause the payment of all judgments and demands of the commonwealth, payable at the state treasury, not discharged in the proper time. He shall, with the assistance of the auditor of public accounts, investigate the condition of all unsatisfied claims, demands, accounts, and judgments in favor of the commonwealth, and shall take all necessary steps, by motion, action or otherwise, to collect or cause to be collected such claims, demands, accounts and judgments, and paid into state treasury."

It is further provided in subsection 5 that—

"The Attorney General and his assistants shall attend to all litigation and business in or out of the state, required of him or them under this act, or other existing law or laws hereinafter enacted, and also any litigation or business that any state officer may have in connection with or growing out of his official duty; and no state officer, board of trustees or the head of any department or institution of the state shall have authority to employ or to be represented by any other counsel or attorney at law, unless an emergency arises, which, in the opinion of the Attorney General, requires the employment of other counsel, in order to properly protect the interest of the commonwealth, in which event the Attorney General shall, in writing, setting forth the reasons for such employment, request the Governor to employ such additional counsel. Before such employment, said written request shall be filed in the office of the secretary of state, and shall be a public record, and a copy thereof shall be retained and kept on file in the office of the Attorney General.

"Before such counsel is employed, his fee and compensation shall be agreed upon and fixed by written contract by the Governor and said counsel, subject to the approval of the Attorney General, and copies thereof shall be kept on file in the office of the Attorney General and the secretary of state."

Under this statute it is made the duty of the Attorney General and his assistants to attend to all litigation and business in which the commonwealth or any state officer in connection with his official duties may be interested; and no state officer, or state board, commission, or head of any department or

institution of the state, or any person connected therewith, has any authority to employ or to be represented by other counsel at the expense of the state, or at the expense of any fund set apart for his or its use, unless the Attorney General requests the employment of such other counsel.

The purpose of the statute was, as said in *Com. v. Louisville Property Co.*, 141 Ky. 731, 133 S. W. 759, "to do away with the practice, hitherto obtaining, of employing special counsel or attorneys to represent the interest of the commonwealth," and to put in the hands of the Attorney General and his assistants all litigation and other business that might or did require the employment of attorneys, thus taking away from every other state officer or state board, commission, department, institution, or any person connected therewith, the authority to employ at the expense of the state, or at the expense of any fund set apart for his or its use, special attorneys, unless their employment is first requested by the Attorney General and authorized by the Governor.

The employment, however, of special counsel, is not limited to matters or litigation affecting some state department, board, or commission. The statute is broad enough to permit the employment of special counsel in escheat cases, or in any action, proceeding, prosecution, or matter affecting the interest of the commonwealth and concerning which it is the duty of the Attorney General to represent the state. They may also be employed to investigate and determine whether suit should be brought by the commonwealth in a particular case, as well as to investigate and determine whether a defense in a designated case should be made by the commonwealth, and in any matter affecting the interest of the commonwealth or any state officer, state board, commission, department, or institution.

Accordingly, as suits to escheat property can only be brought by and in the name of the commonwealth (*Chesapeake & Ohio Ry. Co. v. Rosskamp*, 179 Ky. 175, 200 S. W. 496) at the instance of the Attorney General of the state and in his name as counsel for the state, it follows that, if this suit was not brought by the Attorney General, or by special counsel duly authorized to do so, the action was properly dismissed by the lower court.

[2] We say this because the defendant in any suit has the right to question by motion, supported by affidavit, the authority of the counsel representing the plaintiff to institute or prosecute the action, and when such an affidavit is filed the court may in the exercise of a sound discretion issue a rule against the attorneys of record representing the plaintiff to show by what authority, if any, they brought the suit, and if in response to the rule they fail to show sufficient authority for instituting the action the court may dismiss

it without prejudice. *McAlexander v. Wright*, 3 T. B. Mon. 189; *Belt v. Wilson*, 6 J. J. Marsh. 495, 22 Am. Dec. 88; *Com. v. Louisville Property Co.*, 128 Ky. 790, 109 S. W. 1183; 4 Cyc. 928.

[3] This was the practice pursued in the lower court in this case, and we will now inquire into the question whether this suit was brought by attorneys authorized to institute and prosecute it. At the very outset we are met with the argument on behalf of the commonwealth that the petition on its face shows that the suit was brought by the commonwealth on the relation of the Attorney General of the state and other special counsel, and further shows that it was signed by the Attorney General as well as the special counsel. Therefore it is said that although it should be conceded that the special counsel had no authority to institute or prosecute the action, this would not authorize the dismissal, because, if the names of the special counsel were stricken from the petition, it would yet appear that the suit was brought by the Attorney General of the state. Of course, if it should be admitted that the suit was brought by the Attorney General of the state, the action of the lower court in dismissing it would plainly be error, as the Attorney General had, as we have said, the undoubted right to bring the suit.

We are further of the opinion that, if the suit was in fact brought by the Attorney General, the mere circumstance that other attorneys not connected with his office joined with him as counsel for the plaintiff did not authorize the dismissal of the suit, upon the ground that it was dismissed by the lower court. If the Attorney General does in fact bring such a suit as this, it will be a suit in the name of the commonwealth, brought by the Attorney General, although other counsel not employed in the manner authorized by the statute may be associated with him in the prosecution of the suit. The statute does not prevent the Attorney General from having the assistance of other counsel in cases brought by him, when such other counsel with his consent volunteer their services without any expense to the state. So that again the question recurs: Was this suit in fact brought by the Attorney General, or by the special counsel whose names are signed to the petition?

[4] Passing for the present the validity of the employment of these special counsel by the Governor, and their right to bring such a suit as this under the employment, we find in the record the uncontroverted affidavit of Lewis E. Harvie, counsel for the Roberta Coal Company, heretofore set out, averring that as he "is informed and believes, and now charges, this suit has in fact been instituted by Theodore B. Blakey and Clayton B. Blakey alone, and without the knowledge or authority or direction of Charles H. Morris, Attorney General, and that the use of the



name of said Charles H. Morris, Attorney General, as one of the relators in the petition, and also as one of the attorneys for the commonwealth therein, was wholly unauthorized by said Morris, and such use was made without his knowledge or consent." When this affidavit was filed, the court should have permitted special counsel for the commonwealth to file the counter affidavit controverting the averments of the affidavit made by Harvie; but as the court, for reasons that do not appear in the record refused to give time to prepare and file such a counter affidavit, we think that on the uncontroverted affidavit of Harvie the action was properly dismissed.

[5] But the error committed by the court in refusing to give time to controvert the affidavit of Harvie is not so material, in view of the larger and controlling question presented by the record, which put in issue the validity of the employment by the Governor of the Blakeys as special counsel. We say this, because it seems very plain, from the facts appearing in the record, that these counsel were not volunteers, but were under the employment of the Governor. It is also manifest that the suit was in fact brought by them, and not by the Attorney General. It is true the name of the Attorney General appears as relator in the petition and is signed to the petition as one of the attorneys for the plaintiff; but we think there can be no doubt that the name of the Attorney General was put in as relator and signed to the petition by the special counsel, who believed they had the right to do this under their employment.

It is hardly necessary to here add that in making these observations we have no intention of reflecting on the special counsel, who are gentlemen of high character. They assumed that their employment was valid, and therefore they might with entire propriety join with them the Attorney General; for, of course, if the employment was valid, as they believed, they had the right to use his name in any legitimate way in connection with the litigation they were engaged to carry on.

[6] Looking, now, again to the manner in which the special counsel were employed, we find from the letter of the Attorney General to the Governor that he was informed by Theodore B. Blakey and Clayton B. Blakey that "there are large tracts of land in this state which have escheated to the commonwealth, or are subject to be escheated to it," and that "an extended investigation and the expenditure of a considerable sum of money would be required if this department should undertake to investigate whether this information that has come to me is correct, and this office is not prepared to undertake the investigation of these matters with its present force, or the prosecution of such suits as

may be necessary to recover the property subject to escheat." He further said that—

"Inasmuch as this department, on account of the pressure of other business cannot investigate whether these properties are subject to escheat, I am of the opinion that such an emergency exists as is contemplated by the statute which authorizes and requests the employment of other counsel on a contingent basis. I therefore request that you employ counsel for the purpose above indicated."

Following this request, and on the next day, the Governor employed the Blakeys to "institute and prosecute to completion such suits or proceedings in the name of the commonwealth as may be necessary to recover for the commonwealth of Kentucky any property which under section 192 of the Constitution of Kentucky and section 567 of the Kentucky Statutes has escheated to the commonwealth of Kentucky, or which is now subject to be escheated to it, or which may be subject to escheat during the current year 1919."

The validity of the employment of these special counsel is challenged upon two principal grounds: First, that the employment of special counsel under the statute is not authorized, "unless an emergency arises which in the opinion of the Attorney General requires the employment of other counsel," and the argument is made that there was no such "emergency" as is contemplated by the statute; second, that when such an emergency exists as authorizes the employment of special counsel the employment must be confined to a particularly described suit against a named person or corporation, and that, as the employment here did not name the corporation against whom the suit, or any suit, was to be brought, it was a void employment.

Whether an emergency exists that will warrant the employment of special counsel is a question that must be determined by the Attorney General, and when his request for special counsel falls within the reasonable bounds of the statute the courts will not interfere with the employment, if it is regularly made by the Governor. The Attorney General is the chief law officer of the state, and the Legislature in its wisdom thought it well to leave with him and to his sound discretion, subject to the limitations of the statute, the authority to determine when it was best for the interest of the state that special counsel should be employed to assist him in the discharge of duties required by the statute.

[7] If the construction contended for should be adopted, and the court should undertake to control his discretion in requesting special counsel in cases in which he had the right to make such request, it would result in setting up its judgment in place of his as to when an emergency existed that

would warrant the employment of special counsel, and in every case in which special counsel was employed there would be room for contention and litigation, with its attendant delay and uncertainty, until the matter had been adjudicated. It was not intended by the Legislature that the confusion which would follow such a division of discretionary authority with the resulting detriment to the interest of the state in cases or matters of pressing urgency should exist. We do not, however, mean that there is no limitation upon the power of the Attorney General in the matter of requesting the employment of special counsel, or that the statute gives him the unrestrained right to describe in as broad and general terms as he pleases the powers of the special counsel whose appointment he requests, or that the courts may not inquire into the validity of any employments made on his request.

The statute, as we have seen, makes it the duty of his office to attend to all litigation in which the state is concerned, "unless an emergency arises" which in his opinion "requires the employment of other counsel," and means, as we clearly think, that the emergency must arise in respect to some particularly named suit, proceeding, prosecution, or thing, and does not contemplate the general employment of special counsel to perform general legal services, although such services in the opinion of the Attorney General might be of benefit to the state. In other words, whenever special counsel are to be employed, the request for the employment, as well as the contract of employment, must specify the nature of the suit, proceeding, prosecution, or matter the special counsel are to be engaged to assist in, and the name of the person or corporation whose interests will be affected by the employment, and employments not so confined may be declared void by the courts.

When the discretion and authority of the Attorney General is thus limited to obtaining in a particular emergency the benefit of the assistance of other counsel, this exercise of discretion will fully protect the interests of the state and effectuate the intent of the statute. The Attorney General is rightfully vested by the statute with large authority and wide discretion in the control of actions and proceedings in which the state is interested. He is the chief legal representative of the commonwealth, and in the conduct of his office has behind him all the power and resources of the state; and we think it would be against public policy and in violation of the statute to permit the Attorney General to surrender, through a general and unlimited employment, a large part of the authority and discretion vested in him by the law to special counsel engaged on a contingent or other basis, thus placing in their hands and under their control the resources the commonwealth may have the aid of in the prose-

cution or defense of suits in which it is interested, and this, too, without the restraining influence of the responsibility that high official place and power naturally imposes upon public officers.

Aside from this, the Governor, who alone can make the contract of employment, is entitled to know the nature and character of the particular suit, proceeding, prosecution, or matter in which the assistance of other counsel is required, as well as the name of the person or corporation to be affected, so that he may intelligently decide whether such employment is necessary, because the Governor is not obliged to adopt the request of the Attorney General, but may, if he chooses, decline to employ counsel, although so requested by the Attorney General. So that the Governor, equally with the Attorney General, is responsible for the grant of authority attempted to be conferred upon the special counsel through a misconstruction of the statute, as their employment could not have been made without his consent. The Attorney General merely recommends or requests the employment, and the Governor may or may not, in his discretion, accede to the request of the Attorney General.

It will be observed that in his letter to the Governor the Attorney General recommended that the special counsel, whose employment he requested, be vested with authority by the Governor to "institute and prosecute to completion such suits or proceedings in the name of the commonwealth as may be necessary to recover for the commonwealth of Kentucky any property which, under section 192 of the Constitution of Kentucky, and section 567 of the Kentucky Statutes, has escheated to the commonwealth of Kentucky, or which is now subject to be escheated to it, or which may be subject to escheat during the current year 1919."

It will thus be seen that the special counsel were given unrestricted authority to institute and prosecute suits in the name of the commonwealth anywhere in the state against any corporation they considered guilty of violating the escheat laws of the state. There was no limitation whatever upon their powers in this respect. No corporation to be proceeded against was named or described. They could bring one suit or 1,000 suits of this nature, and it appears in this record that more than 100 suits have been brought under their employment against as many different corporations.

It should, however, be said that the Attorney General, in requesting that special counsel be employed and handed a roving commission to go about the state hunting out property that might be subject to escheat and bring suits to recover the same for the commonwealth, and the Governor in granting the special counsel blanket authority for this purpose, were not without precedent. A like contract was made in 1907 between S.

W. Hager, auditor, and George L. Pickett, an attorney, under which Pickett was given the unlimited right to institute such suits or proceedings as might be necessary to recover escheated property, and in *Commonwealth v. Louisville Property Company*, 128 Ky. 790, 109 S. W. 1183, 33 Ky. Law Rep. 225, this court held that the contract was authorized by section 1622 of the Kentucky Statutes, giving to the auditor of the state power to employ, with the approval of the Attorney General, special attorneys to attend the claims of the commonwealth for the recovery of escheated property. This employment, however, was before the enactment of the statute we have quoted, defining the powers of the Attorney General and the Governor in respect to the employment of special counsel, and this statute has superseded section 1622, under which Pickett was employed.

Having the opinion expressed as to the construction of the statute, we think the request of the Attorney General was broader than the statute authorized, and that the contract made by the Governor under it was void. This being so, the special counsel were without authority to bring this suit, and the lower court properly dismissed it.

Wherefore the judgment is affirmed.

#### MIDDLETON et al. v. BEASLEY et al.

(Court of Appeals of Kentucky. Dec. 12, 1919.)

#### 1. EXECUTORS AND ADMINISTRATORS §473, 474(2)—INTERVENTION IN SUIT TO SELL REAL ESTATE.

Rejecting petition to intervene in an action to sell decedent's real estate and settle his estate is error, if its allegations are sufficient to support a constructive trust in petitioner's favor in lands to which deceased held title.

#### 2. TRUSTS §103(3) — FACTS RAISING CONSTRUCTIVE TRUST.

A constructive trust is raised, where husband and wife agreed to purchase land jointly, to pay for it by the joint and combined labors of themselves and their respective children by former marriages, and to have it conveyed to them jointly, so that the children of each would eventually take the share of their respective parent, and the wife died before full payment, and the husband thereafter took deed to himself, on the understanding and agreement that he would reconvey to the wife's children her half interest, and they, pursuant thereto, continued to his death to help to cultivate it to pay therefor, she and they fully carrying out their agreement, and he continued to his death to recognize the binding force of the agreement, but neglected to convey.

Appeal from Circuit Court, Garrard County.

A petition by John Middleton and others to intervene in an action to which Clarence Beasley and others were parties was rejected, and petitioners appeal. Reversed and remanded.

R. H. Tomlinson, of Lancaster, for appellants.

J. E. Robinson, of Lancaster, for appellees.

CLARKE, J. Appellants, the children of a former wife of John Beasley, deceased, attempted as interveners, in an action to sell his real property and settle his estate, to assert an undivided one-half interest under a constructive trust in 43 acres of land to which he held title. Their tendered petition to be made parties was rejected, but made part of the record, and following a final judgment they have appealed.

It is alleged, in substance, in the rejected petition as amended, that decedent and his then wife, appellants' mother, entered into an agreement to purchase this tract of land jointly, to pay for it by the joint and combined labors of themselves and their respective children by former marriages, and to have it conveyed to them jointly, so that the children of each would eventually take the share of their respective parent; that the mother of appellants died before the land was fully paid for, and decedent thereafter took deed to himself, upon the understanding and agreement that he would reconvey to appellants, his stepchildren, their mother's half interest therein; that in compliance with this contract they continued to the time of his death to help raise crops on the land to pay for same; that they and their mother fully carried out her part of the contract; that he at all times recognized their ownership of an undivided one-half interest in the land, and frequently announced to strangers that he intended to fix the title accordingly, but that he neglected to do so.

[1, 2] The only question now before us is whether these allegations of a parol contract are sufficient to support a constructive trust, for, if so, the court erred in rejecting appellants' petition to be made parties, even though, from the other pleadings or evidence in the suit, it might have appeared to the court they could not sustain these allegations under the familiar rule as stated in *Potter v. Potter*, 180 Ky. 370, 202 S. W. 872:

"That in order to show a parol trust against the holder of the legal title, the evidence must be clear, convincing, and satisfactory, and such as to take the case out of the realm of conjecture; and where the evidence is uncertain, conflicting, doubtful, or unsatisfactory, or is susceptible of a reasonable explanation on a theory other than the existence of a trust, no trust will be established."

That a cause of action was stated, at least, we think is beyond question, because of the allegations of confidential relationship between the parties and contributions toward the purchase price by appellants and their mother in addition to the alleged parol contract and the recognition of its binding force by the title holder to the time of his death. The principle upon which a constructive trust may be created and established, that has been frequently approved by this court, is thus stated in *Pomeroy's Equity Jurisprudence*, § 1044:

"If a person obtains the legal title to property by such arts or acts or circumstances of circumvention, imposition, or fraud, or if he obtains it by virtue of the confidential relation or influence under such circumstances that he ought not, according to the rules of equity and good conscience, as administered in chancery, to hold and enjoy the beneficial interest of the property, a court of equity, in order to administer complete justice between the parties, will raise a trust by construction out of such circumstances and relations; and this trust they will fasten upon the conscience of the offending party, and will convert him into a trustee of the legal title, and order him to hold it, or to execute the trust in such manner as to protect the rights of the defrauded party and to promote the safety and interests of society."

See, also, *Crutcher v. Muir*, 90 Ky. 142, 13 S. W. 435, 11 Ky. Law Rep. 989, 29 Am. St. Rep. 366; *Griffin v. Schlenk*, 139 Ky. 523, 102 S. W. 837, 31 Ky. Law Rep. 422; *Sherley v. Sherley*, 97 Ky. 512, 31 S. W. 275, 17 Ky. Law Rep. 450; *Payne v. McClure Lodge*, 115 S. W. 764; *Wiedemann v. Crawford*, 142 Ky. 308, 134 S. W. 495; *Parker v. Catron*, 120 Ky. 145, 85 S. W. 740, 27 Ky. Law Rep. 536, 117 Am. St. Rep. 575; *Warden v. O'Brien*, 142 Ky. 633, 136 S. W. 635; *Willis v. Lamb*, 158 Ky. 777, 166 S. W. 251.

Whether the cause of action stated by appellants can be sustained by the evidence, or has been lost by laches, are matters that cannot be decided until the issues have been made up and the evidence heard, and we do not now, of course, express any opinion upon any of these questions.

Wherefore the judgment is reversed, and cause remanded for proceedings consistent herewith.

#### EWING v. McCLANAHAN.

(Court of Appeals of Kentucky. Dec. 19, 1919.)

#### 1. BILLS AND NOTES §527(1)—EVIDENCE NOT SHOWING SATISFACTION OF NOTE.

In action on note executed to plaintiff by defendant, principal on prior note, defense being that note was executed for stock, which, with other stock owned by defendant and turned over

to plaintiff, was accepted by plaintiff in full satisfaction of the note, verdict for defendant held flagrantly against the evidence.

#### 2. APPEAL AND ERROR §1003 — VERDICT FLAGRANTLY AGAINST EVIDENCE WILL BE REVERSED.

While court on appeal would be compelled to uphold verdict for defendant, if case turned on credibility of plaintiff and defendant, it will not do so where defendant's evidence is not only vague and unsatisfactory, but utterly inconsistent with all the circumstances surrounding the transaction, as well as the ordinary course of dealing between business men.

Appeal from Circuit Court, Hickman County.

Suit by R. C. Ewing against W. T. McClanahan. Judgment for defendant, and plaintiff appeals. Reversed and remanded for new trial.

Bennett, Robbins & Bennett, of Clinton, for appellant.

J. D. Via, of Clinton, for appellee.

CLAY, C. Plaintiff. R. C. Ewing, brought suit against the defendant, W. T. McClanahan, to recover on a note for \$1,000 dated May 5, 1907, and payable six months after date, with interest at the rate of 6 per cent. per annum until paid. Defendant admitted the execution of the note, and pleaded that the note was executed for stock in the McClanahan Harness & Collar Company, of Columbia, Tenn.; that said stock was turned over to plaintiff by the defendant, and that in addition \$1,400 worth of stock owned by the defendant was also turned over to the plaintiff; that plaintiff took possession of the stock, sold and disposed of the corporation, and converted the money for his own use and benefit, which more than paid him for the note sued on; that said stock was turned over to plaintiff in full satisfaction of said note. A trial before a jury resulted in a verdict and judgment for defendant. Plaintiff appeals.

[1] A reversal is asked on the sole ground that the verdict is flagrantly against the evidence. It appears that the McClanahan Harness & Collar Company was a corporation engaged in business at Columbia, Tenn., and that plaintiff was its president, and defendant its general manager and also a director. One Shelton was the owner of \$2,000 worth of the stock. Being dissatisfied with the manner in which the corporation was run, Shelton proposed to sell his stock. Plaintiff agreed to take \$1,000 worth of the stock, and defendant the remainder. Not being able to pay cash for the stock, it was finally agreed that defendant should execute his note for \$1,000, with plaintiff as surety. This note was afterwards sold and discounted at a bank, and after being renewed from time to

time it was finally paid by plaintiff. At that time defendant executed to plaintiff the note sued on. Shelton says that the \$1,000 worth of stock transferred to defendant was attached to the note as collateral, but the stock was not attached to the note when discounted by the bank. It further appears that on February 26, 1907, the McClanahan Harness & Collar Company made an assignment for the benefit of its creditors. The assets of the corporation were not sufficient to pay the creditors, and, instead of the directors and stockholders receiving anything, they were compelled to pay certain notes of the corporation on which they were sureties. At the time of the execution of the note sued on, the affairs of the corporation had been wound up, and its stock was worthless.

The defendant testified that he signed the note, but did not owe it. He paid the note by transferring to Ewing the \$1,000 worth of stock in the McClanahan Harness & Collar Company purchased from Shelton with the \$1,000 note, and also the transfer of \$1,000 worth of stock that he owned in the same company. Upon being recalled as a witness, he stated that when he bought the \$1,000 worth of stock from Shelton he turned the stock over to Ewing, who had signed his note to Shelton for the stock. He further stated that when he left Tennessee the McClanahan Harness & Collar Company had been liquidated, and that he turned over to Ewing the additional \$1,400 worth of stock "at par value" in full satisfaction of the note that he had executed for the \$1,000 worth of stock; that said stock was turned over to Ewing after the execution of the note sued on, and was accepted by Ewing in full satisfaction of same. He also stated that he never received any dividend from the stock which he purchased from Shelton, nor did he receive any portion of the assets of the company, and added that the company's failure was due to the fact that its business was improperly managed by plaintiff and his associates. He further testified that he never promised to pay the note sued on at any time, and that he told plaintiff, when the note was first executed, that he did not want the stock and was not able to buy it, but plaintiff told him to go ahead and buy it, and he (plaintiff) would take care of him.

Plaintiff testified to the circumstances under which the \$1,000 worth of stock was purchased by defendant from Shelton. He stated that after the Shelton stock was transferred to the defendant the company declared one dividend, which defendant received. After the execution of the note sued on, defendant promised on two or three occasions to pay it. At one time J. D. Dobbins, plaintiff's partner, was present. He never at any time took, or agreed to take, as collateral security the stock which McClanahan purchased from Shelton, nor had he ever seen or had the stock in his

possession. He never agreed to take over any stock in the company in payment of the note sued on. At the time the note was executed the stock in that company was not worth the paper it was written on. Judge W. B. Turner, to whom the property of the harness company was assigned, testified that he wound up the company's affairs and its assets were not sufficient to pay its debts. He knew nothing of defendant's having transferred any stock to plaintiff. John D. Dobbins, who was formerly a partner of plaintiff in the hardware and furniture business, and a director of the McClanahan Harness & Collar Company, stated that he was present on one occasion when defendant promised to pay the note in question.

[2] It will be observed that defendant testified that the stock purchased from Shelton was delivered to plaintiff at the time plaintiff became defendant's surety on the note to Shelton, and was never afterwards in possession of defendant. There is no contention that the stock was then accepted by plaintiff as payment of the note on which he was surety, and certainly it cannot be contended that it was accepted in payment of the note sued on, which was not executed until about two years later. Indeed, defendant says that after the note sued on was executed, he turned over to plaintiff \$1,400 worth of stock in the McClanahan Harness & Collar Company "at par value," and this stock was accepted by plaintiff in full satisfaction of the note. If the case were one that turned on the credibility of plaintiff and defendant, we would, of course, be compelled to uphold the verdict; but such is not the case. Not only is defendant's evidence vague and unsatisfactory, but it is utterly inconsistent with all the circumstances surrounding the transaction, as well as with the ordinary course of dealing between business men. In the first place, at the time it is claimed the stock was turned over to plaintiff in payment of the note, the company had been liquidated and the stock was known by both plaintiff and defendant to be absolutely worthless, and would not have been accepted, either at its "par value" or at any value, by a man having only a slight glimmering of reason, much less a sensible business man, such as plaintiff. In the next place, the weight of the evidence is that defendant promised to pay the note after it is claimed the stock was accepted in satisfaction of the note. In the third place, a man of defendant's business experience does not ordinarily pay a note of \$1,000, and leave it in the possession of the payee for many years thereafter. Viewing the evidence in the light of these circumstances, which speak louder than words, we are constrained to the conclusion that the verdict of the jury is flagrantly against the evidence.

Judgment reversed, and cause remanded for a new trial consistent with this opinion.

## CLINE v. COMMONWEALTH.

(Court of Appeals of Kentucky. Dec. 12, 1919.)

## 1. CRIMINAL LAW §737—PEREMPTORY INSTRUCTION AS TO VENUE.

Evidence as to venue on prosecution for seduction held sufficient to justify refusal of peremptory instruction asked by defendant.

## 2. CRIMINAL LAW §369(1)—EVIDENCE OF RAPE ON PROSECUTION FOR SEDUCTION.

Evidence of rape months after alleged seduction is inadmissible on a prosecution for the seduction, being within no exception to the general rule against evidence of another crime wholly independent of that for which defendant is being tried.

## 3. CRIMINAL LAW §1169(11)—EVIDENCE OF OTHER CRIME PREJUDICIAL.

Admission on trial for seduction of evidence of subsequent rape held prejudicial, in view of argument of commonwealth's counsel and conflicting evidence as to seduction.

## Appeal from Circuit Court, Floyd County.

Henry Cline was convicted of seduction, was refused a new trial, and he appeals. Reversed and remanded for new trial.

A. J. May, of Prestonsburg, for appellant.

C. H. Morris, Atty. Gen., Beverly M. Vincent, Asst. Atty. Gen., and J. D. Smith, Com. Atty., B. M. James, and W. W. William, all of Prestonsburg, for the Commonwealth.

SETTLE, J. The grand jury of Floyd county found and returned in the circuit court of that county an indictment charging the appellant, Henry Cline, with the seduction of Maggie Blackburn, a female 17 years of age, accomplished, as alleged, under and by virtue of a promise on his part to marry her. On the trial, the jury, by their verdict, found the appellant guilty of the offense charged, and fixed his punishment at confinement in the penitentiary for one year, following which sentence was pronounced, and judgment entered by the court in conformity with the verdict. He was refused a new trial, and has appealed.

The indictment was found and conviction obtained under Kentucky Statutes, § 1214, which provides:

"Whoever shall, under promise of marriage, seduce and have carnal knowledge of any female under twenty-one years of age, shall be guilty of a felony and, upon conviction thereof, shall be confined in the penitentiary not less than one year nor more than five years."

Only two of the several grounds urged for a new trial in the court below are relied on by appellant for a reversal of the judgment

of conviction, viz: (1) Error of the trial court in refusing an instruction directing a verdict of acquittal, asked by appellant at the close of the appellee's evidence, and again after the introduction of all the evidence. (2) Error of that court in admitting, over appellant's objection, incompetent evidence introduced by the appellee on the trial.

[1] The first of these contentions rests the right of appellant to the refused peremptory instruction on the claim that the evidence failed to prove that the crime charged in the indictment was committed in Floyd county. The contention is not sustained by the record. The indictment alleges its commission in Floyd county, and while it is true no witness testified, in terms, that it was committed in Floyd county, the prosecutrix testified on the trial that the offense, which constituted her first act of sexual intercourse with a man, took place between her and the appellant in the parlor of the residence of one Tucker Buskirk, on Wolf creek, following appellant's promise then given her, and others previously made, that he would marry her if she would permit such intercourse, which induced her to yield to his solicitation and participate in the wrongful act. She also testified that she was then living at Lewis Burchett's, whose home was near and in view of that of Tucker Buskirk, where the offense was committed; that appellant then, as at the time of the trial, made his home with his widowed mother, whose farm lies on Wolf creek, in the immediate neighborhood of, and but a short distance from, Buskirk's home; and according to her further testimony, and other evidence of like effect found in the record, it was fairly made to appear that the homes of the persons above named are but a few miles from Prestonsburg, the county seat of Floyd county, where appellant's trial occurred. The evidence referred to necessarily localized and precisely fixed in the minds of the jury, all of whom were residents of Floyd county, the venue of the alleged offense and enabled them to determine whether or not the offense was committed in Floyd county. Moreover, they were required by the instructions of the court to believe from the evidence beyond a reasonable doubt, not only that the appellant was guilty of the offense charged, but also that it was committed in Floyd county, Ky., before they could find him guilty. Such facts as these have repeatedly been recognized by this court as sufficient to establish the venue of the offense or crime. *Kennedy v. Commonwealth*, 100 S. W. 242, 30 Ky. Law Rep. 1063; *Commonwealth v. Patterson*, 8 S. W. 694, 10 Ky. Law Rep. 167; *Hays v. Commonwealth*, 14 S. W. 833, 12 Ky. Law Rep. 611; *Combs v. Commonwealth*, 25 S. W. 592, 15 Ky. Law Rep. 659; *Pickrel v. Commonwealth*, 30 S. W. 617, 17 Ky. Law Rep. 120; *Warner*

v. Commonwealth, 84 S. W. 742, 27 Ky. Law Rep. 219. It follows from what has been said that the trial court's refusal of the peremptory instruction asked by appellant was not error.

[2, 3] The alleged incompetent evidence complained of in the second assignment of error consisted of testimony given by the prosecutrix regarding the commission, several months after the return of the indictment, of an alleged rape upon her person by appellant, his brother, Virgil Cline, and D. Nunnery. This crime, if committed as stated by the prosecutrix, was one of the most revolting ever revealed by a witness. According to her testimony, it occurred several months after her seduction by appellant and subsequently repeated acts of sexual intercourse between them, resulting from his promises made at the time of her seduction and later to marry her; also after the return of the indictment against appellant, and within a month of her giving birth to a child of which he was the alleged father. Without entering upon a discussion of the disgusting details disclosed by her testimony regarding the alleged rape, it is sufficient to say that it was to the effect that she was enticed from her home by appellant, who, upon getting her out of the view of those in the house, was joined by his brother and Nunnery, whereupon each of the three men in turn forcibly had carnal knowledge of her; she being compelled, notwithstanding her protests, to yield in each instance through fear of threatened death from pistols which they at the time carried and pointed at her.

This evidence was clearly incompetent and necessarily highly prejudicial to appellant. In view of what was said of it by counsel for the commonwealth in argument to the jury, his violent denunciation of the alleged rape, and characterization of the brutality of the alleged perpetrators thereof, it can well be believed that the jury gave no credence to the latter's denial of their guilt of the crime. Indeed, it is by no means improbable that the revolting circumstances attending the alleged rape, as related by the prosecutrix, made its enormity so great in the estimation of the jury that they permitted it to overshadow and outweigh all evidence introduced in behalf of appellant conducing to prove his innocence of the crime of seduction charged in the indictment, although much of it came from divers young men of about appellant's age, by way of confession of sexual intercourse with the prosecutrix both before and after the act of seduction charged against appellant, and from other persons who saw her indulge in such intercourse with men other than the latter.

The general rule is that, on a prosecution for a particular crime, evidence which in any manner shows or tends to show that the accused has committed another crime wholly

independent of that for which he is on trial, even though it be a crime of the same sort, is irrelevant and inadmissible. There are, however, some exceptions to this rule. The general rule is inapplicable where the evidence tends directly to prove the defendant's guilt of the crime charged, or where two distinct offenses are so inseparably connected that the proof of one necessarily involves proving the other. Evidence of another crime is also admissible, if committed as part of the same transaction and it forms a part of the *res gestæ*. Evidence of another and distinct crime committed by the defendant is also admissible where it directly tends to identify him as the person who committed the crime charged and for which he is under trial, or to prove the knowledge, motive, or intent with which the crime charged was committed by him; but in all such cases the trial court should with great care admonish the jury of the purpose for which such evidence is admitted and that it cannot be considered by them for any other purpose. 1 Bishop's New Criminal Procedure, §§ 1126-1225; 1 Greenleaf's Evidence, § 53; 3 Greenleaf's Evidence, § 15; Martin v. Commonwealth, 93 Ky. 192, 19 S. W. 580, 14 Ky. Law Rep. 95; Bishop v. Commonwealth, 109 Ky. 553, 60 S. W. 190, 22 Ky. Law Rep. 1161; McCreary v. Commonwealth, 163 Ky. 206, 173 S. W. 351.

It is patent that the evidence complained of by appellant in the instant case did not come within any of the exceptions to the general rule of evidence above stated. The alleged rape to which it relates had no connection whatever with the crime of seduction for which appellant was indicted and tried. The evidence of the rape in no way served or was necessary to identify him as the person who committed the crime of seduction charged. It did not tend in the remotest degree to prove him guilty of that offense, neither did it prove his knowledge of the offense, the manner of its commission, nor any motive on his part for committing it; hence, when objected to by appellant, the trial court should by reason of its incompetency have excluded it from the consideration of the jury, and its failure to do so constitutes reversible error.

In Jordan v. Commonwealth, 180 Ky. 379, 202 S. W. 896, 1 A. L. R. 617, an appeal involving the same offense here charged, we held incompetent and prejudicial certain evidence admitted on the trial in the circuit court to prove the pregnancy of the prosecutrix and the birth of a child resulting from her seduction by the defendant, and because of its admission, and the exhibition made of the child to the jury, reversed the judgment. After declaring in the opinion that under our statute, defining the crime of seduction and prescribing the punishment therefor, a conviction may be had on the unsupported evidence of the prosecutrix that the seduction

was accomplished under a promise of marriage, we in part said:

"And under this statute we are unable to perceive the relevancy of evidence of pregnancy or birth of a child, or how evidence of the facts could furnish any corroboration of the testimony of the prosecuting witness that she was seduced under a promise of marriage. Plainly, if no child was born as the result of the intercourse, or she never became pregnant because thereof, the prosecution could nevertheless be successfully maintained upon evidence alone of the act of seduction and the antecedent promise of marriage. It should, however, here be said that it is essential that the woman seduced should be of chaste character, and therefore, if her character for virtue is put in issue by the defendant, \* \* \* it might be incumbent on the commonwealth to introduce evidence in support of it. \* \* \* And the defendant may likewise introduce in his behalf every relevant fact and circumstance that tends to support his theory that there was no promise of marriage or seduction induced thereby, or his defense that the woman was not chaste, if this issue is put into the case. \* \* \* We are therefore of the opinion that it is not competent, in prosecutions under this statute, to admit evidence of pregnancy or the birth of a child, and it was manifestly prejudicial error to permit the commonwealth to exhibit before the jury a child as young as this one was, for no other purpose than to excite the sympathy of the jury for Agnes Hayes and the child, and to arouse their prejudice against the reputed father, Schofield Jordan. \* \* \* We do not, however, rule that, if a child is born as the result of the alleged seduction, the prosecuting witness may not have with her, in the courtroom, in the presence of the jury, the child, although its presence, unexplained or uncommented on, might create in the minds of the jurors an unfavorable sentiment against the accused; but the probability that the appearance of the child might create such a feeling is not, we think, sufficient to justify us in holding that the mother may not have it with her in the courtroom. But she cannot be inquired of about its parentage, nor should the commonwealth's attorney be permitted to allude in any manner to its presence or make any comments on its appearance. *State v. Fogg*, 206 Mo. 696 [105 S. W. 618]; *State v. Carter*, 8 Wash. 272 [36 Pac. 29]."

If evidence of the pregnancy of the prosecutrix, the birth of a child as the result of the seduction, and the exhibition of the latter to the jury, should not be allowed, for a greater reason should evidence of an alleged rape, committed by the accused upon the prosecutrix months after the act of seduction charged, be excluded. As the case will be remanded for another trial, we refrain from expressing an opinion on the issues of fact raised by the evidence.

For the reasons indicated, the judgment is reversed, and the case remanded for a new trial and such further proceedings as may be consistent with the opinion.

# CITY OF LUDLOW v. LUDLOW et al.\*

(Court of Appeals of Kentucky. Dec. 12, 1919.)

## 1. MUNICIPAL CORPORATIONS § 29(3)—INJURY TO OWNERS FROM ANNEXATION OF TERRITORY.

That residents or owners of property in territory sought to be annexed to city of fourth class will be compelled to pay taxes to city is not, considering the benefits received, the character of injury contemplated by Ky. St. § 3483, providing that annexation will be denied upon objection of a majority of the resident voters in territory to be annexed or owners of property if there be no resident voters, if change will cause material injury to owners of real estate in the limits of the proposed extension.

## 2. MUNICIPAL CORPORATIONS § 29(3)—ANNEXATION OF TERRITORY NOT INJURY TO OWNERS OF LAND.

In proceedings under Ky. St. § 3483, to annex territory to city of the fourth class, where territory proposed to be annexed was on highway and could not be used for agricultural purposes except as pasture land, with which use annexation would not interfere, and where land was suitable for municipal purposes and with benefits of annexation would appeal to home-seekers and investors as property fronting on highway, held, that annexation would not result in material injury to owners of the land; the enhanced valuation offsetting amount of taxes to city.

Appeal from Circuit Court, Kenton County, Common-Law and Equity Division.

Proceedings by the City of Ludlow to annex territory to its corporate limits, opposed by William S. Ludlow and others. Petition dismissed, and the City appeals. Reversed for further proceedings, with directions.

Herbert S. Jackson and Jackson & Woodward, all of Cincinnati, Ohio, for appellant. Myers & Howard, of Covington, for appellees.

QUIN, J. By an ordinance duly passed by its council, appellant sought to annex to its corporate limits a tract of land 1255 by 533 feet, entirely surrounded by the city of Ludlow on the north and west and by the city of Covington on the south and east, and fronting on the Ludlow highway. The highway is within appellant's present limits, but only one-half of it has been improved, because to pave the entire width of the street would have cast the cost of the remaining one-half on the city. This thoroughfare is the only connecting roadway between the cities of Ludlow and Covington. The appellees, four in number, are the owners of the entire tract to be annexed, and they are resisting annexation claiming it would cause material injury to them, and that the realty consists of a rough, steep, and precipitous



hillside, used only for pasturage, not adapted to agricultural purposes nor suitable for municipal use, and they would derive no possible benefit therefrom. In a very learned opinion the chancellor ordered a dismissal of the petition.

The city of Ludlow is a city of the fourth class. A part of its charter (Ky. Stats. § 3483) is as follows:

"\* \* \* If the court, upon hearing, be satisfied that less than a majority of the resident voters of the territory sought to be annexed or stricken off have remonstrated against the proposed extension or reduction, and that the proposed extension or reduction of the limits of the city, as the case may be, will be for the interest of the city, and will cause no material injury to the owners of real estate in the limits of the proposed extension or reduction, it shall so find, and the proposed extension or reduction shall be decreed or adjudged. But if the court shall find that a majority or more of the resident voters in the territory to be affected or the owner or owners of said property, if there be no resident voters, remonstrated against such change, and that said change will cause material injury to the owners of real estate in the limits of the proposed extension or reduction, it shall so find, and said extension or reduction shall be denied."

In the matter of extension of boundaries the charter of fourth-class cities is different from that of cities of the five other classes in that the charters of the latter contain this provision:

"If the court shall be satisfied that seventy-five per cent. or more of the resident freeholders of the territory sought to be annexed or stricken off have remonstrated, then such annexation or reduction shall not take place, unless the court shall find from the evidence that a failure to annex or strike off will materially retard the prosperity of such city, and of the owners and inhabitants of the territory sought to be annexed or stricken off. In case the court shall so find, the annexation or reduction shall take place, notwithstanding the remonstrance." Ky. Stats. §§ 2762, 3051, 3287, 3612, and 3655.

Since all the owners of the property have remonstrated, the single question presented for our consideration is whether the change or annexation will cause material injury to the owners of real estate in the proposed extension.

The Ludlow highway is constructed along the side of an Ohio river hill. On that portion in the city limits, to wit, on the north side of the road, or on the descending grade, several houses have been built during the past 25 years. Appellees' land is to the south or on the ascending grade. No houses have ever been built on the land. While some of the land is hilly, precipitous, and rough, a large portion of it abutting the highway is suitable for building purposes to a depth of 150 to 200 feet. As cultivation

would cause the soil to wash away, the land has been converted into a pasture, a use that would not be interfered with by annexation; hence no material or substantial injury to the use would result from annexation.

[1] After all there can be and is but one real objection to the annexation, viz. the payment of municipal taxes. That residents or owners of property in the territory sought to be annexed will be compelled to pay taxes to the city is not the character of injury contemplated by statute, considering the benefits received. *Yancey v. Town of Fairview*, 66 S. W. 636, 23 Ky. Law Rep. 2087.

Appellees could not suffer material injury from the annexation, if the city boundary is so extended as to include this property, where the inclusion will bring distinct advantages. Benefits and injury are inconsistent expressions. The existence of one negatives the presence of the other. It is inconceivable that appellees would suffer material or any injury from the annexation when we consider the beneficial results incident to incorporation in the city, viewed in the light of the facts of the record before us and the location of the property.

As an offset to the burden of taxation, the highway is necessarily a benefit to appellees and their property. It enables them to market their stock or produce in the adjacent cities. The proximity of waterworks is an advantage, accessible to any purchasers of lots, or for watering the stock as long as the land is used for pasturing cattle, besides offering an inducement to prospective buyers.

There are no buildings on the land at the present. This is due doubtless to the fact that appellees have never offered the property for sale. A number of houses have been erected on the opposite side, and a witness for appellant says that with proper grading this tract would be more desirable for building purposes than much of the property on the north side. It is said to be better adapted for residential purposes than some other property in Ludlow; while several witnesses state that the sister city of Cincinnati has improved property as bad or worse than appellees' land. It is said there has been no market for the land, but one of the appellees states that he has been asked by one or two persons to give them a price on the property, but he declined to do so because he did not think they were purchasers and he did not intend to satisfy idle curiosity. From this it appears he not only has made no effort to dispose of the property, but, on the contrary, has refused to submit a price when requested.

Accompanying incorporation in the city limits are the benefits and advantages incident to urban existence, such as fire and po-

lice protection, schools, water, electricity, gas, city rates on telephones, fire insurance, and street cars. Some people are content to remain outside the city limits and enjoy the same benefits as the citizens without sharing any portion of the expense incident to the maintenance of the municipal government. It is argued that these attributes of city life do not apply to appellees, since the property is not improved, no one is occupying the premises, and there is no one to reap the advantages referred to, such as schools and the like.

There are hundreds and thousands of people in our cities to-day who have no children and yet they are taxed to support the schools. We may look for prospective expansion and the accruing benefits as a result of annexation. Besides, as said in *Kelly v. Pittsburgh*, 104 U. S. 78, 26 L. Ed. 658:

"Every man in a county, a town, a city, or a state is deeply interested in the education of the children of the community, because his peace and quiet, his happiness and prosperity, are largely dependent upon the intelligence and moral training which it is the object of public schools to supply to the children of his neighbors and associates, if he has none himself.

"The officers whose duty it is to punish and prevent crime are paid out of the taxes. Has he no interest in maintaining them, because he lives further from the courthouse and police station than some others?"

W. S. Ludlow declined to put a valuation on the land, but estimated the value of the property on the north side from \$15 to \$30 a foot. Some of the witnesses state that land on the south side is as desirable or as valuable as that on the north side. Land increases in value by reason of proximity to a city; its value being derived from its prospective city use, and not from its present county use. The street cannot be paved to its full width without great cost to the city, unless the property is annexed, and we are satisfied its incorporation in the city limits will not result in any injury to appellees other than the payment of city taxes, and that the benefits received and the increased valuation of the property following annexation will be greater than the taxes levied.

*Carrithers v. City of Shelbyville*, 126 Ky. 766, 144 S. W. 744, 17 L. R. A. (N. S.) 421, is a suit brought under the same statute; Shelbyville being a city of the fourth class. In resisting an extension of the city boundary embracing their property it was contended, among other things, that the burden of municipal taxation would be added without benefit to plaintiffs. From an examination of the original record in this case we find it was alleged in the petition that the Carrithers' property was wholly unimproved, there being no buildings or structures of any kind upon same, nor had any buildings

ever been erected thereon, and the property of appellee Murphy was also unimproved, contained a rock quarry, and was otherwise used exclusively for farming purposes. Though alleging that annexation would produce irreparable injury to their property, a verdict in the city's favor was sustained. This opinion contains a very illuminating history of the origin and growth of the law pertaining to municipal corporations. The creation of municipalities is always and essentially a political act.

Speaking on this subject, Judge Dillon, in his work on *Municipal Corporations*, thus states (section 355, 5th Ed.):

"Not only may the Legislature originally fix the limits of the corporation, but it may, unless specially restrained in the Constitution, subsequently annex, or authorize the annexation of, contiguous or other territory, and this without the consent, and even against the remonstrance, of the majority of the persons residing in the corporation or on the annexed territory. And it is no constitutional objection to the exercise of this power of compulsory annexation that the property thus brought within the corporate limits will be subject to taxation to discharge a pre-existing municipal indebtedness, since this is a matter which, in the absence of special constitutional restriction, belongs wholly to the Legislature to determine."

To the same effect see *McQuillin on Mun. Corp.* § 265.

In *Town of Williamstown v. Matthews*, 103 Ky. 121, 44 S. W. 387, 19 Ky. Law Rep. 1766, annexation was denied; likewise in *Town of Latonia v. Hopkins*, 104 Ky. 419, 47 S. W. 248, 20 Ky. Law Rep. 620. In the first case the court recognized the propriety of annexing some territory to the town limits, but, not being familiar with the location of the territory, and it being impossible, in the absence of a map, to tell whether the annexation would be advantageous, weight was given to the findings of the lower court. In the second case a city containing an area of 26 acres and with 275 inhabitants sought to annex 1,050 acres of surrounding territory with a population of from 1,500 to 2,000 persons.

[2] The facts of these cases are different from those presented by this record. We are satisfied that a large and considerable portion of appellees' land is suitable for municipal purposes, and its inclusion in the city boundary, with the accompanying benefits, would be such an invitation and inducement to homeseekers and investors as would create a demand for the property fronting the highway. The enhanced valuation will more than offset the amount of taxes.

Having reached the conclusion that the annexation of appellees' property will not cause material injury to them, the judgment of the lower court will be reversed for further proceedings not inconsistent with this opinion.

## PURCELL et al. v. CITY OF LEXINGTON.

(Court of Appeals of Kentucky. Nov. 14, 1919.  
Rehearing Denied Jan. 9, 1920.)1. MUNICIPAL CORPORATIONS  $\S$  978(8)—TAXATION; ACTION BY CITY ON RELATION OF BACK TAX ASSESSOR.

Ky. St.  $\S$  3166, being a part of the charter of cities of the second class, only defines the duties of the city solicitor, and does not limit the powers of the city with reference either to the institution of actions or the employment of counsel, and as section 3187 permits a city to bring direct action in its own name by its solicitor, attorney, or other authorized agent, it may bring an action on the relation of the back tax assessor.

2. STATUTES  $\S$  178—STATUTORY CONSTRUCTION OF THE WORDS "REAL ESTATE" AND "LAND."

Ky. St.  $\S$  458, providing that "the words real estate or land shall be construed to mean lands, tenements and hereditaments, and all rights thereto and interests therein other than a chattel interest," is a part of chapter 26 of the statutes dealing with and announcing rules for construction of statutes and is of general application where rules of construction are necessary to a correct interpretation of the language of the statute, but not applicable where the statute by its terms provides otherwise.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Land; Real Property.]

3. TAXATION  $\S$  193, 347—LEASEHOLD ESTATES NOT EXEMPT FROM TAXATION.

Neither Ky. St.  $\S$  458 and 4022, which merely classify property, nor section 4049, determining which of the owners of successive interests shall be liable ordinarily for taxes upon the whole, can be construed to exempt the owner of a valuable chattel interest in the real property from taxes thereon, regardless of whether the owner of the freehold pays taxes on the whole as contemplated, since such construction would bring it within the inhibition of Const.  $\S$  170, against any exemption in favor of such property, as well as in violation of Ky. St.  $\S$  4030, taxing all personal and real estate at its fair cash value, and section 4050, requiring personal property to be separately stated and valued.

4. TAXATION  $\S$  219—EXEMPTION OF LEASEHOLD.

Ky. St.  $\S$  4049, does not exempt from taxation the leasehold interest in land and only excuses the owner thereof from listing it separately for taxation when its value is an inseparable part of and included in the ordinarily larger interest remaining in the owner of the freehold, and tenants are liable for taxes on leasehold which has a separate and independent cash value that can be estimated at its fair voluntary sale price, even if as between themselves the taxes ought to be paid, under section 4049, by the lessor, and are recoverable by the lessee from lessor under section 4033.

5. TAXATION  $\S$  338—ON LEASEHOLD ESTATE ON RETENTION OF ONLY TECHNICAL FEE.

Where an instrument, though technically a lease, demised to lessees every beneficial interest in the land in perpetuity, retaining only a technical fee with a small annual rental exacted, lessee's interest is not such a lesser interest in the land as was contemplated by Ky. St.  $\S$  4049, should be listed by the owner of the first freehold estate, and included in the taxes paid by the owner, but is a larger and more valuable interest, taxable in the name of the lessee not under some special statute as section 4039 in case of oil leases, but on the broad ground of being property different from ordinary leases, having taxable values of their own not included in the real estate value assessable against the owner.

6. CONSTITUTIONAL LAW  $\S$  205(7)—MUNICIPAL CORPORATIONS  $\S$  957(2)—STATUTE AUTHORIZING CITY TO EXEMPT PROPERTY FROM TAXATION INVALID.

Under second Ky. Const., the Legislature did not have authority to confer upon a city the power to exempt property from taxation, in view of Bill of Rights,  $\S$  1, providing against special privileges.

7. MUNICIPAL CORPORATIONS  $\S$  967(1)—EXEMPTION OF CITY'S PROPERTY FROM TAXATION DOES NOT EXTEND TO PURCHASER.

The city in disposing of or leasing its property for valuable consideration could not as a gratuity extend an exemption of taxation to its grantees or lessees.

8. MUNICIPAL CORPORATIONS  $\S$  967(1)—PROVISION IN LEASE BY CITY EXEMPTING LESSEES FROM TAXATION.

A 99-year lease by a city of certain lands with perpetual privileges of renewal held not to show that the exemption from taxation therein was granted to the lessees for a reasonably adequate consideration, even at the date of the grant, and particularly now when the taxes on the value of the leasehold exceed the entire annual rentals under the lease.

Appeal from Circuit Court, Fayette County.

Action by the City of Lexington, on the relation of Thomas E. Coyne, Back Tax Assessor, against J. D. Purcell and others. Judgment for plaintiff, and defendants appeal. Judgment affirmed, with directions to modify order of sale.

George O. Webb and Hunt & Bush, all of Lexington, for appellants.

H. E. Ross and Miller & Miller, all of Lexington, for appellee.

CLARKE, J. The appellants are the present owners of the interest which the city of Lexington, as the fee-simple owner of four lots on Main and Water streets in the city of Lexington, demised in 1839 to Thomas K. Layton and Michael Gaugh by four separate leases which are identical in terms, and one of which, omitting the description of the

property, leased and certificates of acknowledgment and recordation, is as follows:

"This indenture made and entered into this 13th day of February, 1839, between the city of Lexington, of the one part, and Thomas K. Layton, of the said city, of the other part, witnesseth:

"That, in consideration of the rents, covenants and conditions on the part of said Layton to be paid, kept and performed, as hereinafter mentioned, the said city of Lexington hath demised and to farm let unto the said Layton, his executors, administrators and assigns, all that lot or parcel of land situated on Water street in the city of Lexington, and bounded as follows: [Description.] \* \* \*

"To have and to hold said parcel of ground to the said Layton, his executors, administrators and assigns, for and during the full end and term of 99 years from the 18th day of March, 1838, and the said city of Lexington doth hereby covenant that at the expiration of said term of 99 years it will cause to be executed another demise of said premises for the same term and containing the same covenants, clauses, conditions and rents as this indenture, and it is understood by the parties aforesaid, that this is a clause of perpetual renewal, and it is their intention so to make it, and the said city of Lexington doth further covenant and agree that she will keep him, the said Layton, his executors, administrators and assigns, in the full and complete use, occupation and enjoyment of said demised premises during the term aforesaid, free of all let or hindrance interruption or disturbance whatsoever, in consideration of which demise and the foregoing covenants by the said city, the said Layton doth covenant and agree that he and his executors, administrators and assigns, shall well and truly pay to said city of Lexington, her assigns, the annual sum of \$35.83, to become due in equal semiannual installments, computing the time from the 18th day of March, 1838, being the rent reserved and payable and issuing out of the ground demised as aforesaid, and upon the said rent or any part thereof becoming due and being in arrear, the said city of Lexington, by her collector or assigns shall have the right to distrain, sue for and recover the same without delay, and said rent or any part thereof remaining in arrear and unpaid for the space of 12 months, from the time it shall become due, then it shall be in the election of the said city of Lexington, or its assigns to recover the same either by distress and suit, or to re-enter upon said demised premises, and upon such re-entry this lease shall become and be utterly null and void, and the premises with the buildings and improvements and appurtenances shall vest in said city of Lexington forever, and its assigns, and the said Layton is to perform and keep his article of agreement entered into on the 13th day of Feb. 1838, in the name and firm of T. K. Layton & Co. and in conjunction with B. Ford, M. Gaugh, and R. King, with said city of Lexington, and to perform its conditions and covenants. Said article of agreement is of record in the record books of the city council of Lexington. It is further covenanted and agreed that said Layton is to keep an insurance upon the premises and this lease and the buildings thereon, and

the same shall be exempt from city taxation for the term aforesaid.

"In testimony whereof the said city of Lexington hath caused the name and signature of the mayor of said city with the public seal of said city to be hereunto affixed, and the said Layton has hereunto set his hand seal the day and year first above written.

"Charles H. Wickliffe, Mayor.

"T. K. Layton."

The lessees, since the execution of the leases, have been in possession of the premises and paid the rentals, etc., as stipulated, and the city of Lexington never at any time prior to the filing of this suit, on July 20, 1916, collected any taxes or asserted the right so to do against the original lessees or any of the several successive assignees. In this action, styled and prosecuted in the name of "The City of Lexington, on Relation of Thomas E. Coyne, Back Tax Assessor, Plaintiff, v. J. D. Purcell, J. D. Purcell Company, a Corporation, and Security Trust Company of Lexington, Kentucky, a Corporation, Defendants," it was sought to have the value of the leasehold assessed against the lessees for taxation by the city for the five years preceding the filing of the suit, and to recover judgment for the taxes due thereon, with interest, penalty, and costs, and, from a judgment granting plaintiff the relief prayed for, the defendants have prosecuted this appeal.

[1] 1. It is first insisted that the court erred in overruling a special demurrer to the petition upon the ground that under the charter of cities of the second class, to which Lexington belongs, all actions for and on behalf of the city must be prosecuted by the city solicitor; that there is no such officer as "back tax assessor" recognized by the charter; and that, even if the council had authority to appoint such an officer, he is yet without authority to institute or prosecute an action in the name of the city. It is true that the charter does not in terms provide for such an officer as back tax assessor, and that in section 3166 of the Kentucky Statutes, a part of the charter of cities of the second class, it is provided that the city solicitor, in addition to other specified duties, "shall appear for the city, and attend to all cases in the circuit court and court of appeals, wherein the city may be a party complainant or defendant, or a party in interest." But this section only defines the duties of the city solicitor, and does not limit the powers of the city with reference either to the institution of actions or the employment of counsel, certainly not with reference to the assessment of omitted property and the collection of delinquent taxes, since in another section of the charter, being section 3187, Kentucky Statutes, is the provision, among others, that—

"Where any property, subject to taxation, has been omitted from assessment for any

year or years, the city may, by direct action, brought in the name of the city by its city solicitor, city attorney or other duly authorized agent, in any court otherwise competent for the purpose, recover judgment against the person liable for the payment of taxes on such property."

As the petition alleges that the relator prosecuting this action was duly appointed back tax assessor for the city of Lexington and authorized "to discover and report for assessment all property subject to taxation in the city of Lexington which has been omitted from the assessment for any year or years and to maintain and prosecute suits in the name of the city of Lexington for the collection of taxes on property in the city of Lexington omitted from assessment for any year or years," we think it is clear that the court did not err in overruling the special demurrer to the petition.

[2, 3] 2. Upon the merits, the principal question is whether the provision in the leases exempting the demised property from city taxes was a valid and binding obligation upon the city under the laws of the state at the time of the execution of the leases; but, before undertaking a decision of that question, it will be necessary to determine whether or not defendants' leasehold interest in the demised premises is such an interest as would be taxable against them under the present law even if there were no exemption clause in the leases, since the defendants earnestly insist that such interest as they have in the property, although personal property, is taxable under existing laws only as real estate against the lessor. This contention is based upon sections 458, 4022, and 4049 of our present Statutes, and the rule almost, if not universally, recognized as stated in 24 Cyc. 1074, that—

"In the absence of agreement or special covenant, the duty to pay all state, municipal, and county taxes and assessments which during the term of the lease becomes chargeable upon the premises is imposed by law upon the landlord."

This is a correct statement of the general rule, and as such accords with the provisions of the above sections of our Statutes, which, in so far as applicable, are respectively as follows:

"Sec. 458. The words 'real estate' or 'land' shall be construed to mean lands, tenements and hereditaments and all rights thereto and interests therein, other than a chattel interest."

"Sec. 4022. For the purpose of taxation, real estate shall include all lands within this state and improvements thereon; and personal estate shall include every other species and character of property—that which is tangible as well as that which is intangible."

"Sec. 4040. Real estate, or any interest therein, shall be listed in the county or district where situated against the owner of the first freehold estate therein."

Section 458, supra, is a part of chapter 26 of the Statutes, dealing with and announcing rules for "construction of statutes," and is of general application where rules of construction are necessary to a correct interpretation of the language of a statute, but not applicable where the statute by its terms provides otherwise. Applying this general rule of construction, this court, in *Prather v. Davis*, 13 Bush, 372, *Combs Lumber Co. v. Chinn*, 90 S. W. 251, 28 Ky. Law Rep. 715, and *Hampton v. Glass*, 116 S. W. 243, held that a lease for years is not real but personal estate, and in *Wilgus v. Commonwealth*, 9 Bush, 556, it was decided that a leasehold under a contract almost, if not, identical with the one involved, was a chattel real. And so it is both at common law and under section 458 of our Statutes, and probably also under section 4022; but, even so, the Legislature by section 4049, supra, has provided specially that "any interest" in real estate shall be listed against the owner of the first freehold estate therein. If these were the only provisions of the law to be considered, we would have to decide, as contended by appellant, that, although the leasehold is technically a chattel, it is not taxable as such against the owner thereof, but rather as real estate against the owner of the first freehold estate in the land, who, to avoid the necessity of splitting up real estate into lesser than freehold interests for purposes of taxation, is required in one assessment to cover and include all such lesser interests. This was done, no doubt, upon the theory that the owner of the freehold interest may still be considered, for taxation purposes, the beneficial owner of the whole, including the lesser chattel interest demised to others, on account of the rentals received by him therefor.

Ordinarily, this is true, and the arrangement that the owner of the land shall pay all taxes against same or any lesser interest therein owned by his lessees works out satisfactorily and fairly to the state and all parties as a general rule. But neither these sections, which merely classify property, nor section 4049, which simply determines which of the owners of successive interests therein shall be liable ordinarily for taxes upon the whole, can be construed to mean that the owner of a chattel, or any interest in real property, if of value, is to be exempted from the payment of all taxes thereon, regardless of whether the owner of the freehold estate therein pays taxes on the whole as contemplated, because to so construe it would bring it within the inhibition of section 170 of the Constitution against any exemption in favor of property such as this, as well as in violation of section 4030 of the Statutes, which declares that all personal and real estate within this state shall be subject to taxation and assessed at its fair cash value at

a voluntary sale, and section 4050, providing that—

"Personal property of every kind shall be separately stated and valued in the appropriate column of the tax book herein provided, and if there be no appropriate column, it shall be valued and stated in the column headed 'miscellany.'"

[4] We are therefore quite clear that section 4049 does not exempt from taxation a leasehold interest in land, but merely excuses and could excuse the owner thereof from listing it separately for taxation only when in fact, as is usually the case, its value is an inseparable part of and included in the ordinarily larger interest remaining in the owner of the freehold estate. That this is so is also apparent from section 4033 of the Statutes, providing that, "whenever the occupant or tenant of any land \* \* \* shall pay the tax thereon which the owner ought to pay, the person paying the tax shall be entitled to recover of the owner the amount of the tax so paid, and interest," which clearly implies that the occupant or tenant may in order to protect his possession be required to pay the taxes on the land which the owner ought to have paid; and that neither the state nor any subdivision thereof can be forced to lose any taxes due on the land or any taxable interest therein because of any inability, however arising, to collect same from the owner of the first freehold estate therein.

[5] Hence defendants are liable under present laws for all taxes on their leasehold, since it is unquestionably property having a separate and independent cash value that can be estimated "at the price it would bring at a fair voluntary sale," even if, as between themselves, the taxes ought to have been paid under section 4049 by the lessor. But if the taxes ought to have been paid by the lessor, defendants can, if required to pay same, under section 4033 of the Statutes, recover the amount thereof and interest from the lessor. So the real question upon which their liability to plaintiff, who is also their lessor, depends (aside from the attempted exemption in the lease), is whether it was primarily the city's duty, as owner of the first freehold estate in the land, to have assessed it and paid taxes to itself thereon. We think not, because this grant to appellants, though technically a lease, demises to them every beneficial interest in the land in perpetuity, and retains only a technical fee, with a small annual rental exacted, which we assume was adequate as rental, but only as such, when the contract was made. But this rental was then, as it is now, merely nominal, or no consideration whatever for the privilege bestowed upon the lessees by the perpetuity clause, of being the beneficiaries of the natural increase in

the value not only of the leasehold but in the fee as well.

This is not such a lesser interest in land as was contemplated by section 4049 should be listed by the owner of the first freehold estate and included in the taxes paid by him, because it is a much larger and more valuable interest than any technical freehold interest left therein and, because of this perpetuity clause, which makes the lessee rather than the lessor the custodian and principal beneficiary of the fee itself, it is not within the general rule of taxing leases as part of the real estate, but an exception thereto, much the same as is an oil or gas lease, and for the same or like reasons independently taxable against its owner rather than the owner of the fee. This court in *Mt. Sterling Oil & Gas Co. v. Ratliff, Sheriff*, 127 Ky. 1, 104 S. W. 993, 31 Ky. Law Rep. 1229, *Wolfe County v. Beckett*, 127 Ky. 252, 105 S. W. 447, 32 Ky. Law Rep. 167, 17 L. R. A. (N. S.) 688, and *Raydure v. Board of Supervisors*, 183 Ky. 84, 209 S. W. 19, has recognized the power of taxing authorities, notwithstanding the provisions of section 4049, to assess against and collect from the lessee taxes on the value of oil and gas leaseholds, not as assumed by counsel for defendants under section 4039 of the statute, which does not confer such power, as was pointed out in the *Raydure Case*, supra, but upon the broad ground that they are property different from ordinary leases, having taxable values of their own, independent of and not included within the value of the real estate assessable against the owner.

We are therefore clearly of the opinion that under our present laws this leasehold is taxable against the lessees, upon the same broad principles as are oil and gas leases, because of the perpetuity clause in the lease, which gives to it a peculiar and unusual value independent of and not beneficially included in the freehold interest remaining in the lessor; that it is quite immaterial, and we do not decide, whether the leasehold is to be considered as personality or realty for taxation purposes, since both are taxable in exactly the same way and to the same extent, or were during the years involved in this action; and that municipal ownership of the retained technical fee, and consequent failure to pay city taxes thereon, does not affect the lessees' independent liability for taxes on their interest in the property.

The several courts in the following cases, though upon somewhat different facts in each case as pointed out by counsel for defendants, and not always in the same way, have nevertheless arrived at practically the same conclusions, and held the owners of leases in perpetuity liable for taxes thereon despite the general rule as stated in *Cyc.*

supra, and statutes similar in effect to ours: Ocean Grove Camp Meeting Association v. Reeves, 79 N. J. Law, 334, 75 Atl. 782; Wells v. Mayor and Others of the City of Savannah, 87 Ga. 397, 13 S. E. 442; Penick v. Atkinson, 139 Ga. 649, 77 S. E. 1055, 46 L. R. A. (N. S.) 284, Ann. Cas. 1914B, 842; Perry Co. v. Norfolk, 220 U. S. 472, 81 Sup. Ct. 465, 55 L. Ed. 548; La Salle County Mfg. Co. v. Ottawa, 16 Ill. 418; Ex parte Gaines, 56 Ark. 227, 19 S. W. 602; Street v. City of Columbus, 75 Miss. 822, 23 South. 773; Moeller v. Gormley, 44 Wash. 465, 87 Pac. 507.

Hence we conclude that the defendants were primarily liable for all taxes on their interest in this property, and to the city for the taxes sued for in this action, unless the exemption in the lease is a valid stipulation and protects them.

[6] 3. Counsel for defendants practically concede that the exemption clause in the contract would be invalid under our present Constitution, but insist that it was valid when made, and therefore still binding upon the city. Lexington was created a town in 1782 by an act of the Virginia Legislature, which provided that its affairs were to be managed by trustees, who were empowered to hold the real estate upon which the town was located for the benefit of the town and its inhabitants, and were empowered to sell and convey same.

In 1831 (Laws 1831, c. 633), by act of the Kentucky Legislature, the city of Lexington was incorporated, and the management of its affairs vested in a mayor and board of council, with all of the power theretofore vested in the trustees, and among additional powers the following:

"The said mayor and councilmen shall have the power and authority to assess, levy and collect taxes upon such real estate and personal property as they may designate."

In January, 1835, the charter of the city was amended, the mayor and council authorized to raise a limited amount of money by the sale of scrip of the city, and in order to provide for payment of same to set aside and appropriate the rents of all city property, including the houses that might be erected thereon. So it is clear that the city, when it executed this contract, being the owner in fee simple of the property, had full power and authority to execute the leases involved, and it is insisted by counsel for defendant that, since there was no provision in the Constitution then in force in this state, such as sections 170 and 172 of our present Constitution, enjoining equality of taxation and forbidding exemptions, or any mention whatever of taxes in the entire Constitution, that there was nothing to prevent the city from exempting its lessees from the payment of city taxes. In fact, it is urged that the provision quoted above

from the act of the Legislature of 1831, incorporating the city, expressly gave to the city council and mayor the power to designate the real estate and personal property that should bear the burden of taxation.

Without attempting to construe what these provisions of the charter meant, but assuming for present purposes the Legislature attempted thereby to confer upon the governing authorities of the city of Lexington power to designate some and thereby exempt other property from taxation, which it surely did not mean, we are certain that the Legislature did not itself have such unusual powers and could not therefore confer them. In the second Constitution of this state, then in force, the first section of the Bill of Rights declared:

"That all freemen, when they form a social compact, are equal, and that no man or set of men are entitled to exclusive separate public emoluments or privileges from the community, but in consideration of public services." Article 10, § 1.

Surely we need not at this late date cite authorities, as we shall however later do, in proof of the protection this provision afforded citizens of the commonwealth and every subdivision thereof against the burdens of taxation being made unfair or unequal by grant from the community to any man or set of men of exclusive privileges.

[7] That the lots owned by the city of Lexington prior to 1839 or since were not subjected to city taxation was not due to any inability on the part of the city in its governmental capacity to levy taxes upon properties owned by it in a private capacity, nor because of any power supposed to have been vested in the mayor and council, of designating property that should be taxed, but was simply because, though taxable, it made no difference to other property owners, and all of them, in the city, whether the lots owned by the city were taxed or not, since, if taxed for the city, the city, out of revenues received from other properties, had to pay same, and the burden remained in either event upon the owners of other property. But this immunity was immaterial only so long and to the extent that the city's ownership was retained; and the city in disposing of or leasing its property, for a valuable consideration, as it had the right to do, could not, in addition, throw in as good measure, or as a gratuity, an exemption from taxation to its grantees or lessees.

[8] That cities must keep their valid contracts, as well as others, is fully recognized by all courts, so we find in the decisions from this court, as well as others, an effort, in considering all such contracts as this, to determine whether an attempted exemption was or not a part of the consideration received by the city, or whether it was, in

fact, a mere gratuity thrown in, as it were, for good measure. And this court at least has upheld such an attempted exemption from taxation as a part of an otherwise valid contract only where it is for a reasonable term and there is a reasonably adequate consideration to the city therefor, and this is made clearly to appear from the contract itself by a provision that, in the event the city thereafter should collect of the grantee city taxes, the city will refund a like amount. Otherwise an attempted exemption must be considered merely a gratuity and not a part of the consideration, and therefore not binding upon the city.

In *Board of Councilmen of City of Frankfort v. Capital Gas & Electric Co.*, 29 S. W. 855, 16 Ky. Law Rep. 780, a provision in a contract of sale by the city of its gas plant to the appellee that same "shall from and after the execution of this contract be exempt from the payment of all city taxes to the city of Frankfort; and if it be determined that the party of the first part has not the power to make such exemption from city taxes, then any and all sums which the second party or its assigns shall have to pay for city taxes upon the said property, herein attempted to be exempted, shall be added to the sum herein stipulated to be paid for lighting the streets of the first party," was held a valid stipulation, but only because, as said by the court, "it is manifest that these parties, when entering into the contract, regarded this exemption as forming a part of the consideration, and they may have known or believed that the city had no power to make the exemption, and for that reason inserted the clause by which the city was to sustain the loss, by adding to the cost of lighting the streets the amount of taxes required to be paid. \* \* \* Exemption from taxation is held invalid, because it increases the tax on property not exempt; but here, if the citizen is required to reimburse the appellee, the burden remains the same, for if taxes are collected from the appellee the city must pay them back."

In the city of *Dayton v. Bellevue Water & Fuel Gaslight Co.*, 119 Ky. 714, 68 S. W. 142, 24 Ky. Law Rep. 194, 7 Ann. Cas. 1012, a clause in the contract by which the city agreed to pay an annual rental of \$45 for each of 16 fire hydrants to be erected, and provided also that the property used in the construction of the waterworks system should be exempt from all city taxes for a period of 25 years, was held to be invalid. In discussing the case of *City of Frankfort v. Capital Gas & Electric Light Co.*, supra, the court said:

"The facts in that case were peculiar, and distinguished from those in the case at bar. There the contract expressly provided that the exemption was in part consideration for lighting the streets of the city, and it was

further stipulated, in the event the exemption was found to be invalid, that all sums the company was required to pay for taxes should be added to the sum stipulated to be paid for lighting the streets. This court is not disposed to carry the doctrine announced in that case any further, especially as it seems to us to be in conflict with the universal trend of modern authorities on this subject, and the provisions of our present Constitution."

In *City of Winchester v. Winchester Waterworks*, 149 Ky. 177, 148 S. W. 1, Ann. Cas. 1914A, 1258, the court held that a provision in a contract of sale by the city of its waterworks, by which the water company agreed to furnish each year an amount of water for certain municipal purposes equal in value to the amount of taxes that might be assessed against its property, was not an exemption from taxation and was a valid stipulation; but in the course of the opinion the court cited many authorities, including *Maine Water Co. v. Waterville*, 93 Me. 586, 45 Atl. 830, 49 L. R. A. 294, and *Cartersville, I. G. & W. Co. v. Cartersville*, 89 Ga. 683, 16 S. E. 25, to show that any such stipulation, to be valid, must not be intended merely to keep within the semblance of validity an illegal attempt to exempt property from taxation without a fair return therefor, but must be made in good faith for a reasonably adequate consideration and for a term of years not unreasonably long.

These same principles were but recently reaffirmed in *Walker v. City of Richmond*, 173 Ky. 28, 189 S. W. 1122, Ann. Cas. 1918E, 1084, upon an exhaustive reconsideration of the whole question.

It is true the contracts in those cases were executed under our third Constitution, while in the case at bar the second Constitution was in force when the contract was executed; but the first section of the Bill of Rights was identical in each, and a sufficient guaranty that all taxation should be uniform and equal. *Barbour v. Board of Trade*, 82 Ky. 645; *Lancaster v. Clayton*, 86 Ky. 373, 5 S. W. 864; *Commonwealth v. Makibben*, 90 Ky. 384, 14 S. W. 372, 12 Ky. Law Rep. 474, 29 Am. St. Rep. 382; *Clark v. Louisville Water Co.*, 90 Ky. 519, 14 S. W. 502; *Whiting v. West Point*, 88 Va. 905, 14 S. E. 698, 15 L. R. A. 860, 29 Am. St. Rep. 750.

In the case at bar the contract does not show that the exemption was granted for a reasonably adequate consideration even in 1859. It was granted in perpetuity, and certainly without any consideration whatever now when the taxes on the value of the leasehold exceed the entire rentals defendants are paying therefor; hence it is invalid.

It therefore results that defendants are liable for the taxes as adjudged, and the



judgment is affirmed; but the order of sale should be so modified as to make it clear only defendants' leasehold interest in the lots is to be sold to satisfy the judgment.

### KEEN et al. v. ROSS.

(Court of Appeals of Kentucky. Dec. 12, 1919.)

#### 1. CONTRACTS §116(1) — VALIDITY OF CONTRACT IN RESTRAINT OF TRADE.

A contract not to re-engage in a certain business is enforceable, providing the restraint of trade involved is reasonable and not so extensive as to affect the public interest.

#### 2. CONTRACTS §147(1) — INTENT OF PARTIES TO GOVERN CONSTRUCTION.

The fundamental rule in interpreting contracts is to ascertain the expressed intent of the parties, and give such a construction as will carry out that intention.

#### 3. CONTRACTS §169 — CIRCUMSTANCES SURROUNDING PARTIES TO BE CONSIDERED.

In construing contracts, the court may consider the situation and circumstances surrounding the parties at the time they made the contract, in order to determine their intent.

#### 4. PARTNERSHIP §230 — PROMISE OF RETIRING PARTNER NOT TO RE-ENGAGE IN "LIVERY BUSINESS."

A contract by which a retiring partner agreed not to re-engage in the "livery business" in a certain community, etc., precluded him from hiring his automobile to all applicants and transporting them in and about the community involved.

Appeal from Circuit Court, Cumberland County.

Injunction suit by J. R. Keen and others against J. F. Ross. From a judgment dismissing the petition, plaintiffs appeal. Reversed, with directions.

Prescott Sandidge, of Burkesville, for appellants.

W. G. Keen, of Burkesville, for appellee.

THOMAS, J. Prior to July 17, 1915, the appellants and plaintiffs below, J. R. Keen and C. C. Baker, with Dix McComas, were equal partners with the appellee and defendant below, J. F. Ross, in the livery business in Burkesville, Ky. The firm owned some real estate and a livery stable situated thereon, some wharf privileges on the Cumberland river, some horses, vehicles, and the contract to carry the United States mail between Burkesville and Glasgow, Ky. On the day mentioned the defendant Ross sold his one-fourth interest in the property and business of the firm to the plaintiff Baker, which sale

was evidenced by a written contract transferring the personal property and conveying the defendant's one-fourth interest in the real estate owned by the firm. In the contract is this clause:

"This sale and conveyance terminates a partnership that has been in operation, composed of J. R. Keen, Dix McComas, J. F. Ross, and C. C. Baker, and for the consideration above recited, in addition to conveying the above-mentioned property to said C. C. Baker, the said J. F. Ross hereby agrees and binds himself never again to engage in the livery business in the town of Burkesville, Ky., either individually or as a member of a partnership, or a stockholder or officer of a corporation or joint-stock company, so long as the said C. C. Baker, J. R. Keen, and Dix McComas, or any one of them, are engaged in said business in said town."

Within a short time thereafter the defendant became interested in an automobile agency in Burkesville, and, besides dealing in automobiles, he commenced to operate one in the transportation of persons for hire. Claiming that such operation violated the terms of the contract, plaintiff Baker and his other partner brought this suit against the defendant to enjoin him from doing so. The court upon trial dismissed the petition, and, complaining of that judgment, plaintiffs appeal.

[1] It is at once apparent that the question involved is the interpretation of the above-quoted clause in the contract, and whether the matters complained of in the petition come within those terms. Before taking up this question, it might be well to state that a contract in partial restraint of trade, of the nature of the one here involved, is enforceable, provided the restraint is reasonable, and is not so extensive as to affect the interest of the public. *Breeding v. Tandy*, 148 Ky. 345, 148 S. W. 742, and *Torlan v. Fuqua*, 175 Ky. 428, 194 S. W. 359, L. R. A. 1917F, 251. In the latter case, speaking directly upon the point, this court said:

"Hence agreements in restraint of trade, which are ancillary to the sale of a business, and which prohibit the vendor from engaging in the business at a particular place, or for a designated time, or with particular persons, are valid and enforceable, if the restrictions are reasonable."

The business sold in that case, and to which the restraint applied, was the undertaker's business, and the contract obligated the seller never to engage in the business anywhere in Trigg county so long as the purchaser continued in that business in the same county, and while the court recognized the above principle, it held that the restraint was so extensive in its effect as to prejudice the interest of the public, and for that reason declined to uphold it. In the *Breeding Case* the alleged violated contract was

precisely like the one in the instant case, involving a sale of a livery business, and obligating the seller not to engage in the same business in Glasgow as long as his purchaser continued in that business at the same place. This court upheld the contract, and also held that injunction was the proper remedy, if the contract should be violated.

[2, 3] Looking, now, to the merits of the case, the fundamental rule in the interpretation of contracts is to ascertain from their terms, if possible, the intention of the parties, and to give them such construction as will carry out that intention. *Lexington & Big Sandy Railway Co. v. Moore*, 140 Ky. 514, 131 S. W. 257; *Nelson Creek Coal Co. v. West Point Brick & Lumber Co.*, 151 Ky. 835, 152 S. W. 929, and *Owens v. Georgia Life Insurance Co.*, 185 Ky. 507, 177 S. W. 294. A rule of likewise universal application is that, to aid the court in determining the intention of the parties, it may consider their situation and circumstances, the conditions surrounding them at the time of making the contract, and the object intended to be accomplished thereby. The essential thing is for the court to look at the contract from the standpoint of the parties at the time they executed it, and the purpose they had in view in doing so. See cases, *supra*.

[4] Applying these rules to the contract under consideration, it will be seen that there is no ambiguity in its terms, nor is there any doubt of the object which the parties had in view, or the purpose which they intended to accomplish; i. e., that defendant would not engage in the "livery business" within the place and during the time stipulated. The only task before us, then, is to determine what the parties meant by the phrase "livery business," as used in the contract, and then to find whether the complained-of acts of the defendant come within the terms of that definition. Mr. Webster, in the latest edition of his *International Dictionary*, defines the word "livery" to be:

"The feeding, stabling, and care of horses for pay; boarding; as the keeping of one's horse at livery; the keeping of horses in readiness to be hired temporarily for riding or driving; a livery stable."

He defines a "livery stable" to be:

"A stable where horses and vehicles are kept for hire, and where stabling is provided."

From these definitions we see that the word "livery," as applied to the business here involved, means the same as the term "livery stable," the same as if the defendant had obligated himself not to engage in "the livery stable business." In *Rawle's third edition of Bouvier's Law Dictionary*, "livery stable" is defined as "a place where horses are groomed, fed and hired, and where vehicles are lent." Substantially the same definition

is given in 17 R. C. L. 1045, 19 A. & E. Ency. of Law (2d Ed.) 430, and 25 Cyc. 1505.

A research into the history of the business shows that at the beginning the service rendered by one operating a livery stable consisted only in boarding or keeping horses in consideration of stipulated charges. The scope of the business was gradually enlarged, until it included, not only the boarding of horses belonging to others, but the hiring out of horses and vehicles to the public. The latter branch of the business has long since been its chief source of revenue. The definitions referred to, which include the enlarged scope of the business, are not confined to the mere hiring of horses, but they likewise include the hiring of vehicles. Until recent years the only motive power for vehicles in use in "livery business" was horses, and therefore reference is made to them in the definition, not because the legitimate scope of the business was to be confined to horse-drawn vehicles, but rather because it was only that character of vehicles which were in use and which were hired by the keeper of a livery stable. The service rendered could as effectually be accomplished by a vehicle drawn or propelled by any other motive power, and it would be an extremely narrow interpretation to hold that a particular service, if rendered in a particular way and by the use of certain means, would appertain to and be a part of a particular business; but if rendered in another way and by different means it would not be a part of that business.

Such a holding would surrender the substance to the shadow, a thing which the law does not tolerate. Definitions of terms in use by the people, like the law itself, are constantly expanding, so as to apply to new and improved conditions, and to keep pace with the rapid advance of science. We are not, therefore, to conclude that service rendered by livery stable keepers is none the less livery service because it is rendered with motor-drawn, instead of horse-drawn, vehicles. We know, as a matter of current history, that the transportation of members of the public for hire is now largely being performed with the use of the automobile, which has in great measure supplanted the old horse-drawn carriage and its companion, the buggy. It is therefore patent that the contracting parties in the instant case, at the time of the execution of the contract, intended to deprive the defendant of the right of performing any service for the public which was an essential part of that performed by one engaged in the livery business, and the fact that such service was performed in a different manner from the way it was formerly done will not excuse the defendant in violating the very purpose and object intended by the contract.

We would not be understood as holding that a stipulation in a contract like the one here involved would prevent the obligor from

establishing a regular line of transportation between designated points, and operating his vehicles on schedule time, since such business would be that of common carrier rather than that of the keeper of a livery stable. We do hold, however, that the conduct of the defendant in hiring his machine to all applicants and transporting them to and from Burkesville is performing the service of a liveryman, which is in violation of his contract, and the court erred in dismissing the petition.

Wherefore the judgment is reversed, with directions to set it aside and to enter one in conformity with this opinion.

### JONES v. COMMONWEALTH.

(Court of Appeals of Kentucky. Dec. 16, 1919.)

#### 1. HOMICIDE $\S$ 112(2) — RIGHT OF SELF-DEFENSE FORFEITED BY PROVOKING DIFFICULTY.

A person instigating a quarrel by his own wrongful act forfeits his right to plead self-defense, and a challenge, assault, or insult reasonably calculated to provoke an assault is usually regarded as sufficient provocation.

#### 2. HOMICIDE $\S$ 112(2) — INSTRUCTION AS TO FORFEITTING RIGHT TO PLEAD SELF-DEFENSE.

An instruction depriving accused of his right of self-defense if he instigated dispute with deceased regarding the boundary line between their farms and thus brought on the quarrel, etc., *held* erroneous, since accused had a right to discuss the proper location of the boundary line with deceased.

#### 3. HOMICIDE $\S$ 282, 309(4)—EVIDENCE WARRANTING INSTRUCTION AS TO MANSLAUGHTER.

Evidence tending to show that accused and deceased were on friendly terms until they reached a disputed boundary line between their farms, when the difficulty suddenly arose, *held* to require instruction as to manslaughter; such issue always being for the jury where there is any evidence that accused was guilty of manslaughter.

#### 4. HOMICIDE $\S$ 207 — DYING DECLARATIONS ADMISSIBLE WHEN MADE BY MOTION OF HEAD.

In a homicide case, dying declarations made by replying to questions by nodding the head are admissible, although deceased previously and subsequently verbally answered other questions.

#### 5. CRIMINAL LAW $\S$ 811(2) — INSTRUCTIONS GIVING UNDUE PROMINENCE TO DYING DECLARATION.

In a homicide case, an instruction admonishing the jury to decide the case on the evidence, including the dying declaration of deceased, etc., *held* improper because giving undue prominence to the dying declaration.

Appeal from Circuit Court, Greenup County.

Thomas Jones was convicted of murder, and appeals. Reversed and remanded for a new trial.

H. R. Dysard, A. S. Cooper, and W. T. Cole, all of Ashland, E. E. Fullerton, of Greenup, and E. D. Stephenson, of Ashland, for appellant.

C. H. Morris, Atty. Gen., and Overton Hogan, Asst. Atty. Gen., for the Commonwealth.

CLAY, C. Thomas Jones, who was convicted of murder and given a life sentence, seeks a reversal of the judgment.

Appellant and the deceased, Joseph Eggers, owned adjoining farms, and their relations were friendly. It was reported to appellant that the deceased was cutting wood on his property. After receiving this information, appellant put on an overcoat in which there was a revolver, placed his deed in his pocket, got on a mule, and started to the point where the wood was being cut. While en route, he met Garland Bradley, a nephew of the deceased. Bradley says that, while appellant was talking to him, appellant said:

"Joe Eggers is a God durned rascal, and he is cutting wood on me. I am going to show you. Watch old Joe Eggers run. If one law don't work, I will make me a law of my own that will work."

Appellant denies that he made these remarks. When appellant reached the point where the two boys were at work cutting wood, he inquired where their father was, and was informed that he was at the house. Appellant then went to the house of the deceased. When he arrived, he called to the deceased, who came to the door. He asked deceased if he knew that he was cutting on his (appellant's) land. Deceased replied that he was cutting on his own land and asked appellant if he had a deed to the land. Appellant said that he had. Appellant then asked deceased if he had a deed. Deceased said that he had, but that his deed was in town. Appellant then asked deceased to go with him and show him the line. They went to the point where the wood was being cut. According to Clifford Eggers, the eleven year old son of the deceased, his father pointed out the line to appellant. Appellant said he was going to throw the wood into the creek. His father said, no, he, "wasn't." They then went on down to a sycamore. His father put his hand on the sycamore and appellant shot him. There was also proof of a dying declaration of Eggers to the effect that appellant shot him over the line, and that he was not doing anything at the time. According to the appellant, he pointed out his line when he reached the field. The deceased stated that that was not the line, and

told appellant to come on down and he would show him where the line was. After going down a piece, deceased pointed to four little trees and told appellant that, if he wanted to know where the corner was, there was the corner. Appellant said, "You know better than that, Joe Eggers, and I forbid you cutting any more wood on here." Appellant then wheeled his mule around to go the other way. Deceased grabbed a club and knocked appellant off the mule. While deceased was attempting to strike appellant again, appellant fired two shots, one of which struck the deceased, but the other lodged in the neck of the mule.

The court gave no instruction on manslaughter, but instructed on murder and self-defense, and then qualified the self-defense instruction by instruction No. 3, which is as follows:

"The jury are further instructed that if you shall find and believe from all the facts and circumstances proven in evidence beyond a reasonable doubt that the defendant, Thomas Jones, at a time when he was not in danger of death or great bodily harm at the hands of the deceased, Joseph Eggers, armed himself with a pistol and thus armed went to the home of said Eggers for the purpose of killing him or doing him some great bodily harm, and finding him at his home, with the intention of bringing on a difficulty and consummating his said purpose, if any he had, did, for said purpose and in pursuance thereof, raise a dispute with said Eggers about the line between their respective farms, and by reason thereof did bring on and cause the difficulty in which said Eggers was shot and killed, and that defendant willingly engaged in the difficulty, if any, with said Eggers, in which he was killed, then and in this event the defendant is not excusable for such killing on the ground of self-defense or apparent necessity therefor as indicated in instruction No. 1 or No. 2."

[1, 2] It is settled law that one who brings on the difficulty by his own wrongful act forfeits his right to plead self-defense (*Cockrill v. Commonwealth*, 95 Ky. 22, 23 S. W. 659, 15 Ky. Law Rep. 328); and a challenge, an assault, a personal affront or insult reasonably calculated to provoke an assault from another, is usually regarded as a sufficient cause of provocation (*Harris v. Commonwealth*, 140 Ky. 41, 130 S. W. 801). It will be observed that instruction No. 3 deprived the accused of the right of self-defense if he raised a dispute with the deceased about the line between their respective farms, and by reason thereof did bring on and cause the difficulty. Manifestly, the accused had a perfect right to go to the deceased and enter into a discussion with him as to the proper location of the dividing line, and we are not prepared to announce the rule that one who engages in a dispute with his neighbor over the location of a dividing line between their farms thereby forfeits his right of self-defense if his neighbor attempts

to kill him. Since a mere dispute is not sufficient provocation, and it does not appear that the accused was guilty of any act or used any language reasonably calculated to provoke an assault, it follows that no instruction qualifying the right of self-defense should have been given.

[3] We are also of the opinion that the trial court should have given an instruction on manslaughter. Where there is any evidence that the accused was guilty of manslaughter, the question is always for the jury. According to appellant's evidence, the deceased traded at his grocery and he and deceased were on friendly terms. When appellant reached the home of the deceased, he made no attempt to harm him in any way. Together they went to the point where the timber was cut. During all this time the discussion was altogether friendly, and there was no demonstration of hostility on the part of the accused. After they reached the disputed land the difficulty suddenly arose. Under these circumstances, it was for the jury to say, if they believed the defendant guilty, whether the shooting was done with malice aforethought, or in sudden affray and without previous malice.

[4] Complaint is made of the admission of the dying declaration of the deceased. Though there was no objection to this evidence, we deem it proper to discuss the question in view of another trial. It is not contended that the dying declaration was not made at a time when the deceased was in extremis and had abandoned all hope of recovery, but insisted that the declaration was not admissible because of the manner in which it was made. It appears that the declaration was in the form of answers made by the deceased to questions propounded by his brother-in-law, Sam Alexander. The first question was, "Who shot you?" The deceased answered, "Tom Jones." The next question was, "What made him do it?" The deceased answered, "He shot me over the line." The next question was, "You and Tom have a fight, or did you make any attempt to hit Tom before he shot you?" The deceased replied by shaking his head (indicating "no"). The next question was, "Did you make any attempt to use any club or something like that, or did you have anything to hit him with, a club or anything?" The deceased answered by shaking his head violently (indicating "no"). After the deceased was carried into the house, he asked to have his feet put on the floor, and lived but a few minutes. It is argued that the only material portion of the dying declaration was the answer that the deceased had not attempted to strike the accused, and, as this answer was made by a nod of the head, it should not have been received in evidence, in view of the fact that deceased showed that he was not speechless by using his voice both before and

after the answer was made. It has long been the established rule in this state, as well as in many other jurisdictions, that dying declarations may be made by the means of questions and answers, and need not necessarily be either written or spoken; but any method of communication between mind and mind may be adopted that will develop the thought of the declarant, as a pressure of the hand, a nod of the head, or a glance of the eye. *Mockabee v. Commonwealth*, 78 Ky. 380; R. C. L. § 88, p. 543; *People v. Madas*, 201 N. Y. 349, 94 N. E. 857, Ann. Cas. 1912B, 229. In view of this rule, we do not regard the fact that certain answers were oral, while others were made by means of a nod, as fatal to the admissibility of the declaration, but as a circumstance to be considered by the jury in connection with the other circumstances surrounding the transaction in determining the weight and credibility of the declaration.

[5] It is conceded that the court gave the following admonition to the jury:

"I want you to try the case alone on the evidence given you by the witnesses on the witness stand, including the dying declaration of the deceased, James Eggers; which under the Kentucky law is competent evidence, and return into court a just, true, and honest verdict."

Though proper objection and exception to this admonition were not saved by the accused, we deem it necessary, in view of another trial, to say that it is not proper, in admonishing the jury to try the case according to the evidence, to specify, and thus give undue prominence to, any particular portion of the evidence.

Judgment reversed, and cause remanded for a new trial consistent with this opinion.

### SUTTON v. HARDISON.

(Court of Appeals of Kentucky. Dec. 12, 1919.)

#### 1. MORTGAGES ⇨37(2)—PAROL EVIDENCE TO SHOW DEED ABSOLUTE A MORTGAGE.

A deed absolute upon its face may be shown by parol evidence to have been intended as a mortgage, without alleging fraud, accident, or mistake.

#### 2. MORTGAGES ⇨6—CONDITIONAL SALE OR MORTGAGE.

Where there is a doubt whether a writing is a mortgage or a conditional sale, that construction will be adopted which is most favorable to the debtor, and the instrument held to be a mortgage.

#### 3. MORTGAGES ⇨6—CONDITIONAL SALE OR MORTGAGE.

Where a mortgagor conveyed to the mortgagee by deed absolute upon its face for a reasonably adequate consideration, and the mort-

gagee later upon the same day signed a contract by which he agreed to convey the land to the mortgagor upon his making certain installment payments, but providing that, if he failed to do so he should be deemed a renter, etc., the supplemental instrument was merely a conditional sale contract, and the transaction did not constitute a mortgage.

Appeal from Circuit Court, Christian County.

Action by S. T. Sutton against J. C. Hardison. Judgment for defendant, and plaintiff appeals. Affirmed.

Thomas P. Cook, of Hopkinsville, for appellant.

O. H. Bush, of Hopkinsville, for appellee.

QUIN, J. Appellant (plaintiff below) borrowed from appellee in October, 1911, the sum of \$900, and executed his note to the latter for \$940, representing the amount borrowed, with interest, and to secure the payment of said note appellant and his wife on said date executed and delivered to appellee a mortgage on a tract of land then consisting of 416 acres. January 20, 1912, appellant borrowed from appellee the further sum of \$560. The first note and mortgage were canceled, and a new note, secured by mortgage, was executed for the sum of \$1,620, the total amount borrowed, with interest at the rate of 8 per cent. per annum to maturity. The tract of land above mentioned was purchased by appellant from G. I. Rogers, and as a part of the consideration appellant assumed payment of two notes, aggregating \$998, payable to Rogers' vendor, L. R. Davis, by whom they were assigned to the Planters' Bank & Trust Company of Hopkinsville. January 16, 1912, appellant, with the consent of the bank and appellee, sold to one Rideout 150 acres of the land, the proceeds of which were applied on the purchase price. February 12, 1913, the bank brought suit on the two notes, asked the enforcement of the vendor's lien on the land, and recovered a judgment for its debt, interest, and costs.

At the time he took the mortgages appellee knew nothing of the vendor's lien on the property. The bank was about to sell the property under its judgment, when appellant urged appellee to come to his rescue, to pay the bank its debt, interest, and costs, and take another mortgage on the property; but this appellee refused to do, stating he did not desire more mortgages, but, if appellant would give him a deed to the property, he would settle the bank debt. Thereafter, to wit, on March 24, 1913, appellant and wife executed and delivered to appellee a general warranty deed to the remaining 266 acres.

It is admitted by appellant that said instrument on its face is an absolute conveyance, but he insists it was intended and un-

derstood only as a mortgage to secure the amounts borrowed, with interest. Subsequent to the execution of said deed, but on the same day, the parties entered into a contract which recites, in substance, that appellee as the owner of the land agrees to convey same to appellant for \$3,085.55, of which \$900 is to be paid in cash before January 1, 1914; the balance represented by notes, payable one-third each in one, two, and three years at 8 per cent., and upon payment of the cash and execution of the notes appellee was to execute a general warranty deed to appellant. Appellant was then in possession, and it is recited that in the event he failed to comply with these conditions he should be deemed a renter and pay appellee as rental one-third the crops raised during 1913. Appellant obligated himself to put a new roof on the residence. The contract contains other terms and conditions not necessary to mention, except that appellant was to deliver possession of the property to appellee January 1, 1914, if he did not exercise the option to purchase before said date.

February 11, 1914, the parties entered into another contract, providing among other things, that appellee had rented the farm to appellant for a consideration of \$320 per year and the payment of taxes for 1914 and 1915. Appellant agreed to erect a fence, clear some of the land, sow grass and clover seed on a stated acreage, to cover the barn, paint the dwelling, and to execute a mortgage to appellee on the crops to secure the rent; that if appellant elected to purchase the farm during 1914 he could do so by the payment to appellee of the sum of \$3,500 on or before January 1, 1915, upon payment of which amount appellee agreed to convey the farm to him, no credit to be given for the rent. If appellant complied with the terms of the contract, and paid the rent during 1914, he should have the right to remain on the premises during 1915; if he did not purchase the premises during 1914, and should elect to purchase same any time during 1915, he could do so upon the payment to appellee of the sum of \$3,680; the rental for 1915, if it had been paid, to be credited on the purchase price, but if said purchase price was not paid, during 1915, appellant agreed to vacate the premises on or before January 1, 1916.

Appellant did not tender or pay to appellee any of the sums or rentals referred to, other than a portion of the proceeds of some of the crops, and he only partially performed other conditions of the contract relative to fencing and roofing the barn and dwelling. The barn was destroyed by fire, but, the insurer being insolvent, nothing was ever realized under the policy.

[1] Appellant having declined to vacate the premises on January 1, 1916, appellee was compelled to resort to a writ of forcible detainer to evict him. He offered no resistance

to said proceedings, and possession was thus secured by appellee. Thereafter this suit was instituted by appellant, seeking to declare the instrument of March 24, 1913, to be a mortgage and not a deed. From an adverse judgment he has appealed. It is a well-established rule in this jurisdiction that a deed absolute upon its face may be shown by parol evidence to have been intended as a mortgage, and, contrary to the general rule, relief may be had in this state without an allegation of fraud, accident, or mistake as a foundation therefor. *Castillo v. McBeath*, 162 Ky. 382, 172 S. W. 669; *Carr v. Morrison*, 178 Ky. 683, 199 S. W. 783.

It is said in *Charles et al. v. Thacker*, 167 Ky. 835, 181 S. W. 611:

"Where the land is sold with an option reserved to the vendor to repurchase it by the payment of a certain sum within a specified time, the sale is known as a conditional sale, and will become absolute upon the failure to pay the stipulated sum at the time specified. The vendor in such a transaction is not entitled to an equity of redemption, but can only enforce the agreement to resell if the payment is made as required. A conditional sale may, in equity, be shown to be a mortgage upon the same principles as in the case of a deed absolute on its face. If it appears that the parties intended the conditional sale to operate as a security for the debt, equity will treat the transaction in all respects as a mortgage. The intention of the parties, as ascertained by considering their situation and the surrounding facts, as well as the written memorials of the transaction, furnishes the criterion for the distinction. \* \* \* The true test, therefore, whether a conveyance is a mortgage or not, is to ascertain whether it is a security for the payment of money, or for the performance or nonperformance of any act or thing. If the transaction resolves itself into a security, whatever be its form, it is, in equity, a mortgage. If it is not a security, then it is either an absolute sale or a conditional purchase. If the debt is extinguished, leaving the grantor to pay or not, as he chooses, and thereby entitle himself to a reconveyance, the transaction operates as a conditional sale. *Horbach v. Hill*, 112 U. S. 144 [5 Sup. Ct. 81, 28 L. Ed. 670]."

[2, 3] Where there is a doubt whether the writing is a mortgage or conditional sale, that construction will be adopted which is most favorable to the debtor, and the instrument held to be a mortgage. *Castillo v. McBeath*, supra; *Vaughn v. Smith*, 148 Ky. 535, 146 S. W. 1094. The leading case in Kentucky on the subject of conditional sale is *Tygret v. Potter & Co.*, 97 Ky. 57, 29 S. W. 976, 16 Ky. Law Rep. 809, the facts of which are almost identical to those of the instant case. *Tygret*, being indebted to *Potter*, executed to the latter his note secured by mortgage on real estate; *Tygret* being unable to pay the note, *Potter & Co.*, purchased the land and surrendered the note. The deed contained the usual covenants as to title. At the time of the execution of the deed the parties en-

tered into an agreement by the terms of which Tygret was given 12 months within which to pay Potter & Co. a stated sum, with 8 per cent. interest, upon payment of which amount Potter & Co. agreed to convey the land to Tygret; if the money was not so paid the contract was to have no binding effect, and if the amount specified was not paid by a stated time Potter & Co. agreed to rent the land to Tygret at a specified rental for the following year. Part of the land was sold during the life of the contract, and the rental on the balance was reduced. There was a verbal extension to enable Tygret to repurchase, but he did not comply with it, and, after notice to surrender possession, suit was brought to recover the rent and possession of the land. The contention in that case was, as here, that the writing was a mortgage and not a conditional sale of the land, and that usurious interest was charged. In the course of its opinion the court says:

"In this case the appellees held a mortgage upon the entire premises conveyed at the time the deed was executed, that passed to the appellees all the right and title the appellant and his wife had in the land, as a security for the debt, and there could be no motive prompting the parties to so change the terms of a writing that upon its face was plainly a mortgage, to an absolute conveyance, unless they both intended this conveyance to pass the absolute fee in the event the debt was not paid within 12 months, and at the end of that time the appellant to become the tenant of the appellees. The evidence of the debt had been surrendered, and there is no evidence conducing to show the land to be of greater value than that paid for it, or that the agreement was unconscionable or oppressive; but, on the contrary, it is manifest the appellant saw or believed he could not discharge or release the mortgage, and therefore made the best possible terms with his creditor. That was, to sell him the land, with the right to repurchase within 12 months, and if he failed to do so then to become his tenant."

This case has never been overruled; on the contrary, it has been cited with approval in several later cases, notably *Charles v. Thacker*, supra, *Carr v. Morrison*, supra, and *White v. Nichols*, 184 Ky. 335, 211 S. W. 849. In each of which cases similar documents were held to be conditional sales and not mortgages. In cases where the court has construed the instruments involved as mortgages, the rule in *Tygret v. Potter & Co.* is clearly distinguished. *Allen v. Brown*, 62 S. W. 726, 23 Ky. Law Rep. 217; *Castillo v. McBeath*, supra.

In the present appeal, as in practically all similar cases, the contention is made that the property is of a much greater value than the amount paid by the lender. But an examination of the evidence convinces us that the 266 acres were not at the time of the transaction of a greater value than the amounts advanced by appellee, with legal interest.

Appellant's contention that the land is

worth approximately \$6,000 finds little support outside of his own family. On the question of value appellant introduced one man who fixed a valuation of \$30 an acre on it; but this witness never owned any land, and we find nothing in the record to show he is posted as to land value. Appellant placed the value at \$25 an acre; his two sons say it is cheap at \$3,500, while his only other witness says it was worth about \$3,000. The value fixed by this latter witness is more in harmony with the weight of the evidence, and with what we believe the fair valuation. Some witnesses for appellee put it as low as \$2,000. Aside from various amounts paid by appellee for seed, etc., he paid to and for the account of appellant three principal items, viz.: \$900 November 10, 1911; \$560 January 1, 1912; \$1,278.37 March 24, 1913—the latter being the bank judgment, interest, and costs. These three items with 6 per cent. interest from their several dates to January 1, 1916, aggregate \$3,301.10.

Appellant contends he is entitled to certain credits, one of which is \$881.50, the amount for which the fire loss on the barn was adjusted; but this could become a credit only when paid, and since no part of this loss has ever been settled, necessarily no credit can be allowed therefor. The other items are nominal amounts only, they are disputed, and even if each was proper would not substantially reduce the total indebtedness.

Several letters passed between the parties. December 15, 1915, appellant wrote appellee as follows:

"I have done all I can to get up your money for you and I find it impossible, and under our contract you are in due possession the 1st of January, which seems hard to me; but I am now subject to your commands, so please let me know by return mail if you demand possession by the first of the year, so that I can make arrangements to comply with your wishes."

This is rather conclusive that appellant then treated the contract as a conditional sale, and not a mortgage, as he now contends.

Appellant had abundant time in which to pay the amount due; he enjoyed the use of the premises until January 1, 1916; during all this time he paid nothing on the debt, nor did he comply with the provisions of the contract as to improvements, etc. It is manifest that appellee in his endeavor to assist and accommodate appellant made the first loan, likewise the second, and finding appellant unable to pay the indebtedness thus incurred, it was but natural appellee should refuse to execute a third mortgage, convinced as he must have been of appellant's inability to take care of his debts. Appellant had not previously mentioned the lien notes held by the bank, and notice of the judgment doubtless confirmed appellee in his determination not to advance further sums on mortgages. He agreed to

pay off the judgment held by the bank upon the sole condition that he should receive an absolute deed. Having paid the bank and received the deed, and being desirous of giving appellant further opportunity to secure a reconveyance of the property, he executed the supplemental or conditional contract of March, 1913. Whatever the status of the parties under the two mortgages, their rights were merged in and fixed by the deed and by the later document the indebtedness was extinguished. The supplemental paper was a conditional sale, not a mortgage, and the evidence convinces us the parties did not intend it should operate as a security for debt.

The presiding judge being of counsel for one of the parties, the case was by agreement heard by Hon. Joe McCarroll as special judge.

Satisfied, as we are, of the correctness of the judgment, same is accordingly affirmed.

### BALL v. BROWN-ROSS SHOE CO.

(Court of Appeals of Kentucky. Dec. 12, 1919.)

#### 1. FRAUDULENT CONVEYANCES $\S$ 299(11)—EVIDENCE OF TRANSACTIONS BETWEEN RELATIVES.

Evidence held to show that conveyances from a judgment debtor to his wife prior to the judgment for a recited consideration of \$750, from the judgment debtor and his wife after the judgment to the debtor's brother as trustee, and from the brother back to the judgment debtor as trustee for his daughter, were solely to insure the judgment debtor's enjoyment of the property, whatever the result of his business ventures; the conveyances having been without consideration.

#### 2. FRAUDULENT CONVEYANCES $\S$ 208 — OBJECTIONS BY SUBSEQUENT CREDITORS.

Conveyances without consideration and to protect the property, made by a judgment debtor to his wife, before creation of debt and rendition of judgment, and, after judgment, by the debtor and his wife to the debtor's brother, who reconveyed to the debtor as trustee for his daughter, were fraudulent and void, under Ky. St. § 1906, as to the debtor's creditors, past, present, and prospective.

Appeal from Circuit Court, Harlan County.

Action by the Brown-Ross Shoe Company against John H. Ball, trustee. Judgment for plaintiff, and defendant appeals. Affirmed.

J. S. Forester, of Harlan, for appellant.

Zeb A. Stewart, of Harlan, for appellee.

CLARKE, J. In 1915 appellee recovered a judgment against John H. Ball for \$155.70, with costs and interests from February 6, 1913. After an execution had been returned

"no property found" appellee instituted this action in equity under section 439 of the Code to enforce satisfaction of this judgment, and, attacking as fraudulent and void the several deeds hereinafter described, levied an attachment upon a house and lot in the city of Harlan, Ky., as the property of the judgment defendant. From a judgment holding the deeds fraudulent and void as to the appellee, sustaining the attachment, and ordering a sale of the property to satisfy the original judgment, John H. Ball, trustee of Mary Ball, is appealing.

John H. Ball owned the attached property prior to November, 1910, when he conveyed it to his wife, Louisa Ball, for the recited consideration of \$750 cash in hand paid. In January, 1916, "John H. Ball and his wife, Louisa," conveyed it to his brother, Smith Ball, as trustee, but without stating for whom he was trustee for the recited consideration of "one dollar and other good and valuable considerations." In December, 1916, the latter reconveyed it to John H. Ball, trustee for Mary Ball, his nine year old daughter, it being recited in the deed that the grantee "has the right to lease, rent, sell or otherwise dispose of said property for the benefit of the said Mary Ball, at his pleasure."

[1, 2] These conveyances and the testimony of the Balls, despite their efforts to create a different impression, prove rather conclusively, we think, as evidently did the chancellor, that no consideration whatever passed between the parties for any of these deeds; that John H. Ball's beneficial ownership and absolute control of the property was never disturbed in the least; that Smith Ball was not trustee for any one other than John H. Ball, during the time he held the title to the property as trustee, and that the only purpose of the several transactions between these closely related parties was to insure John H. Ball's enjoyment of the property whatever the result of his business ventures, from which it follows that each of these conveyances was fraudulent and void under section 1906, Kentucky Statutes, as to John H. Ball's creditors, past, present, and prospective. *Williamson v. Morris*, 166 Ky. 231, 179 S. W. 45; *Magic City Coal & Feed Co. v. Lewis*, 164 Ky. 454, 175 S. W. 902; *McDonough v. McGowan*, 165 Ky. 425, 177 S. W. 277; *Stix v. Calender*, 155 Ky. 806, 160 S. W. 514; *Frazer v. Frisbie Furniture Co.*, 86 S. W. 539, 27 Ky. Law Rep. 688; *Wigginton v. Minter*, 88 S. W. 1082, 28 Ky. Law Rep. 79; *Doyle v. Sleeper*, 1 Dana, 531.

It is therefore immaterial that his indebtedness to appellee was created after the execution of the deed to his wife or that the deed to her could not have been attacked as fraudulent had it been a bona fide transaction, and the cases of *Pace's Trustee v. Pace*



et al., 162 Ky. 457, 172 S. W. 925, H. T. Hackney Co. v. Noe, 146 Ky. 818, 143 S. W. 418, Morton v. Jones, 136 Ky. 797, 125 S. W. 247, and other like cases cited by appellant are not in point because the conveyances attacked therein were real conveyances made in good faith.

Judgment affirmed.

## HANSON'S GUARDIAN AD LITEM v. HANSON.

(Court of Appeals of Kentucky. Feb. 20, 1920.)

WILLS  $\S$ 692, 693(1) — LIFE TENANT GIVEN POWER TO SELL LAND AND REINVEST MONEY WITHOUT ORDER OF COURT.

A will, creating a life estate in certain property and providing that it "may be sold and amounts reinvested at his discretion," held to give life tenant the right to sell the land and convey title in fee and reinvest the proceeds at his discretion, and that without an order of court.

Appeal from Circuit Court, Fayette County.

Action between the guardian ad litem of Richard H. Hanson, Jr., and others, and Richard H. Hanson. From a judgment determining that the latter had the power to sell land under a will, the guardian ad litem appeals. Affirmed.

A. M. Hall, of Lexington, for appellant.

George C. Webb, of Lexington, for appellee.

CARROLL, C. J. The third clause in the will of Mrs. Jennie M. Hanson Helm reads as follows:

"I give and bequeath to my dear brother, R. H. Hanson, my property in Lexington, located as follows: The entire corner that I own, Church and Mill, Market and Church, including the old J. M. Hanson Agency Building, No. 155 Market, my residence No. 163 Market, the Old Sayre property No. 160 North Mill, and the garage, No. 172 North Mill. Any mortgage or debts, liens, etc., on any of these properties, are to be paid off out of my estate. I leave them to him, R. H. Hanson free from any debts of any kind whatsoever. The properties are to revert to his children at his death, but they may be sold and amounts reinvested at his discretion.

I also will and bequeath to him, R. H. Hanson, the sum of ten thousand dollars (\$10,000.00) to be invested by him to revert to his children. Should I survive my brother, the (3) above I bequeath to his children that survive me."

The question in the case is whether Richard H. Hanson had the power, under this third clause, to sell and convey a good title to the purchaser of the property mentioned in it.

The lower court adjudged that Hanson had the power to sell any of the property mentioned or held by him under the third item of the will, and reinvest the proceeds in other property to be held under the same conditions and limitations, and that he had the further power to execute and deliver such deeds or writings as were necessary to sell and convey any of the property for the purpose of reinvestment and to give to the purchaser thereof a fee-simple title.

For the purpose of having the correctness of the judgment determined, the infant children of Richard H. Hanson have prosecuted this appeal, and it is insisted by their counsel that R. H. Hanson could only sell and convey the property by and with the consent of the chancellor, upon it being made to appear in a suit brought for that purpose that it would be advisable that the property should be sold and the proceeds thereof reinvested.

We think the judgment of the lower court was correct, and that R. H. Hanson, although invested only with the life estate in the property, was given the right to sell the same and reinvest the proceeds "at his discretion." The power to sell at his discretion is plainly expressed, and this necessarily carries with it the power to convey the property sold and invest the purchaser with a good title.

To hold that the property could only be sold under an order of the court would give no meaning or effect to the very words in the will by which the testatrix authorized R. H. Hanson to sell at his discretion. If the words, "at his discretion," had been omitted, there would be much force in the argument of counsel for the infants that the property could not be sold except by decree of court under the provisions of the Code.

Therefore the judgment is affirmed.

$\Rightarrow$ For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

## MOORE et al. v. SHIFFLETT.

(Court of Appeals of Kentucky. Feb. 10, 1920.)

## 1. GIFTS ¶1, 18(1)—DELIVERY ESSENTIAL TO "GIFT INTER VIVOS."

A "gift inter vivos" is one made by one or more persons to another or other persons without reference to the future and to come into immediate and absolute effect without further act of the parties, delivery being an essential.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Gift Inter Vivos.]

## 2. GIFTS ¶53—CONDITIONAL AND REVOCABLE CHARACTER OF "GIFT CAUSA MORTIS."

A "gift causa mortis" is a gift of personalty in expectation of death then imminent, and on an essential condition that the property shall belong fully to the donee in case the donor dies, as anticipated, leaving the donee surviving him, if the gift is not revoked, but not otherwise.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Gift Causa Mortis.]

## 3. GIFTS ¶41, 74—GIFTS CAUSA MORTIS REVOCABLE, AND GIFTS INTER VIVOS IRREVOCABLE.

A gift inter vivos cannot be revoked, while a gift causa mortis may be revoked by the donor at any time before his death.

## 4. TRUSTS ¶1—DEFINITION AND CHARACTERISTICS OF "PAROL TRUST," "TRUSTEE," "CESTUI QUE TRUST."

A "parol trust" is a right of property created without writing by one party for the benefit of another, a "trust" being a confidence reposed in one person, called the "trustee," for the benefit of another, called the "cestui que trust," with the property held by the former for the benefit of the latter, and implies two estates or interests, one equitable and the other legal.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Cestui Que Trust; Trust; Trustee.]

## 5. GIFTS ¶62(6), 74—GIFT OF MONEY CAUSA MORTIS TO AGENT FOR DONEE PERFECTED BY SYMBOLICAL DELIVERY.

Where a wife before her death called in her sister, showed her money in gold and greenbacks, and had her replace it in a dresser drawer from which it had been taken, and gave such sister the key, stating that she wished her nephew to have the money after her death, there was a valid gift causa mortis, the symbolical delivery by means of the key being sufficient, which gift was not revoked by the wife's subsequent will to her husband which took effect only at her death.

## 6. JOINT TENANCY ¶9—TITLE RIPENED IN ONE OF SEVERAL JOINT TENANTS CLAIMING WHOLE.

Where a wife and one of her sisters who had lived on certain land before their marriage discharged a purchase-money lien against it with the understanding with other joint owners,

their brothers and sisters, that they should have the whole land, and subsequently the sister conveyed an undivided half interest to the wife, which deed was recorded, other brothers and sisters not claiming any interest, and the wife asserting title to the whole, the wife's claim ripened into title by adverse possession.

Appeal from Circuit Court, Butler County.

Action by O. H. Moore and others against Jacob Shifflett. From judgment for defendant, plaintiffs appeal. Judgment affirmed in part, and reversed in part.

W. A. Helm and E. N. Mayhugh, both of Morgantown, and W. R. Gardner, of Bowling Green, for appellants.

N. T. Howard, G. V. Willis, and A. Thatcher, all of Morgantown, Sims, Rodes & Sims, of Bowling Green, and Gilliam & Gilliam, of Scottsville, for appellee.

SAMPSON, J. Eliza Shifflett, wife of appellee, Jacob Shifflett, departed this life in April, 1918, having made and executed a last will and testament giving all of her property to her husband. Shortly after her death, her sister Mrs. Moore, and nephew J. C. Gardiner, instituted an action against Jacob Shifflett to recover of him the possession of \$1,125 cash, \$900 of which was in gold and the balance in greenbacks and silver, which it was alleged the decedent had given in trust to Mrs. Moore for the use and benefit of her nephew J. C. Gardiner, and to be delivered by the said Mrs. Moore to Mr. Gardiner on the death of the donor.

Mrs. Shifflett and her brothers and sisters in their early life inherited a small farm. They agreed among themselves that the farm should be held in trust for the use and benefit of the unmarried children, and as they married off they should relinquish their interest in the farm. In the course of time, all the children married and left Eliza alone on the farm. In the meantime, however, another sister who had lived with her for a number of years sold and conveyed to Mrs. Shifflett a one-half undivided interest in the said farm. This deed was placed on record by Mrs. Shifflett, and she continued to live there and claim the whole of the farm until her death in 1917, at which time she was about 81 or 82 years of age. To recover their interest in this farm, the brothers and sisters of Mrs. Shifflett instituted a second action against Jacob Shifflett, setting up their claim to the land. These two actions were shortly thereafter consolidated and heard and decided at the same time by the court below in favor of appellee, Jacob Shifflett, and Mrs. Moore and the other plaintiffs below prayed and are now prosecuting this appeal.

1. Let us first consider the judgment in the action to recover the \$1,125 alleged to have

been given by Mrs. Shifflett to Mrs. Moore in trust for her nephew J. C. Gardiner. The evidence shows that Mrs. Shifflett, who had been twice married, had accumulated some money by raising stock and otherwise running the farm which she inherited from her relative. For some three or four years before her death she had been in feeble health. During this time she made a will giving all of her property to her nephew J. C. Gardiner, and this will was delivered to his mother to be kept by her; but appellee, hearing of the will by some means, caused it to be revoked and another will made giving all of the property of Mrs. Shifflett to him, and this will has been probated and is not contested. Under this paper the husband claims all of the property of Mrs. Shifflett, including the \$1,125 in cash found on the premises after her death.

According to the evidence of Mrs. Moore, a sister of Mrs. Shifflett, she was visiting at the home of Mrs. Shifflett about a year before the death of testatrix, and while waiting on her Mrs. Shifflett asked her to go to a certain drawer in the dresser in a nearby room and bring a package to her. This Mrs. Moore did and delivered it to Mrs. Shifflett, who opened the package, which contained money, and counted it. There was \$900 in gold and \$175 in greenbacks and \$50 in silver, a total of \$1,125. After the money was counted, Mrs. Shifflett again tied up the package and gave it to Mrs. Moore and instructed her to put it in a clothespress which stood just back of the chair in which the invalid sat, telling Mrs. Moore to lock the press, which she did, and then Mrs. Shifflett delivered the key to Mrs. Moore, saying to her in substance to give the money to Cecil Gardiner, their nephew, after the death of the donor, but not to let appellee, Jacob Shifflett, know about the money. It is further shown by the evidence that, after the death and burial of Mrs. Shifflett, the husband, Jacob, took charge of her affairs and gathered up what money he could find that belonged to the decedent. On the following day, Mrs. Moore and J. C. Gardiner came to the house, and Mrs. Moore asked Jacob if he had found the money, whereupon he answered that he had found it. She then told him she did not think he had found it all, as he had only a small amount which belonged to the deceased. She did not have the key to the clothespress with her, having by oversight failed to bring it with her; but she knew a secret way of opening the press, and entering that way she brought forth the package containing the \$1,125 in the same condition that it was when she placed it there several months before. When it was untied and the contents exhibited, the husband was greatly surprised and agitated, declaring that he did not know his wife had the package or that she had any money ex-

cept that which he had already found. He then said he wanted to put it back in the press where it had been and he would leave it there so long as he lived. Mrs. Moore and Gardiner left the house without telling Jacob that this money had been given by Mrs. Shifflett to Mrs. Moore for the use and benefit of Gardiner. On the day following, they returned to the Shifflett home for the purpose of making known to Jacob the wish of the deceased with reference to the package of money, only to learn that Jacob had in the meantime carried the money to Morgantown, where he had invested it in bonds, and further that he was claiming it as his property under the will of his wife. When Jacob refused to surrender the money, or its equivalent, the action first above mentioned was instituted.

It is the contention of appellants Gardiner et al., who claim the money, that the delivery of the money by Mrs. Shifflett to Mrs. Moore, to be placed in the press and locked up and the key held by Mrs. Moore with instructions to deliver the money to Gardiner after the death of the donor, amounts to a parol trust which is enforceable in equity. They also aver that the facts constitute a delivery of the gift, if not actual delivery, at least a symbolical delivery, which was sufficient to execute a gift *causa mortis* if not sufficient to perfect a gift *inter vivos*.

[1] For appellee it is contended that the facts are not sufficient to constitute a gift *inter vivos* or *causa mortis*, because there was no delivery either actual or constructive, and that a parol trust is not enforceable, but, even if enforceable, the expression parol trust can mean no more than a gift *inter vivos*; and, as the facts are insufficient to support a gift *inter vivos*, they are insufficient to support a parol trust. A "gift *inter vivos*" is one made by one or more persons to another or other persons without reference to the future and to come into immediate and absolute effect. In such gift no further act of the parties is needed to give it effect. One of the essential things, however, is delivery. Without actual possession the title does not pass. A mere intention or naked promise to give, without some act to pass the property, is not a gift. In other words, the property must be surrendered to the donee, and he must take and hold complete dominion over it, and the donor cannot revoke the gift. *Roche v. George's Ex'r*, 93 Ky. 609, 20 S. W. 1039, 14 Ky. Law Rep. 584.

To constitute a valid "gift *inter vivos*," the purpose of the donor to make the gift must be clearly and satisfactorily established, and the gift must be completed by actual, constructive, or symbolical delivery without power of revocation. 20 Cyc. 1193.

[2] A "gift causa mortis" is defined to be a gift of personal property made by a person in expectation of death then imminent, and on an essential condition that the property shall belong fully to the donee in case donor dies, as anticipated, leaving the donee surviving him, if the gift is not in the meantime revoked, but not otherwise. 20 Cyc. 1228; *Meriwether v. Marrison*, 78 Ky. 572.

[3] The chief distinguishing feature between a gift *inter vivos* and one *causa mortis* is that in the first instance the gift must be accompanied by actual or symbolical delivery and must be absolute and irrevocable; while in the second instance the gift is made by one in expectation of immediate death and is to take effect only in case of death of donor leaving the donee surviving, and only then in case the donor shall not in the meantime revoke the gift. In other words, a gift *inter vivos* cannot be revoked, while a gift *causa mortis* may be revoked by the donor at any time before his death. *Hall v. Howard*, Rice (S. C.) 314, 33 Am. Dec. 115; *McCoy, Adm'r, v. McCoy*, 126 Ky. 783, 104 S. W. 1031, 31 Ky. Law Rep. 1189.

[4] A "parol trust" is a right of property created without writing by one party for the benefit of another. A "trust" is a confidence reposed in one person called the "trustee" for the benefit of another called the "cestui que trust," with respect to property held by the former for the benefit of the latter. It implies two estates or interests, one equitable and the other legal.

[5] The facts recited above were found to exist by the chancellor. Undoubtedly, the gift from Mrs. Shifflett to her nephew was revocable at any time; but it was not revoked by her, and after her death it could not be revoked by another. At the time she made the gift she had the power to do so. She told her sister to bring her the package, and when this was done Mrs. Shifflett counted the money in the presence of her sister and tied the package up, delivered it to her sister, and instructed her where to put it and to lock it up and, when this was done, gave her sister the key and directed her to give the money to their nephew after the death of Mrs. Shifflett. This was a symbolical, if not an actual, delivery of the money to Mrs. Moore for the use and benefit of Gardiner. Mrs. Moore accepted the money, at least symbolically, in trust for Gardiner, because she received and held the key to the press in which the money was placed. It has been held many times by this and other courts that, where a gift is delivered by one person to another for the use and benefit of a third person, such a trust is enforceable, and further that the delivery of a key or other means of holding and possessing the gift is a constructive delivery of the gift itself.

In the case of *Stephenson's Adm'r v. King*,

81 Ky. 425, 50 Am. Rep. 173, we held that the delivery of the key to a desk in which was a letter containing a full description of certain notes and bonds was a sufficient delivery to make the gift *causa mortis* complete.

A gift has been sustained where the donor delivered to the donee a key of his desk in which he kept papers, and where the owner of stocks, bonds, and bank books at the time in a cupboard in the room, gave the key of the cupboard to his daughter and said that all that was in the cupboard was hers, and she took out all the papers and books, looked them over, and put them back, locked the cupboard, and put the key in her pocket, all in the presence of the donor, and retained the key until his death, this was held to be a sufficient delivery. Where the circumstances of the delivery of the key would sustain a gift if the delivery had been made direct to the donee, it is sufficient if the delivery is made to a third person for the donee. 12 R. C. L. 961; *Pyle v. East*, 173 Iowa, 165, 155 N. W. 283, 3 A. L. R. 889, and cases cited.

The rule is well settled, however, that delivery need not be made to the donee personally, but may be made to a third person as agent or trustee, for the use of the donee, and under such circumstances as that indicate the donor relinquishes all right to the possession or control over the property, and intends to vest a present title in the donee. 20 Cyc. 1198; *Reynolds v. Reynolds*, 92 Ky. 556, 18 S. W. 517, 13 Ky. Law Rep. 793; *Forsyth v. Kreakbaum*, 7 T. B. Mon. 97; *Burge v. Burge*, 76 S. W. 873, 25 Ky. Law Rep. 979.

Where one delivers a gift *causa mortis* to another for the use and benefit of a third person and it is not revoked, the third person may, after the death of the donor, enforce the gift in the same way and manner that he could have enforced it had the gift been delivered directly to him instead of to another in trust for him. With equal force is this rule applied to a gift, the delivery of which is symbolically made. If a gift *causa mortis* would be valid if the delivery be symbolical only, as by delivery of a key to the receptacle in which the gift is located, the gift would likewise be valid if the key was delivered to a second person to be held until the death of the donor and then turned over to the third person for whose benefit the gift was made. This is but a parol trust and may be enforced. Whether we denominate the gift of the money by Mrs. Shifflett to Mrs. Moore for the use and benefit of their nephew Gardiner, a gift *causa mortis* or parol trust makes little difference, because it might be sustained as either under the facts of this case. *Williamson v. Yager*, 91 Ky. 287, 15 S. W. 660, 13 Ky. Law Rep. 273, 34 Am. St. Rep. 184; *Krankel v. Krankel*, 104 Ky. 745, 47 S. W. 1084, 20 Ky. Law

Rep. 901. Mrs. Moore was the trustee of the parol trust and received the money symbolically for the use and benefit of Gardiner. The delivery of the key to the chest in which the money was locked was such a delivery as was sufficient to have invested Mrs. Moore with that character of dominion over the gift as to bring it within the rule governing gifts causa mortis. We therefore conclude that the chancellor erred to the prejudice of appellants in holding the gift of the money void for want of a sufficient delivery.

It is contended, however, by appellee that, inasmuch as the testatrix gave him all of her property by will executed months after the alleged gift to Mrs. Moore for Gardiner, such gift, if it were ever valid, was revoked by the execution of the testamentary paper, and the money passed under the will. This, however, is not the rule. Such a gift is not revocable by a subsequent will, for, as a will does not operate until the decease of the testator, and the donor, at his decease, is divested of his property in the subject of the gift, no right or title in it passed to his representatives. 12 R. O. L. 969; 20 Cyc. 1245; Brunson v. Henry, 140 Ind. 455, 39 N. E. 256; Hoehn v. Struttman, 71 Mo. App. 399, Emery v. Clough, 63 N. H. 552, 4 Atl. 796, 56 Am. St. Rep. 543. See notes 99 Am. St. Rep. 913.

[6] 2. While the second suit mentioned above was instituted primarily for the division of the land on which Mrs. Shifflett lived with her husband at the time of her death, on the averment that said land had descended to Mrs. Shifflett and her brothers and sisters in equal portion, and whenever all the plaintiffs in the second suit had conveyed to Mrs. Shifflett their interests in the

land, the real purpose of the suit was to determine who had title to the land.

It is admitted by appellee, Jacob Shifflett, that the plaintiffs owned a joint interest in the land with Mrs. Shifflett years before; but it is contended that Mrs. Moore sold and conveyed her interest to Mrs. Shifflett, and that Mrs. Shifflett having taken a deed to the whole of the property, and having held and adversely claimed the whole of the same for more than 15 years next before the institution of the action, the plaintiff's right, if any he ever had, to said land, was barred and tolled. Mrs. Shifflett and one of her sisters, who had lived upon the land for years before their marriage, paid off and discharged a purchase-money lien against the land with the express understanding with the other joint owners that the two unmarried sisters should have the whole boundary of land. Some time after this payment was made, Mrs. Moore, who had contributed to the payment, sold and conveyed an undivided one-half interest in said lands to Mrs. Shifflett, and this deed was placed on record. The other children did not claim any interest in the land, and Mrs. Shifflett asserted title to the whole of it. Under such facts, Mrs. Shifflett's claim ripened into a perfect title by adverse possession if she did not otherwise acquire title. Hence the trial court did not err in adjudging Jacob Shifflett the owner of said boundary of land under the will.

The judgment is therefore affirmed with respect to the lands in controversy, and reversed with respect to the gift of money, with directions for further proceedings not inconsistent with this opinion.

Judgment affirmed in part and reversed in part.

**DREW v. JARVIS. (No. 3143.)**

(Supreme Court of Texas. Nov. 19, 1919.)

**1. APPEAL AND ERROR ⇨374(2)—ADMINISTRATRIX NEED NOT GIVE BOND.**

Though minors are the only children and heirs, and entitled to the whole of the estate of deceased, the duly qualified and acting administratrix of deceased's estate is entitled, in view of Vernon's Sayles' Civ. St. 1914, art. 3235, as to possession and holding of estate by administrator, to appeal as administratrix without bond from judgment withdrawing estate from administration.

**2. APPEAL AND ERROR ⇨664(1)—RECORD OF JUDGMENT CONCLUSIVE.**

Absolute verity attaches to judgment of district court on appeal from order appointing guardian as it appears on the minutes, and the judgment entry on the minutes cannot be controlled by what appears on the docket, unless and until the district court shall itself correct the minutes.

**3. COURTS ⇨202(5)—DUTY OF COUNTY COURT TO ENTER JUDGMENT AS DIRECTED BY DISTRICT COURT.**

It was the duty of the county court to enter upon its minutes as its judgment that which appears on the minutes of the district court as the judgment rendered on appeal from order appointing guardian, and thereby such order is as effectually vacated as though it had never been rendered, in view of Vernon's Sayles' Civ. St. 1914, art. 4297.

**4. EXECUTORS AND ADMINISTRATORS ⇨7—WITHDRAWAL OF ESTATE FROM ADMINISTRATION.**

Judgment of district court on the minutes on appeal from order of probate court appointing guardian for minor heirs, denying application of applicant to be appointed guardian, but not confirming appointment of appellee, is insufficient to sustain a judgment ordering the estate withdrawn from administration.

**5. EXECUTORS AND ADMINISTRATORS ⇨7—DEFECTIVE APPLICATION FOR WITHDRAWAL OF ESTATE FROM ADMINISTRATION DOES NOT DEFEAT JURISDICTION.**

That application of guardian of minor heirs for withdrawal of estate from administration did not state that applicant was guardian of estates as well as persons of minors did not deprive county court of jurisdiction to determine whether estate should be withdrawn, and to whom it should be delivered, if withdrawn; applicant having executed bond required by Vernon's Sayles' Civ. St. 1914, art. 3385.

**6. COURTS ⇨202(5)—AMENDMENT OF PLEADING ON APPEAL FROM COUNTY COURT.**

Though application of guardian of minor heirs for withdrawal of estate from administration did not state that applicant was guardian of estates as well as of persons of minors, the defect was curable by amendment or new pleading in the county court, and could be cured in like manner in the district court on appeal.

**Certified Questions from Court of Civil Appeals of Second Supreme Judicial District.**

In the matter of the estate of Mrs. Willie Mae Jackson, deceased. Van Zandt Jarvis made application in the county court for withdrawal of the estate from administration. From the judgment of the district court on appeal, withdrawing the estate from administration, Mrs. S. M. Drew, administratrix, appealed to the Court of Civil Appeals, where motion to dismiss the appeal was sustained, whereupon the administratrix made application for rehearing. Questions certified to Supreme Court. Questions answered.

See, also, Jarvis v. Drew, 215 S. W. 970.

Simpson & Estes, D. W. Odell, and Ocie Speer, all of Ft. Worth, for plaintiff.

Slay, Simon & Smith and Flournoy, Smith & Storer, all of Ft. Worth, for defendant.

**GREENWOOD, J.** Questions certified from the Court of Civil Appeals of the Second Supreme Judicial District of Texas, on an appeal from the district court of Tarrant county. The certificate of the Honorable Court of Civil Appeals is as follows:

"To the Honorable Supreme Court of Texas:

"Mrs. S. M. Drew, administratrix of the estate of Mrs. Willie Mae Jackson, deceased, appealed without bond from a judgment of the district court withdrawing the estate from administration. Appellee, guardian of the person and of the estates of the minors, Ella Louise and Mary Davis Moore, the only heirs of their mother, Mrs. Jackson, filed in this court a motion to dismiss the appeal, on the stated ground that as an administratrix the appellant had no appealable interest in the controversy, and that, having failed to give an appeal bond, she could not prosecute the appeal in her personal capacity. This court sustained appellee's motion to dismiss the appeal, as shown by the opinion filed herein. The cause is now pending in this court on appellant's motion for rehearing. The members of this court are not entirely agreed as to the proper action to be taken on said motion. The majority, consisting of Associate Justices Dunklin and Buck, are of the opinion that the motion for rehearing should be overruled, while Chief Justice Conner is inclined to the opinion that it should be granted. Because of this dissent, and because we deem it advisable to do so, we hereby certify to your honors the questions hereinafter set out.

"Mrs. Drew was appointed administratrix of the estates by the county court, sitting as a probate court, July 6, 1916. After filing her bond, duly approved, and taking the oath, she entered upon the discharge of her duties. On July 6, 1917, Van Zandt Jarvis, appellee herein, filed his application to withdraw the estate from administration, which application described the applicant, as 'the legally appointed, qualified, and acting guardian of the persons of the minors, Ella Louise and Mary Davis Moore, who are the only heirs at law of Willie Mae Jackson, deceased, and entitled to the whole of her

estate.' Citation thereupon was issued, returnable to the next term of court, to the administratrix, to make a report showing the condition of the said estate. At said next term of court the administratrix filed her exhibit, and answered first by general demurrer, and by special plea that the estate showed a vast amount of unfinished business in the nature of lawsuits, etc., and that to grant the relief prayed for by applicant would result in serious financial loss to the estate. Whereupon she prayed that the application be denied. The court overruled the demurrer and entered an order withdrawing the estate from administration. In this order and judgment it is recited that the minors mentioned are the only children and heirs of deceased and are entitled to the whole of the estate, and that Jarvis is the duly appointed, qualified, and acting guardian of the estates of said minors, 'under appointment by this court.' Said order further recites that a bond had been given by said Jarvis as guardian of the estates of the said minors, and by the court duly approved and ordered filed, and the bond itself describes Jarvis as the guardian of the estates. From this order and judgment the plaintiff appealed to the Sixty-Seventh district court, where a trial was had, de novo. In the latter court the administratrix attacked the status of Jarvis as the guardian of the estates, alleging that the application filed by Jarvis in the county court was only in the stated capacity as guardian of the persons of the minors, and that as guardian of the persons only the applicant did not show himself to be entitled to withdraw the estates from administration.

"It is further alleged that therefore, on, to wit, July 6, 1916, the county court of Tarrant county sitting in probate made an order appointing Jarvis guardian of the estates of said minors, but that one Mrs. Lula Mansfield contested the application of Jarvis to be appointed guardian of the estates, and regularly and lawfully gave notice of an appeal from the order and judgment of the court appointing Jarvis, and did appeal from such decree to the Seventeenth district court of Tarrant county, executing proper appeal bond within the required time, and in all things complied with the law as to such an appeal; that thereby the order and judgment of the county court was superseded, nullified, and destroyed; that said Seventeenth district court never made an order, decree, or decision in any respect whatever appointing Jarvis guardian of the estates of said minors, and that no order or judgment was entered of record disposing of the appeal of Mrs. Mansfield.

"In the Sixty-Seventh district court Jarvis amended his application, alleging that by inadvertence or error in his application to withdraw the estates as originally filed in the county court he had described himself only as the guardian of the persons of the minors, but that he was also the guardian of the estates of said minors, in which latter capacity he desired to further prosecute the application.

"The statement of facts discloses that Jarvis was appointed temporary guardian of the persons and estates of said minors on May 3, 1916, and on July 6th thereafter was appointed guardian of both the persons and the estates of said minors, and thereafter he duly qualified. Mrs.

Mansfield appealed, as before stated, to the Seventeenth district court, where an entry was made on the docket, of date December 8, 1916, denying the application of Mrs. Mansfield, and confirming the appointment of Jarvis, and Mrs. Mansfield excepted and gave notice of appeal to this court. That part of the order and judgment denying the application of Mrs. Mansfield to be appointed guardian of the estates was entered on the minutes of the court, but not that portion of the judgment confirming the appointment of Jarvis. Later an application of Jarvis to enter a judgment in the minutes of the court nunc pro tunc, so as to conform to the docket entry, was made, and Mrs. Mansfield, through her attorney, waived service of said motion. It does not appear that said motion was granted, or that the said amended judgment was ever carried into the minutes of said Seventeenth district court.

"Appellant urges error in the action of this court in sustaining appellee's motion to dismiss the appeal on several grounds, among which are:

"(1) That appellee did not in his application to the county court show himself entitled, under article 8384, Vernon's Sayles' Tex. Civ. Stat., to the relief prayed for; that in said application he did not show himself to be the heir, devisee, legatee, or the guardian of the estates of the minors, and that said article, in using the term 'guardian,' evidently intended it to mean guardian of the estates; that only such persons as are mentioned in said article are entitled to withdraw an estate from administration, and that the capacity of the applicant is a jurisdictional fact, and must be alleged in the application in order to give the probate court jurisdiction.

"(2) That Jarvis was not, in fact, the guardian of the estates of the minors at the time of his application, because of the appeal of the contestant, Mrs. Mansfield, to the Seventeenth district court; that, no final judgment ever having been recorded in the minutes of said court appointing Jarvis guardian of the estates, by reason of the appeal, the judgment of the county court appointing him guardian of the estates was rendered an absolute nullity.

"(3) That, irrespective of other reasons offered, appellant is entitled to prosecute this appeal without bond and in the capacity of administratrix, in order for the appellate court to determine whether or not Jarvis is, in fact, the guardian of the estates of the minors.

"It will be noted that, in the application of Jarvis to withdraw the estates from administration, it is alleged that the only creditors or those having claims against said estates join in said application. The truth of this allegation does not seem to be seriously questioned by appellant. At least no creditor, so far as the record disclosed, objected to the appointment of Jarvis as the guardian of the estates, neither did any such seek to intervene at any stage of the proceeding. With the foregoing statements of the case and the issues involved, this court certifies to your honors the following questions:

"(1) If the regularity of the appointment of Jarvis as guardian of the estates of the minors be conceded, has appellant shown herself entitled to appeal as administratrix without bond?

"(2) Did the failure to enter on the minutes of the Seventeenth district court that portion

of the docket entry of its judgment confirming the appointment of said Jarvis as guardian of the estates, or the failure of the record to show that the district court certified said order to the county court, affect the validity of such judgment?

"(3) Did the county court have jurisdiction, under the allegation of appellee's application, to entertain said application and to grant the relief prayed for, if as a matter of fact, as found by the county court, Jarvis was the duly appointed guardian of the estates of the minors?"

"(4) If it should be held that the county court did not have jurisdiction, because of the failure of the applicant to describe himself as the guardian of the estates, did the district court err in permitting an amended application in which Jarvis was properly described as the guardian of the estates?"

"(5) Is this court limited to the pleadings of the parties and the judgment record, in order to determine its jurisdiction to entertain this appeal, or may it refer to the statement of facts for such information therein contained as may shed light upon the question involved?"

"(6) Do the pleadings of the administratrix herein tender such an issue, that she may appeal without bond from the judgment of the district court?"

"The majority of this court are of the opinion that *De Cordova v. Rogers*, 97 Tex. 60, 75 S. W. 16, *West v. Keeton*, 17 Tex. Civ. App. 139, 42 S. W. 1036, *Alexander v. Barton*, 71 S. W. 72, *Trotti v. Kinnear*, 144 S. W. 327, *Coleman v. Zapp*, 105 Tex. 491, 151 S. W. 1040, *Watson v. Chappell*, 19 Tex. Civ. App. 685, 48 S. W. 624, and other decisions, are authority for the conclusion that the entry of the judgment on the docket constituted a compliance with article 3219, Vernon's Sayles' Texas Civil Statutes, which is as follows:

"All such decisions, orders, decrees and judgments shall be entered on the records of the court, during the term at which the same are rendered; and any such decision, order, decree or judgment shall be a nullity unless entered of record."

"By article 4051 of the Statutes this provision is made to apply to guardianship proceedings, and the majority are further of the opinion, under the authorities cited, that a judgment entered on the docket would have the force and the effect of a judgment 'entered of record,' even though such docket entry was made in the district court trying de novo a probate proceeding appealed from the county court."

"The majority, at least, are of the opinion that the district court did not err in permitting the appellee to amend his petition as to the capacity in which he sued. We rely, in part, on the authority of the following cases: *Marshall v. Stubbs*, 48 Tex. Civ. App. 153, 106 S. W. 435; *Harrell v. Traweek*, 49 Tex. Civ. App. 417, 108 S. W. 1021; *Phelps v. Ashton*, 30 Tex. 345; *Elwell v. Universalist General Convention*, 76 Tex. 514, 13 S. W. 552."

[1] We answer questions (1) and (6) in the affirmative. It is the statutory duty of the administrator of the estate of a deceased person "to recover possession of and hold such estate in trust to be disposed of in ac-

cordance with law." Article 3235, Vernon's Sayles' Texas Civil Statutes. It is as much the administrator's duty to withhold the estate from one not lawfully entitled to receive it as it is his duty to surrender the estate, whenever the administration may be closed, to those entitled thereto. The proceeding to withdraw the estate from administration was of vital concern to the beneficiaries of appellant's trust, and she had the same right to invoke the exercise of appellate jurisdiction, in her fiduciary capacity, as to defend in the county court. Appellant was before the appellate courts as the representative of the estate, and no bond was requisite to perfect the appeals. *Huddleston v. Kempner*, 87 Tex. 373, 28 S. W. 936.

The cases of *Houston v. Mayes*, 66 Tex. 297, 17 S. W. 729, and *Houston v. Mayes*, 77 Tex. 265, 13 S. W. 1036, are decisive against the contention that an administrator is not entitled to appeal from an order withdrawing his intestate's estate from administration. In both cases the Supreme Court entertained such appeals and determined them on their merits. In the latter case one of the determinative holdings was that the appeal from the order withdrawing the estate from administration, though prosecuted by the administrator, had the legal effect to vacate the order pending the appeal, so that property coming into the administrator's hands, after the order of withdrawal and before the appeal was finally determined, could not be recovered by an action against the administrator in the district court, but must be accounted for in the probate court.

[2] Answering question (2), we are of opinion that absolute verity attaches to the judgment of the district court as it appears on the minutes, and that the judgment entry on the minutes cannot be varied or controlled by what appears on the docket, unless and until the district court shall itself correct the minutes, in the exercise of unquestionable power to make same disclose the very truth with respect to the judgment rendered. *Weaver v. Vandervanter*, 84 Tex. 693, 19 S. W. 889; *Coleman v. Zapp*, 105 Tex. 493, 151 S. W. 1040.

[3,4] It was certainly the duty of the county court to enter upon its minutes, as its judgment, that which appears on the minutes of the district court as the judgment rendered on the appeal from the order appointing the guardian, and thereby such order is as effectually vacated, at least so far as its future operation is concerned, as though it had never been rendered. Article 4297, Vernon's Sayles' Texas Civil Statutes. It follows that the order of the county court can no longer be looked to as a source of authority by appellee, and the judgment on the minutes of the district court is insufficient to sustain a judgment ordering the estate with-



drawn from administration and delivered to appellee.

[5, 6] We answer to questions (3) and (4) that the defects in the original application did not deprive the county court of its jurisdiction to determine whether the estate should be withdrawn from administration, and to whom it should be delivered, if withdrawn. We think it appears from the record that appellee was before the county court in his capacity as guardian of the estate as well as of the person of the minors, seeking an order of delivery to the guardian of the minors' estate, by whom alone, as principal, the bond required by article 3385 was executed. The defects with respect to a formal or proper application in behalf of appellee as guardian of the estate of the minors being curable, by amendment or other new pleading in the proceeding, when pending in the county court, they could be cured in like manner in the district court. *Elwell & Heist v. Universalist General Convention*, 78 Tex. 518, 13 S. W. 552; *Newton v. Newton*, 61 Tex. 512; *Arredondo v. Arredondo*, 25 S. W. 336; *Harrell v. Traweek*, 49 Tex. Civ. App. 417, 108 S. W. 1022.

In *McLane v. Paschal*, 62 Tex. 104, the contention was rejected that parties could raise no new issues on trials de novo on appeals in probate matters to the district court. In holding, in the case cited, that the trial court erred in striking out an amended answer, the court, per Chief Justice Willie, said:

"The only test of the propriety of the amendment was: Would it have been admitted in a cause originally commenced in the district court?"

The above declaration is but an application of the decision that in probate matters "on appeal, the district court may do in the given case whatever the county court could have done." *Vance v. Upson*, 64 Tex. 268.

What has already been said renders it unnecessary for us to make a specific answer to question (5).

HESS & SKINNER ENGINEERING CO. et al. v. TURNEY et al. (No. 3306.)

(Supreme Court of Texas. Nov. 26, 1919.)

1. BRIDGES  $\S$ 20(2)—RELEASE OF SURETY ON CONTRACTOR'S BOND BY CHANGE IN CONTRACT.

That bridge company did not require one-half of the cost of steel furnished to contractor to be paid in cash at point of shipment, when its contract with contractor would have entitled it to such cash payment, and, when it held an assignment of the contract from contractor to secure purchase price of steel, consented to application of money due under construction contract to payment of claims of lo-

cal merchants and laborers for which surety was liable on bond, did not change the contract guaranteed by the surety on contractor's bond, nor relieve surety from liability to the bridge company.

2. PRINCIPAL AND SURETY  $\S$ 59—RULES APPLICABLE TO COMPENSATED SURETY.

The rules which determine the rights of uncompensated sureties are applicable in determining the rights of corporation sureties who enter into contract of suretyship for profit.

3. ASSIGNMENTS  $\S$ 50(1), 85—EQUITABLE ASSIGNMENT FIRST IN TIME IS PRIOR IN RIGHT.

Where bridge building contractor in consideration of execution of contractor's bond agreed that all payments specified in bridge contract and withheld by the county should be paid to the surety company, and later gave a bank, to secure its advances of moneys used to pay wages of laborers, an order on the county to be paid out of money due on the bridge contract, *held* that each had merely an equitable assignment of money retained by the county, so that the surety company as the elder must prevail.

4. ASSIGNMENTS  $\S$ 85—PRIORITY OF EQUITABLE ASSIGNMENTS IN ORDER OF THEIR DATE.

The rule is sound which gives priority in rank to equitable assignments in the order of their dates without regard to notice to the debtor.

5. ASSIGNMENTS  $\S$ 55 — CONSIDERATION OF ASSIGNMENT TO SURETY ON CONTRACTOR'S BOND.

Assignments by bridge building contractor to surety on his bond of balance retained by county under bridge contract to secure surety against liability on its bond "in consideration of the execution of said bond" *held* supported by a valuable consideration.

6. BRIDGES  $\S$ 20(2)—SUBROGATION  $\S$ 23(8)—BANK ADVANCING MONEY TO CONTRACTOR FOR WAGES NOT SUBROGATED TO LABORERS' RIGHTS UNDER BOND.

Bank, which advanced money to bridge building contractor to pay wages of laborers and later secured an order on county which retained balance due under bridge contract, *held* not subrogated to the rights of the laborers, and not protected by contractor's bond as to the debt.

Error to Court of Civil Appeals of Third Supreme Judicial District.

Suit by M. M. Turney and others against the Hess & Skinner Engineering Company and others. On appeal the Court of Civil Appeals (207 S. W. 171) reformed the judgment, and the Lion Bonding & Surety Company brings error. Judgment of the Court of Civil Appeals reformed, and as reformed affirmed.

A. B. Wilson, of Houston, for plaintiff in error.

N. A. Rector, of Austin, and H. W. Fielder and M. C. Jeffrey, both of Lockhart, and Paul D. Page, of Bastrop, for defendants in error.

GREENWOOD, J. The writ of error was granted to the Lion Bonding & Surety Company, who executed as surety a bond, dated May 1, 1914, wherein the Hess & Skinner Engineering Company was principal, to the county judge and county commissioners of Bastrop county, in the sum of \$45,000, conditioned to be void if the Hess & Skinner Engineering Company should faithfully perform a certain contract between it and the county judge and county commissioners of Bastrop county, for the construction of a bridge, and should promptly make payments to all persons supplying said company with labor and material in the prosecution of the work as provided for in the contract, and as provided by articles 6394f to 6394j, Vernon's Sayles' Texas Civil Statutes.

[1] The surety company complains of a judgment against it in favor of the Vincennes Bridge Company for a balance of \$6,407.09. It is not denied that the bridge company supplied the Hess & Skinner Engineering Company material, viz. steel, in the prosecution of the work covered by the contract, nor that the balance justly due therefor is \$6,407.09. It is contended that the surety company was discharged from its obligation to pay for this material to the bridge company on two grounds: (1) That the bridge company shipped the steel without requiring one-half its cost to be paid in cash at point of shipment, when the contract between the bridge company and the engineering company entitled it to such cash payment; and (2) that the bridge company, when it held an assignment of the contract from the engineering company, to secure the purchase price of the steel, consented for \$6,499.80 to be applied to claims of laborers and local merchants, and that this had the effect to reduce the surety's obligations to the bridge company in that amount.

[2] We do not agree with the intimation in the opinion of the Court of Civil Appeals that the rules which determine the rights of uncompensated sureties have no application in determining the rights of corporation sureties, who enter into contracts of suretyship for profit. One who contracts as surety for another cannot be held bound save in so far as the law binds a surety. The views of this court on that subject are too clearly and emphatically stated in *Loneragan v. San Antonio Trust Co.*, 101 Tex. 77, 104 S. W. 1061, 106 S. W. 876, 22 L. R. A. (N. S.) 364, 130 Am. St. Rep. 803, to require further statement.

The surety company invokes the elementary rules that material change in the terms of a contract, on which one is secondarily liable as surety, such as extension of time for performance, without the surety's consent, will discharge the surety from his obligation under the contract, and that the act of a creditor in releasing collateral securities so as to deprive a surety of the right to have same applied in satisfaction of the debt of

the principal, guaranteed by the surety, will release the surety to the extent of the value of the securities.

There never was any change in the contract guaranteed by this surety company. Such contract was silent as to the terms on which the material for the construction of the bridge was to be purchased. The bond in effect authorized the contractor to make his own terms, and we see no good reason why it should be held that this did not include authority, while acting in good faith, to change such terms.

As said by the Supreme Court of the United States in *Guaranty Co. v. Pressed Brick Co.*, 191 U. S. 425, 24 Sup. Ct. 144, 48 L. Ed. 242:

"The guarantor is ignorant of the parties with whom his principal may contract, the amount, the nature, and the value of the materials required, as well as the time when payment for them will become due. These particulars it would probably be impossible even for the principal to furnish, and it is to be assumed that the surety contracts with knowledge of this fact. Not knowing when or by whom these materials will be supplied, or when the bills for them will mature, it can make no difference to him whether they were originally purchased on a credit of 60 days or whether, after the materials are furnished, the time for payment is extended 60 days, and a note given for the amount maturing at that time."

The surety company was liable, on the bond, for the payment of the debts to the local merchants and laborers, being essentially claims for labor in the prosecution of the work of performing the engineering company's contract. Hence it sustained no injury by the bridge company's consent to the application of \$6,499.80 to satisfy such claims.

[3] On April 30, 1914, the Hess & Skinner Engineering Company, "in consideration of the execution of said bond," agreed in writing to reimburse the Lion Bonding & Surety Company all amounts of money which it might pay or become liable to pay, on account of the bond's execution, and agreed that all payments specified in the bridge contract, withheld by Bastrop Company until completion of the work, should be paid to the surety company, and that such agreement should operate as an assignment of the payments, it being stipulated that any residue, after full reimbursement of the surety company, should be paid by it to the engineering company.

On February 20, 1915, the engineering company gave to defendant in error First National Bank of Smithville its note for \$500, and on February 26, 1915, it gave to said bank its note for \$1,000 for borrowed money, and to secure the payment of the notes the engineering company gave the bank an order on Bastrop county, to be paid out of the money to become due the engineering com-

pany on the bridge contract, and the county, acting by the county judge, accepted the order. The engineering company represented to the bank that the borrowed money was needed to pay wages of laborers employed in the prosecution of the work of constructing the bridge, and the money was so applied. The laborers were not parties to the loans, and no assignment was taken by the bank of their claims.

The outstanding claims for material and labor, protected by the bond other than the debt of the bank, exceeded the amount due the engineering company, which was withheld by the county.

On these facts the trial court gave the bank judgment against the surety company for the amount of the two notes of the engineering company, and also adjudged that the bank be first paid out of the sum of \$6,854.33, which had been paid into the registry of the court by Bastrop county, said sum having been withheld until completion of the work in accordance with the terms of the bridge contract.

The Court of Civil Appeals reformed the trial court's judgment so as to deny the bank a personal judgment against the surety company, but affirmed the direction that the fund in the registry of the court be first applied to the payment of the bank's debt.

By proper assignment, the surety company challenges the correctness of the judgment ordering payment of the notes to the bank out of the fund on deposit in court.

The opinion of the Court of Civil Appeals holds that, though the bank held a mere equitable assignment of sufficient of the money due the engineering company by the county to satisfy its notes, and though the assignment to the surety company was prior in time, and though the bank was subrogated to no right of the laborers, nevertheless the bank held an equitable claim on the money in the registry of the court superior to any right thereto of the surety company, for two reasons: First, that there was no consideration for the assignment to the surety company, and the money obtained from the bank was actually used to pay claims for labor on the bridge; and, second, that the assignee of a chose in action who first gives notice to the debtor is entitled to precedence in determining priority between assignees.

[4] In our opinion the rule is sound, which gives priority in rank to equitable assignments in the order of their dates, without regard to notice to the debtor. *Brander v. Young*, 12 Tex. 335; *Harris Co. v. Campbell*, 68 Tex. 27, 3 S. W. 243, 2 Am. St. Rep. 467; *Bank v. Convery*, 8 Tex. Civ. App. 181, 27 S.

W. 829; *Harris Co. v. Donaldson*, 20 Tex. Civ. App. 9, 48 S. W. 791; *Henke v. Keller*, 50 Tex. Civ. App. 533, 110 S. W. 784.

The debtor is fully protected because he is not affected by the assignment until notified, and the subsequent assignee, in dealing with a chose in action, is chargeable with knowledge that he can get no better right than that of his assignor.

It increases uncertainty in the law's administration to substitute the date of notice to the debtor as the test of priority for the date of assignment; and we can see how grave harm would follow for us to now depart from our thoroughly established simple test of priority in right from priority in time of the assignment.

[5] The assignment to the surety company was supported by a valuable consideration. *Campbell v. Grant Co.*, 36 Tex. Civ. App. 641, 82 S. W. 794.

The case of *Harris County v. Donaldson*, 20 Tex. Civ. App. 9, 48 S. W. 791, involved a controversy between assignees of a fund held by Harris county to pay the contract price of certain furniture. The debt of the senior assignee had no relation to the contract, while that of the junior assignee was for work in installing the furniture under the contract. The senior assignment was given precedence, because the junior claimant "had no lien upon this fund, and his rights in it arose from his assignment alone, and the assignments take rank in the order in which they were given." 20 Tex. Civ. App. 15, 48 S. W. 794. The same principle is equally conclusive here against the bank's claim of a superior equity because of the nature of the debt.

[6] We agree with the conclusion of the Court of Civil Appeals that the bank did not become subrogated to the rights of the laborers, and there can be no doubt that its debt is not protected by the bond. *Gaylord v. Loughridge*, 50 Tex. 577; *Lion Bonding & Surety Co. v. Bank* (Civ. App.) 194 S. W. 1012; *Bank v. Corse*, 133 Tenn. 720, 182 S. W. 917; *United States v. Rundle*, 107 Fed. 227, 46 C. C. A. 251, 52 L. R. A. 505.

The bank and the surety company each hold merely an equitable assignment of the fund in the registry of the court, and the surety company's, as the elder, must prevail.

The remaining assignments complain of rulings in which we find no error.

It is therefore ordered that the judgment of the Court of Civil Appeals be so reformed as to deny the bank any recovery herein, and that said judgment, as so reformed, be affirmed.

**DAVIDSON v. STATE. (No. 5431.)**

(Court of Criminal Appeals of Texas. Nov. 19, 1919.)

**1. CRIMINAL LAW §1166(9)—CONTINUANCE FOR ABSENCE OF WITNESS.**

Complaint cannot be made of the overruling of a motion for continuance on the ground of absence of a witness, where the witness appeared and testified.

**2. CRIMINAL LAW §598(6) — CONTINUANCE DENIED FOR ABSENCE OF WITNESS FOR WANT OF DILIGENCE.**

Where indictment was filed on January 4, 1919, and soon afterwards subpoenas were issued for a number of witnesses, but one for L. was not procured until February 8th, and was returned not served, witness not being found within the county, and the case was called for trial February 15th, a motion for continuance on account of the absence of L. was properly overruled, where no reason or excuse was shown for failure to sooner secure the issuance of the subpoena for L.

**3. CRIMINAL LAW §598(5) — CONTINUANCE DENIED FOR REDUCTION OF JURY BELOW NUMBER REQUIRED.**

The court did not err in refusing a motion for continuance, in that all but five of the jurors on the bench disqualified; Code Cr. Proc. 1911, tit. 8, c. 4, providing for the formation of juries in cases less than capital, specifically taking care of any case where, from any cause, the number of jurors in the box or in the panel is reduced below the number required.

**4. BURGLARY §6 — STORAGE OF HOUSEHOLD GOODS AS OCCUPANCY; "OCCUPIED."**

Where owner left his dwelling closed up and went to a distant state, leaving his household goods stored in one room of his house, his stock in the pasture, feed in the crib, etc., the house was "occupied" within the meaning of the burglary statute; the actual corporeal presence of the alleged occupant not being necessary.

**5. CRIMINAL LAW §878(2)—GENERAL VERDICT APPLIED TO EITHER OF SEVERAL COUNTS.**

Where there was a general verdict of guilty, without special reference to either of two counts of an indictment, the court on appeal may apply the verdict to either of the two counts.

**6. BURGLARY §22—ALLEGATION OF OWNERSHIP BY CARETAKER.**

When one leaves the state and asks another to look after his house and property, an indictment may allege ownership in the one left to care for the house.

**7. CRIMINAL LAW §1091(9) — SUFFICIENCY OF BILL OF EXCEPTIONS.**

The appellate court will not search the entire record, to ascertain if a bill of exceptions is well founded, and a bill to the court's charge, stating no grounds of exception and no facts, is insufficient.

**8. CRIMINAL LAW §369(7) — EVIDENCE OF OTHER CRIMES.**

In a burglary case, it was not error to permit the owner of the house to show where he found the property taken from his house; such testimony not tending to show a separate and distinct crime or transaction, there being nothing in the evidence to suggest more than one burglary, or tending to raise the question of the connection of any one therewith save accused and those indicted with him.

**9. CRIMINAL LAW §815(4)—REQUESTED INSTRUCTION OMITTING ISSUES PROPERLY DENIED.**

In a burglary case, court properly refused to give a special charge with reference to whether the doors were open or not, instruction only mentioning "doors of the house," omitting entirely the submission of the question as to whether the "doors of the room, in which the property was stored, were open."

**10. BURGLARY §9(3) — ENTERING CLOSED ROOM.**

Burglary may be committed by entering a room which is closed, although the outer doors of the house are open.

Appeal from District Court, Erath County; J. B. Keith, Judge.

Raymond Davidson was convicted of burglary, and he appeals. Affirmed.

J. A. Johnson, of Stephenville, for appellant.

Alvin M. Owsley, Asst. Atty. Gen., for the State.

LATTIMORE, J. Appellant was convicted of burglary in the district court of Erath county, and his punishment fixed at two years' confinement in the penitentiary.

The indictment contains two counts, one alleging occupancy of the house in W. L. Hunt, and the other in C. A. Hunt. It was held in *Pyland v. State*, 33 Tex. App. 382, 26 S. W. 621, that an allegation of occupancy alone is sufficient.

[1, 2] Appellant made a motion for continuance, because of the absence of the witnesses Fincher and Lewallen, which was overruled. Fincher appeared and testified, and the diligence used to obtain the testimony of Lewallen was not sufficient. The indictment was filed January 4, 1919, and soon afterwards subpoenas were issued for a number of witnesses; but the subpoena for the witness Lewallen was not procured until February 8th, and was returned "Not served, said witness not being found within the county." The case against appellant was called for trial February 15th. No reason or excuse is shown for failure to sooner secure the issuance of said subpoena.

[3] Appellant's bill of exceptions No. 2 shows that he made a special motion for continuance, on the ground that there was not

a regular jury present to try his case, setting up in said motion that all of the other jurors on the panel disqualified, save and except five; that to compel him to go to trial with only that number of qualified jurors present would deprive him of a trial by a jury selected by the jury commissioners. This motion was properly overruled. The provision of chapter 4, title 8, of our C. C. P., providing for the formation of juries in cases less than capital, specifically takes care of any case where, from any cause, the number of jurors in the box or panel is reduced below the number required. If, after the law was followed by the court, in sending the sheriff for jurors, objectionable jurors were attempted to be forced upon appellant, he had his proper remedy by objections setting forth proper grounds for disqualification.

[4-8] Claiming that the evidence did not support the allegation of occupancy of the alleged burglarized house on the part of either W. L. Hunt or C. A. Hunt, appellant asked an instructed verdict of not guilty. The evidence shows that W. L. Hunt owned said house, and on September 12, 1918, he closed it up and went to California, and that prior to leaving, he requested C. A. Hunt, his brother, who lived some miles away, to look after his things and keep the doors closed, if they happened to be open. W. L. Hunt left his household goods stored in one room of his house. He also left his stock in the pasture, feed in the crib, etc.

We do not deem it necessary, in order to constitute occupancy, within the meaning of the burglary statute, that there be the actual corporeal presence of the alleged occupant in the house at the time. In *Moore v. State*, 48 Tex. Cr. R. 400, 88 S. W. 230, this court held the term "occupancy" as equivalent to "possession." In *Tidwell v. State*, 45 S. W. 1015, we held "occupancy" tantamount to "ownership." One may occupy premises miles away from his sleeping, eating, or staying quarters, by keeping his goods there, or by other means not necessary here to enumerate. We think the allegation of occupancy was met by the evidence, and that the requested instruction was properly refused. In this connection we further observe that there was a general verdict of guilty, without special reference to either count of the indictment, and in such case we would apply this to either of the two counts. We have carefully noted the authorities cited, but do not think they hold different to this opinion.

The complaint is not well founded that the court erroneously instructed the jury that, where the owner of property leaves the state and leaves the property in the care and custody of another, such other person is the special owner thereof. There was no question that the property was in the possession either of W. L. Hunt, the real owner, who was in California, or his brother, C. A. Hunt, who

lived near the property, and was requested to look after the same during the absence of W. L. Hunt. The charge covered ownership and possession in both W. L. Hunt and C. A. Hunt. We think it well settled that when one leaves the state, and asks another to look after his property, or take care of it while he is away, this would support an allegation of ownership and possession in this special owner. *Bonner v. State*, 59 Tex. Cr. R. 350, 128 S. W. 1102; *Webb v. State*, 44 S. W. 498.

[7] Appellant's sixth bill of exceptions is to a certain portion of the court's charge, which is therein quoted. No grounds of exception are stated in said bill, and no facts are therein stated or referred to, from which this court may derive information as to whether or not said exception was well taken. This court will not search the entire record, to ascertain if a bill is well founded, but will look to the bill itself. The insufficiency of this bill prevents our consideration of the same. What we have just said will apply also to appellant's seventh bill of exceptions.

[8-10] Appellant's tenth bill of exceptions complains of the action of the trial court in allowing Will Snyder to testify that along before Christmas he met appellant and Walter Carneal, hauling a car with a team of mules, and that the second house from where he met them was vacant, and that some time after meeting them he saw two mattresses in said vacant house—one blue, and one striped—and that Charlie Hunt got permission from him to get said mattresses. It was shown by the witnesses that the mattresses were part of the stolen property, which was gotten back from several places. The last witnesses in said burglarized house before the date of the alleged burglary said that they saw the said mattresses in the house at that time; it being five days prior to the date of the burglary charged against appellant.

There being nothing in the evidence to suggest more than one burglary, or tending to raise the question of the connection of any one therewith save appellant and those indicted with him, we see no error in permitting the owner to show where he found his property, which was in the house and taken therefrom. It certainly can work no injury to appellant, and does not tend to show separate and distinct crimes and transactions, such as is discussed in the authorities cited by appellant in support of this exception. This also applies to the evidence of Ed. Lockhart and H. F. Jones, as shown by other bills of exception. We think the evidence sufficient to show appellant's connection with the alleged stolen property, and that the room in which the property was located was closed when the property was taken.

Appellant put a number of witnesses on the stand to testify that, prior to the date of

the alleged burglary, they had seen the doors of the house open; but these witnesses confined themselves mostly to the outside doors. The last witnesses who were at the burglarized house before the property was taken stated that when they left it on December 5th the doors of the room in which the property of the owner was stored were closed and bolted. The court specially submitted this issue to the jury. The special charge asked, with reference to whether the doors were open or not, was properly refused, for the same mentioned only the doors of the house, omitting entirely the submission of the question as to whether the doors of the room in which the property was were open. Burglary may be committed by entering a room which is closed, as well as by entering a house.

Believing that there are no reversible errors in the record, the judgment of the trial court is affirmed.

#### CARNEAL v. STATE. (No. 5432.)

(Court of Criminal Appeals of Texas. Nov. 26, 1919.)

##### 1. BURGLARY $\S$ 6—LIVING IN HOUSE NOT NECESSARY TO "OCCUPANCY."

It is not necessary that there should be some one actually living in the house in order to constitute "occupancy."

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Occupancy.]

##### 2. CRIMINAL LAW $\S$ 594(1)—DENIAL OF CONTINUANCE FOR ABSENT WITNESSES.

The court did not err in refusing a continuance on the ground of absence of witnesses, where diligence as to one witness was insufficient, and the court states that it was not shown that witnesses would give alleged testimony, and it was evident that the absent testimony would not, if present, have brought about a different result.

##### 3. CRIMINAL LAW $\S$ 1172(1)—INSTRUCTIONS IN PROSECUTION FOR BURGLARY AS TO CONSENT HARMLESS.

In a prosecution for burglary, exceptions to a charge based upon the submission of want of consent of the occupant are not tenable, where it is affirmatively shown that the property was taken without consent.

##### 4. BURGLARY $\S$ 38—EVIDENCE AS TO POSSESSION OF PROPERTY STOLEN FROM OUTHOUSE.

In a prosecution for burglary, there was no error in permitting proof that accused was in possession of a rope stolen from an outhouse at the same time the property described in the indictment was taken from the house.

Appeal from District Court, Erath County; J. B. Keith, Judge.

Walter Carneal was convicted of burglary, and appeals. Affirmed.

J. A. Johnson, of Stephenville, for appellant.

Alvin M. Owsley, Asst. Atty. Gen., for the State.

MORROW, J. The conviction is for burglary. This is a companion case to Davidson v. State (No. 5431) 216 S. W. 624.

The indictment in separate counts charged the house was occupied by W. L. Hunt and C. A. Hunt. It developed that W. L. Hunt was the owner of the house and that it was his place of abode; that, leaving his household furniture therein, he had gone to the state of California, with the view that he might locate there in the event he was satisfied. During his absence he requested his brother, C. A. Hunt, to look after the property in his house, and to make it convenient to go to the premises, see that the doors were kept locked, and to ship him the furniture in the event he wanted it done, and instructed him how to enter the premises. The brother, C. A. Hunt, undertook to comply with this request, and did do so. Based upon these facts, the appellant contends that there was a failure to prove occupancy as charged in the indictment, and also contends that there was error in refusing to require the state to elect upon which count the prosecution would be maintained. There was a general verdict of guilty.

[1] The prosecution was based upon one transaction, and two counts touching the ownership were inserted to avoid a variance. *Gonzales v. State*, 12 Tex. App. 657; *Dalton v. State*, 4 Tex. App. 335; and cases listed in Branch's Annotated Texas Penal Code, p. 233. The terms "occupancy" and "ownership" are treated in the decisions as synonymous. *Pyland v. State*, 33 Tex. Cr. R. 382, 26 S. W. 621. The restrictive construction contended for by appellant is not to be given. It was not necessary that there should be some one actually living in the house in order to constitute occupancy.

There was an issue of fact as to whether the door of the house was open on the occasion of the offense, and there was on this issue a conflict of evidence—several witnesses testifying to having passed the house on various occasions and seen it unlocked or one of the doors open; others testifying that they had passed it and seen the doors closed. It seems to have been proved without controversy that the particular room from which the articles were taken was closed.

[2] An application for continuance was filed for two witnesses. One of these, Fincher, would have testified he was familiar with the premises and had frequently passed there, and that there was no one living in the house, and that he in the month of October prior to the burglary had seen the door open. The other witness would have testified there was

no one living in the house, and that he on various occasions had passed the premises and seen the door open. The offense took place on the 10th of December. It was conceded that the door was open on various occasions; some parties having gone into it in pursuance of looking after the property. The diligence for one of these witnesses was insufficient, and the court, in qualifying the bill, says that it was shown that neither of them would give the testimony alleged, and that, if given it would not have changed the result. In view of the evidence as disclosed by the statement of facts, it appears quite evident that the absent testimony would not, if present, have brought about a different result.

[3] Exceptions to the charge based upon the submission of the want of consent of W. L. Hunt or C. A. Hunt are not tenable. It was affirmatively shown that the property was taken without the consent of either of these men.

[4] The bill complaining of testimony describing a rope and other property that was left in the garage and smokehouse of W. L. Hunt is not accompanied with such explanatory facts as indicate that there was harm in admitting the testimony, even if it should have been rejected. The same may be said of the bill referring to the refusal of the court to instruct the jury that they should disregard the testimony to the effect that a mattress was identified as having come from the burglarized premises. The bill gives no information touching the relation of this matter to the case. Examination of the statement of facts discloses that the witness W. L. Hunt testified that, with the other property taken from the premises, he found a mattress which he identified as his property, and as having been taken from the house. Nor was there error in permitting proof that appellant was in possession of a rope stolen from the burglarized premises at the same time the property described in the indictment was taken.

We find no error in the record, and refer for citation of authorities to the companion case of Davidson v. State.

The judgment is affirmed.

# MIDLAND & N. W. RY. CO. v. MIDLAND MERCANTILE CO. (No. 1016.)

(Court of Civil Appeals of Texas. El Paso. Nov. 13, 1919. Rehearing Denied Dec. 11, 1919.)

## 1. PLEADING §193(5)—PETITION WHEN SUBJECT TO GENERAL DEMURRER.

Petition is subject to general demurrer, a fact necessary to be proved to sustain a recovery,

neither being alleged therein, nor fairly inferable from facts alleged.

## 2. RAILROADS §17—AUTHORITY OF BOARD OF DIRECTORS.

Under Rev. St. arts. 6445, 6446, all authority of a railroad corporation is vested in its board of directors, and the power of its officers depends on action of the board in conferring authority on them.

## 3. RAILROADS §179—PLEADING AND PROOF OF PRESIDENT'S AUTHORITY TO EXECUTE ACCEPTANCE.

To recover of a railroad company on an acceptance by its president, there must be proof of authority conferred on him by its board of directors to execute the acceptance or of estoppel or ratification; and therefore pleading of these things.

## 4. APPEAL AND ERROR §1170(8)—OVERRULING DEMURRER TO PETITION HARMLESS IN VIEW OF SUPPLEMENTAL PETITION.

Though supplemental petition is not to be considered in determining whether demurrer to petition should have been sustained, the error in overruling it, because petition did not allege authority conferred on defendant railroad company's president by its board of directors to execute the acceptance sued on, or estoppel or ratification, was harmless, within Court of Civil Appeals rule 62a (149 S. W. x) as to grounds for reversal; estoppel and ratification being properly set up in the supplemental petition in avoidance of the defensive matter, of want of authority, set up in the answer.

Appeal from District Court, Midland County; Chas. Gibbs, Judge.

Action by the Midland Mercantile Company against the Midland & Northwestern Railway Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Thomas, Milam & Touchstone, of Dallas, and J. M. Caldwell, of Midland, for appellant.

Garrard & Baker, of Midland for appellee.

## Statement of Case.

HIGGINS, J. The Midland Mercantile Company, appellee, brought this suit against the appellant and recovered judgment as prayed for. The questions presented by the appeal arise upon the pleadings. For this reason the substance of the allegations will be stated. The allegations of plaintiff's original petition are as follows: That the defendant is a railway corporation, incorporated under the laws of Texas; that on June 17, 1918, defendant by and through its president, T. J. O'Donnell, executed and delivered to plaintiff its certain trade acceptance in writing due August 17, 1918, and reading as follows:

"Trade Acceptance.

"\$1,126.82 Midland, Texas, June 17, 1918.

"On Aug. 17, 1918, pay to the order of ourselves eleven hundred twenty-six & 82/100 dol-

lars. The obligation of the acceptor of this bill arises out of the purchase of goods from the drawer, as per statement rendered June 17, 1918.

"Midland Mercantile Co.,

"By W. A. Dawson, Secretary.

"To Midland & N. W. Ry. Co., Midland, Texas.

"Accepted June 17, 1918, payable at Midland Nat. Bank, at Midland, Texas.

"[Signed]

"Midland & Northwestern Ry. Co.

"By T. J. O'Donnell, President."

Formal averments were then made as to maturity, etc., and defendant's refusal to pay, concluding with prayer for recovery and general relief.

On February 4, 1919, the defendant answered by general and special exception, general denial and special plea under oath, setting up a want of authority on the part of its president, O'Donnell, to execute in its behalf the acceptance sued upon or to obligate it thereon. Other special defenses pleaded are not pertinent to the questions presented by the appeal, and need not be stated.

On February 6, 1919, the plaintiff in response to the defendant's answer filed its first supplemental petition, wherein it set up an estoppel against appellant and its board of directors to question the authority of its president to execute the acceptance, also ratification of his act in executing the same, and prayed for recovery as in its original petition. This plea is quite lengthy, and it is unnecessary to detail the facts pleaded as an estoppel and ratification. By supplemental answer the defendant denied generally the allegations of the supplemental petition.

On February 7, 1919, the cause came on for trial, and the defendant's demurrers were overruled, and upon trial without a jury judgment was rendered in appellee's favor.

The court filed findings of fact and conclusions of law. In the findings the court found facts as set up in appellee's supplemental petition, and upon the facts so found concluded that appellant was "estopped to deny the authority of the said T. J. O'Donnell to execute the trade acceptance in controversy." To these findings and conclusions no error is assigned.

The first three assignments of error complain of the court's action in overruling appellant's demurrers to the original petition. They all relate to the same question, namely, the failure to allege in such petition authority of the defendant's president from its board of directors to execute the acceptance.

Three propositions are submitted as follows:

First. "Since the management of a railroad corporation is vested by statute in its board of directors, and the powers of its officers are expressly limited by statute, an original petition is subject to general demurrer which does not

allege authority of the agent or officers of the corporation to perform the act on which the cause of action is based."

Second. "There being no averment that T. J. O'Donnell, the president, had authority to bind the board of directors of the railway, it will not be inferred in the face of a special exception that the directors were bound."

Third. "Affirmative relief cannot be given upon issues pleaded solely in a supplemental petition."

#### Opinion.

[¶] If a fact necessary to be proved to sustain a recovery on the part of the plaintiff be neither alleged in the petition, nor fairly inferable from facts alleged, such petition is subject to a general demurrer. *Laas v. Seidel*, 95 Tex. 442, 87 S. W. 1015.

[2] Under articles 6445, 6446, R. S., all authority of railroad corporations is vested in its board of directors, and the power of the officers of such corporations depends upon the action of the board in conferring authority upon them. *Railway Co. v. City of Sweetwater*, 104 Tex. 329, 137 S. W. 1117; *Logue v. Railway Co.*, 106 Tex. 445, 167 S. W. 805.

[3, 4] In view of the rule announced in the two cases last cited, appellee, to recover upon the acceptance, must have proven authority conferred by defendant's board of directors upon its president, O'Donnell, to execute the same, or else proven an estoppel or ratification. No such facts are alleged in the original petition, nor can the same be inferred from any facts pleaded. Estoppel and ratification are pleaded in the supplemental petition, but it is not the function of a supplemental petition to supply necessary allegations omitted from the original. The rules in this respect are well stated in *Towne's Texas Pleading* (2d Ed.) 401, 447, and it is unnecessary to further discuss the same. We are therefore of the opinion that the court erred in overruling appellant's exceptions to the original petition, but the question arises as to the reversible nature of the error and in the condition of the record we are of the further opinion that it is not reversible. The general rule that error must be prejudicial in order to require a reversal applies with full force to rulings of the court with regard to the pleadings. At an early date this rule was recognized in this state. *Hardy v. De Leon*, 5 Tex. 211. And it has been repeatedly applied by our courts. In *Day v. Stone*, 59 Tex. 612, it was said:

"The rule is well stated in *Johnson v. Blount*, 48 Tex. 38, to the effect that an error, to be material, so as to require a reversal of the judgment, must be one that is prejudicial to the party complaining. Rulings of the court with respect to the pleadings, which did not affect the ultimate rights of the party, is not ground for the reversal of the judgment."

See, also, *Railway Co. v. Tel. Co.*, 52 S. W. 108, and *Dwyer v. Hosea*, 1 Posey, Unrep. Cas. 600. Such holdings have usually been



made with respect to the action of the court upon special demurrers, but no good reason occurs to this court why the same rule should not apply to the erroneous overruling of a general demurrer to the original petition, when it clearly appears that the ruling was not prejudicial to the complaining party and his ultimate rights have not been affected, and the pleadings as a whole are sufficient to support the judgment.

In *Rains v. Wheeler*, 76 Tex. 390, 13 S. W. 324, the suit was in trespass to try title by Wheeler, executor, against Rains. A general demurrer was interposed to the petition and overruled. This ruling was assigned as error. It was held that it was not necessary to determine whether the petition was bad on general demurrer, for, if it was, no prejudice accrued to the defendant from overruling it, and the case was affirmed. In passing upon the question Justice Gaines said:

"If it were necessary definitely to decide the question, we should hesitate before holding the petition bad on general demurrer.

"We do not think it necessary; for, if the general demurrer to the petition had been well taken, we are of opinion that no prejudice has accrued to the defendant from overruling it. In connection with her other pleadings, she filed a plea in reconvention, in which she claimed of the plaintiff an undivided one-half interest in the property described in the petition, as well as other property alleged to be in his possession as executor of the will of George C. Rains, deceased, and prayed that she have judgment for its recovery. In reply to this, plaintiff filed a supplemental petition, in which he fully and specially pleaded his testator's title. The plea in reconvention and the plaintiff's reply thereto were sufficient to present the issues, and, so far as mere pleadings are concerned, to warrant a judgment for either party. If the original petition had been stricken out, no reason is seen why the case should not have proceeded to trial and judgment upon the plea in reconvention and plaintiff's supplemental petition in reply thereto. The latter, as well as the original petition, contains a prayer for specific, and in the alternative, for general relief.

"What has already been said is a sufficient answer to appellant's second assignment of error. The allegations in the supplemental petition might properly, in part at least, have been pleaded as an amendment to the original petition, but they were also proper in reply to the cross-action of defendant."

Now in the case at bar the allegations of estoppel and ratification set up in the supplemental petition should properly have been contained in an amended original petition, in the absence of an allegation that defendant's president was authorized by its board of directors to execute the acceptance, but they were also properly set up in the supplemental petition in avoidance of the plea of want of such authority set up in the defendant's answer. It is in this respect different from a case where facts are alleged in a supplemen-

tal petition for the sole purpose of supplying necessary allegations omitted from the original petition. With estoppel and ratification properly set up in the supplemental petition in avoidance of defensive matter contained in the answer, we are of the opinion that the pleadings were sufficient to support the judgment rendered, and no reason is seen why the case could not proceed to trial and judgment upon the allegations contained in the original and supplemental petitions. Such in effect was the ruling in *Rains v. Wheeler*. The case did proceed to trial and judgment in favor of appellee, and the trial court's findings of fact and conclusions of law disclose that he held the defendant estopped to question the want of authority on the part of defendant's president to execute the acceptance. It is thus clearly apparent that no prejudicial error resulted to appellant from the overruling of the exceptions to the petition which attacked its sufficiency solely upon the ground that such authority was not alleged in the original petition.

Our holding that the error in this case is not reversible is further supported by *Merchants & Bankers, etc., v. Williams*, 181 S. W. 859, where a general demurrer had been improperly overruled and assigned as error. In passing upon the assignment the court said:

"Following the rule, it is believed the demurrer was improperly overruled. And it is not thought the supplemental petition could be considered in connection with the original petition in determining whether or not the demurrer to the original petition should be sustained. The office of the supplemental petition is to make response to the pleading of the defendant. Rule 10, District Court (142 S. W. xviii). The question is sufficiently discussed in *Towne's Texas Pleading* (2d Ed.) pp. 401, 447. And in *Insurance Co. v. Camp*, 64 Tex. 521, the court says: 'Under the rules, the defects in the petition could only be cured by an amendment, whilst the supplement is confined to the avoidance of matters of defense set up in the answer.'

"And while we still think there was error in overruling the demurrer, we are now convinced that the error is not, in this record and in view of rule 62a (149 S. W. x), sufficient to cause reversal. The omission in the petition did not in any manner contribute to the judgment rendered. The undisputed facts show that the company did not pay the claim, but that it denied liability on account of the loss. The case of *Rains v. Wheeler*, 76 Tex. 390, 13 S. W. 324, says: 'If the general demurrer to the petition had been well taken, we are of the opinion that no prejudice has accrued to (appellant) from overruling it.'

"And as the allegations in plaintiff's supplemental petition, tantamount to an allegation that payment had not been made, were properly pleaded to matters set up in defendant's original answer, such allegations form a proper basis for pleadings before the court, as said in the *Wheeler Case*, supra, for the rendition of judgment."

Upon the record here presented and in view of rule 62a and the cases above cited, we hold that the erroneous overruling of the exceptions to the petition presents no reversible error.

There are a number of other assignments based upon the admission of evidence. Counsel in their brief concede they are all dependent upon the ruling with respect to the demurrers. Upon the ruling made it follows that they should be overruled, which is accordingly done.

Affirmed.

### BUIE v. MILLER et al. (No. 1561.)

(Court of Civil Appeals of Texas. Amarillo.  
Oct. 29, 1919. Rehearing Denied  
Nov. 26, 1919.)

#### 1. DEEDS ⇨95—BINDING EFFECT OF TERMS UPON PARTIES TO DEED.

Parties making and accepting a deed to realty are bound by its terms.

#### 2. DEEDS ⇨111—PROPERTY PASSING AS AFFECTED BY DESCRIPTION OR INTENT.

Nothing passes by deed except what is described in it, whatever the intention of the parties thereto may have been.

#### 3. EVIDENCE ⇨40(5)—PAROL EVIDENCE AS TO DESCRIPTIVE WORDS IN DEED.

While parol evidence is often admissible to ascertain what lands are embraced in the description of a deed, such evidence cannot make the deed operate upon land not embraced in the descriptive words.

#### 4. DEEDS ⇨115—DESCRIPTION; LANDS NOT EMBRACED IN THOSE CONVEYED BY COURSES AND DISTANCES.

A grant of 640 acres, located by course and distance, with no marks called for or identified, will not embrace lands not included in the 640 acres, or take the grant of conveyance to lines and corners not called for, merely because the parties may have believed that the survey would embrace such lines and corners.

#### 5. BOUNDARIES ⇨40(3), 48(4) — ACQUIESCENCE RAISES PRESUMPTION OF CORRECTNESS.

While acquiescence in a boundary line raises a strong presumption that the line is correct, acquiescence is a question of fact for the jury, and, where there is no room to doubt the true location, a mere acquiescence in another line will not support a verdict based thereon.

#### 6. BOUNDARIES ⇨37(1) — SUFFICIENCY OF EVIDENCE TO SHOW ESTOPPEL.

Where a deed called for 640 acres, located by course and distance, but no marks were called for or identified, in a suit to recover an excess which plaintiff grantee supposed to be contained in the tract bought as shown by certain marked corners, with reference to which he purchased, evidence held not sufficient to show an estoppel upon grantor to deny the corners as claimed by plaintiff.

Appeal from District Court, Randall County; Henry S. Bishop, Judge.

Action by B. Frank Buie against Frank T. Miller and others. Judgment for defendants, and plaintiff appeals. Affirmed.

W. J. Flesher, Geo. A. Brandon, and B. Frank Buie, all of Canyon, and A. S. Rollins, of Dallas, for appellant.

C. E. Gustavus, of Amarillo, for appellees.

HUFF, C. J. Appellant, Buie, sued Miller and others to recover 45 acres of land out of section 109, block M8, Randall county. It is alleged that the 45 acres is in excess over 640 acres in section 109. The record shows that section 109 was surveyed in January, 1875, and is part of block M8, and calls to begin at a mound the S. E. corner of survey No. 108, in the same block; thence S., 1,900 vrs., to mound; thence W., 1,900 vrs., S. E. corner of survey 92, in same block; thence N., 1,900 vrs., a mound; thence E., 1,900 vrs., to the beginning. The section was patented August 7, 1877, describing the land as in the original field notes of the survey. It was agreed upon the trial that all the surveys in block M8, in Randall county, as shown by the field notes, were consecutively tied together. D. Curry is shown to be the common source of title. On the 6th day of December, 1906, D. Curry conveyed to G. W. Gale the section described as follows:

"Being all of section 109, block M8, patent No. 443, vol. 28, A. B. & M. land, containing 640 acres."

By deed dated December 7, 1906, Gale and wife conveyed 160 acres of land out of section 109 to C. T. Bartok, described as—"being the N. W. 160 acres out of survey 109, block M8, same being 950 vrs. by 950 vrs., cert. 901, A. B. & M. land."

Also on the same day Gale and wife conveyed to Mrs. C. G. Findley the land described as being 240 acres in survey 109, block M8, cert. 901, A. B. & M. land,

"beginning at the N. E. corner of a 160-acre tract conveyed by me to C. T. Barto, said point being 950 vrs. E. of the N. W. corner of said survey 109 and the N. W. corner of this tract; thence E., with the N. B. line this section, to the N. E. corner of the same and the N. E. corner of this tract; thence S., with the E. B. line of this section, a sufficient distance so that when the south line of this tract is run parallel to its north line it will exactly contain 240 acres of land, to a stake in said E. B. line for the S. E. corner of this tract; thence W., to a stake in the E. B. line of a tract this day conveyed by me to Geo. E. Childs, the same being the S. W. corner of this tract; thence N., with the E. B. line of said Childs tract and the E. B. line of said Barton tract, to the place of beginning."

. Also on the same day Gale and wife conveyed to Geo. E. Childs out of the section the first tract, being described as—

"beginning at a stake in the W. B. line of said section 109, block M8, A. B. & M. land, at the S. W. corner of 160-acre tract in said section, this day conveyed by me to C. T. Barto, said point being 950 vrs. S. of the N. W. corner of said section 109, for the N. W. corner of this tract; thence E., with the S. B. line of the C. T. Barto tract, to the S. E. corner of said 160-acre tract, for the most N. E. corner of this tract; thence S., to a point in the S. B. line of said section 109, for the S. E. corner of this tract; thence W. 950 vrs., with the S. B. line, to the S. W. corner of said section; thence N., with the W. B. line of said section, to the place of beginning. Second tract being bounded as follows: Beginning at the S. E. corner of said first tract; thence E., with the S. B. line of said section, to the S. E. corner of same; thence N., with the E. B. line of same, a sufficient distance so that when the N. line of this tract is run parallel to the south line of this tract it will exactly include 240 acres in this tract and the first tract jointly; thence W., parallel to the South boundary line, to a point in E. B. line of the first tract; thence S., with the said E. B. line, to the place of beginning."

In each of the three deeds there is a stipulation:

"The said G. W. Gale hereby agrees to have said land hereby conveyed surveyed promptly, and turn over the field notes to the vendee herein."

Frank T. Miller, one of the appellees, by mesne conveyance is vested with title to the Childs tract of land; also the Barto. The appellant, Buie, bases his right to the 45 acres in controversy on a special warranty deed from Gale to himself dated June 4, 1917. Without setting out the field notes, we state this 45 acres is bounded on the east by the east line of the section, on the south by the second tract in the Childs deed, on the west by the first tract in the Childs deed, north by the tract described in the Findley deed. In other words, it assumes a vacancy in the section between the two tracts—the one deeded to Findley and the other to Childs, 238.5 vrs. wide north and south, and 1,066.7 vrs. long east and west. This result is obtained by assuming that a certain rock is the N. E. corner of section 109, and a gas pipe for each of the corners for the S. E. and S. W. corners of section 109. In December, 1906, or 1907, the county surveyor of Randall county, at the instance of Gale, divided the section in quantities according to deeds of Gale's vendees above mentioned. In doing this work he began at the gas pipe set in the road, assuming it to be the S. E. corner of section 109, running north to a stone for the N. E. corner, then going to the gas pipe for the S. W. corner of the section, and running north to a point where that line would intersect a line running W. from the stone,

and there putting in a stake for the N. W. corner of the section. He found the west and east line of the section to measure, between the points assumed by him as the corners, 1,917 vrs., and the north and south lines to measure 2,016.7 vrs. He then surveyed out 160 acres in the N. W. corner for the Barto, 240 acres for the Findley, and 240 acres for the two tracts to Childs. He gave the proper measurements of lengths of lines to get the quantity called for in the deeds.

Establishing the section corners on the gas pipes and the stone corner and the the gas pipes and the stone corner and the one ascertained by the intersecting lines gave the quantity of land within such boundaries as 685 acres, and after giving the quantity to the several vendees called for by their deeds and running from the corner so assumed by him it left the 45 acres vacancy, for which appellant sues. The testimony of one of the original surveyors who located block M8 and other contiguous blocks shows that the lines and corners were not actually surveyed on the ground, and that no lines or corners were actually established or fixed on the ground at the time of the original location. The evidence shows base lines were run, and the blocks in that country were platted in from these base lines. A base line probably traversed block M8, but did not touch section 109, and the corners and lines for such base line were marked with earth mounds at certain points, and along the base line earth pits were dug. It is shown from the evidence that no such mounds or pits were found on section 109. The county surveyor who surveyed the section by the stone and two gas pipes testified that he found no work on the ground that would indicate mounds called for in the original field notes. He had not at any time made a survey from any known corner called for in the original field notes to the gas pipes, and had no personal knowledge as to who put in the rock or gas pipes. He knew from the surveying he had done that there were some monuments in Randall county which could be identified from the field notes, and further testified:

"Surveying out course and distance from any corners called for in the original field notes which I can identify, it is a fact that I would not find myself at the gas pipe for the S. E. corner of section 109."

D. Curry, who sold the land to Gale, stated that the fence on the north of the section had been there some 27 years, and on the east 18 or 20 years, and on the south line about 27 years, and on the west about 10 years. This fence was erected by Mr. Cook, who at that time owned section 92, just west of section 109. The fence appears to have been erected in reference to the rock and gas pipe. It was reputed that McLellan plac-

ed the rock corner, and that Hutchinson, the surveyor of Swisher county, placed the pipe for the N. E. and N. W. corner of section 110. However, this is all stated as hearsay. The gas pipes were placed there some 12 or 13 years after Curry moved to the country. He stated he never had a survey of the section made. The fence was not placed in reference to the Hutchinson corner. The line was located by himself. He stated the fence was located from the rock corner. It appears from his testimony that none of the lines of the section were run by a surveyor for the purpose of locating a fence on the lines. He also testified:

"I understand that if this line is run by course and distance from an old supposed and identified corner in block 6, that these section corners would be at a different place to the points where the rocks are placed."

Gale stated Curry called his attention to the gas pipe, stone corner, and fence when he purchased, and stated there was an excess in section 109; that there were 685 acres, and that this was partly the inducement on his part to the trade. It appears that the parties who purchased from Gale were on the land when they purchased, and saw or knew of the fence; but we find no sufficient evidence to show that they purchased to the lines as represented by the fences, and as to them there was nothing specifically said, except as stated by Gale, who testified that his attention was called to the pipes and fences as well as the excess, which was an inducement to the trade. Gale nor his agents who had the land surveyed and parceled out, notified either of his vendees that he had done so, or furnished either with the field notes of their respective tracts. The surveyor did not furnish either with his work, and in fact knew neither of them at the time. Subsequently, however, it appears that Mrs. Findley and Miller had the land, as marked by the fences, pipes, and stone, surveyed so as to give each a proportion of the excess, and in the proportion of the amount called for by their deeds, and placed their partition fences accordingly. The trial court instructed the jury substantially that the deed of Gale conveyed to Barto 160 acres, Mrs. Findley 240 acres, and Childs 240 acres of section 109, and, if they found the section contained land in excess of what was conveyed by the deeds outside the boundaries of the then several tracts as described by the deeds, to find for plaintiff for the amount of such excess by virtue of the deed from Gale to Buile. He further told the jury in determining the excess, over 640 acres, they should consider all the facts and circumstances as to what is the length of each of the four boundary sides and of said survey between the four corners thereof, and the amount of land inside of

said boundaries. The jury returned a verdict for the defendants.

The first assignment is based on the failure of the trial court to instruct a verdict for the plaintiff, Buile. The proposition thereunder asserts that a section of land fenced on three sides, and marked on the ground, when recognized as corners, and the vendor sells to one vendee, who accepts the deed, then the land actually pointed out is the actual land sold, whether the land actually pointed out was within the bounds of the section intended to be sold, and that both parties are bound to the land actually pointed out, and are estopped to deny the same. The proposition asserts the same proposition of law as applied to the subsequent vendees of Gale.

[1] Without stating more of this complex proposition, we think it does not state a correct proposition of law. Parties making and accepting a deed are bound by its terms. The deed from Curry to Gale conveyed section 109 by its patent number, and recited that the section contained 640 acres. The patent gives the field notes as it was originally surveyed. The original field notes give its beginning corner at the S. E. corner of section 108, calling for its four sides, 1,900 vrs., and for mounds at its corners. The deeds from Gale to his several vendees call simply for the corners and lines of the section. They nowhere call for the rock or pipe corners, or to the fence alleged and sought to be shown, as pointed out, for the lines. It was Curry's evident intention to convey the section according to the original field notes, and Gale's to subdivide and convey to his vendees the entire section, according to its field notes. It would have been a simple matter if Curry had intended to sell, and Gale to buy, the excess asserted to have called for the rock and pipe corners and for the fences thereon located. This the deeds do not purport to do, but they simply confine the field notes to the original field notes, 1,900 vrs. square. They do not call for a survey of 1,917 by 2,016.7 vrs., which appellant now asserts Curry conveyed, and out of which he now claims he conveyed the three tracts of land, aggregating 640 acres, leaving the excess, 45 acres. The uncontroverted evidence shows there were no marks, either natural or artificial, found on the ground, by which the survey could be located from the original field notes; and the testimony is also uncontroverted that no such marks were ever so made, but that the survey was simply platted in from a base line run for a series of blocks, one of which was block M8. It is shown with reasonable certainty the location of the section can be fixed from a known and established corner for this and other sections in the block, platted in consecutively by running the course and distance called for, and that if it was

so surveyed the rock or pipe corners would not be reached. This is a case where the land should be located by course and distance, such calls being the more certain. It is not at all certain that any surveyor ever placed the pipes or rocks to mark the corners of this section. If so, there is no evidence how the surveyor or surveyors arrived at the conclusion that such were the corners of the section. Certainly the original surveyor never called for them or placed them at that point.

[2] It is well settled that nothing passes by deed except what is described in it, whatever the intention of the parties may have been.

[3] While parol evidence is often admissible to ascertain what lands are embraced in the description, such evidence cannot make the deed operate upon land not embraced in the descriptive words. *Gorham v. Settegast*, 44 Tex. Civ. App. 254, 98 S. W. 669; *Sloan v. King*, 33 Tex. Civ. App. 537, 77 S. W. 48.

[4] A grant of 640 acres, located by course and distance, with no marks called for or identified, will not embrace land not included in the 640 acres, or take the grant of conveyance to lines and corners not called for in any deed, simply because the vendor and vendee may have believed when the deed was executed the survey would embrace such lines and corners. If such was their understanding and purpose, they should have embraced that purpose in the deed. All the evidence in this case is to the effect that the field notes of section 109 will not reach either of the corners assumed by the surveyor and Gale. The evidence from the field notes and that of the original surveyor conclusively established there was no excess in section 109. This case does not involve the question of distributing the excess in a block of surveys made at the same time where the boundaries of the block are established. Gale only purchased section 109, or 640 acres, according to its field notes, and within its corners as called for therein. He sold to his vendees, appellees herein, the 640 acres so embraced. He did not sell them the land outside of those corners and between such corners and the stone and pipe corners. Neither by his deed did he purchase such land. He, therefore, had no excess to sell appellant, as he got none by his deed. The case of *Chesson v. La Flore*, 191 S. W. 745, cited by appellant, sustains our proposition. The headnote, which we copy, reflects the opinion of the court:

"Where the boundaries of a grant as actually located and measured on the ground were so described in the deed, they are the limits of the grantee's rights, although the parties intended to make the northern line common with the northern boundary of a larger tract erroneously surveyed and subsequently found to be further north than the boundary described in the deed."

We do not think the circumstances of acquiescence in this case would have authorized the trial court to have instructed the jury to find a verdict for the appellant for the land sought to be recovered. It is our view that the court could not properly have instructed the jury that the recognition of the stone and pipe corners by the parties were conclusive. No deed executed at the time called for them; no party appears to have asserted that they were corners. It was simply asserted that there was an excess in the survey, and no deed called for the excess; in fact, it is shown the surveyor and Curry recognized that the field notes would not place the corners at these points.

[5] The strongest statement of which the rule with reference to acquiescence can be made is that it should have great weight, and may furnish a strong presumption that the line acquiesced in is the correct line. However, acquiescence is a question of fact for the jury. *Lopez v. Vela*, 200 S. W. 1111, and authorities cited; *Medlin v. Wilkins*, 60 Tex. 409; *Hefner v. Downing*, 57 Tex. 580; *Wiley v. Lindley*, 56 S. W. 1001; *Camp v. League*, 92 S. W. 1066. But where there is no room to doubt the true location, a mere acquiescence in another line would not support a verdict in favor thereof. *Bundick v. Moore-Cortes Canal Co.*, 177 S. W. 1030, at page 1036; *Campbell v. Hamilton*, 210 S. W. 621. It is asserted that appellees are estopped to deny the corners as claimed by appellant. There might be some ground for claiming that Curry as to Gale would be estopped from claiming that the corners were elsewhere, but this would not be established by conclusive evidence. While Gale testified that Curry represented there was an excess in the section and designated the fence, stone, and gas pipe, Curry does not so testify in terms, but, on the contrary, states he did not know of his own knowledge who put in the corners, and that his understanding was they would not be reached by survey from known corners. His deed certainly does not call for them, and does not purport to convey an excess. Gale obligated himself in his deed to survey and furnish appellee the field notes of their several tracts within the four corners of section 109. This he did not do. He appears to have made a survey for his own benefit and to establish an excess. He was not induced thereby by anything the appellees did. The mere fact that they afterwards appropriated this excess did not injure Gale. If the excess was not conveyed to him, he lost nothing. Appellant does not show that he was induced to purchase the particular piece of land by reason of the acts of conduct of appellees. He evidently purchased on the assumption that the stone and pipes marked the corners. These were not placed there by appellees. Their deed did not call for them;

in fact, if, as the evidence indicates, the lines and corners of section 109 would not reach the stone and pipe corners, the excess was outside of section 109, and was not in the field notes of the appellees. The land sued for by appellant would fall on the land conveyed to appellees by Gale, and hence he has no title thereto. If appellees appropriated the excess outside, it is none of appellant's concern, for it is not his by deed or otherwise. There is nothing in the evidence to show that either Bule or Gale were induced to change their position for the worse by any thing appellees did.

[8] In our judgment, there was no estoppel. *Love v. Barber*, 17 Tex. 312; *Clevenger v. Blount*, 103 Tex. 27, 122 S. W. 529; *Decker v. Rucker*, 202 S. W. 1001; *Ware v. Perkins*, 178 S. W. 846. It is our view that the appellant was required to show an excess in section 109, and that the land he sues for was not included in the deeds to the appellees. This we do not think he has established. At least, the jury had evidence to support their verdict that there was no excess.

The second, third, and fourth assignments are overruled for the reasons heretofore given.

The judgment of the trial court will be affirmed.

#### HOUSTON HEIGHTS WATER & LIGHT ASS'N et al. v. GERLACH et al. (No. 7781.)

(Court of Civil Appeals of Texas. Galveston. Nov. 6, 1919.)

#### 1. INJUNCTION ⇨19—PREVENTION OF MULTIPLICITY OF SUITS.

Equity will grant an injunction to prevent a multiplicity of suits; the question of whether, in a particular case, equity will assume jurisdiction, depending, if case is not covered by a controlling precedent, upon the merits of the particular case, the real and substantial convenience of all parties, the adequacy of the legal remedy, the situations of the parties, the points to be contested, and the result to follow as to whether the interests of any of the parties will be unreasonably overlooked or obstructed.

#### 2. EQUITY ⇨44—JURISDICTION OF DISTRICT COURT IN PROTECTING PARTIES IN OTHER COURTS.

The exercise by district court of equity jurisdiction to protect the rights of parties in other courts is not an encroachment upon the jurisdiction of the other courts, even when it prevents such courts from proceeding with the trial of cases within their jurisdiction.

#### 3. EQUITY ⇨44—JURISDICTION OF DISTRICT COURT TO GIVE RELIEF IN JUSTICE COURT.

The exclusive jurisdiction given a justice court in certain classes of cases was not intended to limit or restrict the equity jurisdiction of the district court to give relief against wrong

and injustice, when the justice court does not possess adequate power to grant such relief.

#### 4. PLEADING ⇨214(1)—GENERAL DEMURRER ADMISSION OF FACTS.

The facts alleged in petition must be taken as true on general demurrer.

#### 5. INJUNCTION ⇨28(4) — MULTIPLICITY OF SUITS IN JUSTICE COURT FOR PURPOSE OF ANNOYING DEFENDANTS.

Where seven members of the same household, at the instigation of one of them, brought separate damage suits against defendants for same alleged wrongful act, and where the suits were wholly without merit and for the purpose of harassing and annoying defendants and causing them to expend attorney's fees and costs and were brought in justice court, where they could not be consolidated, and for an amount just below amount which would have entitled defendants to an appeal, for purpose of preventing such appeal, equity will enjoin further prosecution of suits in justice court and require them to be tried in one proceeding in district court, since such proceeding will be a relief to defendants and will work no hardships to the plaintiffs.

Appeal from District Court, Harris County; Wm. Masterson, Judge.

Suit by the Houston Heights Water & Light Association and another against Harry C. Gerlach and others. Judgment for defendants, and plaintiffs appeal. Reversed and remanded.

Baker, Botts, Parker & Garwood, of Houston, for appellants.

F. Charles Hume, Jr., and Harry C. Gerlach, both of Houston, for appellees.

PLEASANTS, C. J. This is a suit for an injunction brought by appellants, Houston Heights Water & Light Association and the Houston Gas & Fuel Company, against Harry C. Gerlach and six other named defendants. The trial court sustained a general demurrer to plaintiffs' petition, and, plaintiffs declining to amend, their suit was dismissed.

For cause of action appellants alleged that on the 17th day of October, 1918, each of the appellees herein filed suit in the justice court of precinct No. 1, Harris county, Tex., Leon Lusk, justice of the peace, said suits being numbered on the docket of that court 28151 to 28158, respectively, and that citations in the seven suits were served on the same day upon F. D. Murphy as agent of the two appellants, a copy of the citation in each case being attached to their petition.

Appellants further alleged that all of the plaintiffs in the seven suits are relatives of either the said Gerlach or his wife, and that all of them live with Gerlach as members of his family at No. 1202 Rutland street, in Houston Heights; that each of said suits is based on identically the same alleged cause of action; that the cause of action alleged

In each of the seven suits is that appellees were residing at 1202 Rutland street, in the city of Houston Heights, Harris county, Tex.; that appellants were obligated to furnish appellees water, and that on the 15th day of October, 1918, appellants, without notice and without presenting a bill, shut off the water in front of appellees' residence; that the agent of appellants used no discretion or ordinary care in determining his right or authority to cut off the water; and that the water shut off deprived appellees of the use thereof in the middle of a raging and severe epidemic of gripe and pneumonia.

Appellants alleged that they have a valid and sufficient defense to each and all of the suits filed by appellees, in this, that appellant Houston Gas & Fuel Company had no connection whatsoever with the transaction involved in these suits; that it did not own the water system during the time appellees were being supplied with water; and that the agent who cut off the water as referred to in the suits of appellees was not in fact an agent of the Houston Gas & Fuel Company. Houston Heights Water & Light Association had previously had a contract with J. A. Jackson, whereby it was supplying water through its water system to the said J. A. Jackson at 1202 Rutland street in Houston Heights, and J. A. Jackson had for a number of years been paying all the water bills for such service, and such payments were made by J. A. Jackson until about the 1st day of July, 1918. On information and belief appellants alleged that on or about July 1, 1918, J. A. Jackson sold and disposed of the property to one L. F. Harris, and that from and after that date the bills of appellant Houston Heights Water & Light Association for water remained unpaid, although service was maintained and water supplied at that number as had previously been done; that in the early part of August, appellee Harry C. Gerlach, with his family, moved into and occupied the house known as No. 1202 Rutland street, under some contract or agreement with L. F. Harris; and that Gerlach with the other appellees lived and resided at said number continuously up until the filing of this suit.

Appellants alleged that until after the water was cut off neither of them had any contract whatever with either L. F. Harris or with any of the appellees for the supplying of water at said place, although Gerlach and the other appellees had been using said water, as appellants were informed and believe, from on and about the 1st day of August, 1918, until the 15th day of October, 1918; that the collector of the Houston Heights Water & Light Association made four calls on various dates in an effort to collect the bills due for the water, and that on three of these visits members of the household of appellee Harry C. Gerlach, and some one of the appellees, gave various ex-

cuses for failing to pay the bill; that, after such repeated efforts to collect the sum admittedly due, the Houston Heights Water & Light Association, on the 15th day of October, 1918, cut off the water from said premises, as it had a perfect right to do and as it should have done several weeks previously; that if appellees had been using water from the system of appellant, as alleged in the suits filed by them, they had been using the same without paying therefor and without having any contract whatsoever with appellant therefor, and appellant had a perfect right to cut off the supply of water; that, after the water was cut off on the 15th day of October, L. F. Harris called at the office of appellant Houston Heights Water & Light Association, on the afternoon of October 16, 1918, and paid to appellant all bills due up to October 1, 1918, for water theretofore supplied, and about 5:30 o'clock that afternoon the water was again turned on.

Appellant further alleged, on information and belief:

That, after the bill was so paid by L. F. Harris, the appellee Harry C. Gerlach refunded and repaid to Harris the bill covering the months of August and September, the period the premises had been occupied by Gerlach and the other appellees in this suit.

That appellees, neither individually nor collectively, had any contractual relations whatsoever with either of the appellants, and had no right to require these appellants, or either of them, to furnish water service without having previously contracted therefor. That said suits were therefore wholly without foundation.

That all of the suits brought by appellees were based on identically the same transaction, and that the testimony of appellants in opposition to the suits will be in each case exactly the same. That all of the suits were filed by appellee Harry C. Gerlach, as attorney, and were all instituted and the filing thereof induced by Gerlach. That the suits were brought in the justice court for amounts accurately placed within the exclusive jurisdiction of that court, so that no appeal therefrom in any case could be had. That, if the cases are tried in the justice court before a jury, appellants will be unable to have the jury charged as to the law in the case, and, if had before the court, will be had before a judge not required to be learned in the law.

That the purpose and effect of the suits being so brought was to harass and annoy these appellants and to cause them to incur the expense of attorney's fees and other costs in defending the seven suits, all of which are without merit or basis. That, unless appellees are restrained and enjoined from further prosecution of these suits in the justice court, appellants will suffer irreparable injury, and their employes will

be taken away from work to testify as witnesses in the trial of seven different suits, and appellants will incur unusual and unnecessary cost and expenses as attorney's fees, witnesses' fees, and other costs, all of which charges will be entirely out of proportion to the amounts involved, and far in excess of what the expense would be to appellants if one trial of all of the causes were had.

That the appellees and each of them are wholly insolvent, and that, even though appellants should win the seven suits, they would be unable to collect from the appellees the costs incurred by them in the defense of such suits.

Appellants then prayed for a writ of injunction enjoining and restraining, first, temporarily during the pendency of this suit, and on final hearing perpetually, appellees from further prosecuting or taking judgments in any of the suits filed by them, and likewise from filing any further suits in the justice court in the state of Texas on the same alleged cause of action, and further that appellees be required to implead in this suit their said cause of action and to determine all issues between the parties in this suit.

The petition was properly verified.

A temporary restraining order was granted by the Honorable William Masterson, judge of the Fifty-Fifth judicial district court, restraining appellees and each of them from further prosecution of said suits.

The appellees answered by general demurrers and a general denial.

Upon hearing before the court, the demurrers to appellants' petition were sustained, and, upon their declining to amend, judgment was rendered in favor of appellees.

The only assignment of error presented by appellants, and the proposition thereunder, are as follows:

"The court erred in sustaining appellees' general demurrers to appellants' petition, for the reason that said petition presented a case for the interposition of a court of equity to prevent a multiplicity of suits, in that it sought to enjoin the separate prosecution of seven separate suits brought in the justice court by seven members of the same household, all of whom were insolvent, for damages growing out of one and the same alleged wrongful act, and involving the same questions of law and substantially the same or similar questions of fact, where no appeal would lie from the judgment of the justice court, and where said petition showed a good and sufficient defense to all of said suits."

First proposition under first assignment of error:

"A court of equity, in order to prevent a multiplicity of suits, will enjoin the separate prosecution of a number of suits brought by various members of the same household, all insolvent, for damages growing out of one and the same alleged wrongful act, and involving

the same questions of law, and substantially the same or similar questions of fact, where no appeal would lie from the judgment of the justice court in any one of said cases, and where the defendants in all of said cases have the same good and sufficient defenses."

[1] The authorities are conflicting upon the question presented by this assignment. No ground of equity jurisdiction is more firmly established than the prevention of a multiplicity of suits, but there is much divergence of opinion as to the limits of the doctrine and its proper application in particular cases.

Mr. Pomeroy, in his great work on Equity Jurisprudence, in stating the several conditions in which a multiplicity of suits could arise which would call for the exercise of equity jurisdiction for their prevention, by settling all the rights and all the controversies in one judicial proceeding, enumerates four classes of controversies. Classes 3 and 4 are thus defined:

"(3) Where a number of persons have separate and individual claims and rights of action against the same parties, but all arise from some common cause, are governed by the same legal rule, and involve similar facts, and the whole matter might be settled in a single suit by all these persons uniting as coplaintiffs, or by one of the persons suing on behalf of the others, or even by one suing for himself alone. The case of several owners of distinct parcels of land upon which the same illegal assessment or tax has been laid is an example of this class.

"(4) Where the same party has or claims to have some common right against a number of persons, the establishment of which would regularly require a separate action brought by him against each of these persons, or brought by each of them against him, and instead thereof he might procure the whole to be determined in one suit brought by himself against all the adverse claimants as codefendants. It should be observed in this connection that the prevention of a multiplicity of suits as a ground for the equity jurisdiction does not mean the complete and absolute interdiction or prevention of any litigation concerning the matters in dispute, but the substitution of one equitable suit in place of the other kinds of judicial proceedings, by means of which the entire controversy may be finally decided." Pomeroy's Eq. Jur. vol. 1 (3d Ed.) § 245.

This learned author, in section 255 of the volume before cited, calls attention to the conflict in the authorities upon the question of what must be the essential elements and external form of the common rights, interests, or claims held by a number of persons against a single party, or by one party against a number of others which would authorize a court of equity to exercise its jurisdiction to prevent a multiplicity of suits. Many courts of the highest authority hold that such community of interest must be in the very right or thing which forms the subject-matter of the controversy or claims, but Mr. Pomeroy says:



"The weight of authority is simply overwhelming that the jurisdiction may and should be exercised, either on behalf of a numerous body of separate claimants against a single party, or on behalf of a single party against such a numerous body, although there is no 'common title,' nor 'community of right,' or of 'interest in the subject-matter,' among these individuals, but where there is and because there is merely a community of interest among them in the questions of law and fact involved in the general controversy, or in the kind and form of relief demanded and obtained by or against each individual member of the numerous body. In a majority of the decided cases this community of interest in the questions at issue and in the kind of relief sought has originated from the fact that the separate claims of all the individuals composing the body arose by means of the same unauthorized, unlawful or illegal act or proceeding."

This statement of the rule has been vigorously assailed by many of the courts, and the conflict seems to increase rather than diminish. We think the proper and reasonable solution of the question is that given by the Supreme Court in the case of *Hale v. Allison*, 188 U. S. 56, 23 Sup. Ct. 244, 47 L. Ed. 380. In that case it is said:

"Cases in sufficient number have been cited to show how divergent are the decisions on the question of jurisdiction. It is easy to say it rests upon the prevention of a multiplicity of suits, but to say whether a particular case comes with the principle is sometimes a much more difficult task. Each case, if not brought directly within the principle of some preceding case, must, as we think, be decided upon its own merits and upon a survey of the real and substantial convenience of all parties, the adequacy of the legal remedy, the situations of the different parties, the points to be contested, and the result which would follow if jurisdiction should be assumed or denied; these various matters being factors to be taken into consideration upon the question of equitable jurisdiction on this ground, and whether within reasonable and fair grounds the suit is calculated to be in truth one which will practically prevent a multiplicity of litigation, and will be an actual convenience to all parties, and will not unreasonably overlook or obstruct the material interests of any. The single fact that a multiplicity of suits may be prevented by this assumption of jurisdiction is not in all cases enough to sustain it. It might be that the exercise of equitable jurisdiction on this ground, while preventing a formal multiplicity of suits, would nevertheless be attended with more and deeper inconvenience to the defendants than would be compensated for by the convenience of a single plaintiff, and where the case is not covered by any controlling precedent the inconvenience might constitute good ground for denying jurisdiction."

"We are not disposed to deny that jurisdiction on the ground of preventing a multiplicity of suits may be exercised in many cases in behalf of a single complainant against a number of defendants, although there is no common title nor community of right or interest in the subject-matter among such defendants, but where

there is a community of interest among them in the questions of law and fact involved in the general controversy."

In the judicial system of this state the district court is made the reservoir of equity jurisdiction and given the power to exercise that jurisdiction for the protection of the rights of the citizens in all cases in which such rights are invaded, and no other court in this state has the power to give adequate protection against such invasion.

[2] The exercise of this jurisdiction by the district court cannot be regarded as an encroachment upon the jurisdiction of other courts, even when it prevents such courts from proceeding with the trial of cases within their jurisdiction.

[3] The exclusive jurisdiction given a justice court in certain classes of cases was not intended to limit or restrict the equity jurisdiction of the district court to give relief against wrong and injustice when the justice court does not possess adequate power to grant such relief.

The petition in this case alleges facts which, if true, show that the suits sought to be enjoined are wholly without merit and were brought at the instigation of defendant Gerlach, all of the defendants being members of his household, for the purpose of harassing and annoying the plaintiffs and causing them to expend large sums in attorney's fees and costs in defending the suits. The suits cannot be consolidated in the justice court and tried as one case so as to avoid the costs, loss of time, expense, and annoyance necessarily incident to a separate trial of each suit. The amount claimed in each suit was fixed just below the amount necessary to entitle plaintiffs to appeal, for the purpose of preventing such appeal and thus requiring plaintiffs to have their defenses finally determined in a court presided over by an officer who is not required to know the law, and not permitted to instruct the jury as to the law of the case.

[4, 5] If the facts alleged are true (and upon general demurrer they must be taken as true), we think they call for the interposition of the equitable power of the district court. The remedy sought by appellants is a relief to them and will work no hardship upon appellees, who can set up their demands in this suit and have the litigation determined in one proceeding and at no apparent increase in expenses or annoyance to them. As said by our Supreme Court in the case of *Railway Co. v. Dowe*, 701 Tex. 5, 7 S. W. 368:

"Our system of procedure is essentially equitable, \* \* \* and was designed to prevent more than one suit growing out of the same subject-matter of litigation; and our decisions from the first have steadily fostered this policy."

While this statement of the Supreme Court was made in a case in which an injunction

was sought against the prosecution by one person of a number of suits against the plaintiff, all growing out of the same subject-matter of litigation, we quote it as showing the general tendency of our courts to exercise their equitable jurisdiction to prevent a multiplicity of suits. Brown on Jurisdiction, § 196, lays down the general rule as follows:

"As a fundamental principle, equity takes jurisdiction where it is made necessary to administer a preventive remedy, or when the courts of ordinary jurisdiction are made instruments of injustice, or when the right of action is given by law, but the remedy allowable by the court within its jurisdiction is inadequate to meet the demands of justice."

In the case of *Supreme Lodge v. Ray*, 166 S. W. 46, the Court of Appeals for the Sixth District held that the district court was authorized to issue an injunction restraining 39 defendants from prosecuting separate suits against the plaintiff, a fraternal benefit association, for recovery of assessments claimed by them to have been illegally made. The opinion in this case sustains our conclusion that, if the allegations of the petition in the instant case are true, appellants are entitled to the relief asked by them.

The Kentucky case of *Railway Co. v. Baker*, 155 Ky. 512, 159 S. W. 1169, 49 L. R. A. (N. S.) 496, was a suit by the railroad company for injunction to restrain 41 defendants from prosecuting separate suits in the quarterly court for damages for the alleged failure of the railroad company to furnish them transportation. Each of the suits was for \$25 and was brought for that amount for the purpose of preventing an appeal. In passing on the questions presented in the case, the court, after stating the general rules under which the defendants had the right to institute separate suits in the quarterly court and have that court hear and determine their claims, says:

"There are, however, some well-founded exceptions to these general rules, and these exceptions have themselves the merit that under their application the plaintiffs will not be unreasonably delayed in the assertion of their rights, or denied the privilege of having their controversy heard and determined by a court of competent jurisdiction. The most usual exception arises when there are a multitude of suits pending by different parties against the same defendant, growing out of the same transaction, and the character of the asserted demands are such that the rights of the plaintiffs can be fully protected by having them all disposed of in one action, thus saving to the defendant the inconvenience, cost, and expense of defending numerous individual suits seeking to accomplish the same end. \* \* \*

"We think there is a broad distinction between invoking the jurisdiction of a court of equity to prevent a multiplicity of suits by different plaintiffs each having a separate, distinct, meritorious cause of action, and invoking this jurisdiction to prevent a multiplicity of suits by

plaintiffs who have not a legally enforceable demand against the defendant. And so, if these coal diggers have not a meritorious demand against the defendant railroad company, there are many reasons why the jurisdiction of a court of equity should be invoked to require all their suits to be heard and determined in one action, that could not be invoked if each of them had a meritorious claim. If no one of the plaintiffs in the quarterly court is entitled to recover any amount against the defendant company in any of these suits, it would be an extraordinary hardship on the defendant to put it to the expense, inconvenience, and cost of defending this multitude of suits in the quarterly court, and be an intolerable condition of affairs if, after defending them to the best of its ability, a binding and unreviewable judgment should be rendered against it in each case for the amount claimed, and it be compelled to pay the large sum that would be required to satisfy these various judgments without an opportunity to have its rights determined by a court speaking with more authority than the quarterly court.

"Having in mind the distinction that should be observed between the assertion of valid and groundless claims, we think that, when a large number of cases arising out of the same transaction or resting on the same common ground have been instituted by different plaintiffs against the same defendant, and none of the plaintiffs have a legally meritorious or enforceable demand against the defendant, the jurisdiction of a court of equity may be invoked to the end that the rights of the parties, plaintiffs and defendant, may be heard and determined in one proceeding, thereby saving the defendant from the unjust burden of defending a number of separate suits."

The case of *Buckeye Garment Co. v. Hieatt*, 177 Ky. 783, 198 S. W. 21, which was also decided by the Kentucky court, approves and follows the holding in the *Baker Case*, *supra*.

We think the trial court erred in sustaining the demurrer to the petition, and the judgment should be reversed and the cause remanded.

Reversed and remanded.

#### CHITTIM v. PARR et al. (No. 6267.)

(Court of Civil Appeals of Texas. San Antonio. Oct. 29, 1919. Rehearing Denied Nov. 26, 1919.)

DISMISSAL AND NONSUIT §60(9) — NONAPPEARANCE BY PLAINTIFF REQUIRES DISMISSAL, NOT JUDGMENT FOR DEFENDANT.

Notwithstanding *Vernon's Sayles' Ann. Civ. St. 1914, art. 1944*, that every suit shall be tried when called, unless continued, postponed, or be placed at the end of the docket, a suit in which there is no pleading for affirmative relief by defendants should be dismissed for want of prosecution if plaintiff fails to appear at time set for trial, not tried in plaintiff's absence, and judgment on the merits rendered for defendants.

Error from District Court, Duval County; V. W. Taylor, Judge.

Suit by Mrs. Annie E. Chittim against G. A. Parr and others. From a judgment for defendants after trial, at which plaintiff failed to appear, plaintiff brings error. Reversed, and judgment entered dismissing the case for want of prosecution.

Dougherty & Dougherty and G. C. Robinson, all of Beeville, for plaintiff in error.

James B. Wells, of Brownsville, Hicks, Hicks, Dickson & Bobbitt, of San Antonio, and C. C. Forry, of Alice, for defendants in error.

COBBS, J. This was a suit instituted by plaintiff in error in the district court of Duval county against defendants in error, in which she sought to have a judgment lien established on certain land in Duval county, and foreclosed. The judgment was alleged to have been rendered against defendant A. Parr, and that title to the land had been fraudulently taken in the name of defendant G. A. Parr, and the defendants answered separately by general denials only. At the May term of the district court of Duval county, on May 21, 1918, the case was set for trial on the 30th day of that month, being on the jury docket, and on May 30, 1918, the case was called for trial, and the plaintiff did not appear in person or by counsel. The court, in the absence of both plaintiff and counsel, upon the announcement of ready by defendant, proceeded to impanel a jury, and a verdict was returned for defendants, and judgment was thereupon rendered that plaintiff take nothing by her suit against defendants, and that they go hence without day and recover their costs.

The sole assignment and proposition necessary to be considered, properly raised and briefed by plaintiff in error, is that the court erred in proceeding to impanel a jury and try this case in the absence of the plaintiff, and the only final judgment that should have been entered was to dismiss the case for want of prosecution.

Defendants in error do not controvert the facts, but take issue with the propositions of law asserted by plaintiffs in error and contend by, first, counter proposition, it is the duty of the trial court to try every suit when it is called for trial, or postponed to be called again in its regular order, where either party is present in court, demanding trial, and, second, case having been regularly called for trial and defendants insisting on trial it was the duty of the court to try, unless a proper motion for continuance was made or a non-suit was taken.

No cross-action or plea for affirmative relief was filed by defendants in error.

For the affirmance of the judgment and in support thereof defendants in error insist this

case should be controlled by article 1944 of Vernon's Sayles' Tex. Civ. Stats., and 'be tried when called in the absence of the plaintiff.' We cannot give the effect to the statute cited that defendants in error insist upon.

In cases where plaintiffs fail to appear, and there is no proper pleading for cross or affirmative relief on file and pending, if defendants insist upon a trial upon its merits, it is entirely proper for the court to dismiss plaintiffs' case for want of prosecution. *Houston v. Jennings*, 12 Tex. 487; *Burger v. Young*, 78 Tex. 656, 15 S. W. 107; *Harris v. Schlinke*, 95 Tex. 88, 65 S. W. 172; *Allen v. Ft. Stockton Irr. L. Co.*, 135 S. W. 682; *Drummond v. Lewis*, 157 S. W. 268.

The judgment of the court is reversed, and judgment rendered, dismissing the case for want of prosecution, without prejudice.

BERING MFG. CO. v. SEDITA et al.  
(No. 466.)

(Court of Civil Appeals of Texas. Beaumont.  
Nov. 15, 1919. Rehearing Denied  
Nov. 26, 1919.)

1. MASTER AND SERVANT  $\S$ 236(8) — CUSTOM  
AS TO GUARDING MACHINE QUESTION FOR  
JURY.

Where the proof showed that a sander machine, without cover over the rollers in which employe's hand was caught, was the only character of sander machine then built, that a similar machine was used by others in the same business, and that no machine was protected by a screen over the rollers, there was no inference of negligence in failure to have screen, and submission of question of such negligence to jury was error.

2. MASTER AND SERVANT  $\S$ 91—EMPLOYMENT  
OF INEXPERIENCED EMPLOYE ON MACHINE  
WITHOUT GUARDS.

Employer was not negligent in permitting boy almost 16 years of age, who had never before worked about machinery, to work as off-bearer at sander machine with duty of taking boards out of machine after they had passed between unguarded rollers, where he was not required to put his hand closer than 12 inches to rollers and where he realized the danger of getting hand between rollers.

3. MASTER AND SERVANT  $\S$ 356 — ASSUMED  
RISK NOT AVAILABLE.

Defense of assumed risk is not available to employer who was not a subscriber under the Employers' Liability Act (Acts 1913, c. 179; Vernon's Sayles' Ann. Civ. St. 1914, §§ 5246h-5246zzzz).

4. TRIAL  $\S$ 203(3)—INSTRUCTION PRESENTING  
AFFIRMATIVE OF ISSUE.

In action for injuries to employe from negligence of employer, refusal to give employer's special charge grouping and presenting in an affirmative way the defenses of employer to employe's charge of negligence held error.

Appeal from District Court, Harris County; A. R. Hamblen, Judge.

Suit by V. Sedita and another against the Bering Manufacturing Company. Judgment for plaintiffs, and defendants appeal. Reversed and rendered.

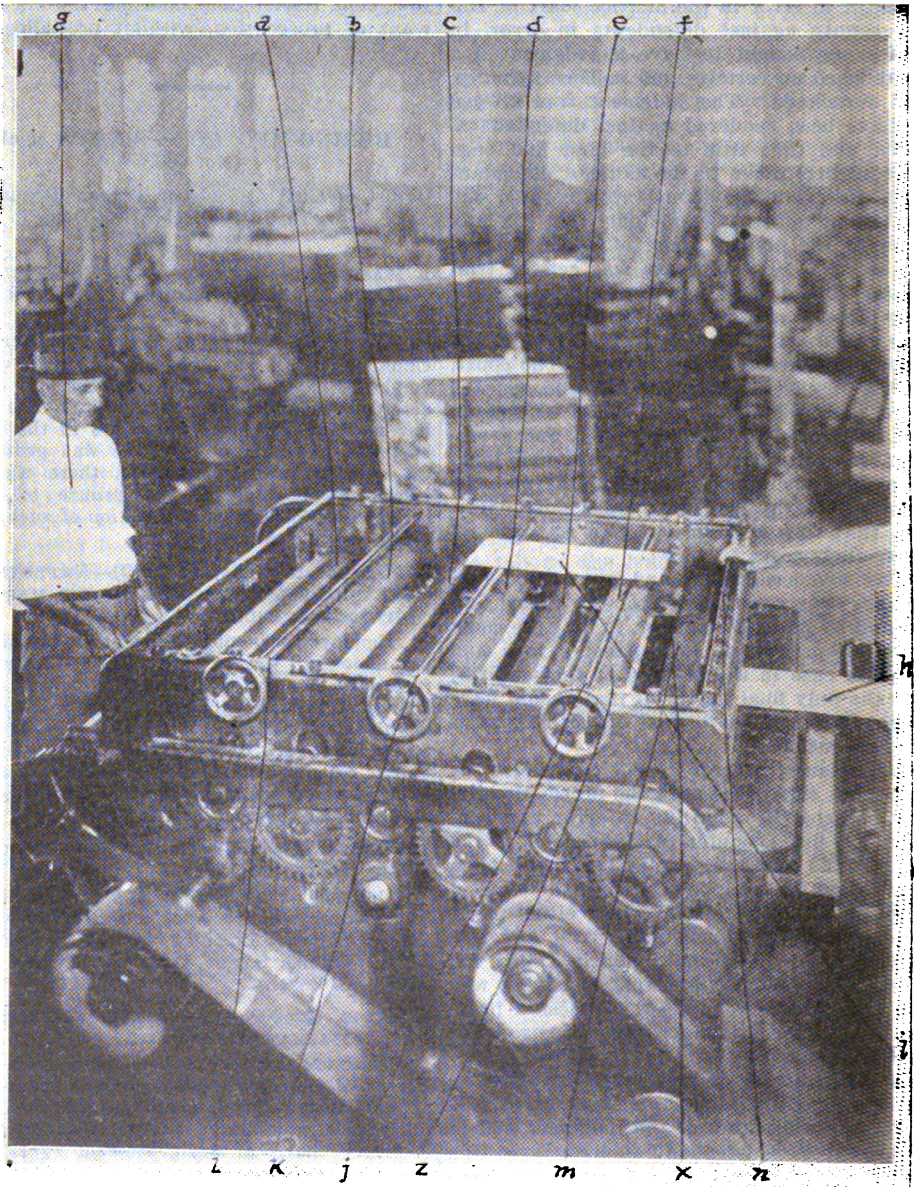
Sherman & Landon, of Kansas City, Mo., and Cole & Cole, of Houston, for appellants.

Woods, Barkely & King, of Houston, for appellees.

WALKER, J. This suit was instituted by V. Sedita, as a feme sole, on behalf of herself and as next friend for her minor son, Law-

rence Sedita, to recover for personal injuries alleged to have been inflicted by the negligence of the defendant on her said minor son on the 13th day of January, 1916, while he was engaged as an employé of the defendant, at defendant's place of business in Houston, Harris county, Tex. The trial resulted in a verdict in favor of V. Sedita for \$500, and in favor of Lawrence Sedita for \$2,400.

Lawrence Sedita was employed by the defendant to work at a sander machine. The character of this machine is well illustrated by the accompanying photograph, which is designated in the statement of facts as "Exhibit B.":





This picture gives a view of the top of the machine. Letters "a," "b," "c," "d," "e," and "f" on this photograph indicate what is known as the dead rollers between which and the live rollers, which cannot be seen and which lie underneath these dead rollers, the plaintiff Lawrence Sedita got his hand caught. Letter "g" represents a man who is standing where the operator, Rapsilver, was standing on the day of the accident, and shows the proper position for feeding planks into the sander machine. Letter "h" shows the position in which a man would stand who would fall off or off-bear the boards and the place where the plaintiff Lawrence Sedita had to stand to do his work. This photograph very well illustrates the distance from the sander machine that a man would naturally stand in performing this duty. Letter "i" indicates a plank being fed back from the off-bearer to the operator. Letters "j" "k" and "l" on this photograph are iron rods connecting the frame of the sander machine. Letter "m" indicates the dead roller under which Lawrence Sedita got his hand caught. This dead roller turned toward the operator, Rapsilver, and away from Sedita. Letter "n" on this exhibit indicates an iron frame of the sander machine, which stands between the off-bearer and any of the rollers, and is 10 or 12 inches deep.

Among other grounds of negligence, plaintiff pleaded that the defendant was guilty of negligence "in permitting a young boy of inexperience and immature years, as was the said Lawrence Sedita, to work around said machine, with the rollers and machinery exposed as they were, and without any protection or guard, or anything to keep one from getting their hands entangled in said machine."

This was the only ground of negligence submitted to the jury. Based on this pleading, the court submitted special issue No. 1, as follows:

"Was the defendant guilty of negligence, as that term has been hereinbefore defined to you, in permitting a boy of the age, intelligence, and experience of Lawrence Sedita to work around the sander machine in question without a cover or screen over the rollers of said machine in which his hand was caught?"

Appellant's first assignment of error is that the court erred in refusing to instruct a verdict in its favor. The majority of the court is of the opinion that this assignment should be sustained. I dissent from this conclusion; but, as I have been instructed by my Brethren to prepare the opinion of the court in this case, I shall endeavor fairly to present their position, and also to make my own position clear on the issues involved.

Appellant presents this assignment under three subdivisions:

1. That no negligence is shown against the defendant company, because the uncontro-

216 S.W.—41

verted and undisputed proof in this case shows that the appellant, in regard to not having a guard over the sander machine, conformed to the universal usage in other concerns of similar character, and without dispute showed that there was never a sander machine constructed, within the knowledge of any of the witnesses in the case, that had a guard on it.

2. (The question involved in the second subdivision was submitted to the jury and the jury found in appellant's favor.)

3. The third subdivision presents the issue that, under the uncontradicted testimony in this case, Lawrence Sedita was not a boy of such inexperience and immature years as to warrant a jury in finding the defendant guilty of negligence in permitting him to work at the sander machine. Both of these propositions are sustained by the majority of the court.

Reverting to the first subdivision mentioned above, appellant succinctly states the facts of this case in his proposition under this subdivision, as follows:

"The undisputed evidence in this case showed the following uncontroverted facts:

"(a) The sander machine on which the plaintiff Lawrence Sedita was working was 55 inches, or 4 feet and 7 inches high, and 5 feet square.

"(b) The end of the machine where plaintiff Lawrence Sedita was standing had an iron frame inclosing the rollers, and from the top of this iron frame down underneath the rollers where plaintiff's hand was hurt is 12 inches, or one foot.

"(c) At the end of the machine where plaintiff Lawrence Sedita stood, and at the base of the perpendicular iron frame just above described, extends an iron piece lying flat down, which comes out 6 inches further at the back end of the machine, where the plaintiff Lawrence Sedita would stand.

"(d) In addition to this, there is a support for the planks to come out on, and which stands between plaintiff Lawrence Sedita and the sander machine.

"(e) Plaintiff Lawrence Sedita, in doing his work, was not required to put his hand down among the rollers or to come closer to them with his hands than 12 inches, and he stood two feet back of the machine to do his work.

"(f) The dead roller which drew his hand in was moving away from him, towards the operator, at the other end of the machine.

"(g) The plaintiff in error Lawrence Sedita testified that he did not need to lay his hand down among the rollers to perform any of the functions of his work, and that it was not a proper place for him to put his hands, in which statements he was corroborated by all of the defendant's witnesses.

"(h) The plaintiff pleaded that he did not know how he got his hand between the roller, and he testified to that effect, and all the defendant's witnesses corroborated the plaintiff, to the effect that they could not conceive how he got his hand where he did.

"(i) No sander machine was ever known to

any witnesses in the case to have a cover on top of it, and all companies used sander machines without covers on them.

"(j) This machine has been in operation in the appellant's plant for 19 years, and no accident ever happened on it before.

"(k) If a cover should be put on the machine, some kind would have to be used as would not obscure visibility of the rollers, and thus interfere with the practical functions of the machine, in this, that it was essential to see the planks go through the sander machine, so as to prevent them becoming jammed, and thus to keep them open and separate from each other."

On those facts appellant announces this proposition:

"We maintain that where the undisputed facts were as set out hereinabove, that no inference of negligence can be drawn as against appellant, and that ordinary minds cannot differ on the question of defendant's negligence, and that the peremptory instruction should have been given to the jury on this phase of the case."

Some of the witnesses of appellant testified that it would be impracticable to operate this machine with a screened cover; but B. F. Femelat, an experienced mill man, a witness for appellant, testified as follows:

"There could have been attached a screen over the top of this sander machine so you could yet see the boards go through if you had the right mesh to the screen, and if that was done its functions would not be interfered with in any way. You could see your roll boards and rollers."

Appellant, in its brief, discussing the question of law involved in this proposition, says:

"On no one question may there be found so great a diversity of opinion among the different jurisdictions in this country than on the question involved, namely: Will the conformity by a master to the common usage and custom of others engaged in the same business, as to any instrumentality to be used by the servant, exonerate the master from liability for negligence as a matter of law? Until the recent case of *H. & T. C. Railroad Co. v. Alexander*, supra [103 Tex. 594, 132 S. W. 119], we would have assumed that Texas was committed to a negative answer of that question, under such well-known cases as *G. & S. F. R. Co. v. Evansich*, 61 Tex. 5, and *G. & S. F. v. Smith*, 87 Tex. 357, 28 S. W. 520.

"However, in *H. & T. C. v. Alexander*, supra, our Supreme Court, speaking through Mr. Justice Williams, reached a conclusion which it seems to us is directly in conflict with the earlier cases above cited, though Mr. Justice Williams took pains to state that he differentiated that case from what he conceived to be the principle enunciated by earlier cases."

In addition to the *Alexander Case*, 103 Tex. 594, 132 S. W. 119, appellant cites. *Taylor v. White*, 156 S. W. 349; *Schroeder v. Michigan Car Co.*, 56 Mich. 132, 22 N. W. 220; *Wilson v. Mass. Cotton Mills*, 169 Mass. 67, 47 N. E. 506; *Kilbride v. Carbon*, 201 Pa. 552, 51 Atl.

347, 88 Am. St. Rep. 829; *Titus v. Bradford*, etc., Ry. Co., 136 Pa. 618, 20 Atl. 517, 20 Am. St. Rep. 944; *Sanford Day Iron Works v. Moore*, 132 Tenn. 709, 179 S. W. 373; *Lively v. American Zinc Co.*, 137 Tenn. 261, 191 S. W. 975; *Labatt on Master and Servant* (2d Ed.) vol. 3, § 940, and cases cited therein. The *Alexander Case* and the *White Case* are the only Texas authorities relied on by appellant.

In the *Alexander Case*, Mr. Justice Williams said:

"It is true that this court has never adopted that theory of the duty of the employer to his employes which concedes to him the legal right to organize and conduct his business in his way, however regardless it may be of their safety, if he will only let them know of the dangers to which he exposes them and obtain their consent to incur them. That the doctrines of assumed risk and contributory negligence have often precluded them from complaining does not entirely preclude the operation of the principle to which this court has always adhered, that the law imposes on employers the duty, in planning and pursuing their businesses, to exercise ordinary care with regard to the safety of the employes, and what we say of the facts of this case is said in full recognition of that principle. But what is the standard by which the question, whether or not that care has been exercised, is to be determined, but the conduct of prudent and careful men in the business under investigation? And when the evidence not only fails to show a departure from the line of conduct pursued by such men, but shows affirmatively complete conformity to it, how can the conclusion of negligence be drawn? Whatever the experience of jurors may enable them to know of affairs of some kinds, it is certainly not true that they can be held to know how such a business as that here in question should be conducted better than all the employers and employes engaged in it. With only such evidence in the case, no issue is presented for a jury to pass upon. The contention for the plaintiff seems to be that the top of the box should have been kept clean. The statement made shows that there was no practice of doing so, and that no one expected it to be done. How, then, is it to be inferred that prudence required that it be done in the proper management of the business? What efforts would have been adequate to the end, and could they have kept the box in a safer condition than would result from its being let alone? The evidence furnishes no other answer than that found in the settled practice of all concerned."

In the *White Case*, supra, Mr. Chief Justice Huff, citing the *Alexander Case* and *Railway Co. v. Seley*, 152 U. S. 145, 14 Sup. Ct. 530, 38 L. Ed. 391, 1 *Labatt on Master and Servant*, §§ 44 and 163, and *Houston & Texas Central Railway Co. v. Cowser*, 57 Tex. 293, said:

"Where the only inference that can reasonably be drawn from the evidence is that the master conformed to the usage of prudent men in well-regulated concerns engaged in his trade or business in the adoption and use of the in-

strumentalities, he may be declared as a matter of law to have been in the exercise of due care."

[1] The majority of this court is of the opinion that the Alexander Case and the White Case control the disposition of this case on this proposition, and the proof showing that the appellant was using the only character of sander machine that was then built, and that all other operators in this line of business used the same character of sander machine, and that none of them was protected with a screen, no inference of negligence could arise as against the appellant, and that no issue of negligence should have been submitted to the jury, on the failure of appellant to screen this machine.

From this statement of the law I most respectfully dissent.

Reverting again to the brief of appellant, in its discussion of the Alexander Case, we find this statement:

"The distinction was very finely drawn by Judge Williams, and we confess ourselves to be at some difficulty in distinguishing that case from earlier pronouncements."

Quoting further from Justice Williams' opinion we find this statement:

"The case is very different from those in which the prevalence of the negligent habit or custom among some employers is invoked as a defense when it has caused injury. In such cases evidence is furnished from which that which was done may be pronounced to have been negligence, and it is therefore held that the constant doing of it is no justification. Here the very test of negligence, when applied to the evidence, can result in no conclusion of its existence."

It seems to me that, if the Supreme Court had intended to overrule or modify the line of decisions previously rendered by it, these decisions would have been specially named and their subsequent authority, as precedents on this question, fully stated. Learned counsel for appellant, referring to the previous history of this proposition in our courts, after a thorough study of this question, said in their brief:

"Will the conformity by a master with the common usage and custom of others engaged in the same business, as to any instrumentality to be used by the servant, exonerate the master from liability for negligence as a matter of law? Until the recent case of *H. & T. C. Railroad Co. v. Alexander*, supra, we would have assumed that Texas was committed to a negative answer of that question"—citing the *Evan-sich Case* and the *Smith Case*, to which we have referred above.

The Supreme Court must have realized the full force of these and other decisions by the appellate courts of Texas on this question, and, if the majority of this court is correct in its construction of the Alexander Case, all this line of authorities was overruled, and

the rule on this question entirely changed, without any special mention by the Judge who wrote the opinion. This question has been before our courts frequently since the decision of the Alexander Case. *Armour v. Morgan*, 151 S. W. 861; *Magnolia Paper Co. v. Duffy*, 176 S. W. 90; *Railway Co. v. Gatewood*, 185 S. W. 932; *Skelton & Wear v. Wolfe*, 200 S. W. 901; *Ebersole v. Sapp* (Com. App.) 208 S. W. 156; *Taylor v. White* (Com. App.) 212 S. W. 656; and *Taylor v. White*, 156 S. W. 349. In some of these cases the Alexander Case is referred to, but in none of them, except in the opinion by the Court of Civil Appeals, in the White Case, 156 S. W. 349, is the Alexander Case given the construction now being followed by the majority of this court.

In the Gatewood Case, supra, Justice Dunklin, speaking for the Court of Civil Appeals for the Second District, cites the Alexander Case as authority for this proposition:

"The rule is well settled that, unless the conduct of the business in a certain manner is negligence per se, then proof of a general custom of others following a like business to pursue the same course is admissible, as tending to show that the method so adopted was not a negligent one."

Again, in *Shelton & Wear v. Wolfe*, 200 S. W. 901, Justice Dunklin, speaking for the same court, says:

"Another contention presented by several assignments in different forms was substantially to the effect that, if the proof showed that the defendants were operating their glass factory in the same manner and using and furnishing the same character of machinery, appliances, equipment, and the same character of place in which to work as were actually employed by other prudent, well-regulated concerns operating and engaged in the same character of business, then they were not guilty of actionable negligence, and that the court erred in failing to so charge the jury. We think this contention is unsound. Appellants have cited *H. & T. C. Ry. Co. v. Alexander*, 103 Tex. 594, 132 S. W. 119, and *Taylor v. White*, 156 S. W. 349. There are some expressions in those decisions to the effect that, if the master, who is charged with negligence, can show that the business in question was conducted in the same manner as that pursued by other prudent, well-regulated concerns of the same character, he cannot be held liable to a servant for damages resulting therefrom. But we do not understand that they go to the extent of denying the general principle that negligence consists of the failure to exercise ordinary care, and that ordinary care is the failure to do that which a person of ordinary prudence would have done, or the doing of that which a person of ordinary prudence would not have done under the same or similar circumstances; in other words, the test at last is how a person of ordinary prudence would have acted under the same or similar circumstances. We do not construe those decisions as holding otherwise than that

there was no evidence deduced in those cases upon which negligence could be reasonably inferred."

Justice Dunklin follows this statement with citations from the *Evansich Case* and the *Smith Case*, supra, also citing *I. & G. N. Ry. Co. v. Hawes*, 54 S. W. 325; *Kirby Lumber Co. v. Dickerson*, 42 Tex. Civ. App. 504, 94 S. W. 153; 3 *Labatt on Master and Servant*, § 947.

Presiding Justice Sonfield, speaking for the Commission of Appeals, in the *Sapp Case*, supra, cites the *Alexander Case* as authority for this proposition:

"The master cannot be held negligent in furnishing an instrumentality for use by the servant, if the instrumentality would have been considered by an ordinarily prudent person, in the exercise of ordinary care, a proper one for use in the manner and place and for the work for which it was furnished."

The *Alexander Case* was decided by the Supreme Court, opinion being filed November 30, 1910. The opinion in *Magnolia Paper Co. v. Duffy*, supra, was filed April 14, 1915; motion for rehearing being denied May 12, 1915. Thus the *Alexander Case* was nearly five years old when the *Duffy Case* was decided. In the *Duffy Case*, Justice Fly, speaking for the Court of Civil Appeals for the Fourth District, says:

"Even though instrumentalities are the same as those used by all others in the same line of business, it is held in Texas that the use of such appliance may be negligence, and it is for the jury to determine whether the use of the machine was negligence or not"—citing a long line of Texas authorities.

Continuing, Justice Fly says:

"The standard of care exercised by a master is, not what other masters do under like circumstances, but, as in all cases, the standard must be the exercise of ordinary care. Proof that an instrumentality is the same used by other masters in the same business may be a circumstance to be considered by the jury in passing upon the question of negligence, but in the final analysis of the matter ordinary care must be the test applied."

Referring to the opinion by the Court of Civil Appeals in *Taylor v. White*, counsel for appellants say in their brief:

"Our Supreme Court first refused a writ of error in December, 1913, in *Taylor v. White*, but thereafter, in January, 1914, on a rehearing, granted the application, with the notation to the effect that a majority of the court were of opinion that both the question of defendant's negligence and of the plaintiff's assumption of risk were for the jury; Mr. Justice Phillips dissenting from the granting of the application, on the ground that the plaintiff had assumed the risk as a matter of law."

The Commission of Appeals, in an opinion by Mr. Justice Strong (212 S. W. 656), af-

firmed the judgment of the Court of Civil Appeals in this *Taylor v. White Case*. Justice Strong said:

"The custom of others engaged in like business is not the absolute test of negligence, but where the undisputed evidence shows affirmatively as it does in this case, that the defendant was conducting his business in accordance with the uniform custom of persons engaged in like business, it devolves upon the plaintiff, before he can recover, to produce evidence showing that such custom is negligent. In the absence of such testimony, the legal presumption is that those engaged in like business were reasonably prudent in the conduct of their business, and that they discharged their legal obligations for the safety of their servants"—citing the *Alexander Case* and *Railway Co. v. Senske*, 201 Fed. 637, 120 C. C. A. 65.

Notwithstanding the judgment of the Court of Civil Appeals was affirmed by this opinion, it seems to me that there is a marked difference between the statement of the law involved in this proposition made by Justice Strong and that made by the Court of Civil Appeals. As to Justice Strong's opinion, the rule as stated in the *Evansich Case* and as recognized by Justice Fly and Justice Dunklin in the cases quoted from by me above is in no way modified. "To produce evidence showing that such custom is negligent" is no greater burden on the plaintiff than to establish the negligence pleaded by him. In order to recover, he must show that the defendant is guilty of negligence, and on such facts as are reflected by this record to show that a custom is negligence, to my mind, involves no greater burden than to show that the defendant was guilty of negligence in the operation of his machine. As I construe the decisions of our courts on this proposition, proof of custom is evidentiary only, and as said by Justice Fly in the *Duffy Case*, supra, "in the final analysis of the matter ordinary care must be the test applied." Even if I have not correctly construed this opinion by Justice Strong, the plaintiff has fully met the issue of showing such custom to be negligence; that is, he has made it an issue of fact before the jury. The testimony of Mr. Femelat quoted by us above is to the effect that a screen over this machine would not have interfered at all with the operation of the machine. Now, if this is true, the issue should go to the jury as to whether an employer, in the exercise of ordinary care, would have placed this screen on this machine, thus making it a safe machine for this boy to operate.

[2, 3] The majority of the court is also of the opinion that this record does not raise an issue of negligence based on the inexperience and immature years of Lawrence Sedita. The defendant had lost the defense of assumed risk, because it was not a subscriber under the Employers' Liability Act



(Acts 1913, c. 179; Vernon's Sayles' Ann. Civ. St. 1914, §§ 5246h-5246zzzz).

Lawrence Sedita began work in November for the defendant. He was hurt about the 12th of January following, and was 16 years old on the 1st of February following. He had never worked about machinery before. It was his first job. He had attended school only five months in his life, and could not write except to sign his name and mark down figures. He was an ignorant Italian boy with very little experience in working with Americans. It was his duty to take the boards or planks out of the machine after they were passed between the live rollers, and to hand them back immediately over the live rollers of the machine with his right hand to a fellow employé at the other end thereof, while with his left hand he would take the next board that was coming through said machine. He testified, in part, as follows:

"I had been working at that plant for about a month and a half. Up to that time I had never had my hands between those rollers. I knew if I should put my hands down there and those rollers would catch my hand, I knew it would hurt me. I knew it was no proper place for me to put my hand, but just as the—Mr. Rapsilver told me to hand him the board, you see, when I drew my hand back I got caught and I couldn't help it. I knew if I did get my hand caught there I would hurt my hand. Sure, I knew that if I put my hand in there that it would catch my hand if I put it down under the rollers, or if I put my hand right where the roller was turning that it would catch my hand. I had seen those rollers revolving there time and again; I had seen them for a while. I had seen them from the very day I went there; there was nothing to hide them from my view. I could see them plainly. You could see them. They was right on top there."

Appellant summarizes this testimony in the following proposition:

"Lawrence Sedita having himself testified that he had worked there during the months of November and December up to the date of the injury, on January 12, 1916, all the time engaged in the same work of off-bearing on the sander machine, and where he testified that prior to the accident in question he had never put his hand down among the rollers of said machine, and that he knew it was no proper place for him to put his hand, and that it would be dangerous for him to put his hand down among such rollers, and that he did not need to put his hand down where it was injured in the performance of any of the services for which he was employed, and that he did not know how he got his hand down among the rollers when he got hurt, and where the said Lawrence Sedita testified that the rollers were in plain sight, and that he saw them every day while he was working there, it is apparent that the master could not have enlarged the said Sedita's knowledge by any instructions in regard to the danger, if any, in getting his hand

in said sander machine, and no actionable negligence is shown on the part of the appellant (defendant below) in not instructing said minor, and this as a matter of law from the minor's own undisputed testimony and admissions."

As supporting this proposition, appellant cites the following authorities: *Stamford Oil Mill Co. v. Barnes*, 103 Tex. 409, 128 S. W. 375, 31 L. R. A. (N. S.) 1218, Ann. Cas. 1913A, 111; *G. & S. A. Railroad Co. v. Anderson*, 187 S. W. 491; *Dallas Park Amusement Association v. Barrentine*, 187 S. W. 710; *Tucker v. National Loan Investment Co.*, 35 Tex. Civ. App. 474, 80 S. W. 879; *Wiggins v. E. Z. Waist Co.*, 83 Vt. 365, 76 Atl. 36; *Ewing v. Lanark Fuel Co.*, 65 W. Va. 726, 65 S. E. 201, 29 L. R. A. (N. S.) 487; *Mitchell v. Comanche Cotton Oil Co.*, 51 Tex. Civ. App. 506, 113 S. W. 158.

In the *Barnes* Case, supra, Justice Williams, discussing this proposition, said:

"We do not mean that contributory negligence is to be charged to the boy as a matter of law, but that the omission of the defendant in not instructing and protecting him does not constitute actionable negligence, since he had the knowledge which instruction would have given him and knew how to avoid this particular danger. This knowledge, affirmatively shown and admitted, distinguishes this case from *Cook v. Navigation Co.*, 76 Tex. 553 [13 S. W. 475, 18 Am. St. Rep. 52], which refuses to hold as a matter of law that a child between 13 and 14 years of age has sufficient knowledge and experience to appreciate and avoid danger."

In the *Anderson* Case, supra, James Anderson, a minor about 14 years old, was in the employ of the defendant, and was injured while crossing a railroad track. Chief Justice Pleasants said:

"When the failure to warn is relied on as an independent ground of negligence authorizing a recovery, it goes without saying that such failure on the part of the defendant must have been a proximate cause of plaintiff's injury. We think the evidence before set out conclusively shows that the failure of defendant to warn plaintiff of the danger of being struck by some train operated in its yards could not have in any way contributed to plaintiff's injury. This danger was obvious and apparent, and plaintiff admits that he knew just as well about how dangerous it was as anybody could tell him. We do not think there is any room for difference in the conclusion from plaintiff's own testimony that the failure of defendant to warn him, when it employed him as night call-boy in the railroad yards, that in going about over the yards he must look out for moving trains, had no causal connection with plaintiff's injury. According to his own testimony, he was not put to work in a place of danger of which he was ignorant, or of which he was incapable of appreciating. Such being the state of the evidence, the failure of defendant to warn plaintiff does not constitute actionable negligence, and that ground of recovery should

not have been submitted to the jury. *Oil Co. v. Barnes*, 108 Tex. 409, 128 S. W. 375, 31 L. R. A. (N. S.) 1218, Ann. Cas. 1913A, 111."

The facts and statement of the law by the court are very well expressed in the sixth syllabus in the *Barrentine Case*, as follows:

"A minor, aged 19, who for two years prior to the accident had been working about a merry-go-round and who had been closing the doors during different periods of such time, who was directed to close the doors after the lights were out, and who knew the danger of stumbling over stobs, set in the ground between the doors, as well as the master, was not entitled to warning not to stumble over the stobs."

The issue of warning the defendant was not submitted to the jury; the only ground of negligence submitted to the jury being issue No. 1, which we have given above.

It is the opinion of the majority of the court that this boy was of such age and experience that the defendant owed him no greater duty than to an adult under the same circumstances, and, having rested his case on the duty to him by the defendant company because of his immature years and inexperience, he cannot recover. To this conclusion I respectfully dissent.

Discussing the authorities cited by appellant, counsel for appellee say:

"An investigation of the authorities, which hold that a boy who knows and appreciates the danger, or who is warned, is placed upon the same footing with an adult, will disclose that he is placed upon such footing only with reference to the issues of contributory negligence and assumed risk, and not with reference to the issue of negligence on the part of the master in permitting him to work around dangerous machinery."

It seems to me that this a correct analysis of these and similar authorities. Plaintiffs sought to recover on the ground that the defendant was negligent "in permitting a young boy of inexperience and immature years, as was the said *Lawrence Sedita*, to work around said machinery with the rollers and machinery exposed, as they were, and without any protection or guard, or anything to keep one from getting their hands entangled in said machine." To the above proposition of appellant, appellee submits this counter proposition:

"When it is shown that a boy of 15 years of age, without experience about machinery and the character of work at which he is placed, and without education or mental training, is permitted and required to work around and over heavy, complicated, and dangerous and exposed machinery, it becomes a question of fact for determination by the jury as to whether his employer was guilty of negligence in employing and permitting him to so work around such machinery, and the request for

peremptory instruction was therefore properly refused."

As a matter of law, can we say that the issue of immaturity and inexperience is not raised by these facts? Had this boy been a few months younger, defendant would have been guilty of negligence as a matter of law in placing him to work at this machine. As he had not reached the age of 16, as he was wholly inexperienced in working with machinery, except for the short time he had been in the employ of defendant, it became an issue of fact for the jury to determine whether or not from the facts in this record the defendant was guilty of negligence in employing him and in permitting him to work on an unscreened sander machine. It is true the plaintiff testified that he knew it was dangerous for him to put his hand in this machine, and that if he did his hand would be hurt; but as I understand the law, in order to relieve the defendant of negligence in employing a young and inexperienced minor to work with dangerous machinery, it must not only appear that he saw and appreciated the result of being caught in the machinery, a fact obvious to the tenderest infant with any discretion, but it must also appear that boys of his age and experience know how to operate such machinery in safety to themselves. As I construe the decisions, this is an issue of fact to be determined by the jury. *M., K. & T. Ry. Co. v. Rogers*, 89 Tex. 675, 36 S. W. 243; *Cook v. Houston Direct Navigation Co.*, 76 Tex. 353, 13 S. W. 475, 18 Am. St. Rep. 52; *Houston & Texas Central Railway Co. v. Lawrence*, 197 S. W. 1022; *Stirling v. Bettis Manufacturing Co.*, 159 S. W. 915; *R. C. L.* vol. 18, p. 550, § 63.

[4] Appellant presents this case to us on 25 assignments of error. The view taken by the majority of the court precludes the necessity for a discussion of the remaining assignments. However, it will be proper for us to say that the court is unanimously of the opinion that reversible error was committed by the trial court in failing to submit defendant's special charge No. 8. This charge grouped and presented in an affirmative way the defenses of the defendant to the charge of negligence as made by plaintiff. This was not done by the court in the main charge. It is also the unanimous opinion of the court that no error was shown by any of the other assignments.

On the 16th day of last month, we announced that this cause was reversed and remanded; but, on further deliberation, the majority of the court is of the opinion that it should be reversed and rendered. The order heretofore entered reversing the cause and remanding the same for a new trial is set aside, and the judgment in favor of appellee is reversed, and judgment here rendered in favor of appellant.

ALLEN et al. v. BERKMIER et al.  
(No. 1564.)

(Court of Civil Appeals of Texas. Amarillo. Oct. 8, 1919. On the Merits, Oct. 29, 1919. On Motion for Rehearing, Dec. 3, 1919.)

## 1. APPEAL AND ERROR ¶655(2)—STRIKING BILL OF EXCEPTIONS FROM THE RECORD.

Bills of exceptions filed more than 30 days after adjournment of term at which case was tried, where no order extending time for filing has been made, will be stricken from the record upon appellee's motion made within 30 days after filing of transcript in court of appeals, in view of Rev. St. art. 2073.

## On the Merits.

## 2. EXECUTORS AND ADMINISTRATORS ¶377—ESTOPPEL TO DENY VALIDITY OF ADMINISTRATOR'S SALE.

Heirs who, being of age, agreed among themselves and with the administrator that, in order to secure a final settlement and distribution of estate, land should be sold to certain of the heirs at specified price, and who participated in the distribution of the proceeds of such sale, are estopped from denying validity of sale, since, having assumed that administrator had the right to make sale, they are estopped from denying existence of such fact.

## 3. ESTOPPEL ¶78(2)—DENIAL OF EXISTENCE OF ASSUMED FACTS IN CONTRACT.

When a contract is made, and the parties thereto as a basis therefor assume a certain state of facts to be true, they are thereafter estopped from denying the existence of such facts so made the basis of the contract.

## On Motion for Rehearing.

## 4. COURTS ¶92—LAW OF THE CASE.

The law of the case controlling the decision becomes authority, and is not obiter dicta, though the court was mistaken in the assumption of the premise of the decision upon which the law was announced.

Appeal from District Court, Floyd County; R. C. Joiner, Judge.

Suit by James B. Allen and others against Josephine Berkmiere and others. Judgment for defendants, and plaintiffs appeal. Motion to strike out bills of exception sustained. Judgment affirmed.

Williams & Martin, of Plainview, for appellants.

P. B. Randolph, of Plainview, for appellees.

## On Motion to Strike out Bills of Exception.

BOYCE, J. [1] It appears from the transcript that the term of the district court at which this case was tried adjourned on April 4, 1919. No order extending the time for filing bills of exception appears. Bill of exception No. 1 was filed on June 1, 1919, and

bills Nos. 2 to 7 inclusive were filed on June 30, 1919. Appellee within 30 days after the filing of the transcript in this court has moved that said bills of exception be stricken from the record because not filed within the time prescribed by law. Under this state of facts the motion must be sustained. R. S. art. 2073; Criswell v. Robbins, 152 S. W. 210; Pearce v. Supreme Lodge, 190 S. W. 1156; Loeb v. Railway, 186 S. W. 379; Comm. v. Houston Oil Co., 171 S. W. 520; Rishworth v. Moss, 191 S. W. 850; Byrne v. Lumber Co., 193 S. W. 600; Camp v. Gourley, 201 S. W. 671; Pool v. Pierce-Fordyce Oil Ass'n, 209 S. W. 706.

## On the Merits.

This suit was brought by appellants against appellees to recover and have partitioned to them a two-fifths interest in 320 acres of land in Floyd county. The land in question belonged to the community estate of James Allen and his wife, Anne Allen, and the appellants were entitled to recover a two-fifths interest therein through inheritance from the said decedents, unless they are precluded from denying the validity of an administrator's sale of such property, under which appellees claim the land. The facts in connection with the administrator's sale, on which the issue of estoppel arises, are, briefly, as follows:

James Allen, by his will, gave to his wife a life estate in all property owned by him, and provided that his said wife and one Samuel Wolfe should be joint executors of his will, and that upon the death of his wife the said Wolfe should continue as sole executor, and that all property remaining after the death of the said wife should be sold as soon as possible, and the proceeds distributed in cash among his legal heirs. The widow filed her acceptance under the will, but declined to act as executor, whereupon Samuel Wolfe was appointed sole executor; and later, upon his resignation, William M. Johnston was appointed administrator with the will annexed. It does not appear definitely when the said Anne Allen died, but it is evident that she was dead at the time of the administrator's sale, presently referred to. All of the parties resided in Ohio, where the administration proceedings were all had, and no administration proceedings were had in Texas; a certified copy of the will and its probate, together with the administrator's deed, being filed and recorded in the deed records of Floyd county. It was apparently assumed by the administrator and all the heirs that the administrator had the power under the terms of the will, and without any proceedings in the Texas courts, to sell the property in Texas. The Texas land was not thought to be of much value; no purchaser therefor could be

found, and all of the heirs declared that they did not want it, and a considerable delay in the final settlement of the estate and distribution thereof was incurred by reason of this fact. The heirs finally agreed among themselves and with the administrator that, in order to secure a final settlement and distribution of the estate, the land should be sold to Joseph Allen and Mrs. Eberly, two of the heirs, at \$1 per acre. Whereupon the administrator, acting as such, by deed dated June 4, 1897, conveyed the land to said parties at such price, and final settlement of the estate was thereafter had, including a distribution to each of the heirs of his proportionate interest in the funds realized from the sale of this land. The appellees claim through the said Joseph Allen and Mrs. Eberly, and the appellants claim through other heirs of the said James Allen and wife, who were parties to such proceeding and participated in the distribution of said funds. All of such heirs were at the time of age, and those through whom appellants claim were cognizant of, and parties to, the agreement under which the land was sold, expressing their preference to take their respective shares of said estate in money. The understanding between the parties which culminated in the sale in this way was arrived at by correspondence among themselves and with the administrator.

[2] It is conceded that the administrator had no power to sell the property in Texas as he did, and we need not discuss such matter. But we are of the opinion that the appellants are estopped from denying the validity of the administrator's sale made under the circumstances stated. *Grande v. Chaves*, 15 Tex. 551; *Ryan v. Maxey*, 43 Tex. 195; *Stafford v. Harriá*, 82 Tex. 178, 17 S. W. 530; *Halbert v. Carroll*, 25 S. W. 1102; *Vineyard v. Heard*, 167 S. W. 22; *Whitaker v. Thayer*, 38 Tex. Civ. App. 537, 86 S. W. 364.

In the case of *Grande v. Chaves*, supra, a sale was made by an administrator, acting as such, under a void administration proceeding. The administrator had been urged in letters from the heirs to sell the property, and also had a power of attorney from them to sell, and the proceeds of the sale were paid to such heirs. The following quotations from the opinion set forth the basis of the holding of the court in the case, to the effect that they were precluded from denying the validity of such sale:

"The controlling circumstance in this case, and which overreaches the question of the validity of the grant, or the sale made under its authority, is the fact that the plaintiffs, claiming this property by heirship, were exceedingly eager for the sale of the land. \* \* \* Their letters to this effect would preclude them, in equity, from disturbing the rights of one who purchased from their agent, who did the

very act they requested and authorized him to perform, although he may have been also acting under another power, which was invalid and insufficient to support his act. \* \* \* Upon the whole, we believe the plaintiffs are precluded by their acts from impeaching the title of the purchasers. They entreated and urged the sale, and they have received the proceeds. Their acts show such acquiescence as to amount to a ratification, and they cannot be permitted to disturb the rights of purchasers under sales fairly made, and with their consent, and from which they received the benefit."

In the case of *Ryan v. Maxey*, supra, the heirs sought to recover property sold by the guardian of the deceased after the ward's death, in pursuance to an order of the court had in the guardianship proceeding. The claimants in such case were active in procuring the sale, and received the benefits thereof, and it was held that, though the court may have been without jurisdiction to order the sale—a point which was not decided—yet such claimants, by reason of such facts, were estopped from denying such power. The gist of the holding in the case is expressed in these words:

"The evidence is satisfactory that the parties were not merely passively consenting to the sale, but that they were active agents in procuring it to be ordered. In truth, the court and the guardian may be regarded as their agents in making the sale."

Following these early cases by the Supreme Court, it has been held in a number of later cases, which we have cited, that heirs, who with knowledge received the proceeds of sales of property made by an administrator of an estate in which they are interested, thereby ratified such sales, and are estopped from thereafter denying their validity, and this seems to be the holding generally in other jurisdictions. *Deford v. Mercer*, 24 Iowa, 118, 92 Am. Dec. 460; *Smith v. Warden*, 19 Pa. 424; *Crane v. Lowe*, 59 Kan. 606, 54 Pac. 666; *Cadematori v. Ganger*, 160 Mo. 352, 61 S. W. 195; *Meddis v. Kenney*, 176 Mo. 200, 75 S. W. 633, 98 Am. St. Rep. 496; *Favill v. Roberts*, 50 N. Y. 222; *Hamp-ton v. Murphy*, 45 Ind. App. 513, 86 N. E. 439, 88 N. E. 876; *Mote v. Kleen*, 83 Neb. 585, 119 N. W. 1125; *Browne v. Coleman*, 62 Or. 454, 125 Pac. 278; *Harl v. Vairin's Ex'rs*, 175 Ky. 468, 194 S. W. 546; *Cyc*, vol. 18, p. 798; *R. C. L.* vol. 11, p. 391.

The facts in this case distinguish it, we think, from the case of *Wilkin v. Owens*, 102 Tex. 199, 114 S. W. 104, 115 S. W. 1174, 117 S. W. 425, 132 Am. St. Rep. 867. In that case the heirs were minors at the time of the sale and had nothing to do with it. The proceeds of the sale were applied in payment of the debts of the estate, and the minors later received what remained of the estate. The title to the property which they received vested in them, subject to the administra-

tion, and they merely took their own in receiving it. The benefit to the property received by them from the sale of the other property was indirect. Every requirement of justice could be met by requiring the heirs, when they recovered the property which had been illegally sold, to pay to the purchaser the purchase price which had been applied in discharge of debts due by the estate. So that a holding against the sufficiency of such facts to constitute an estoppel in that case is not, we think, authority in this case, where the heirs agreed that the sale should be made as it was, and participated in a direct distribution of the proceeds thereof.

Appellants urge that all parties through whom both appellants and appellees claim, since they are charged with a knowledge of the law, must be held to have known that the administrator's conveyance was invalid; that all parties knew the facts, and that one who acts with equal knowledge of the facts cannot plead estoppel against the other party to the transaction. It is true that knowledge of the facts on one side and ignorance thereof on the other, is in many cases an essential to the application by equity of the doctrine of estoppel.

[3] This is not always true, however. For instance, when a contract is made, and the parties thereto, as a basis therefor, assume a certain state of facts to be true, they are thereafter estopped from denying the existence of such facts, so made the basis of the contract, and it is said that in this class of estoppels "it can seldom be an answer to the alleged estoppel, unlike the case of estoppel by conduct, that the party supposed to be estopped acted in ignorance of the facts and under a mistake." *Bigelow on Estoppel* (6th Ed.) pp. 495 and 496; 16 Cyc. p. 719. It might perhaps with some propriety be said that this case belongs to this character of estoppel. The parties assumed that the administrator, as such, had the right to convey their interest in this land, and this fact was the basis of the agreement among themselves as to the disposition to be made of it, culminating in the administrator's deed. Ought they not thereafter be held estopped from denying the truth of the matter thus assumed? In those cases where the heirs are held to a ratification of the sale merely by the subsequent acceptance, with knowledge of the facts, of the proceeds of the sale, the principles of the law of agency are applied. Upon whatever theory the decision is to rest, there appears to be ample authority to support the concrete conclusion that, under the facts in this case, the appellants are precluded from denying the validity of the administrator's conveyance, and this conclusion seems to us to meet the justice of this particular case.

We therefore affirm the judgment of the district court.

### On Motion for Rehearing.

Appellants' attorneys, in their motion for rehearing, after a review in detail of the Texas cases cited in our opinion as authority for the proposition that those who knowingly participate in the proceedings which bring about an administrator's sale of property belonging to a decedent, and thereafter accept the proceeds of such sale, are estopped from denying its validity, assert as a conclusion therefrom that the proceedings in such cases were not void; that the application of the principles of estoppel was not necessary to a decision of such cases; and that whatever might have been said by the courts in regard to such matter is to be regarded as obiter dicta. In our original decision of the case, and in our consideration of the motion, we have not thought it necessary to determine whether as a matter of fact the sales in the cases referred to were void or not. The opinions in several of the cases assume that the sales were void and the decisions based on this predicate. In *Grande v. Chaves*, 15 Tex. 551, the court said: "It does seem that such grant [that is, the grant of administration in Bexar county during the course of which the sale was made] was without legal force or effect." And it is later announced by the court that the "controlling circumstance in this case, and which overreaches the question of the validity of the grant," were the facts which the court held sufficient to estop the plaintiffs from impeaching the title of the purchasers. In *Ryan v. Maxey*, 43 Tex. 195, the court said: "Whether the court in this case had or had not jurisdiction to order the sale, under the facts set up in the answer and established by the evidence, the plaintiffs were estopped from enforcing their claim to the land." In *Stafford v. Harris*, 82 Tex. 178, 17 S. W. 530, the estoppel was based on facts in connection with a sale ordered by the county court, and which was held in the opinion to be void.

[4] If it be true that the courts were mistaken in the assumption of the premise of these decisions, yet the law of the case controlling the decision was announced on this assumption, and the law so announced becomes authority, and is not to be regarded as obiter dicta. *O. J.* vol. 15, p. 839, § 320, and authorities cited, particularly *Brown v. C. & N. W. Ry. Co.*, 102 Wis. 137, 77 N. W. 748, 78 N. W. 771, 44 L. R. A. 586. Even if it should be admitted that these authorities are not controlling, they are strongly persuasive, particularly in view of the fact that the same conclusions of law are stated in well-considered decisions of other jurisdictions. In *Deford v. Mercer*, 24 Iowa, 118, 92 Am. Dec. 460, Chief Justice Dillon said:

"It will be seen that this principle of estoppel is not limited, as contended for by the appellant's counsel, to cases of voidable sales, but extends to cases where the sale is void."

In *Smith v. Warden*, 19 Pa. 424, it was said:

"The application of the principle does not depend upon any supposed distinction between a void and voidable sale. The receipt of the money [proceeds of the sale], with a knowledge that the purchaser is paying it upon an understanding that he is purchasing a good title, touches the conscience, and therefore binds the party in one case as well as the other."

The authorities, we think, not only justify, but require, that we adhere to the conclusions as announced in our original disposition of the case, and the motion for rehearing must be overruled.

#### TEAT et al. v. PERRY. (No. 7734.)

(Court of Civil Appeals of Texas. Galveston. June 4, 1919. On Motion for Rehearing, Oct. 15, 1919.)

#### 1. TAXATION ⚡668 — JUDGMENT FOR TAX SALE INVALID FOR EXCESSIVE FEES.

Costs in excess of lawful amount taxed by reason of clerk's error in making out an original order of sale upon tax foreclosure renders the judgment therein a nullity as against a minor owner, regardless of the smallness of the amount.

#### 2. TAXATION ⚡692—COLLATERAL ATTACK ON TAX SALE JUDGMENT.

If a tax sale judgment was without binding force, the objection that the attack upon it was a collateral one would make no difference.

#### 3. MUNICIPAL CORPORATIONS ⚡980(3)—VALIDITY OF TAX SALE OF MINOR WARDS' LAND.

In view of Houston City Charter of 1905, art. 2, § 2, providing no ordinance shall be enacted inconsistent with, nor shall the city exercise powers prohibited by, general laws or the Constitution, and article 3, § 8, providing that on tax foreclosure an order of sale shall be issued and the land sold "as in other cases of foreclosure," and Vernon's Sayles' Ann. Civ. St. 1914, art. 2000, excepting judgments against executors and administrators and guardians, and article 2004, providing for payment of such taxes as a claim against the estate, a sale of ward's land under a tax judgment was invalid.

#### 4. APPEAL AND ERROR ⚡843(2)—UNNECESSARY QUESTION NOT DETERMINED.

Where a tax sale of a minor ward's land is invalid, it becomes unnecessary on appeal to decide whether the general principle that one who owes the duty to pay the tax cannot acquire the title at a sale thereof is applicable to the guardian.

#### 5. TAXATION ⚡814(1) — REIMBURSEMENT OF OWNER OF INVALID TAX TITLE.

In plaintiff's suit in trespass to try title to land claimed by others under tax sale, *held* that equity and conscience required that defendants be given back what they were properly shown to have paid out for such taxes as constituted a

lien upon the property, particularly in view of the petition's offer to do all equity required of plaintiff.

#### On Motion for Rehearing.

#### 6. TAXATION ⚡810(3)—EVIDENCE SHOWING TAXES PAID WERE LIEN ON PREMISES.

In an action of trespass to try title, defended on the ground of tax title, evidence in the absence of objection thereto *held* sufficient to show that taxes paid by defendants for certain years constituted a valid lien against the land, for which defendants should recover from plaintiff owner.

#### 7. MUNICIPAL CORPORATIONS ⚡980(3)—FEES IN SUIT FOR TAX SALE.

Under the Houston City Charter 1905, except as otherwise specified therein, the fees of officers in suits for sale of property to pay taxes are the same as those in similar suits for state and county taxes under Vernon's Sayles' Ann. Civ. St. 1914, art. 7691.

#### 8. MUNICIPAL CORPORATIONS ⚡980(3)—ATTORNEY'S FEES IN TAX SALE SUITS.

The 5 per cent. allowance for attorney's fees in city tax suits under Houston City Charter, art. 3, § 8, supersedes the provision of Vernon's Sayles' Ann. Civ. St. 1914, art. 7691, which is otherwise applicable, in view of articles 7693, 7699, so that such fee is allowable.

Appeal from District Court, Harris County; K. O. Barkley, Special Judge.

Action by Osceola Perry against George L. Teat and others in trespass to try title. Judgment for plaintiff, and defendants appeal. Judgment reformed and affirmed upon motion for rehearing.

Jno. W. Lewis and B. F. Louis, both of Houston, for appellants.

Carothers & Brown, of Houston, for appellee.

GRAVES, J. In so far as appellants' claim of title to the land here involved is concerned, part of the Grota homestead tract out of the John Austin two-league grant in Harris county, Tex., the correctness of the judgment they now appeal from depends upon whether or not a sale of it for taxes under a judgment therefor in favor of the city of Houston was invalid. If the tax sale under which they claimed was invalid or void, which they vigorously deny, appellants in this court admit that they showed no title, and in effect concede that judgment for the land properly went for the appellee, coupled as it was with a recovery against the latter in their favor for what they were adjudged to have paid out for taxes, with a lien upon the property to insure its payment. Of this portion of the judgment awarding such recovery against her the appellee, in turn, complains through cross-assignments, to which further reference will later in this discussion be made.

The question of the validity of the tax sale is logically of first concern. The facts underlying it were these:

In March of 1909 Lewis and Austin took a deed from one Mills to the land in controversy, which the evidence shows had, prior to that time, and as far back as about 1858, been continuously claimed by the appellee and her ancestors. In October, 1909, the city of Houston recovered judgment in the district court of Harris county against Lewis, Austin, their grantor Mills, and E. F. Perry, as guardian of the estate of appellee here, she being then a minor upon whose estate guardianship was pending, all of whom it had made parties to the tax suit, for the sum of \$382.45, with interest and costs, for taxes accruing to the city on the land for the years 1904 to 1908, inclusive, together with foreclosure of the tax lien and order of sale through the processes of that court against all the parties, including the guardian of appellee's estate. No provision was made for certifying the judgment as against the guardian to the probate court for observance, but execution duly issued out of the district court, and the land was sold thereunder on March 1, 1910, to appellant George L. Teat for the sum of \$450, to whom a sheriff's deed, purporting to convey the right, title, and interest of all of the parties in the property, including that of the minor, was accordingly made. The evidence was uncontroverted that Lewis and Austin furnished most of the money, and that the conveyance was taken in Teat's name for the benefit of all three of them. Lewis and Austin had waived service of process in the tax suit, entered their appearance, and agreed that judgment against them for the full amount the city claimed for taxes might be rendered, which in the manner above stated was done, the judgment reciting that it was to be satisfied only out of proceeds realized from the tax sale.

It appears from the cost bill in this sale for taxes that, because of an error made by him in making out the original order of sale the district clerk issued an alias order, and that, apart from a fee of \$15.05, allowed an attorney for bringing the suit, he and the sheriff actually collected the following items:

<b>Clerk's Costs:</b>	
For costs preliminary to the issuance of the	
first order of sale.....	\$ 8 20
Original order of sale and return.....	1 50
Alias order of sale and return.....	1 50
	<hr/> \$11 20
<b>Sheriff's costs:</b>	
Serving citations .....	\$ 2 25
Jury fee .....	50
Mileage .....	1 50
Costs on order of sale which was returned	
because of the clerk's error.....	6 50
Costs on alias order of sale.....	9 00
Costs in the way of commission alias order of	
sale .....	13 00
<b>Total .....</b>	<b>\$31 75</b>

In contending that this tax sale was in all respects regular and valid, that it was not subject to collateral attack in this proceeding, and that it passed a clear title to the land to them, appellants very ably present two further arguments, stated by themselves in this way:

"Point 3. The statutory provision for tax liens, and suits to establish and foreclose such liens, and for sale of the property under such order of sale, are special provisions with reference to such particular subject-matter, and must be followed; and they apply to minors as well as persons *sui juris*, and such provisions, therefore, will take precedence over general statutes in reference to the collection of ordinary claims or judgment from minors and their estates.

"Point 4. The probate court did not have jurisdiction to give to the city of Houston full and complete relief in the foreclosure of said tax lien and the sale of said land thereunder as could the district court (being a court of general jurisdiction, and of special jurisdiction in foreclosure of tax liens), and it was therefore proper for the district court to render judgment foreclosing said lien, and to decree that order of sale should issue as against all of the defendants, thereby providing for the enforcement of the rights of the city against all of the defendants in one and the same proceeding."

On the other hand, the appellee attacks the sale as being invalid upon two grounds: First, the fees collected as costs were greater than the law allows; second, the fact that she was a minor at the time, with guardianship pending upon her estate in the probate court, entitled her to have the tribunal, rather than the district court, direct the sale as against her interest.

After careful consideration of the opposing views thus presented, we are constrained to agree with the appellee and to hold the tax sale invalid for both the reasons given. She strongly insists that, although the suit was one for taxes brought by the city of Houston under its charter of 1905 (Special Laws 29th Leg. 1905, p. 181), article 7691 of Vernon's Sayles' Statutes, prescribing fees of officers in similar suits for state and county taxes, applies, and that, as therein provided and as is held in the case of Hill et al. v. Lofton, 165 S. W. 67, so construing it, all of the fees here collected were illegal, except \$1.50 allowed the clerk and \$1 to the sheriff by this statute.

[1] That may be the correct view to take, but we find it unnecessary to determine the matter that far, and do not do so, for the reason that the \$1.50 of the clerk's cost and the \$6.50 of the sheriff's, arising wholly from an error on the part of the clerk in making out the original order of sale here, were clearly, we think, in no event chargeable against appellee's interest, and rendered the sale a nullity as against her. It is not even claimed that any statute permitted those charges; neither would the smallness

of the amount affect the matter. *Lufkin v. City of Galveston*, 73 Tex. 340, 11 S. W. 340; *May v. Jackson*, 73 S. W. 988.

[2] And if it was so without binding force, the objection that the attack upon it was a collateral one would make no difference. See paragraph (6), *Hill et al. v. Lofton*, supra, at page 70, and authorities there cited.

[3] Appellants' argument under their "point 3," that tax foreclosure proceedings generally under our Constitution and statutes are special in their character, must be strictly followed, and that they operate alike against minors and all other persons, since no exceptions are made, is one of much force and plausibility. If otherwise sound, however, it is not thought to be properly applicable in this instance, mainly upon the consideration, as above stated, the tax sale here was made under the Houston City Charter of 1905. In section 2 of article 2 of that instrument it is provided that no ordinance shall be enacted inconsistent with, nor shall the city exercise any power prohibited by the general laws or the Constitution of the state. In section 8 of article 3 this provision occurs:

"In suits for taxes, the proper persons shall be made parties defendant in such suit, shall be served with process and other proceedings had therein, as provided by law for suits of like character in the district courts of this state; and in case of foreclosure, an order of sale shall issue and the land be sold thereunder, as in other case of foreclosure, which order of sale shall have all the force and effect of a writ of possession between the parties to the suit and any person claiming under the defendant by any right acquired after the filing of the suit."

So that the city was not only not at liberty to trench upon the general laws of the state in reference to foreclosure sales for taxes, but was by this limitation in section 8 remitted to the same procedure there obtaining "in other cases of foreclosure." What was that procedure? The answer is found in article 2000, Vernon's Sayles' Statutes, the relevant portion of which is this:

"Judgments for the foreclosure of mortgages and other liens shall be that the plaintiff recover his debt, damages and costs, with a foreclosure of the plaintiff's lien on the property subject thereto, and, except in judgments against executors, administrators and guardians, that an order of sale shall issue to the sheriff or any constable of the county where such property may be, directing him to seize and sell the same as under execution, in satisfaction of the judgment. \* \* \*

Then succeeding article 2004 completes the specially prescribed process where a minor's estate is involved, as follows:

"Where a recovery of money is had against an executor, administrator or guardian, as such, the judgment shall state that it is to be paid

in the due course of administration, and no execution shall issue on such judgment, but the same shall be certified to the county court, sitting in matters of probate, to be there enforced in accordance with law."

It will be noted that article 2000 makes no distinction between different kinds of liens, but applies to "mortgages and other liens" generally, including, of course, those for taxes, thus expressly and specifically interdicting the issuance of an order of sale out of the court foreclosing a lien of that character as against a guardian, and leaving that to be done through the probate court where the estate is being administered, as directed in article 2004. Such, therefore, must be the general rule, and to take a particular case out of its operation, granting that it may under some circumstances be done, facts constituting the exception must clearly appear. *Lauraine v. Ashe* (Sup.) 191 S. W. 563, 196 S. W. 501; *Lauraine v. Vaughn*, dissenting opinion and cited authorities, 193 S. W. pp. 712, 713. Were there any such here? Appellants, under their "point 4" above quoted, insist that the single circumstance of *Lewis, Austin*, and appellee's guardian having all been joined as defendants by the city in the suit to collect the taxes presented a condition rendering the powers of the probate court inadequate to give complete relief, citing as their main reliance the holding by majority opinion of this court in the recent cases of *Lauraine v. Masterson et al.*, 193 S. W. 705 et seq.; but the facts there clearly distinguish those cases from the one now under consideration. In the first place, they were not tax suits, which are strictly statutory proceedings wherein the court exercises a limited jurisdiction, and not one for the purpose of adjusting equities between parties; in the second place, even if the narrowed reaches of a simple suit by the city to subject property to the payment of taxes had been the place to do it, there were in this instance no equities whatever to be adjusted; there was not even claimed to be a joint obligation between the opposing claimants of the property to pay the taxes they were sued for, since their asserted rights therein emanated from wholly different sources, and they were merely made joint defendants by the city; hence there was lacking the determining consideration upon which this court sustained the authority of the district court to order the sale of Mrs. Allen's property in *Lauraine v. Masterson*, supra. See both opinions in that case, 193 S. W. at pages 710, 711, and 713. There being, therefore, no common claim of ownership of the property, no character of joint undertaking to pay the taxes upon it, and no pretense otherwise of any outstanding equities between those the



city thus chose to make joint parties to the same suit, having for its sole objective the prosecution to final result of an asserted lien for taxes, it is thought the resulting situation, as affecting the minor's estate, was the same as if her guardian had been sued alone, and consequently did not present such a state of facts as entitled the city of Houston to have her interest sold through the district court instead of the probate court, where the guardianship was then pending. R. S. 1911, art. 2000; *Allen v. Reilly*, 62 Tex. Civ. App. 624, 131 S. W. 1152; *Stafford v. Harris*, 82 Tex. 178, 17 S. W. 530; *Rose v. Newman*, 26 Tex. 132, 80 Am. Dec. 646; *Meyers v. Evans*, 68 Tex. 466, 5 S. W. 66; *Schmidt v. Huff*, 7 Tex. Civ. App. 598, 28 S. W. 1053; R. S. arts. 4230, 4234; *Horton v. Garrison*, 1 Tex. Civ. App. 31, 20 S. W. 773.

Indeed, in the *Allen v. Reilly* Case it is expressly held that a sale for taxes due by an estate must be made through the probate court; and, especially in the absence of contrary authority, no good reason is perceived as to why it should not be so.

From these deductions it follows that the tax sale, being invalid for the reasons given, could not become the means of extinguishing the minor's title in favor of the appellants here. They having shown no other title, and she having both pleaded and produced sufficient proof, as we think, to sustain a title in herself by limitation, the court below properly gave her judgment for the land. That part of the judgment is accordingly in all things affirmed.

[4] The appellee also very earnestly contends that, apart from any question as to its invalidity, the tax sale to appellants could not, upon the facts surrounding it, become the medium of any title into them as against her, under the general principle that one who owes the duty to pay the tax cannot acquire a title at a sale therefor, but will be held to have merely paid what he owed without effecting any change in the title. Many authorities from other jurisdictions are cited as supporting the position, but as none from Texas are presented, and as the determination of its applicability here is obviously unnecessary, under our conclusion that this sale was invalid, it is not thought essential that the matter be gone into.

The cross-assignments relating to the recovery against appellee of what appellants were held to have paid out for taxes upon the land alone remain for disposition. Her chief complaint is that, in addition to taxes for the years 1904 to 1908, inclusive, which were embodied in the joint judgment obtained by the city against them all, appellants were awarded a recovery against her of amounts claimed to have been paid by them for taxes for the years 1909 to 1913, in-

clusive, with neither proof that these had been properly levied and assessed against the land, nor that they constituted for the amount adjudged a lien thereon. Upon examination of the record, its condition in this respect is found to be as claimed. Consequently, so much of the different cross-assignments as raise that issue must be sustained, and the part of the judgment decreeing a recovery in favor of appellants for the sum of \$1,286.67 and interest, with a lien upon and order of sale against the land to secure its payment, must be reversed, and that branch of the cause be remanded for further proceedings as herein provided.

[5] Upon the general principles of equity as applied by the courts in similar controversies, we conclude that in the forum of conscience it is just and right that appellants be given back what they are properly shown to have actually paid out for such taxes as constituted a lien upon the property. *State v. Dashiell*, 32 Tex. Civ. App. 454, 74 S. W. 781; *Railroad Co. v. Hoffman*, 193 S. W. 1143.

The testimony discloses that appellee admitted never having paid any taxes at all on the property herself, nor did her guardian, although testifying as a witness at this trial, claim that he ever had. The validity of the judgment itself for a portion of the taxes recovered for, that is, for the amounts accruing for the years 1904 to 1908, inclusive, was not questioned, the sale made under it alone being attacked for the irregularities we have held fatal to it. The appellants, while, as has above been stated, abandoning in this court any claim of title they may have had to the land, other than such as they acquired by virtue of the tax sale, did in the court below claim under a record title from the sovereignty of the soil down into themselves, and, when the appellee here, who was the plaintiff below, and as such had sued them in trespass to try title to the land, attacked one of the links in that title as being forged, simply introduced no evidence to controvert the affidavit so charging, and thereby failed to maintain the integrity of the connected paper title they offered. In her petition tendering them the issue as to who had title to the land, the appellee, in order to become entitled to recover, offered to do all such equities as might be required of her.

In all these circumstances, it is not thought the court erred in requiring her to return all that appellants had paid out for actual taxes and proper collection charges thereon, but only in fixing an amount without sufficient proof that it comprehended nothing more nor less than such an amount.

Pursuant to these conclusions, the portion of the judgment awarding the money recovery against appellee is reversed, and that

feature of the cause is remanded, with instructions to the trial court to hear evidence and determine the total sum paid out by appellants for such taxes as constituted a valid lien upon the land, including the amount of the judgment referred to and such costs as the law allowed, exclusive of any arising from the invalid sale, and then to enter judgment in their favor against the appellee for the sum so ascertained, coupled, as before, with a lien upon the property to insure its payment.

Affirm in part.

Reversed and remanded, with instructions in part.

#### On Motion for Rehearing.

After careful consideration of appellants' motion for rehearing, it is determined that all conclusions originally announced should be adhered to, except the holding that the proof did not show the amount awarded them below in reimbursement for payments they had made on taxes for the years 1909 to 1913, inclusive, to have been in satisfaction of a lien therefor upon the land. They alleged in their pleadings that they had paid taxes, interest, and costs, levied and charged against the property—

"in the sums for the years and upon the dates, as follows: On May 20, 1910, taxes for the year 1909 in the sum of \$65.16. On May 11, 1912, taxes for the years 1910 and 1911, in the sum of \$133.63. On December 28, 1912, taxes for the year 1912, in the sum of \$113.40. On December 21, 1913, taxes for the year 1913, in the sum of \$139.86."

Mr. Lewis, one of the appellants, then testified without objection that they started paying taxes after their purchase of the property at tax sale, and paid them, as shown in the pleadings, until this suit was filed, when they quit; the record discloses nothing to the contrary.

[6] We now conclude that, in the absence of any objection to this method of proving the payment of taxes, or of their constituting a valid lien against the land, we erred in holding it insufficient. The portion of our former judgment reversing and remanding the cause for further hearing upon the tax payments will accordingly be set aside, and the trial court's judgment for money in favor of appellants will be affirmed, with this modification: They were awarded the sum of \$1,266.67, with interest at 6 per cent. per annum from that date until paid, but this total included, in addition to the principal sum for taxes, an aggregate of \$58 as costs in the tax suit, for which amount the record affirmatively shows the land to have been sold. This itemized bill for such costs being attached to and made part of the order of sale:

#### Bill of Costs.

<b>Clerk's costs:</b>	
Docketing .....	\$ 20
Filing .....	45
Entering appearances.....	30
Issuing citations .....	4 50
Entering judgment.....	1 00
Executing alias and return.....	1 50
Taxing costs .....	25
Affidavits .....	1 50
	<hr/>
	\$9 70
<b>Sheriff's costs:</b>	
Serving citations .....	\$2 25
Jury fee .....	50
Mileage .....	1 50
	<hr/>
Total .....	\$4 25
Attorney's fees .....	\$15 00
Recapitulation of costs as per original order of sale:	
Clerk .....	\$ 9 70
Sheriff .....	4 25
Attorney .....	15 00
	<hr/>
Total .....	\$29 05
Costs which accrued on original order of sale which was ordered returned by the clerk on account of an error therein:	
Levy .....	\$1 00
4 notices .....	4 00
Posting .....	1 00
Return .....	50
	<hr/>
Total .....	\$6 50
Sheriff's costs on alias order of sale.....	\$ 9 00
Sheriff's commission on alias order of sale....	12 00
District clerk's costs on alias order of sale....	1 50
Grand total of above costs.....	<hr/>
	\$58 00

[7] In our original opinion we held \$8 of this \$58 for costs illegal, rendering the tax sale invalid, but declined to go further and hold that the amounts which might properly be charged and collected as costs in a suit for taxes of the character here involved should be determined by article 7691, Vernon's Sayles' Statutes. Upon reconsideration, we conclude that the costs specified in that article, except as modified or changed by Houston's City Charter, should have been applied in this instance, and that, as is therein provided, no greater charge than \$1.50 for the district clerk's services "in the case" and \$1 for the sheriff "for selling and making deed to the purchaser" were legally collectible. From this it results that the clerk should have been allowed \$1.50 only in lieu of the \$9.70, \$6.50, and \$1.50 items appearing in the bill, and the sheriff \$1 in lieu of the \$12 commission on the sale. These deductions take a total of \$27.20 from the \$58 actually collected as costs, to which \$27.20 should be added. 6 per cent. interest thereon per annum from the date of the tax sale, March 1, 1910, to the date of the money judgment in favor of appellants in this suit, March 13, 1918, yielding a final credit of \$40.30, which should come off of the \$1,266.67 awarded them. The judgment in their favor will therefore be reduced to \$1,226.37, and, as so reformed, will be in all respects

affirmed, bearing interest and carrying the lien on the land as before.

[8] As to the attorney's fee of \$15 appearing in the cost bill, we think the 5 per cent. allowed for that purpose in city tax suits under section 8 of the Houston City Charter (Special Laws 29th Leg. pp. 148, 149) superseded the provisions of article 7691, which we have held otherwise applicable. It is true that article 7691 does not in terms cover any but state and county taxes, but other sections of the same law indicate, we think, that it was intended to be applied in city tax suits also. See the sections of the Houston City Charter referred to in our former opinion, and articles 7693 and 7699, Vernon's Sayles' Statutes; *Hill v. Lofton*, 165 S. W. 67.

To the extent stated, the motion is granted, and the trial court's judgment for money in favor of appellants reformed and affirmed as herein indicated, but in all other respects it is refused, and this court's former judgment is left unchanged.

Granted in part, and the trial court's judgment reformed and affirmed.

# MARTINEZ v. BRUNI et al. (No. 6257.)

(Court of Civil Appeals of Texas. San Antonio.  
Nov. 5, 1919. Rehearing Denied  
Dec. 10, 1919.)

## 1. EVIDENCE §187—PREDICATE TO ESTABLISH EXISTENCE AND LOSS OF DEED.

The question whether sufficient predicate for the introduction of testimony to establish the existence and loss of a deed has been established is a question of law addressed to the sound discretion of the court.

## 2. EVIDENCE §182—SUFFICIENCY OF PREDICATE TO ESTABLISH EXISTENCE OF LOST DEED.

In an action of trespass to try title, testimony that the witness saw a deed to his father held sufficient predicate to warrant evidence of contents of the lost deed, particularly as the whole subject was finally submitted to the jury.

## 3. EVIDENCE §182—EXCLUSION OF TESTIMONY TO REBUT PRELIMINARY SHOWING AS TO EXISTENCE OF LOST DEED.

Where sufficient predicate to allow testimony as to existence and loss of deed was laid in absence of jury, the refusal of the court to allow a rebutting witness to testify was not an abuse of discretion, as such witness would again have to be heard by the jury.

## 4. TRIAL §249—OBJECTION TO ABSTRACT INSTRUCTION.

A general charge purporting to instruct particularly on question of abstract law cannot be challenged on the ground that the evidence as to the issue, which was one relating to the existence of an alleged lost deed, was insufficient to take the matter to the jury.

## 5. EVIDENCE §183(15) — SUFFICIENCY OF SHOWING OF LOSS OF DEED TO GO TO JURY.

Testimony that one under whom plaintiff claimed executed a deed to defendant's father, that the deed with a box of jewelry was stolen, that the robbers were pursued to the borders of a foreign country, and that nothing was recovered, is a sufficient showing of loss and inability to produce the instrument.

## 6. DEPOSITIONS §99 — ADMISSIBILITY OF DEPOSITION TAKEN IN DIFFERENT ACTION.

A deposition taken by plaintiff in a different action which was not filed among the papers in the suit until the day on which the case was called for trial cannot be read in evidence; no notice that it would be offered having been given.

## 7. EVIDENCE §372(3) — ADMISSIBILITY IN TRESPASS TO TRY TITLE OF OLD TAX RECEIPTS.

In trespass to try title, where defendants claimed under an alleged lost deed, tax receipts issued 30 years before trial by the proper officer, which identified the persons paying the same by name and described the land, held properly admitted as against objection that there was no proof of execution or identity.

## 8. EVIDENCE §372(3)—ANCIENT TAX RECEIPTS ADMISSIBLE AS ANCIENT DOCUMENTS.

Receipts showing payments by defendant's ancestor to one under whom plaintiff claimed executed more than 30 years before trial held admissible as ancient documents; such receipts having been attached to a deposition taken in another cause wherein they had remained on file for more than 10 years.

## 9. WITNESSES §130, 164(2)—TESTIMONY BY HEIR AS TO EXISTENCE OF LOST CONVEYANCE EXECUTED TO HIS ANCESTOR.

In trespass to try title, where defendants relied on a lost deed, testimony by one of the defendants that he saw and read the deed which conveyed the premises to his father, and from whom he inherited an interest, is admissible, despite Rev. St. 1911, art. 3690, declaring that in actions by or against executors or administrators or guardians in which judgment may be rendered for or against them as such neither party shall be allowed to testify as to any transaction with or statement by the testator, intestate, etc.

## 10. EVIDENCE §471(26) — CONCLUSION OF WITNESS AS TO TITLE.

Testimony that a witness knew his father acquired the interest of another in land, that he was present when the purchase was made, and knew of the transaction, cannot be excluded as a conclusion.

## 11. EVIDENCE §178(4)—PAROL EVIDENCE AS TO LOST CONVEYANCE.

Testimony that witness was present and knew of the transaction by which his father acquired title to land, it being asserted that the deed had been lost since the father's death, cannot be excluded as an effort to prove conveyance of real estate by parol testimony.

## 12. TRIAL §352(4)—SUBMISSION OF ISSUES AS TO EXECUTION OF LOST DEED.

In trespass to try title, where defendants relied on lost deed, and the only admissible

testimony showed that the grantor had conveyed all of her interest in one tract except one league, while inadmissible testimony was that the lost instrument included all the grantor's interest in another tract except one league, it was proper to exclude a special issue relating to conveyance of "all her interest" in the second tract.

**13. TRIAL §352(4)—CONFORMITY OF SPECIAL ISSUES TO ISSUE INVOLVED.**

In trespass to try title, where plaintiff sought to recover lands in one tract which defendants claimed had been conveyed to their ancestor by lost deed, the refusal of the court to submit a special issue as to conveyance of another tract was proper.

**14. VENDOR AND PURCHASER §232(8) — KNOWLEDGE OF PURCHASER OF PRIOR POSSESSION UNDER UNRECORDED INSTRUMENT.**

Where plaintiff, knowing that others had open and notorious possession of a portion of the premises, acquired a claim to lands, for the purpose of asserting in judicial proceedings title so acquired, he cannot be deemed a bona fide purchaser, though the deeds under which defendants claimed title were not recorded.

**15. VENDOR AND PURCHASER §232(10)—PRIOR POSSESSION BY TENANT IN COMMON NOTICE TO PURCHASER.**

Though defendants might be regarded as tenants in common of plaintiff's grantor, their visible and notorious possession was sufficient to put plaintiff on notice and prevent him from being a bona fide purchaser, even though the conveyances under which defendants claimed were unrecorded.

**16. TRIAL §141—FINDINGS OF FACT BY COURT ON UNDISPUTED EVIDENCE.**

In action of trespass to try title, it was not improper for the court to declare facts properly in evidence and undisputed as part of his findings without submitting the matter to the jury.

**17. TENANCY IN COMMON §15(11)—DURATION OF ADVERSE POSSESSION JURY QUESTION.**

Where a tenant in common takes adverse possession of land, notoriously using and enjoying it adversely and claiming to own it, it becomes a question of fact for the jury as to whether limitations are not in favor of such tenant.

**18. TENANCY IN COMMON §32—SHARING OF EXPENSES ON PARTITION.**

Where an ousting tenant in common incurred necessary expenses in defending common title, other tenants in common on obtaining partition must bear their just proportion of such expenses.

**19. ADVERSE POSSESSION §115(7)—EXTENT OF POSSESSION JURY QUESTION.**

In trespass to try title, where plaintiff, among other things, relied on adverse possession, held that the question whether he had perfected an adverse title to the entire premises, though he was only in possession of a portion, and did not render the whole for taxes, was for the jury.

**20. APPEAL AND ERROR §1051(2)—ADMISSION OF EVIDENCE HARMLESS ERROR.**

The erroneous admission in evidence of a deposition is harmless where the testimony related to an issue proven by the undisputed evidence.

Appeal from District Court, Webb County; J. F. Mullally, Judge.

Trespass to try title by Francisco Martinez against A. M. Bruni and others. From a judgment for only part of the relief sought, plaintiff appeals. Affirmed.

H. G. Dickinson, of Laredo, for appellant. Greer & Hamilton, of Laredo, Hicks, Phelps, Dickson & Bobbitt, of San Antonio, and T. C. Mann, of Laredo, for appellees.

COBBS, J. Francisco Martinez brings this suit in the ordinary form of an action in trespass to try title against A. M. Bruni, M. D. Slator, Henry Hein, Antonio Martinez, Jose Maria Martinez, Epigmenio Martinez, Jesus Martinez, Proceso Martinez, A. M. Gonzales, Jose Maria Uribe, Margarito Uribe, Manuel Maria Uribe, and Dolores Perez. Appellant dismissed as to Antonio Martinez, Jose Martinez, Epigmenio Martinez, A. M. Gonzales, and Manuel Maria Uribe. The appellant alleges he is the owner of an undivided interest to the amount and extent of 128,520 acres in that tract of land situated in the counties of Webb and Zapata which is described by metes and bounds out of the Borrego grant. He claims also title to the two tracts of land consisting respectively of 2,896 acres and 29,346 acres under and by virtue of the statute of limitations of three years and ten years, all out of the Jose Borrego grant. He prays judgment for title and possession of his undivided interest, including his title by limitation to said two tracts.

A. M. Bruni, one of the appellees, filed his answer, containing exceptions general and special, a plea of "not guilty," and pleas claiming certain portions of the land under the five and ten year statute of limitations.

Dolores Perez, another appellee, filed answer, containing plea of not guilty, and pleaded the statute of limitations of five and ten years to portions of the land.

Henry Hein, another appellee, filed answer claiming an undivided interest in the land sued for consisting of about 1,600 acres.

Jesus Martinez, Proceso Martinez, Jose Maria Uribe, and Margarito Uribe filed general exceptions and pleas of "not guilty."

M. D. Slator, one of the appellees, filed answer which contained a disclaimer to all the land except four leagues described by metes and bounds, and a general denial, plea of not guilty, and a plea of five and ten year statute of limitations, and further a plea of estoppel.

This case was by the court submitted to the jury at the request of appellant upon special issues.

The appellant caused the suit to be dismissed as to Antonio Martinez, Jose Martinez, Epigmenio Martinez, A. M. Gonzales, and Manuel Maria Uribe.

Upon the findings of the jury and upon an additional finding made therein the court entered a judgment that appellant, Francisco Martinez, take nothing by his suit under his claim for an undivided interest in the land sued for, but that under his plea of the statute of limitations of ten years he recover 160 acres of land out of the Jose Borrego grant, to include when partitioned the 50 acres occupied by Victor Pena as tenant of appellant, together with improvements.

All the facts were submitted to the jury, and the judgment of the court must be affirmed unless there is properly assigned some error of law committed by the court in the trial of the case.

[1, 2] The first error assigned is to the charge of the court to the effect that, when a deed has been executed and delivered, but lost without having been recorded, its execution and delivery and loss may be proved by parol, and further:

"If the jury do not believe from the evidence that such deed ever existed, then no rights can be established under it."

And the second assignment of error, which we will consider together, is:

"In its charge to the jury the court submitted the following special issue, the same being specified as 'second question,' viz.: 'Do you or do you not find that Maria de Jesus Pena Vidaurri on or about the year 1879 or 1880 executed and delivered a deed to Lauriano Vidaurri conveying to him all her interest in the Borrego grant except one league? Answer 'We do' or 'We do not.' To which question the jury in their verdict answered, 'We do.' The court erred in submitting this special issue to the jury because there was no predicate laid by any evidence for introduction of secondary evidence for the purpose of proving the existence, execution, delivery, and contents of the alleged lost deed from Maria de Jesus Pena Vidaurri to Lauriano Vidaurri, purporting to convey to him all her interest in the Borrego grant of land except one league."

The error claimed in each of the assignments is that no proper predicate was laid for the introduction of secondary evidence for the purpose of proving the existence, execution, delivery, and contents of the alleged deed from Maria de Jesus Pena Vidaurri to Lauriano Vidaurri, purporting to convey to him all her interest in the Borrego grant of land except one league. The substance of the testimony of Juan Vidaurri is that he was a son of Lauriano Vidaurri, who died in 1882, and of Trinidad Cuellar de Vidaurri, who died in 1912 or 1914; that he knew

something of the transaction between his father and Maria de Jesus Pena y Vidaurri, who sold all her right in the Borrego tract, with the exception of one league, for the sum of \$320, saw the document, and his father explained everything to him. The document was white paper. He saw it at Corralitos at his father's home, and it was by him kept with other papers. At the time his father was reading papers, and he drew near and saw it. The name of Maria Jesus Pena y Vidaurri was signed to the deed as the seller, and Antonio Navarro's name was on it, who at the time was the county judge. First saw it in 1879 or 1880. The paper was stolen because some thieves in 1884 or 1885 took a box of jewelry away in which the paper was, and they were never recovered. An effort was made to catch them, but they crossed the Rio Grande river to Mexico. A proper affidavit was filed of its loss, and further sufficient proof made that proper search was made and further testimony of its existence and loss made. The bill of exception does not complain so much at the predicate laid as it does at the action of the court in refusing to allow appellant to rebut the predicate, which the court refused at that time, and qualified the bill in several particulars. One was that defendants stated they would offer on the trial other additional evidence to support their contention, and the court further said he could determine whether a proper predicate was laid just as well in the presence of the jury as elsewhere, and they were recalled, and the introduction of testimony proceeded.

We think the predicate was sufficient to permit the testimony, with such other testimony afterwards introduced, to go before the jury. In the preliminary examination of a witness in the first instance to establish a predicate for the introduction of testimony to establish the existence, loss, or destruction of a record it is a matter addressed to the sound discretion of the court. This is purely a question of law. *Mays v. Moore*, 13 Tex. 88; *Waggoner v. Alvord*, 81 Tex. 367, 16 S. W. 1083. However, no injury resulted to appellant, as all the evidence on the subject of the existence and loss of the instrument was finally before the jury, and nothing to show the action of the court was arbitrary and in any way hurtful.

[3] The third assignment complains that the court erred in not allowing him to call witnesses to be used in rebuttal to the testimony of Juan Vidaurri on his preliminary examination for the introduction of testimony to prove existence and loss of the deed. It does not appear that he was denied ultimately to introduce all this rebuttal testimony. From what we have just said it was not error to have heard such portion of the evidence at that time, as it had to again be heard when the jury was present. It

was purely a matter for the court, and it is not complained that he abused his discretion in any way, and the first, second, and third assignments are therefore overruled.

[4] In the sixth assignment complaint is made of the action of the court in submitting the issue to the jury as to whether or not the deed ever existed and was lost without being recorded, and that its execution and delivery may be proved by parol evidence, and likewise its contents be proven by parol evidence, "but, if they do not believe such deed ever existed, then no rights can be established under it"; the objection being that there is no legal, competent, or admissible evidence that Clara de Jesus Pena Vidaurri, under whom plaintiff claims title, by herself or by any person authorized by her, ever executed and delivered either in her own name or in the name of Maria de Pena Vidaurri the alleged lost deed purporting to convey to Lauriano Vidaurri all her interest in the Borrego grant of land, except one league. This assignment does not seem to question the charge in the abstract as a correct proposition of law, but that there was no evidence to support the issue that such a deed ever existed. We do not think any such error can be claimed under this general charge, instructing the jury upon purely a question of abstract law, unless it is itself challenged as an erroneous proposition of law and hurtful to appellant.

[5] The question complained of in the above assignment is now raised in the fifth and sixth assignments in the objection to the special issue given by the court to the jury, to wit:

"Do you or do you not find that Maria de Jesus Pena Vidaurri on or about 1879 or 1880 executed and delivered a deed to Lauriano Vidaurri conveying to him all her interest in the Borrego grant except one league? Answer: 'We do' or 'We do not.'"

—the contention being expressed as follows:

"The court erred in submitting this special issue to the jury because there was no legal, competent, or admissible evidence that Clara de Jesus Pena Vidaurri, under whom plaintiff claims title, by herself or by any person authorized by her, either in her own name or in the name of Maria de Jesus Pena Vidaurri, ever executed and delivered to Lauriano Vidaurri, the alleged lost deed conveying to him all her interest in the Borrego grant of land except one league."

The first because there was no legal evidence offered, and the sixth finding was "against the preponderance of the evidence, and there was no competent or legal evidence to support it." These terms are rather contradictory.

We have carefully read the testimony of the witnesses, and there is enough evidence to go to the jury tending to show that the deed from Maria de Jesus Pena Vidaurri to

Lauriano Vidaurri existed whereby Maria de Jesus Pena conveyed to Lauriano Vidaurri all her interest in the Jose Vasquez Borrego tract of land except one league purchased by A. M. Bruni in 1888.

In the case of Trimble v. Edwards, 84 Tex. 500, 19 S. W. 773; the court, in speaking of the rule and what is necessary to be done to establish the existence of a lost deed, says:

"When secondary evidence of a deed that has been lost or destroyed is offered, it is not necessary to file a preliminary affidavit of the loss or destruction. The evidence of a witness on the stand instead of the affidavit will be sufficient. Parks v. Caudle, 58 Tex. 220. But, in order that secondary evidence of the execution and contents of such a deed may become admissible, it must be shown 'that there has been diligent search and inquiry made of the proper person and in the proper places for the lost deed; that the loss must be proved, if possible, by the person in whose custody it was at the time of the loss, if such person be living, and, if dead, application should be made to his representatives and search made among the documents of the deceased.' Vandergriff v. Piercy, 59 Tex. 372; Hill v. Taylor, 77 Tex. 299 [14 S. W. 366]. The evidence does not show that any application was made to Mrs. Shaddinger for the deed, nor even that it may not have been in the possession of the plaintiff himself. As a predicate for the admission of evidence as to the contents of a lost deed the testimony was clearly insufficient, although Mrs. Shaddinger may have been shown to be beyond the process of the court."

Ordinarily it requires a diligent search and inquiry to be made of the proper person and in the proper places and that the loss be proved by the person in whose custody it was at the time of loss or when last seen, if such person be living, or application should be made to his representatives to search among his documents, if the person be dead. The testimony of Juan Vidaurri showed that the house was robbed, and it was probable the deed was stolen with jewelry with which it was kept in a box belonging to the family in a house where they were living, by robbers, whom they pursued to the Mexican side, and nothing was recovered, and they have never seen the deed or other property since. He testified at the time of the robbery in 1884 or 1885 at night his mother and sisters were in the house at the time it was robbed, but he and his brother were absent, but his father was dead, having died in 1882. This testimony was fully corroborated by other witnesses to the same effect. A. M. Bruni testified:

"I caused a search to be made for that deed. I went to see if they could find the deed, and I had Atlee, the attorney, to go down to the record of Zapata county and look for the deed, and he looked on the record, and the deed was not found, as well as in this county. I made inquiry of the Vidaurri family for it, but I did not obtain it from them."

We think the proof of the existence, loss, and search of the deed was sufficiently established, and no further search was required; for it sufficiently shows it had been stolen, and members of the family and household made every effort to restore it. The law only demands, as said in *Waggoner v. Alvord*, supra, that a party in good faith exhaust reasonably all the sources of information and means of discovery which the nature of the case would naturally suggest and which were accessible to him. The law in such cases, or in any case, will not require an unreasonable and useless thing to be done as a preliminary step to lay a predicate for the introduction of testimony, but leave it as a matter of law rather to the sound discretion of the judge trying the case. *M., K. & T. Ry. Co. v. Dilworth*, 95 Tex. 332, 67 S. W. 88.

[6] The seventh and eighth assignments complain that the court erred in permitting defendants to use and read on the trial of the case the deposition of Trinidad Cuellar taken in cause No. 2369 on the docket of the district court of Webb county, Tex., entitled *Francisco Martinez v. A. M. Bruni et al.*, because taken in a different case from this, and not filed among the papers of this suit until the 4th day of December, 1918, the day on which the case was called for trial, and no notice given that such deposition would be offered.

The question, as we understand it, is no longer an open one in this state, and is settled by the decision in *People's Nat. Bank v. Mulkey et al.*, 94 Tex. 395, 60 S. W. 753, and followed and cited in numerous cases, some of which are *Dawedoff v. Hooper*, 190 S. W. 523; *Castleberry v. Bussey*, 166 S. W. 17; *Parlin & Orendorff v. Vawter*, 39 Tex. Civ. App. 520, 88 S. W. 407; *Rucker v. Carr*, 163 S. W. 633.

Appellees rely upon the case of *St. L. S. W. Ry. Co. v. Hengst*, 36 Tex. Civ. App. 217, 81 S. W. 833, to support their contention and to differentiate the two cases. In the *Hengst* Case there was but one suit filed, and depositions were taken in that case. *Hengst* died, and his children made themselves parties. It is true there were amendments filed, but it was always the same one identical suit originally instituted by himself and prosecuted to judgment.

Besides, if Judge Brown had not intended to hold as he did and overrule, and not follow, *Emerson v. Navarro*, 31 Tex. 338, 98 Am. Dec. 534, he would have made some allusion to that holding itself independently, and not simply disposed of it by citing *Peck v. San Antonio*, 51 Tex. 490, holding that court was not a constitutional court, and should not be regarded as authority. This is only mentioned to intensify the ruling that our Supreme Court meant to hold, as it did, that the deposition taken in one case could

not be used in another. No depositions, in view of the contrary holding to *Emerson v. Navarro*, taken in one case under our statutes, therefore, are admissible and can be used in another case. This was laying the rule down broadly, but was following the plain language of our statute. We therefore hold the court erred in admitting the deposition per se over appellant's objection.

[7] In the same assignment, and presented in the third proposition, appellant claims the court erred in allowing the introduction of tax receipts issued by the tax collector of Zapata county, Tex., for payment of taxes on one league of land situated in that county, one for the year 1879 issued to Ma. de Jesus (V.) Pena, one for the year 1880 issued to Pena Ma. de Jesus (V.), one for the year 1881 issued to Jesus Pena Vidaurri, one for 1882 issued to M. Jesus Pena Vidaurri, and one for the year 1883 issued to Ma. Jesus Pena Vidaurri, showing payment of taxes on one league of land situated in the Jose Vasquez Borrego tract of land in Zapata county; the objection being (a) no proof of their execution; (b) no proof of identity of person to whom issued; (c) not competent, because parts of deposition taken in another case. We think, independent of the deposition, the tax receipts were admissible to go to the jury for what they were worth, in connection with all the testimony. They sufficiently identified the person paying by name and the land grant. Being issued by the officer authorized to issue tax receipts in the county, and taking into consideration their age, execution thereof was sufficiently established. *Ballard v. Carmichael*, 83 Tex. 355, 18 S. W. 734. Tax receipts, though admissible, are not conclusive. *Seemuller v. Thornton*, 77 Tex. 157, 13 S. W. 846; *Brymer v. Taylor*, 5 Tex. Civ. App. 105, 23 S. W. 635. We overrule this assignment.

The ninth assignment of error complains that the court erred in allowing Trinidad Cuellar Vidaurri to testify by deposition that her husband, Lauriano Vidaurri, bought the right of Maria de Jesus Pena Vidaurri to the Corralitos lands, and that she made her husband a deed which was lost when their house was robbed, because it was "in reference to transaction with decedent, Maria de Jesus Vidaurri, alleged to be the same person known as Clara de Jesus Pena Vidaurri, then deceased, under whom plaintiff claims title," as prohibited from testifying under the provisions of article 3690 of the Revised Civil Statutes of Texas. No objection is here urged against the testimony because the deposition was taken in a different suit from this, but that objection is raised to it in the tenth assignment.

We sustain the last assignment, under the authority of *Bank v. Mulkey*, 94 Tex. 395, 60 S. W. 753, and for the reasons given heretofore in sustaining same objection, raised

in seventh and eighth assignments heretofore discussed, in admitting the deposition.

[8] In the eleventh assignment of error appellant complains the court erred in permitting the introduction of an alleged letter of Maria de Jesus P. Vidaurri to Lauriano Vidaurri, dated April 1, 1879, and the alleged receipt of Maria de Jesus Pena Vidaurri, acknowledging receipt of \$140 from Guadalupe Ortiz, because a part of the deposition of Trinidad Vidaurri taken in another suit, and because there was no proof of the execution of said instruments. These receipts were attached to a deposition taken in another case and in the same court and filed therein on the 6th day of November, 1909, of which appellant was plaintiff in a suit brought by him for same land or part and same parties defendant or those in privity with appellant, and remained on file in the proper custody (of the court) until introduced here. Outside of the fact they are shown to be attached to depositions taken in another case in the same court where they remained on file for some ten years, we think they come as ancient documents free from suspicion to such an extent as justified the court in permitting them to go to the jury as a circumstance for what they are worth. *Ballard v. Carmichael*, 83 Tex. 359, 18 S. W. 734; *Holt v. Maverick*, 5 Tex. Civ. App. 650, 23 S. W. 751. In the last-named case, by this court, there is a very full discussion as to the admissibility of such instruments. There was no error in allowing them to go before the jury; they proved themselves as ancient documents. This assignment is overruled.

[9] In the twelfth assignment appellant complains it was error to allow Juan Vidaurri to testify that he saw and read an instrument purporting to be a deed of Maria Pena Vidaurri conveying to his father all her interest in the Vasquez Borrego grant of land except one league, dated about 1879 or 1880, because no predicate was laid and because he was a son of Lauriano Vidaurri, deceased, from whom he inherited an interest he thereafter conveyed to defendant A. M. Bruni, being in reference to transactions with a decedent, Maria de Jesus Pena Vidaurri, known as Clara de Jesus Pena Vidaurri, then deceased, under whom plaintiff claims title, as prohibited by the provisions of article 3690, Revised Stat. The assignment does not make clear appellant's objection. The inhibition contained in the statute is:

"In actions by or against executors, administrators or guardians, in which judgment may be rendered for or against them as such, neither party shall be allowed to testify against the others as to any transaction with, or statement by, the testator, intestate or ward, unless called to testify thereto by the opposite party."

By no possible construction of the statute can it be made to apply here. It is not an

action against executors, administrators, or guardians in which a judgment may be rendered for or against them as such, and does not come within the prohibition that would not allow the party to testify as to any transactions with or statements by the testator, intestate, or ward, so that a judgment might be rendered against him in the above capacity. *Newton v. Newton*, 77 Tex. 508, 14 S. W. 157; *Ferguson v. Coleman*, 208 S. W. 571. This assignment is overruled.

The thirteenth to nineteenth assignments raise practically the same question in respect to the testimony of other witnesses similarly situated and related, and they are severally overruled.

The appellant in his nineteenth assignment complains that the court erred in the special issue No. 5 submitted to the jury, as follows:

"Did A. M. Bruni have peaceable and adverse possession and cultivate, use, and enjoy any lands on the Dolores or Corralitos portions of the Borrego grant? Answer 'Yes' or 'No.'"

This was followed up by the sixth question, as follows:

"If you answer No. 5 'Yes' (meaning by No. 5 the question as to the peaceable and adverse possession of A. M. Bruni), then state how many acres of land were so possessed and used by said Bruni, describe the same and state the length of time it was so possessed and used, giving the dates of such possession and use."

Special issue No. 5 appellant sets out in his nineteenth assignment, and special issue No. 6 in his twenty-fourth assignment. We see no reason for so separating them, and shall consider both together, as the propositions thereunder and objections made are practically the same. It is not claimed they were not in form correct propositions of law, but that the evidence itself was not sufficient to support the pleas of limitation, and, as the same questions are raised in regard to the other defendants, we here set out the charge of the court in respect to the balance, with the answers of the jury thereto and the special finding of the court in the judgment:

To the fifth question, above set out, the jury answered: "Yes."

To the sixth question, also copied herein, the jury answered: "97,663.4 acres, known and described as the following ranches or pastures: La Perla, containing 49,655 acres, in his possession since 1887. Tule, containing, 6,088 acres, in his possession since 1893. Cabazon, containing 7,732 acres, in his possession since 1897 or 1898. Salledor, containing 16,446 acres, in his possession since 1898. Rega, containing 6,573 acres, in his possession since 1898. Burrito, containing 5,311 acres, in his possession since 1898 or 1899. A. M. Bruni has continuously possessed and used all the lands above described from the dates mentioned opposite



each described tract in this answer, up to and including the present date.

Seventh Question. "Did Dolores Perez have peaceable and adverse possession and cultivate, use, or enjoy any land on the Dolores and Corralitos portions of the Borrego grant? Answer 'Yes' or 'No.'" Answer: "Yes."

Eighth Question. "If you answer No. 7 'Yes,' then state how many acres of land were so possessed and used by said Dolores Perez, describe the same, and state the length of time it was so possessed and used, giving dates of such possession and use." Answer: "4,000 acres described by metes and bounds as set out in the surveyor's field notes in her petition as offered in evidence, and known as La Muralla ranch, of which she has been in continuous possession of and used from 1891, or 1892, when it was fenced up to the present time."

Ninth Question. "Did the defendant M. D. Slator and those under whom he claims the land described in his first amended original answer claim said land under deeds duly registered and have peaceable, continuous, and adverse possession of the land claimed in the first amended original answer of said Slator, using and enjoying the same and paying all taxes due thereon for a period of more than five years after plaintiff's cause of action accrued and before the commencement of this suit? Answer 'Yes' or 'No.'" Answer: "Yes."

Tenth Question. "Did the defendant M. D. Slator and those under whom he claims have peaceable and adverse possession by actual inclosure of the land described in his first amended original answer, using and enjoying the same for a period of ten consecutive years after plaintiff's cause of action accrued, and before the commencement of this suit? Answer 'Yes' or 'No.'" Answer: "Yes."

Eleventh Question. "Did the defendant M. D. Slator and those under whom he holds and claims title, claiming to have good and perfect right and title to the land described in his first amended original answer, being a part of the lands and tenements claimed in plaintiff's petition, have and hold peaceably the land claimed and have adverse possession of same for a period of more than ten years after plaintiff's cause of action accrued and before the commencement of this suit, taken and held under a deed or deeds specifying the boundaries of said tract, and duly recorded in the deed records of Webb county? Answer 'Yes' or 'No.'" Answer: "Yes."

Twelfth Question. "Did A. M. Bruni and the others named in the deeds to A. L. McLane and E. A. Atlee, offered in evidence by M. D. Slator, convey said four leagues of land to said A. L. McLane and E. A. Atlee for services in clearing up and defending the title to the Jose Vasquez Borrego grant? Answer 'Yes' or 'No.'" Answer: "Yes."

Thirteenth Question. "Did plaintiff or those under whom he claims pay any part of the expenses incurred in defending the title to the Borrego grant by those who executed deeds to McLane and Atlee? Answer 'Yes' or 'No.'" Answer: "No."

Fourteenth Question. "If you have found that the services of an attorney were needed to defend and protect the title to said Borrego grant or any part thereof, and McLane and Atlee were employed to render such services by A. M.

Bruni and some of the other parties interested in said land, and that neither the plaintiff nor those under whom he claims contributed any part of said expenses of defending said suits against those holding under Jose Vasquez Borrego, then state if the compensation given McLane and Atlee for the services rendered in defending said suits was a reasonable compensation for their services, considering the work done and the value of the land at the time of such suit? Answer 'Yes' or 'No.'" Answer: "Yes."

Fifteenth Question. "If you answer questions Nos. 1 and 2, 'We do not,' then answer this question: What was the undivided interest in acreage of Clara de Jesus Pena Vidaurri in the Dolores and Corralitos tracts of land, considered as a whole, inherited by her from her parents, Hipolito de la Pena and Antonina Vidaurri?"

Sixteenth Question. "What undivided interest in acreage, if any, did Clara de Jesus Pena Vidaurri have in the Dolores and Corralitos tracts of land, taken as a whole, at the time of her death in May, 1888?" Answer: "None."

"In addition to the finding of the jury, the court finds from the undisputed evidence in this case that, when Lauriano Vidaurri purchased the land from Maria de Jesus Pena Vidaurri described in the deed made in 1879 or 1880, then he went into immediate possession of said land; that upon his death in 1882 his heirs continued to possess said land, and that, when in 1885 said heirs sold said land to the defendant A. M. Bruni, the defendant A. M. Bruni went in actual and visible possession of said land, and has ever since continued in such actual and visible possession thereof."

[10, 11] The fifteenth assignment of error, which claims "that the testimony of Basilio Vidaurri that his father, Lauriano Vidaurri, purchased all her interest in the Vasquez Borrego grant except one league of land about the year 1879 or 1880 was a conclusion of the witness and an effort to prove the conveyance of real estate by parol testimony," is overruled. He testified he was present when the purchase was made and knew of the transaction.

It is complained in the sixteenth assignment the court erred in permitting Ignacio Vergara to testify:

"That Lauriano Vidaurri purchased from Maria de Jesus Pena Vidaurri all her interest in the Vasquez Borrego grant except one league of land, and that she told him that she had sold all her interest except one league to Lauriano Vidaurri, about the year 1879 or 1880, and that the consideration for said purchase was the sum of \$320, paid partly in money and in steers," because (a) no predicate was laid, (b) conclusion of witness, and (c) an effort to prove conveyance of real estate by parol testimony."

For similar reason already given this assignment is overruled.

The court made the following indorsement on the bill of exception:

"On the question of predicate for the introduction of oral testimony proving the deed from

Maria de Jesus Pena Vidaurri to Lauriano Vidaurri for all her interest in the Borrego grant, except one league, said deed being dated about the year 1879 or 1880, the defendant A. M. Bruni made and filed among the papers of the cause, same being included in the transcript in this cause, an affidavit as to the loss of said deed as is provided by statute. The witness Juan Vidaurri testified as to the making of said deed and as to its loss. The witness A. M. Bruni testified before the court and jury as to the loss of said deed and to the search that he had caused to be made for the same in the proper places, and the witness Trinidad Cuellar y Vidaurri testified by depositions that Maria de Jesus Pena Vidaurri had made such a deed, and that the same was lost when their house was robbed."

The seventeenth assignment presents a similar objection to the testimony of Pablo Navarro, which for same reason is likewise overruled.

The eighteenth assignment makes a similar objection to the testimony of Escolastica G. de Navarro, which for the same reason is overruled.

[12] The twenty-sixth assignment of error complains of the refusal of the court to give the jury the following special requested issue:

"Did Clara de Jesus Pena Vidaurri, by herself or by any person duly authorized by her, ever execute and deliver a deed to Lauriano Vidaurri, conveying to him all her interest in the Corralitos tract of land, except one league? Answer this question 'Yes' or 'No,' and if you answer 'Yes,' state when or about what time the deed was executed and delivered."

Overruled because Juan Vidaurri and Proceso Martinez testified the lost deed conveyed all interest of Maria de Jesus Pena Vidaurri in the Borrego grant except one league, and Trinidad Cuellar Vidaurri testified it was to the Corralitos lands. The testimony of Trinidad Cuellar Vidaurri appears in the deposition taken in another case, which for that reason cannot be considered, and upon appellant's own objection should have been excluded.

[13] In the second question the court submitted to the jury the question:

"Do you or do you not find that Maria de Jesus Pena Vidaurri on or about the year 1879 or 1880 executed and delivered a deed to Lauriano Vidaurri conveying to him all her interest in the Borrego grant except one league of land? Answer 'We do' or 'We do not.'"

At the same time and in the same paper requesting special issues appellant requested the court to instruct the jury:

"Did Clara de Jesus Pena Vidaurri, by herself or by any person duly authorized by her, ever execute and deliver a deed to Lauriano Vidaurri, conveying to him all her interest in the Vasquez Borrego grant of land, except one league? Answer this question 'Yes' or 'No,'

and if you answer 'Yes,' state when or about what time the deed was executed and delivered."

To have given these two special issues perhaps would have been confusing to the jury. The same matters requested in the second was practically given by the court. What useful purpose would have been served by giving the first one as to the Corralitos lands or how appellant was injured by the refusal we cannot see. Appellant sought to recover lands out of the Borrego grant, and the Corralitos lands were a part of that grant, and the charge, if given, would not have aided the jury in locating appellant's land, or in any way assist the appellant in the recovery of any land sued for, but would have tended to mislead and confuse them.

This assignment is overruled.

The twenty-seventh assignment practically is to the same effect, except it puts the issue in the alternative as to "any land on the Dolores or Corralitos parts of the Borrego grant." This charge designating Corralitos therein was shown by the evidence a mere designation of a portion of the named Borrego grant sued for by appellant as such and not disputed by any one, and there was no possible injury shown committed by refusing this charge. These claimed errors were in fact disposed of by the third question submitted by the court and the finding of the jury thereon, to wit:

"Did Victor Pena, and after him Francisco Martinez, have peaceable and adverse possession and cultivate, use, or enjoy any land on the Dolores or Corralitos parts of the Borrego grant? Answer 'Yes' or 'No.'"

And the fourth question:

"If you answer No. 3 'Yes,' then state how many acres of land were so possessed and used by said Pena and Martinez, describe the same, and state the length of time it was so possessed and used, giving the dates of such possession and use?"

To which the jury answered:

"To the third question we answer 'Yes.' To the fourth question we answer, 'About 50 acres in his possession since 1904 and up to the present times.'"

These two special charges and answers thereto dispose of those assignments, and they are overruled.

[14,15] The twenty-eighth assignment of error complains of the court in refusing to give the following special issue:

"Did Francisco Martinez, plaintiff, at the time of the execution of the deed from Victor Pena to him, date June 1, 1899, have any notice of the execution of any deed by Clara de Jesus Pena Vidaurri, conveying all her interest in the Dolores and Corralitos tract of land except one league to Lauriano Vidaurri?"

The testimony all showed that plaintiff knew that the defendants were in possession

of various tracts of land on the Borrego grant, claiming it by improvements, use, and occupation and paying taxes, so that by use of any diligence he would have known it. He testified himself he paid no money for the land, but at his own cost, expense, and labor would prosecute legal proceedings to recover, and, when recovered, would pay \$1,500, and then give him the ranch where he lives. He then began and performed various legal services and commenced legal proceedings looking to the recovery of the land, and in so doing paid out and incurred costs and various expenses. What effect the want of notice of the lost deed would have upon appellant, except under a plea of purchaser in good faith for value without notice, we cannot perceive. He has made no such issue by proper pleading. If he was put upon any inquiry by the adverse claims of appellees or any one, he was required to follow it out. But he did know of adverse claims, for he made his purchase with the view of instituting the very proceedings he did, to recover this very land. He occupied a portion of the grant for a period of time himself long enough to toll limitations to a portion thereof, and could not close his eyes to the holding of the others on the very grant he was getting ready to recover; hence to have submitted that issue would have served no useful purpose. The court found as an undisputed fact from the evidence:

"In addition to the findings of the jury the court finds from the undisputed evidence in this case that when Lauriano Vidaurre purchased the land from Maria Jesus Pena Vidaurre, described in the deed made in 1879 or 1880, that he went into immediate possession of said land; that upon his death in 1882 his heirs continued to possess said land, and that in 1885 said heirs sold said land to the defendant A. M. Bruni; that the defendant A. M. Bruni went into actual and visible possession of said land, and has ever continued in such actual and visible possession thereof."

The visible possession of the defendants, though they may be regarded as cotenants holding under unrecorded deeds, was sufficient to put plaintiff on notice, and he could not have been a bona fide purchaser. *Colum v. Sanger Bros.*, 98 Tex. 162, 82 S. W. 450, 83 S. W. 184; *Boedefeld v. Johnson*, 201 S. W. 1027.

[16] The twenty-ninth assignment complains of the findings of fact of the court as shown by the judgment and set out above under the foregoing assignment. As the finding is supported by the evidence, we can see no reason why the court may not so declare facts properly in evidence and undisputed as a part of his findings to support the judgment, and the assignment is overruled.

The thirtieth and thirty-first assignments raise issues already discussed, and are overruled.

The twenty-first and twenty-second assignments have to do with the issues raised between appellant and M. D. Slator, one of the appellees, and as he is represented by a different attorney, who has briefed his case separately, we consider it last. Most of the issues and testimony, however, are similar to those presented by other appellees.

The twenty-first complains of the court in submitting to the jury the five and ten year limitation defenses, paying taxes under deeds defining boundaries, and the twenty-second is:

"Did plaintiff or those under whom he claims pay any part of the expenses incurred in defending the title to the Borrego grant by those who executed deeds to McLane & Atlee? Answer 'Yes' or 'No.'"

To all the questions the jury answered "Yes" for this appellee.

[17] No objection is made that the charges do not submit correct propositions of law. The error claimed, however, seems to be that the appellee holds under and from A. L. McLane and E. A. Atlee, who were tenants in common with plaintiff, and therefore could not convey any specific lands held in common so as to bind plaintiff or those under whom he claims title, and therefore could not hold adverse possession against plaintiff. That is precisely what he could do, if the facts justify.

We think the agreement signed by all the parties practically establish his right to the land by limitations without going to the testimony, which testimony itself justified the finding of the jury for him. The agreement referred to is as follows:

"It was agreed that M. D. Slator claims title to the land described in his first amended original answer in this cause under and by virtue of a deed from A. L. McLane and E. A. Atlee, dated the 17th day of September, 1908, which deed has been duly recorded in Webb county and Zapata county, and from the date of purchase by said M. D. Slator he has held the same continuously until the present date in peaceable and adverse possession as to all the parties, and that same has been continuously since said date inclosed by a good and substantial fence, with lots and barns located on said land, and since 1908 M. D. Slator paid all taxes due thereon as same accrued."

When a tenant in common takes adverse possession of land notoriously, using and enjoying it adversely and claiming to own it, then it becomes a question of fact for the jury to pass upon as to whether he has matured limitations. *Houston Oil Co. of Tex. v. Davis*, 181 S. W. 851; *Gist et al. v. East et al.*, 16 Tex. Civ. App. 274, 41 S. W. 306.

It is held in *De Leon v. McMurray et al.*, 5 Tex. Civ. App. 280, 23 S. W. 1038, a deed placed upon record conveying an entire tract made by a cotenant was notice to a cotenant of the repudiation of the cotenancy.

[18] In the twenty-second assignment above the contention practically is made by appellant that he was not properly chargeable as a cotenant with any part of the expenses in perfecting the common title, as there was no evidence to show he was ever consulted as to the employment of McLane and Atlee or ever knew anything about it.

The facts are:

"Appellant claims through Victor Pena, who claimed under a will made by Maria Clara de Jesus Pena Vidaurri. This will was not probated until just prior to the institution of this suit, and deed from Victor Pena to appellant was made only a short time prior to the institution of this suit. Maria Clara de Jesus Pena Vidaurri resided in Mexico and inherited her interest in the grant. There is nothing to show that any of the tenants in common knew or thought of her having an interest or knew or was in any way charged with notice of the claim of Victor Pena when they contracted with McLane and Atlee to defend suits then pending against those claiming under and through Jose Vasquez Borrego. The validity of the grant was in dispute, and was to be passed upon by the courts in the causes then pending. McLane and Atlee were employed by a large majority of the tenants in common, if not all of them, to defend the title of said grant, and gave much time and arduous labor in protecting the rights of all those having an interest in the Borrego grant. If Victor Pena and Maria Clara de Jesus Pena Vidaurri were interested in the grant, they had derived the same benefits from the services rendered by said attorneys as any one else to the extent of their interest. The evidence of A. M. Bruni showed that the land was of little value at the time, and that, considering the work done by said attorneys, the compensation was to the interest of all persons interested to have the validity of the grant established."

The services performed were for the benefit of all the cotenants. This court held in *Stephenson v. Luttrell*, 160 S. W. 666:

"The question is not an open one in Texas, but it has been held by the Supreme Court: 'The court, in determining the rights of the parties, will adjust them upon the proper basis. It will deny to the ousting cotenant his claim to the exclusive ownership of the property, but will enforce his true rights with respect to it; and, if he has discharged burdens which rested alike on the whole estate, it will require his cotenants, when they seek partition and settlement with him, to bear their just proportion of such burdens, requiring him, at the same time, to account for any benefits in excess of his just share which he has received from the estate.'"

See *Corpus Juris*, vol. 13, p. 828; *Estill's Trustees v. Francis* (Ky.) 89 S. W. 172.

Of course, such claim would be protected in any equitable adjustment between the parties or in any partition. It will be borne in mind, too, the jury found against appellant on any title except limitation.

We overrule the assignments.

The evidence introduced was properly allowed to go before the jury and be considered

by them, and was sufficient to sustain their findings in favor of each defendant. As we have fully considered the objection of appellant to the evidence and its admissibility presented under each assignment, and held with the trial court, it would make this opinion too long and serve no useful purpose to set it out at length.

[19] Appellant bases his claim to an undivided interest in the Borrego grant under the will of Clara de Jesus Pena y Vidaurri. The evidence, without the deposition, in effect, was that she parted with the title thereto by conveying all of her interest, except one league, to Lauriano Vidaurri.

A. M. Bruni exhibited title by deeds from Trinidad Cuellar Vidaurri, widow of Lauriano Vidaurri, and children. After that sale she only rendered one league for taxes out of the Borrego grant. She sold the one league mentioned to said A. M. Bruni; then rendered no more of that land ever afterwards for taxes. The date of this sale was June 8, 1887. She made a will on July 8, 1884, by the terms of which she devised her interest in the land in controversy to Victor Pena and others, who conveyed to Victor Pena, who in turn conveyed, or contracted, it to appellant. She died in 1898. At the time of her death, the time the will took effect, she had no interest in the land in controversy, as shown, for she had parted with all of her title.

The existence of the deed independently of the depositions was established by the testimony of about six uncontradicted witnesses. Likewise the possession and limitation was established without any reference to and partly subsequent to the deposition. So, for the consideration of this case, that deposition may be laid entirely out of sight.

As to the language and recitals of the will of Clara de Jesus Pena y Vidaurri, under whom appellant holds, dated the 8th day of July, 1884, made at her home where she resided in the city of Mier, state of Tamaulipas, in which she declared among the property which she actually possessed is the following:

"A tract of land known by the name of Dolores, whose amount or extent she cannot at present moment state, said land being in the state of Texas, of the United States of America, and in the counties of Zapata or Webb, which belongs to the party speaking by inheritance from her father, the aforementioned Don Hipolito de la Pena, who obtained it by purchase from Don Margil Vidaurri and coheirs. A right to land in Corralitos. \* \* \* Such right descended to her by inheritance from her mother, Dona Antonio Vidaurri."

If such recitals could be considered for any purpose, it was before the jury. She disposed also of other property in her will, not touching this grant. There is nothing material in those recitals that contradict the tes-

timony introduced. She owned land at that time. She declares she does not know the amount and did not undertake to state or define as she did not herself know. She rendered one league for taxes up to 1886. She sold the league to Bruni and rendered no more land in that grant for taxes thereafter. She lived and died in Mexico.

The issue was squarely submitted to the jury, "What undivided interest in acreage, if any, did Clara de Jesus Pena Vidaaurri have in the Dolores and Corralitos tracts of land taken as a whole at the time of her death in May, 1888?" and the jury answered, "None." The testimony disclosed the Ratonis ranch in Zapata county as on the Borrego grant. The Borrego grant has three different tracts, to wit: San Ignacio, Dolores, and Corralitos. The only title by limitation shown by appellant's proof was under those who showed actual possession to about 50 acres on the Ratonis ranch, and constructive possession to a larger area, which was held by other defendants at the same time.

The plaintiff testified he—

"never rendered any of this land for taxes, because I am not in possession of the land; others are in possession, and I am waiting to take possession in order to pay taxes. I have never had any possession of the land since I bought it, only that piece I bought through Victor. I have never rendered it for taxes and have never paid the taxes, waiting for the verdict of this court."

He claims under two deeds, one dated June 1, 1899, reciting \$1,500 paid, and one dated April 22, 1905, reciting \$300 paid. Neither deed describes the land conveyed, but both an undivided interest in the lands in the Borrego grant, and the manner of the payment of the consideration was conditioned as stated, and he has never paid one cent taxes on it, and does not intend to unless he gets a verdict in his favor.

It was for the jury to say whether or not the appellant's adverse claim to use and occupation of the land he attempted to hold by limitations was consistent with his claims, whether he was "flying his flag" claiming against the whole world, or were his vendors to be deferred in the payment of the expressed consideration mentioned in the deed until a verdict could be had to ripen his possession in a title when he would settle up and pay

taxes, too. Was it purely a speculative holding, a conditional and speculative limitation claim in which he recognized the adverse claims of others upon which he dared not to pay taxes until he might yet defeat by the verdict of a jury? At any rate all these questions were for the jury. *Wies v. Goodhue*, 46 Tex. Civ. App. 142, 102 S. W. 793; *Kirby v. Boaz*, 121 S. W. 226.

It is contended by appellees that the admission of the deposition of the witness Trinidad Cuellar Vidaaurri taken in a former suit should not cause a reversal, because her testimony relates to a matter established by the undisputed evidence. The right of recovery of appellees was made to depend on the title and possession, use, and occupation.

The court only submitted special issues on the claims set up by A. M. Bruni, Dolores Perez, and M. D. Slator, and therefore no error is assigned against the judgment, especially as to the following named defendants, who recovered under the general judgment, to wit: Jesus Martinez, Proceso Martinez, Jose Maria Uribe, Margarito Uribe, and Henry Hein. No brief is filed by Henry Hein, but the proof fully established his title to the land claimed by him. The court evidently regarded the issues submitted in respect to appellant's title and found against him established the rights of all of the other defendants, because there is a definite finding in the judgment in favor of appellant against each of said defendants named for 160 acres only. The appellant himself seems to take that view, as there are no special assignments raising any specific errors directed to the charge, except as to those named wherein special issues were submitted as to them, and the only general assignment that could be considered was that of a prayer in the stating part of the motion for new trial, that the judgment rendered on the verdict of the jury be set aside.

[20] As stated in the previous portion of the opinion, while the court erred in permitting the deposition taken in another case to be used in this, still, as the objectionable testimony related to an issue proven by the undisputed evidence, the error becomes harmless and does not affect the ultimate result.

Having fully considered the case, we do not find any reversible errors assigned, and the judgment of the court is affirmed.

**PANHANDLE & S. F. RY. CO. v. HUCKABEE et ux. (No. 1562.)**

(Court of Civil Appeals of Texas. Amarillo.  
Nov. 5, 1919. Rehearing Denied  
Dec. 10, 1919.)

**1. RAILROADS ⇨303(1)—DEFECT IN CROSSING CAUSING INJURY TO DRIVER.**

A railroad company failing to use ordinary care in maintaining a public crossing in repair is liable for injuries to a driver thrown from a wagon by the bad condition of the track without negligence on his part.

**2. RAILROADS ⇨351(5)—INSTRUCTIONS AS TO DUTY TO MAINTAIN CROSSING.**

Instruction in language of Rev. St. 1911, art. 6485, providing that a "railroad shall keep such crossing in repair," with an instruction that railroad was required to use ordinary care to maintain crossing, did not impose an absolute duty on the railroad.

**3. TRIAL ⇨129—ARGUMENT OF COUNSEL IN REPLY TO OPPOSING ATTORNEY'S IMPROPER ARGUMENT.**

The rule that it is reversible error to permit an attorney to advise a jury what the legal effect of their answer to an issue would be is subject to the exception that a party, whose counsel improperly pursues a line of argument not called for by the facts, will not be heard to complain of reply of adverse party's counsel thereto.

**4. APPEAL AND ERROR ⇨882(17)—ESTOPPEL BY REQUESTING SUBMISSION OF ISSUE.**

A party who requests jury to make finding on certain question will be estopped from asserting there was error in submitting the issue because there was no evidence authorizing its submission.

**5. TRIAL ⇨129—REPLY TO IMPROPER ARGUMENT OF COUNSEL.**

In parents' action for son's death, where defendant's counsel, after submitting issue of number of years son would have continued to contribute to parents' support and requesting jury to consider evidence thereon, stated in argument to jury that their only answer thereto could be, "We don't know," parents' counsel had the right to tell jury to make answer some number of years or none, and that answer of, "We don't know," would have caused mistrial; such argument being in reply to improper arguments of defendant's counsel.

**6. DEATH ⇨99(1)—DAMAGES TO PARENTS FOR SON'S DEATH NOT EXCESSIVE.**

Verdict of \$1,750 given parents for death of son who at time of death was contributing \$250 per year to support of parents over and above expenses they were out on him, and in all reasonable probability would have continued to do so for next seven years, *held* not excessive.

**7. DEATH ⇨95(1) — AMOUNT OF DAMAGES JURY QUESTION.**

The amount of damages for death rests largely in the judgment of the jury, based on facts of the particular case.

**8. TRIAL ⇨355(2)—ANSWER TO SPECIAL ISSUES.**

Where each special issue was divided by letter into several questions, jury's answer numbered to correspond with number of issue, and not by the divisions as lettered, *held* sufficiently intelligible for rendition of judgment.

Appeal from District Court, Floyd County; R. C. Jolner, Judge.

Suit by W. A. Huckabee and wife against the Panhandle & Santa Fé Railway Company. Judgment for plaintiffs, and defendant appeals. Affirmed.

W. C. Reid, of Albuquerque, N. M., and Madden, Trulove, Ryburn & Pipkin and F. A. Cooper, all of Amarillo, for appellant.

T. F. Houghton, of Floydada, for appellees.

HUFF, C. J. W. A. Huckabee and wife, appellees, sued the appellant railway company for damages occasioned by the death of their son, J. W. Huckabee, through the alleged negligence of the appellant in failing to keep and maintain its road crossing on Virginia street, in the town of Floyd City, in good condition, and in permitting its ties and rails to rise above the level of the roadway some four or five inches, and negligently allowing the track so to remain. It is alleged the deceased, the son of appellees, was crossing the appellant railway at the street crossing above mentioned with a wagon load of lumber, and that the wheels of his wagon struck the track, and from the jar and fall of the wagon on and from the rails caused part of the load to fall, throwing the deceased to the ground and inflicting injuries from which he died. This case was reversed by this court on a former appeal. 207 S. W. 329.

[1] The first assignment asserts error in refusing the request to instruct a verdict for appellant. We conclude the facts and circumstances of this case are sufficient to authorize the finding that the crossing on the street at the time of the injury was out of repair and dangerous, as alleged, and that such street was dedicated to the use of the public as a thoroughfare; that it was the duty of appellant to maintain it in repair; that it did not do so; and that in such failure it did not use ordinary care. The condition of the crossing at the time of the injury was owing to the negligence of appellant in failing to maintain the crossing in repair and was the proximate cause of the injury and death of the deceased. The deceased used ordinary care in loading his lumber on the wagon and in driving across the railway track. His team was not wild or unruly; the lumber did not fall or commence to fall before the wagon reached the track. The load of lumber was caused to fall by the bad condition of the track, there-

by causing the deceased to fall to the ground. This fall was not caused from the fright of the team before reaching the track. The deceased was not guilty of contributory negligence, and there is sufficient evidence to support the finding of the jury to that effect. Under the findings of facts by the jury, the railway is liable for such injuries. Ry. Co. v. Butcher, 81 S. W. 819.

By the second assignment, appellant insists that the trial court, by its charge on the issues submitted, placed too great a burden on it as to keeping the crossing in repair, by instructing that it was an absolute duty imposed upon appellant. Under this assignment appellant presents the proposition that in maintaining the crossing appellant was only required to use ordinary care. The charge given, of which complaint is here made, is as follows:

"You are instructed that the railway company in this case had a right to construct its road across the street at the point where it was constructed, but it was the duty of said company to restore said street thus intersected to its former state, or to such state as not to unnecessarily impair its usefulness, and to keep such crossing in repair."

The issue submitted, of which complaint is made, is as follows:

"After the construction of said track and the crossing on said street, did said company keep and have same in repair on the 23d day of February, 1917"—which was the date of the injury?

The jury answered this issue in the negative. The trial court, in addition to the above charge, also defined "negligence" and "ordinary care," giving approved definitions. He also submitted an issue as to whether, after the construction of its road, the appellant restored the street to its former state, etc. The jury answered that issue in the affirmative. The court submitted special issue No. 3, which is as follows:

"As the term 'negligence' has been defined to you, state whether or not the defendant company, in the construction and maintenance of the track and crossing, across the street in question, was guilty of negligence."

The jury answered this issue in the affirmative. And by the fourth issue they were asked to state if such negligence, if any, was the proximate cause of the injury, as "proximate cause" had theretofore been defined by the charge. This issue was answered in the affirmative. The jury were required to find if appellant had kept the crossing in repair on the day of the injury. They were also required to find, and did find, that in the maintenance of the crossing appellant was negligent, and that such negligence was the proximate cause of the injury. These two findings were sufficient to support the judgment.

[2] We think, when the entire charge is considered, the jury were instructed the appellant was only required to use ordinary care to maintain the crossing. The charge, of which complaint is made, is in the language of the statute. Article 6485, R. C. S. This statute imposed the duty upon the railroad to keep the crossing in repair. The mere fact that the court instructed the jury it was a duty on appellant to maintain the crossing did not instruct liability. The statute imposed the duty relative to the crossing. The court in effect instructed the jury that liability could only be established by the failure to use ordinary care to perform the duty of maintaining the crossing. And the jury, in answer to the issue, so found. It appears to be the holding of some of the courts:

"Where a railroad is constructed across a public road or highway [or street], already established, the duty of the railway company, under the statute, to keep the crossing in repair, is absolute." Ry. Co. v. Smith, 49 Tex. Civ. App. 1, 107 S. W. 638; Railway Co. v. Randall, 51 Tex. Civ. App. 249, 113 S. W. 181; Ry. Co. v. Haddox, 36 Tex. Civ. App. 385, 81 S. W. 1036; Railway Co. v. Gillenwater, 146 S. W. 589; Railway Co. v. Williams, 175 S. W. 486; Horton v. Railway Co., 171 S. W. 1023; Railway Co. v. Sherer, 183 S. W. 408 (11).

The appellant cites the cases of *Stephenson v. Railway Co.*, 164 S. W. 1125; *Railway Co. v. Johnson*, 38 Tex. Civ. App. 622, 85 S. W. 476; *Railway Co. v. Belt*, 24 Tex. Civ. App. 281, 59 S. W. 607. The first case discussed the rule as to a crossing not on a public highway, and holds in such case the railway is only held to the exercise of ordinary care in relation thereto. The last two cases, however, appear to hold that it is an absolute duty to restore the crossing disturbed, but in maintaining the crossing it is only required to use reasonable or ordinary care. It is unnecessary for us to determine which rule we will follow in this case, as we think the trial court followed appellant's contention and construction of the statute as is manifest from the entire charge as above indicated by us. This assignment will be overruled.

The third assignment is based on the remarks of the appellees' counsel in argument to the jury and the action of the court in permitting such remarks and the refusal to instruct the jury not to consider them. The bill recites:

"While the plaintiffs' counsel was making his closing argument to the jury in connection with the defendant's requested special issue No. 8, as submitted by the court to the jury in his charge, counsel for plaintiffs stated to the jury that in answering said special issues they should make it some number of years or none, which would make it final, and that

if the jury answered it did not know it would cause a mistrial."

It is further recited in the bill:

"In connection with such statement to the jury, plaintiff states that it was in answer to defendant's argument to the jury where, after reviewing the evidence on that issue, defendant's counsel had stated to the jury that under the evidence before them the only answer the jury could make to said special issue was, 'We do not know.'"

The objection to the argument and request to instruct the jury to disregard it were overruled. Appellant requested the trial court to submit special issue No. 8, which the court did. The issue requested and given is as follows:

"How long under all the facts presented to you in the evidence before you would the deceased, Wesley Huckabee, have reasonably been expected to have remained with the plaintiffs and contributed his labor and earnings to their support?"

The jury answered: "Seven years."

[3] It is asserted in a proposition that it is reversible error to permit an attorney to advise a jury what the legal effect of their answer to an issue would be. This we understand to be the rule; but there is another one, or an exception, to the rule, to the effect if counsel for one party pursues a line of argument not called for by the facts of the case, and if it is improper, he ought not to be heard to complain of the reply, and in such case appellate courts will not reverse a judgment upon an assignment based upon such fact. *Railway Co. v. Gracia*, 62 Tex. 289, 290; *Trinity, etc., v. Denham*, 88 Tex. 203, 30 S. W. 856; *Railway Co. v. Perry*, 30 S. W. 709; *Railway Co. v. Hagen*, 188 S. W. 954; *Wilson v. Fitch*, 208 S. W. 556.

[4] When the appellant requested the jury to find how long the deceased would have been reasonably expected to contribute to appellees' support, it assumed there was evidence from which the jury could find the length of time such support would be given. The appellant would have been estopped from asserting there was error in submitting the issue because there was no evidence authorizing its issue. Appellant was inconsistent to argue to the jury there was no evidence upon which they could base an answer to the issue which it had submitted after requesting them to consider such evidence on the issue, and he should not have told them they could only answer, "We don't know."

[5] Now appellee certainly had the right to advise the jury they could answer "some number of years, or none." It is evident that counsel for appellees believed it was the purpose of appellant to obtain a mistrial by the answer sought in its argument. He was within his rights in requesting that such result be avoided, and if they found deceased

would not have contributed for any number of years to say so, or if he, in all reasonable probability, would have contributed, to answer the number of years. The issue as submitted perhaps was not the proper method of obtaining the amount of damages to which appellees might be entitled. The ultimate fact to be established was the damages the appellees sustained in the death of their son. It is doubtless true the jury could consider the amount he had contributed and would, in all reasonable probability, have contributed in the future, in arriving at the ultimate facts sought. Appellant sought an answer to an issue on evidence to be considered in arriving at the ultimate fact sought, assuming there was evidence by which such issue could be answered, and then argued there was no such evidence and advised in effect a mistrial on that issue. It seems to us that counsel for appellees had the right to inform the jury, if they followed the advice of opposing counsel, what would be its result. He did not tell them how to answer the issue, but told them what appellant's request would mean. We do not think under the record appellant ought to be heard to complain.

The fourth assignment is also based on the opening argument of counsel for appellee. If there was any error, we can see no injury. If the facts were as stated, the argument, it seems to us, was legitimate and a reasonable deduction from the evidence.

[6, 7] The fifth assignment assails the verdict as being excessive. The jury found that the deceased contributed \$250 to appellees' support per year at the time of his death, over and above expenses they were out on him, and in all reasonable probability he would do so for the next seven years. The judgment rendered was for \$1,750. We are not prepared to say the verdict is excessive, and do not feel justified in requiring a remittitur. We did suggest on the former trial that the judgment then rendered for \$3,500 under the facts was excessive. There is no mathematical rule for fixing the amount in cases of this kind, and under the evidence becomes a question for the jury and rests largely in the judgment of the jury, based upon the facts of the particular case.

The sixth assignment is also overruled.

[8] The seventh assignment objects to the judgment because it is asserted the jury failed fully to answer the special issues requested by appellant, which were submitted. There appears to have been seven special issues submitted, as requested by appellant. To illustrate the point made to the issue submitted and the answer of the jury, we give the first issue and the answer of the jury, as made:

"Defendant's specially requested issue No. 1:

(a) Was the deceased, J. W. Huckabee, neg-



ligent in failing to provide a stronger standard and support for the load of lumber in question? (b) Did such negligence on the part of deceased contribute to the injuries resulting in his death?"

The jury answered No. 1, "No." So on through the entire seven issues they were so divided by letters, submitting several grounds of alleged contributory negligence, and in each instance the jury numbered their answer to correspond with the number of the issue and answered the issue by number, and not by the divisions as lettered. We think the answers are sufficiently intelligible upon which a judgment could be rendered. The answer to each of the issues is not uncertain.

The eighth and ninth assignments are overruled for the reasons given under the first assignment.

The judgment of the trial court is affirmed.

SOVEREIGN CAMP, WOODMEN OF THE  
WORLD. v. WERNETTE.  
(No. 6273.)

(Court of Civil Appeals of Texas. San Antonio. Nov. 12, 1919. Rehearing Denied Dec. 10, 1919.)

1. INSURANCE ⇐815(2)—ANSWER OF INSURER  
RAISING ISSUE OF FRAUD IN PROCURING FRATERNAL CERTIFICATE.

In the absence of exceptions, the allegations of an answer of a fraternal insurer held sufficient to raise the issue that the applicant was guilty of fraud in falsely representing that he was not engaged in the saloon business when in fact, he was engaged in such business, which occupation was prohibited by the insurer, etc.

2. INSURANCE ⇐723(8) — FALSE STATEMENT  
THAT APPLICANT WAS NOT ENGAGED IN PROHIBITED OCCUPATION.

Where an applicant for membership in a fraternal insurer which classed saloon keeping as a prohibited occupation falsely represented that he was not engaged in the saloon business, and thus procured a certificate, such certificate is null and void because of the misrepresentation, and recovery cannot be allowed, though the member paid assessment for long period.

3. EVIDENCE ⇐370(4) — APPLICATION FOR  
MEMBERSHIP IN FRATERNAL SOCIETY.

Where there was no attack on the genuineness of an application for membership in a fraternal insurance society, the application, which was signed by deceased, proves itself.

4. INSURANCE ⇐724(2)—ESTOPPEL OF INSURER  
TO RELY ON FALSE STATEMENT BY APPLICANT.

Where the applicant for membership in a fraternal insurer falsely stated that he was not engaged in the saloon business, and the clerk issuing the certificate testified he did not

know that the applicant was so engaged, the insurer cannot be estopped to rely on the false statement in the application because it was well known in the community that the applicant was engaged in the saloon business, which was one of the occupations prohibited by the by-laws of insurer, etc.

5. INSURANCE ⇐724(1)—FRATERNAL SOCIETY  
NOT ESTOPPED BY KNOWLEDGE OF SUBORDINATE OFFICER.

Since Acts 33d Leg. c. 113, § 20 (Vernon's Sayles' Ann. Civ. St. 1914, art. 4847), provides that a fraternal insurer may provide by its constitution and by-laws that no subordinate body of subordinate officers shall have power to waive any of its provisions, no estoppel can arise against a fraternal insurer because of the acts or knowledge of a subordinate officer, where the by-laws contain such prohibition against waiver, etc.

6. INSURANCE ⇐723(8)—FALSE REPRESENTATION  
AS TO PROHIBITED OCCUPATION BARS RECOVERY.

Where deceased at the time of his application for membership in a fraternal insurer falsely represented that he was not engaged in the saloon business, whereupon he was admitted to membership and paid assessments until death, no recovery can be allowed on the certificate because of those provisions of by-laws of the insurer which, after forbidding the insuring of persons engaged in the saloon business, allowed members who thereafter entered such prohibited occupation to continue their insurance upon payment of an additional assessment.

7. INSURANCE ⇐724(2) — ESTOPPEL OF FRATERNAL  
INSURERS BY ACCEPTANCE OF PREMIUMS.

Where, at the time deceased became a member of a fraternal insurance society which included saloon keeping within the prohibited occupations, the clerk of the fraternal insurer knew that deceased was engaged in the business of a saloon keeper, the insurer, having accepted premiums paid, is estopped from asserting the invalidity of the certificate, although it was provided in the policy that an agent might not waive its conditions.

8. INSURANCE ⇐724(2) — TO ESTOP FRATERNAL  
SOCIETY IT MUST HAVE KNOWLEDGE OF FALSE STATEMENT IN APPLICATION.

To estop a fraternal insurer to claim a forfeiture of the certificate because of the member's false statements that he was not engaged in a prohibited occupation, it must appear that the clerk had actual knowledge that deceased was engaged in the prohibited occupation, and such knowledge cannot be presumed.

9. INSURANCE ⇐723(8) — CONSTRUCTION OF  
BY-LAWS AS TO PROHIBITED OCCUPATION BY OFFICER OF FRATERNAL SOCIETY.

Where deceased from time of his application for membership until death was a member of a partnership engaged in the hotel and saloon business, deceased managing the hotel, and his partner the saloon, he was engaged in the saloon business within the by-laws of a fraternal insurer prohibiting the insuring of persons

in such business, notwithstanding the clerk of the insurer construed the prohibition to extend only to those actively selling intoxicants, etc.

**10. INSURANCE — 723(2)—EFFECT OF INCONTESTABLE CLAUSE ON VOID CERTIFICATE.**

Where a fraternal insurance certificate was void because of false representations made by the applicant in his application, it was never in force, and could not be validated by an incontestable clause.

**11. INSURANCE — 719(1) — INCONTESTABLE CLAUSE IN POLICY OF FRATERNAL SOCIETY.**

An incontestable clause added by the by-laws to a fraternal insurance certificate does not have a retroactive effect so as to make incontestable a certificate which had already been issued for a period of five years, after expiration of which time it was provided there should be no contest; hence, where the incontestable clause was in less than the five years fixed changed so as to allow contests when insured shall die while engaged in prohibited occupations, a certificate issued on deceased's false representation that he was not engaged in prohibited occupation may be contested, though it had been issued more than five years.

**12. INSURANCE — 745 — INCONTESTABLE CLAUSE IN POLICY OF FRATERNAL SOCIETY.**

There is no law requiring fraternal benefit insurance societies to put incontestable clauses in their certificates, as is demanded by Rev. St. 1911, § 4741, of health, life, and accident companies, and consequently clauses of that kind in certificates of fraternal insurers derive their authority, not from statute, but from contract.

Appeal from District Court, Bexar County; R. B. Minor, Judge.

Action by Eliza Wernette against the Sovereign Camp, Woodmen of the World. Judgment for plaintiff, and defendant appeals. Reversed and remanded.

E. D. Henry, Perry S. Robertson, and Atlas Jones, all of San Antonio, for appellant.

Perry J. Lewis, H. C. Carter, Champe G. Carter, and Randolph L. Carter, all of San Antonio, for appellee.

**FLY, C. J.** This is a suit for \$1,100 brought by appellee, \$1,000 being for insurance on the life of Joseph Wernette, her deceased husband, and \$100 for a monument to his memory, which it was alleged appellant had agreed to furnish. The defense was that deceased, at the time of his death and for years prior thereto, was a saloon keeper and engaged in the retailing of intoxicating liquors as a beverage, which was prohibited by the constitution and laws of the fraternal association, and that deceased had not paid the additional sum each month required when a member changes from a vocation allowed to one prohibited, nor had he given the required notice in writing of such change. The cause was submitted to the

court without a jury, and judgment rendered in favor of appellee for the amount for which she sued.

On December 2, 1908, Joseph Wernette was insured, appellee, his wife, being the beneficiary, by appellant in the sum of \$500 if he should die within a year, or \$1,000 should he live longer than two years. The certificate binds the insured by all of the laws, rules, and regulations then "in force or which may hereafter be enacted." Deceased died in January, 1918, leaving appellee as his survivor and the beneficiary in the certificate of insurance.

When Joseph Wernette applied for membership in the association, he represented his occupation as that of hotel proprietor, and also represented that he was not directly or indirectly following the occupation of a "saloon keeper, bartender, nor engaged in the retailing of intoxicating liquors as a beverage." At the time that the certificate was issued deceased was engaged in running a hotel and saloon in partnership with Frank Grimsinger, and the saloon was in a room of the hotel. Deceased had immediate supervision of the hotel part of the business, and Grimsinger had immediate control and supervision of the saloon. The profits of hotel and saloon were divided between Grimsinger and the insured, Joseph Wernette. The hotel and saloon business was continued by the partners from a time before the policy of insurance was issued to deceased up to the time of his death in January, 1918. Grimsinger testified that he and the insured were equal partners in the hotel and saloon business; that they had been engaged in such business as partners from September, 1908, until he died. It was agreed by the insured in his application for membership "that any untrue statements or answers made by me in this application \* \* \* or any concealment of facts in this application, \* \* \* intentional or otherwise," should render the beneficiary certificate null and void.

In section 42 of the constitution and by-laws of the Sovereign Camp, Woodmen of the World, in effect since July 1, 1907, it is provided:

"Persons engaged in the following classes of business or employment shall not be admitted:

"Employés in ammunition factories, balloonists, plow grinders, sand stone cutters, grindstone turners, those employed in anthracite coal mines, saloon keepers, bartenders; those engaged in the retailing of intoxicating liquors as a beverage; also persons employed in the making, compounding, distilling, rectifying or brewing of malt, spirituous, vinous or intoxicating liquors, or in the distribution or delivery of the same.

"The beneficiary certificate of a member who shall engage in any prohibited occupation shall thereby become null and void unless such member shall within thirty days after engaging in

such prohibited occupation notify the clerk of his camp, in writing, of such change of occupation, and thereafter, while so engaged, pay an additional sum of fifty cents on each assessment for each one thousand dollars of his beneficiary certificate."

The evidence showed that there was no change of occupation, but, if there had been, that insured never gave notice to the clerk of the camp in writing that he was engaged in the business of a saloon keeper or in retailing intoxicating liquors as a beverage, nor ever paid the additional sum of 50 cents on each assessment. The evidence as to deceased being engaged in the saloon as well as the hotel business was uncontradicted. Zizik, the clerk of appellant, swore that he investigated the occupation of Joseph Wernette when he applied for membership, and did not know he was engaged as a saloon keeper, or that he retailed intoxicating liquors. The testimony tended to show that the clerk of the local camp did not know that there was a saloon in the hotel conducted by appellee, but that he raised the question when the application was filed as to whether Wernette, who had formerly owned a saloon, was out of the saloon business, and was informed that he was at that time in the hotel business. The application was received under that belief. Zizik did not testify that he knew there was a saloon in the hotel controlled by Wernette. No one connected with appellant testified that he knew Wernette was engaged in the business of a saloon keeper.

[1] No exceptions were urged to the pleadings of appellant. In the first amended original answer it was alleged that—

"At the time said certificate was issued defendant did not issue certificates to a saloon keeper, or bartender, or one engaged in the retailing of intoxicating liquors as a beverage, or in the distribution or delivery of malt or intoxicating liquors, and defendant says that when insured applied for said certificate he represented to defendant, in writing, that he was not a saloon keeper or bartender, and that he was not engaged in the retailing of intoxicating liquors as a beverage, and that he was not engaged in the distribution or delivery of malt or spirituous liquors."

Appellant was permitted to file a trial amendment of the paragraph herein quoted, and it was alleged in the trial amendment that the representations were untrue, and that by reason of such false representations the certificate was null and void. In the absence of exceptions, the allegations were sufficient to support a finding of fraud in obtaining the issuance of the certificate. The very terms of the contract upon which the certificate was issued made it void if the representation as to occupation was untrue, and the representation made by Wernette was alleged to be untrue. The facts alleged

constituted fraud, whether the party making the representations knew they were true or not. It is alleged that appellant did not issue certificates to persons engaged in retailing spirituous liquors, and, if the representations as to not being engaged in that business were false, the certificate was necessarily issued by reason of such false representations. *Riggins v. Trickey*, 46 Tex. Civ. App. 569, 102 S. W. 918.

[2] The uncontroverted facts clearly and indubitably show that Joseph Wernette, at the time he applied to appellant for insurance, was engaged in retailing intoxicating liquors. The saloon in the hotel was a part of the hotel business, and appellee cannot shield herself from the effects of the representations made by insured as to his business or occupation, or the concealment of the fact that along with his hotel business he was engaged in selling liquor, because his partner actually did the selling of the intoxicants while the insured attended to the other part of the hotel business. The legal effects of the contract cannot be avoided without making a new one for the parties. For reasons deemed sufficient to it, appellant had declared that no saloon keeper or person who sold intoxicating liquors at retail could become a member of its organization, and in order to guard against the admission of members of that class it provided that an applicant must disclose his occupation, and that falsehood or concealment in regard to it should render a certificate issued upon the misrepresentation null and void. Strict payment of all assessments could not render vital a certificate rendered void by fraud and concealment.

In the case of *Dwight v. Germania Life Ins. Co.*, 103 N. Y. 342, 8 N. E. 654, 57 Am. Rep. 729, the appellant had stated that he was not engaged in the manufacture or sale of intoxicating liquors, and it was shown by the facts that he was a hotel keeper and sold wines and liquors to his guests, and the New York Court of Appeals held that the statement was false, was a breach of warranty, and forfeited the policy. As said by the court:

"Parties to an insurance contract have the right to insert such lawful stipulations and conditions therein as they may mutually agree upon, or which they may consider necessary and proper to protect their interests, and which, when made, must be construed and enforced like all other contracts according to the expressed understanding and intent of the parties making them. If an insurance policy in plain and unambiguous language makes the observance of an apparently immaterial requirement the condition of a valid contract, neither courts nor juries have the right to disregard it or to construct, by implication or otherwise, a new contract in the place of that deliberately made by the parties."

Again, citing *May on Insurance*, the court held:

"In considering the language of an insurance contract, the words of a promise are to be regarded as those of the promisor, while those of a representation upon which the promise is founded are the words of the promisee, and are to be taken most strongly against the party using them."

To the same effect is *Holland v. Supreme Council*, 54 N. J. Law, 490, 25 Atl. 367.

[3, 4] Although it is contended by appellee that the evidence does not show that deceased signed the application for insurance, it may be stated that the application, purporting to be signed by Joseph Wernette on November 7, 1908, was placed in evidence, no attack having been made upon its genuineness, and it, of course, proves itself. No contest was made on that point. The evidence showed that the application was made while Wernette was running a hotel and saloon, and that he represented that he was not directly or indirectly "engaged in the retailing of intoxicating liquors as a beverage." At that very time he was directly engaged in retailing liquors in a saloon in his hotel, and there is no testimony tending to show that appellant knew that he was so engaged. The assertion of his son, Elmer Wernette, that every one knew his father's business was a mere conclusion, and not based on the facts. Appellee swore that he was not in the saloon business, but was conducting a hotel.

It may be taken as settled that the doctrine of estoppel applies to fraternal benefit societies, and, where it appears that by the fault of one party another has been induced innocently or ignorantly to change his position for the worse in such manner that it would operate as a virtual fraud upon him to allow the party by whom he has been misled to gain by it, the party permitting such inducement cannot profit by it. If Joseph Wernette had disclosed in his application the facts as to the saloon in which he was a partner being conducted in the hotel, and, in spite of the knowledge of those facts by the clerk, appellant had issued the policy and accepted payment for years of the premiums or assessments, estoppel might arise, but where such facts were not disclosed, and the deceased stated positively that he was not engaged in retailing intoxicating liquors, and the knowledge of such retailing is not brought home to the knowledge of the clerk, although he tried to investigate and ascertain the facts, the doctrine of estoppel would not apply. We have seen no case in which the knowledge of members of a local lodge or organization would be the knowledge of the organization, but it is usually confined to the knowledge of the clerk, secretary, or recorder who takes the applications and re-

ceives the assessments. In the case of *Woodmen of the World v. Putnam*, 206 S. W. 970, decided by the Court of Civil Appeals of the Ninth District, the clerk went to the saloon of the insured where he was retailing liquor and collected assessments, and it was found by the court that the clerk knew that the insured was retailing liquor and had been at it for nine years preceding his death. That was a case of a member entering a prohibited business after obtaining his certificate. Under those circumstances the certificate was not forfeited unless the insured failed to give notice in writing of his entering the prohibited occupation and failed to pay an increased assessment. The court found that the clerk was the duly authorized agent to collect the dues or assessments, and, although he knew that the insured had gone into the retail liquor business, he made no effort to collect the additional assessment. The facts of this case do not bring it within the purview of the *Putnam Case*.

[5] It may be well in this connection to state that the decisions as to waiver and estoppel cited by appellee were made in cases in which the acts upon which they were based occurred prior to 1913, as did those in this case, and the same rule cannot properly be made as to facts occurring since that year. In 1913 it was enacted by the Legislature of Texas that—

"The constitution and laws of the society may provide that no subordinate body nor any of its subordinate officers or members shall have the power or authority to waive any of the provisions of the laws and constitution of the society, and the same shall be binding on the society and each and every member thereof and on all beneficiaries of members." Acts 33d Leg. c. 113, § 20 (*Vernon's Sayles' Ann. Civ. St. 1914*, art. 4847).

There could, therefore, no question of waiver or estoppel arise under the facts of this case on account of any acts or knowledge of Zizik since 1913.

[6] The facts of this case do not bring it within the scope of the provision of the rule enacted by appellant as to change from an occupation permitted to one prohibited, because the insured did not change his occupation, but from the time that he obtained his insurance to the hour of his death he was engaged in conducting a hotel and saloon business, and the forfeiture must be based, if at all, on representations made to obtain the insurance, and estoppel, if it arises, must be based on the knowledge of appellant through its clerk of the facts in regard to the business of the insured at the time he applied for insurance, or at the time he delivered the certificate and accepted the premium. *Modern Brotherhood v. Phelps*, 142 Ky. 544, 124 S. W. 892; *McGurk v. Life Ins. Co.*, 56 Conn. 528, 16 Atl. 263, 1 L. R. A. 563.

[7] If at the time of the issuance of the

policy it was known to Zizik, the clerk, that Joseph Wernette was engaged in the business of a saloon keeper or was selling liquors at retail, appellant would be estopped from asserting the invalidity of the policy. *Joyce on Ins.* § 515; *Western Assurance Co. v. Hillyer*, 167 S. W. 816. This may be true although it is provided in the policy that the agent may not waive its conditions. The rules enunciated apply to fraternal benefit societies. *Joyce on Ins.* § 5151; *Newman v. Benefit Ass'n*, 76 Iowa, 56, 40 N. W. 87, 1 L. R. A. 659, 14 Am. St. Rep. 196; *Modern Woodmen v. Breckenridge*, 75 Kan. 373, 89 Pac. 661, 10 L. R. A. (N. S.) 136, 12 Ann. Cas. 636; *Modern Woodmen v. Trust Co.*, 25 Colo. App. 26, 136 Pac. 806.

[8] However, in order to bind appellant, and estop it from claiming a forfeiture of the certificate, knowledge of the facts must be brought home to the clerk, and such knowledge cannot be presumed or inferred, but must have been actually known by the clerk. Appellant was under no obligation to go into an investigation of the representations of insured, but was authorized to act upon the presumption that they were true. The doctrine of estoppel "rests upon the ground that facts made known to an agent of the company, when acting as such, are in law known to the principal, and that a fraud would be perpetrated if an insurance company, through its agent, was allowed to deliver its policy and accept the premium with knowledge of facts which under its provisions rendered it void ab initio, and thereafter assert its invalidity." *In re Millers' Ins. Co.*, 97 Minn. 98, 106 N. W. 485, 4 L. R. A. (N. S.) 231, 7 Ann. Cas. 1144; *Virginia Ins. Co. v. Cummings*, 78 S. W. 716.

[9] The Kentucky case of *Life Ins. Co. v. Hughes*, 110 Ky. 26, 60 S. W. 850, is based on facts totally different from those found in this case. No decision, we think, can be found that holds that each partner is not engaged in the saloon business and in retailing intoxicating liquors under similar facts to those in this case. No one has been shown to have expressed such an opinion except Zizik, whose authority to construe such policies is not as well established as might be desired if there should be any inclination to be guided by it. Mr. Zizik's offhand opinion

that a "saloon keeper is the man behind the bar, the man going behind the bar and dealing out the drinks," is novel, if not binding on any one.

[10, 11] If the policy was obtained by false representations, under the very terms of the contract it was void ab initio, and was never "in force" within the purview of the clause of the policy as to its being incontestable after five years. However, there was no incontestable clause in effect when the certificate was issued, nor for seven years thereafter, when certificates were made incontestable, except when the death of the insured was caused by the beneficiary, or the hands of justice, or from drinking intoxicating liquors, or use of opiates, cocaine, chloral, or narcotics or poison, or when death occurs in war, except in defense of the United States. That provision lasted for only two years, and on October 1, 1917, another clause was enacted which added to the other grounds for contest when the insured shall die while "engaged in a hazardous or prohibited occupation." The insured was bound under his contracts by the laws made by appellant, and his certificate was not rendered incontestable under the law of 1915, because it was not in existence for a sufficient length of time and had no retroactive force or effect. His occupation was one prohibited, and under the law of 1917, the certificate could not become incontestable.

[12] There is no law of this state requiring fraternal benefit societies to put incontestable clauses in their certificates as is demanded in article 4741, Revised Statutes, of life, health, and accident insurance companies, and consequently clauses of that kind in certificates of mutual benefit organizations derive their authority, not from the statute, but from the contract. It follows that decisions made in ordinary insurance cases as to the incontestable clause based on the statute such as that in *Southern Union Life Ins. Co. v. White*, 188 S. W. 266, can only be looked to as to such matters as that even fraud, after the incontestable period has been perfected, will not invalidate a policy.

The judgment is reversed, and the cause remanded.

MOURSUND, J., not sitting in this case.

**COURCHESNE v. BROWN. (No. 1014.)**

(Court of Civil Appeals of Texas. El Paso.  
Nov. 13, 1919.)

**1. APPEAL AND ERROR ¶927(7)—REVIEW OF REFUSAL TO DIRECT VERDICT.**

Court of Appeals, in determining correctness of lower court's action in refusing to direct verdict for defendant, must take plaintiff's evidence as giving the true version of the matter at issue.

**2. MASTER AND SERVANT ¶77—PURPOSE OF EMPLOYER IN DEDUCTING HOSPITAL FEE FROM WAGES, JURY QUESTION.**

In an employe's action for hospital expenses, question of whether employer's purpose in making monthly deductions from employe's pay, called "hospital fees," was to establish a hospital, or hospital plan, or to apply fees any time thereafter to the payment of hospital expenses at a hospital in case of sickness, held for jury.

**3. MASTER AND SERVANT ¶77—DEDUCTION FROM WAGES FOR HOSPITAL SERVICE CONSTITUTES TRUST FUND.**

Employer, who monthly deducts a portion of employe's wages for purpose of accumulating a fund with which to care for employes who become sick, holds the fund in trust for the contributing employes, and assumes no personal responsibility to employe who becomes sick, other than a proper and faithful administration of the trust fund, requiring him, in absence of his own hospital or a custom of furnishing hospital service, to furnish such services only if there is an unexpended portion of the trust fund.

**4. MASTER AND SERVANT ¶77—BURDEN OF PROOF OF DEDUCTION OF MEDICAL EXPENSES FROM WAGES.**

Employe suing to recover hospital expenses from employer who had deducted "hospital fee" from monthly wages of employes had burden of alleging and proving that fees were collected as a present hospital fund, to be used in case of sickness and that employer had on hand a sufficient amount of the funds to pay the expenses.

Appeal from District Court, El Paso County; P. R. Price, Judge.

Action by C. A. P. Brown against A. Courchesne. Judgment for plaintiff, and defendant appeals. Reversed and remanded.

Winter, McBroom & Scott, of El Paso, for appellant.

Brown & Wilchar, of El Paso, for appellee.

**WALTHALL, J.** This is an appeal from a judgment in favor of appellee, plaintiff below, and against appellant, for \$567.

For cause of action appellee alleged, substantially, the following:

Appellee on dates mentioned was in the

employ of appellant; appellant is the owner of, and for many years was engaged in, a lime, rock, and lumber business, and has been the employer of labor, and has had employed in said business a great number of employes; appellee's special position with appellant was that of accountant, office manager, and cashier, at a salary of \$200 per month; appellee entered upon his said employment on July 1, 1917; appellant withheld from appellee's wages \$1 per month for each and every month that appellee was with appellant, for hospital fees, including medical attention and nurse hire, and withheld a like sum from each of his employes every month, and said deduction was made upon the books of appellant as "hospital fees," and that appellant has customarily, for a long period of time, been collecting said sum of \$1 per month from his said employes as hospital fees; that the withholding and collecting by appellant of said sum of money as hospital fees from appellee's wages entitled appellee to hospital services, medical attention and nurse hire, including nurse's board in the event appellee became sick; that on September 28, 1917, appellee became violently sick while so employed, the particular sickness being appendicitis, and that it became necessary to send appellee to the hospital for proper treatment; that appellant's son, then actively engaged in managing and assisting appellant in said business, sent appellee to Hotel Dieu, a hospital; that it was necessary for appellee to receive treatment from said date to December 1, 1917, and to secure the services of surgeons and physicians in the operation; and that said hospital fees and nurses' and doctors' bills are as stated, the several sums itemized aggregated \$747; that said sums were incurred by appellee, including necessary ambulance fee to and from the hospital of \$10; that all of said bills were reasonable and necessary; that by virtue of the premises appellant became liable and bound for said sums; that appellant has failed and refused to pay said sums; and that it became necessary that appellee pay, and he has paid, all of said sums, as the parties with whom said bills were made looked primarily to appellee for payment; that section 12g, pt. 1, of Employers' Liability Act (Acts 1913, c. 179), as amended by the 35th Legislature (1917) c. 103 (Ver-non's Ann. Civ. St. Supp. 1918, art. 5246-28), prohibits any employer from collecting from employes, any part of the premium which any employer might have to pay by reason of being a subscriber under the terms of said act; and appellant was a subscriber under said act, and appellant was an employer of more than five persons, and at the time appellee began working for appellant, and at the time of his sickness, and when said bills were incurred, appellant was a subscrib-

er to the Employers' Insurance Association under said act; the insurance so secured by appellant for his employes covered necessary hospital fees of all of his employes for injuries arising in the course of their employment, and that the hospital fees of \$1 as above deducted from the wages of employes was, in the contemplation of the parties, for sickness or disability arising from any cause other than injuries received in the course of their employment, which sickness or disability would necessitate said employes or appellant incurring hospital fees, medical attention, nurse hire, and board; appellant owned no hospital, nor was he a subscriber to any particular hospital, nor was it specified by appellant which particular hospital would be necessary in the event it became necessary for an employe to incur hospital attention, yet appellee would show that by the direction of appellant's son, agent and manager of appellant's business, appellee was sent to the hospital Hotel Dieu; that while there were no written specifications between appellant and his employes as to what hospital services employes would be entitled to receive, said hospital fees were collected by appellant for the purpose of securing to employes said necessary medical and hospital attention, and that such was in contemplation of the parties, and that by the payment of said \$1 per month appellant expressly and impliedly contracted to pay all necessary hospital and medical expenses and services, including nurse and board of his employes, including appellee; that between September 26 and November 1, 1917, appellant furnished to appellee certain goods, wares, and merchandise in the sum of \$180 and appellee tenders said amount as a credit on the amount sued for, and prays judgment for \$567, interest and costs.

Appellant pleaded general demurrer, general denial, expressly denied that he customarily or otherwise collected any sum from appellee or other employes as hospital fees; but alleged that it was the custom in his business to give any employe desiring it an order for a doctor, for medicines, or for hospital services, and to charge to and collect same from such employe.

A trial, with the aid of a jury, resulted in a verdict and judgment in favor of appellee for the amount sued for.

Appellant presents five assignments of error. The first claims error in the court's refusal to instruct a verdict in his favor. The second assignment involves practically the same proposition, and is to the effect that appellee's cause of action is based upon an implied contract to pay hospital services, including the items sued for, and that, the undisputed evidence showing that no such contract existed, the court erred in refusing to give the peremptory instruction asked by appellant. The insistence of appellant under these assignments is that the undisputed

evidence shows that there was no contract between appellant and appellee obligating or binding appellant to pay the items for which he is sued, and it was therefore the duty of the court to instruct in his favor.

The evidence is of too great a volume to reproduce it all, and we will state only the substance of what to us seems to be the evidence on the essential facts. Appellee testified:

Appellee began work for appellant about June 30, 1917, as accountant; appellant employed from 80 to 150 men; appellant's business was that of operating a limestone quarry; as each man came to work his name was entered on the pay roll book, and the first charge against his account was a "hospital fee of one dollar at the top of the page"; every employe of every kind paid that hospital fee; appellee paid the hospital fee; appellee, while at work for appellant, was taken sick on the 25th or 26th of September (1917); between the time he went to work there and the time he was taken sick he took the matter of hospital fees up with appellant; representatives of the Texas Employers' Association came out there; appellant had signed a contract with them; appellant also carried insurance in an indemnity company, protecting him from damage suits or any cause of any liabilities on account of accidents to any of his employes. At that time witness read the law to appellant, and called appellant's attention to the fact that the collection of a dollar a month from his employes not only was of no benefit to him, but under the law it rendered him liable to personal damage suits by any one injured there—that is, an employe who was hurt there, according to the way witness interpreted the law, would be entitled to compensation at law, and also have the right of suit at common law against appellant. Appellant then stated that the dollar a month was not collected for the purpose of payment of any insurance he might have to pay for protection; that that dollar a month was a hospital fee, and was to be used for purposes outside of paying insurance; he partly stated that there were many things that came up which were not provided for in the law which he was compelled to take care of, and those accumulations of a dollar a month were to be used to take care of those things; sickness was mentioned in that connection in this way, he stated that his employes were frequently sick, and he had to take care of them, and his insurance did not take care of that, and he was obliged to have some other funds to take care of these other things; he stated it was not collected for accident insurance, it was for this other purpose; at that time something was said about a change in the way that that matter should be handled on the books; "Mr. Courchesne at that time told me if that was the case—by 'the case' I mean what I had referred to in the first part

of my testimony about the double liability; he stated we would no longer call it insurance, but call it hospital fees, and open a hospital account, and that he would provide hospital service; that is the statement I am positive he made in the exact words; after that conversation he continued to deduct a dollar a month from my salary up until the time I fell ill." Appellee was working for appellant at the time he was taken sick, and was sent to the hospital, where he was operated on for a gangrenous appendix. The evidence shows that the hospital and all services for which a charge is made were rendered to appellee as stated in the account. The bills charged and stated in the itemized account were paid by appellee, and the charges are shown to be proper and reasonable charges. Witness admitted he owed appellant the \$180 on account. Appellee further testified:

"Mr. Courchesne stated to me that he was not collecting this fee for the purpose of paying any part of the accident insurance, and that the purpose of the fee in the future would be used as a hospital fee. Those are approximately the exact words. Up to that time this dollar a month had been charged as insurance; it was called insurance. \* \* \* What he agreed to do and what he did do were different things. Why, yes; I do claim that he even agreed that if there was anything ever said that he would pay my doctor's bills and medical attention; that was at the time we were speaking about, that I had with him at the time we changed it from insurance to hospital fees. At that time he did not mention my name; that he would pay my hospital fees, but he said that he would use my money to take care of those things. They were not included in accidents. He stated that to me. \* \* \* Shortly after I had this conversation with Mr. Courchesne I fell ill. Up to that time we had that conversation nothing had been given for that dollar; the medical services that were furnished the employes had been charged to them, or had afterwards been paid for by the employes themselves up to that time. \* \* \* Many of the men objected to the charge for medicines, and wanted to know what did they pay that dollar for, and so on, and I referred them to Mr. Courchesne. \* \* \* Mr. Courchesne was the active manager and his son was also a manager. \* \* \* I had a conversation with Mr. Courchesne himself, he and I, with reference to this hospital charge shortly after those insurance men were there. It was shortly before I fell sick. \* \* \* I was not instructed to discontinue the charge, and the fact is I had a pamphlet which gave the law, \* \* \* and showed him that, and he said, 'We won't call it insurance; we will call this a hospital account; and use it as a hospital account; and the little room will be the hospital room, and we will open an account on the ledger;' which I did, and it is on his general ledger called 'Hospital Account,' and it was opened with his full knowledge and consent. We discussed it thoroughly. \* \* \* Up until the time I fell sick the matter was discussed between Mr. Courchesne and myself, but no change was made in our understanding as to what the funds were to be used

for. \* \* \* Up until that time these charges had been made regularly and deducted from the men's wages. That had been the rule." Appellant had a regularly employed physician.

Mrs. Brown, wife of appellee, testified:

"I know Mr. Tom Courchesne very well. The night before Mr. Brown went to the hospital I had a conversation with Mr. Tom Courchesne about Mr. Brown at Mr. Courchesne's store. I went down to telephone for a doctor, and Mr. Tom Courchesne said Mr. Brown ought to be sent to the hospital. Yes; I had a conversation with Mr. Tom Courchesne subsequent to that time. The next morning, after Mr. Brown went to the hospital, Mr. Tom Courchesne came to my door with the mail, and we were talking about Mr. Brown's sickness and the hospital, and he told me not to worry about the expenses."

Appellant offered much evidence in denial of the appellee's evidence, and to the effect that the \$1 fees collected monthly from employes were to cover premium for accident insurance, and not for hospital fees or services.

Our statements and quotations are made from appellee's evidence, and made only to determine the question raised by the assignment, viz., Was the court in error in refusing to instruct the jury to return a verdict for appellant?

[1] In determining the correctness of the court's action, we must take appellee's evidence as giving the true version of the matter at issue. The question is presented, Does the evidence show an obligation on the part of appellant personally, and out of his own means, to meet the necessary and proper hospital expenses of appellee? The facts of appellee's employment, his illness, the rendition of all of the hospital services constituting the several items charged, the necessity for such services, the reasonableness of them, and that appellee had paid them, were established beyond question. It is also shown that a fee of \$1 a month was deducted from the wages of each employe, including appellee. One of appellant's contentions is that the purpose for which the fees were collected is not shown by this evidence, and what was shown was only a promise for some uncertain future action.

[2] While the evidence is not clear as to what was meant by "hospital fees," and how the fees were to be applied, whether in the establishment of a hospital, or hospital plan, or applied at any time thereafter to the payment of hospital expenses at a hospital in case of sickness, we think the evidence possibly sufficient to take the case to the jury on the issue of purpose in collecting the fees and the time when effective. Except as to the preparation of the little room as a hospital, the expressions used, according to the evidence, could have reference to matters already accomplished in what seemed to be the inauguration of the plan to accumulate



a fund with which to care for sick employes. The fees had been and continued to be collected; the account was then opened on the ledger as a hospital account, and so thereafter continued. There was no evidence that the little room referred to was then or thereafter to be additionally prepared for hospital uses. But the evidence offered does not suggest that the expenditure of hospital fees was to abide the preparation of the room for hospital uses, or to be in any way postponed or conditioned on the use of the room. The use or preparation of the room for a hospital, if a part of the plan, was with appellant. Had he prepared the room for hospital uses, or directed that appellee be taken there, or had the hospital service been on condition of the preparation and use of the little room as a hospital, it would suggest an issue not presented here. We are of the opinion that, so far as the expenditure of the fees collected is concerned, the evidence shows more than simply the expression of an intention of appellant to provide for hospital or hospital service, or hospital plan, at some future date. We have found no case which we consider directly in point in which the issues presented here are discussed. In the cases we have examined a hospital had already been furnished and was in use at the time of the collection of the hospital fees. Here appellant had no hospital, and no custom is shown of his having furnished hospital service.

[3] We have concluded, however, that the Supreme Court in *Texas Central Railway v. Zumwalt*, 103 Tex. 603, 132 S. W. 113, 30 L. R. A. (N. S.) 1206, announce principles of law conclusive of the issues presented here, both as to pleading and proof. That case is similar to the case here, in that the railroad company in that case, as appellant did in this (as found by the jury), inaugurated the plan of accumulating a fund with which to care for such of its employes as might become sick during such employment. The Supreme Court there said that the fund collected did not become the property of the company, but it was held by it in trust for the contributing employes; that, there being no method of executing the trust specified, the company was charged with the duty of administering it in such manner as would best accomplish the end for which it was accumulated—that is, to provide for the care of the sick employes who should come within the terms of the trust; that from the standpoint of the contributing employes the fund constituted a charity, because it was raised by them to be expended for the benefit of persons entitled thereto, who would receive it without cost to them. The point

of application is the court said the fund collected was a trust fund. In this case, as in the *Zumwalt* Case, no method is shown for executing the trust, and appellant is charged with the duty of administering it in such manner as would best accomplish the end for which it was accumulated; that is, to provide for the care of the sick employes who should come within the terms of the trust. Evidently the extent of the duty appellant assumed in collecting the fund was to properly administer it. If appellant had a hospital the implication arising from the collection of the fees would be service at the hospital; but, having no hospital, we think it would not necessarily be implied that he would furnish one. It is a matter of allegation and proof. We think if appellant is liable for hospital service in the absence of a hospital of his own, or custom of having furnished hospital service, it would be necessary to allege and to prove that appellant, as trustee, had on hand an unexpended portion of the trust fund which appellee was entitled to have administered by appellant in the discharge of the hospital services rendered. Evidently, under the holding in the *Zumwalt* Case, appellant assumed no personal liability to appellee beyond that of a proper and faithful administration of the trust fund. While we think the evidence is rather meager and unsatisfactory as to the purpose for which the funds were collected, beyond that it was for hospital fees, we think the evidence sufficient to go to the jury on that issue. "Hospital fees" may mean that it was to provide a hospital, and it may mean that it was to be administered only in case of sickness. We think, however, in the absence of a hospital owned or subscribed to by appellant, or custom to furnish hospital service, the evidence is wholly insufficient to raise the presumption that hospital service in a hospital not owned by appellant is implied, or to justify a personal judgment against appellant to supply hospital service.

[4] The burden is on appellant, under the evidence and facts shown, not only to allege and show the collection of fees, but the purpose and extent of the purpose for which the fees were collected as a present hospital fund to be used in case of sickness. It would necessarily follow that it must also be alleged and shown that appellant had on hand sufficient amount of the trust funds to which appellee was entitled to pay the items of the account; otherwise appellant would have nothing to administer, no duty to perform as trustee. We need not discuss other assignments.

The case is reversed and remanded.

**PITTMAN & HARRISON CO. v. KNOWLAN MACHINE & SUPPLY CO. (No. 6275.)**

(Court of Civil Appeals of Texas. San Antonio. Nov. 19, 1919. Rehearing Denied Dec. 17, 1919.)

**1. APPEAL AND ERROR 846(6)—STATEMENT OF FACTS REVIEWED TO DETERMINE CORRECTNESS OF JUDGMENT.**

Where there is a statement of facts filed, but no findings of fact or conclusions of law, motion for new trial, or bill of exceptions, the judgment on trial before the court without a jury will be held conclusive on the facts, unless defeated by some testimony that shows that another judgment should have properly been rendered; no request to file findings of fact or conclusions of law having been made.

**2. APPEAL AND ERROR 931(1)—AFFIRMANCE IN ABSENCE OF CONCLUSIONS OF FACT.**

In the absence of conclusions of fact, the appellate court will impute to the trial court full verity to its findings, and, if there is any issue of fact sufficient to sustain the judgment, it will be done.

**3. PRINCIPAL AND AGENT 123(7)—EVIDENCE OF AUTHORITY OF SELLER'S AGENT TO SIGN CONTRACT FOR SEED GRAIN.**

In suit for breach of contract for shipment of car of seed grain, evidence held to support conclusion that person who signed order for grain on behalf of defendant seller was its authorized agent to sign the contract, and that the contract was valid.

**4. SALES 90—NO MERGER OF ORIGINAL CONTRACT IN NEW CONTRACT.**

In suit for breach of contract for shipment of car of seed grain, held, under the evidence, that there was no new contract made or any merger of the original contract by one of a later date.

**5. NOVATION 4—EVIDENCE SHOWING NO SUBSTITUTION OF NEW AGREEMENT.**

Where plaintiff buyer of seed grain never accepted or agreed upon a change of price of any article specified in original contract except upon condition, held, there was no novation.

**6. PRINCIPAL AND AGENT 170(3)—ALLEGED PRINCIPAL MUST REPUDIATE AGENCY PROMPTLY.**

If G., who signed order given by plaintiff for seed grain, was not the agent of defendant seller, defendant should have promptly repudiated his agency at the time the order was received, and not continued negotiations with plaintiff on the order.

Error from District Court, Victoria County; John M. Green, Judge.

Suit by the Knowlan Machine & Supply Company against the Pittman & Harrison Company. Judgment for plaintiff, and defendant brings error. Affirmed.

C. C. Carsner, of Victoria, and French & Harney, of Sherman, for plaintiff in error.

R. L. Daniel, of Victoria, for defendant in error.

COBBS, J. This suit is for damages growing out of a breach of an alleged contract for the shipment of a car of seed grain, alleged to have been made by C. F. Gribble, traveling agent of plaintiff in error. The instrument upon which the suit is predicated to establish the breach is as follows:

"Pittman & Harrison Co., Seedman.

"Sherman, Texas, 12-3-1917.

"Knowlan Machine & Supply Co., Victoria, Texas:

"We book your order for the goods named below to be shipped 10th February, 1918, to Victoria, Texas, via H. & T. C. and Southern Pacific R. R. Terms: Draft B/L attached through Levi Bank & Trust Company. Price basis being C. A. F. your station,

Remarks .....  
100 bushels Surecropper corn at.....\$3.50  
5,000 pounds Red Top cane at..... 7.00  
5,000 pounds Amber cane at..... 6.00  
Bal. car Red Tag R. P. oats at..... .92  
All in even weight sacks.

"We give no warranty, either expressed or implied, as to the purity, productiveness, or any other matter of any of the seeds we sell, nor will we be in any way responsible for crops. If the goods are not accepted on these conditions, we are to have immediate notice.

"Our responsibility ceases when we deliver goods to carrier in proper shipping condition. Complaints of any kind must be made immediately for shortage or damage, must be accompanied by railroad expense bill bearing proper notations.

"On carlot sales, immediate shipment means 3 days; quick, 5 days; prompt, 10 days—exclusive of Sundays and legal holidays.

"No agreement recognized which is not plainly stipulated herein.

"Accepted: Knowlan Machine & Supply Co.,  
By A. F. Knowlan. Pittman & Harrison Co.,  
C. F. Gribble."

[1] This case was tried by the court without a jury, resulting in a judgment for \$611.56 in favor of defendant in error. There is a statement of facts filed, but there are no findings of fact or conclusions of law, motion for new trial, bills of exception, or anything presented to the court below indicating the supposed errors committed.

There are no fundamental errors complained of or assigned. Defendant in error in reply, because there are no bills of exception, etc., contends, and presents but one proposition in the brief for that reason, that plaintiff in error has no standing here, and in support of that contention cites *Stewart v. McAllister et ux.*, 209 S. W. 704. That case does not support the contention. There it was upon a trial before a jury upon special issues, where a different rule of procedure prevails. Trial here was before the court without a jury, and, no request to file findings of fact or conclusions of law having been made, it will be treated as a general judgment conclusive on the facts, unless defeated by some testimony

that shows another judgment than the one entered should have properly been rendered. *Mackey v. Armstrong*, 84 Tex. 160, 19 S. W. 463; *Schofield et al. v. Tex. Bank & Trust Co.*, 175 S. W. 506.

[2] In the absence of conclusions of fact, the appellate court will impute to the trial court full verity to its findings, and if there is any issue of fact sufficient to sustain the judgment, it will be done. *Hull v. Woods*, 14 Tex. Civ. App. 590, 38 S. W. 256.

The first assignment is to the effect that the court erred in holding that C. F. Gribble had authority as agent to enter into a binding contract for the sale of the grain at the prices named to be delivered in February, 1918; and the second was that the date of delivery was so remote as to put defendant in error on notice that it had to be subject to confirmation and approval; and fifth, that the contract was so unusual and out of the ordinary as to put defendant in error upon notice and charge it with such information that a person of ordinary prudence and care would have gained by making inquiry as to authority of the agent; sixth, court erred in holding that Knowlan Machine & Supply Company did not accept the offer of December 8, 1917, as a substitute contract, and could not hold it on the old contract; eighth, in holding there was no custom of the trade requiring sales of grain and seed by traveling salesmen or brokers to be accepted and confirmed before becoming a binding contract. These assignments all relate to same matter and will be considered together.

The fourth assignment is somewhat confusing. It is as follows:

"The court erred in not holding that Knowlan Machine & Supply Company, having been notified that C. F. Gribble was not supplied with grain and seed quotations for the month of February, 1918, that Knowlan Machine & Supply Company were bound to ascertain C. F. Gribble's authority, and in entering into contract with C. F. Gribble, as agent of Pittman & Harrison Company, for a shipment of grain and seed for the month of February, 1918, with such knowledge in mind, contract at their own risk, and Pittman & Harrison Company, having promptly repudiated the contract attempted to be made by C. F. Gribble, that the Pittman & Harrison Company were not liable upon the contract sued upon."

[3] The court is supported by the evidence that C. F. Gribble, who signed the order for goods dated December 3, 1917, was the authorized agent to sign the order. In fact, the letter of December 8, 1917, acknowledging receipt of the same, says:

"Your order for mixed car given our Mr. Gribble for mixed car shipment cannot confirm, especially the oats and Surecropper corn. It will be questionable whether or no we will be able to get up the Surecropper corn at all, as it is very hard to get hold of, and for oats we would have to charge 98 cents per bushel.

Let us know if you will want us to book on that basis."

This letter neither repudiates the agency nor the order. It calls him "our Mr. Gribble," and continues the negotiations for a higher price for oats, using same order as a basis. It at least to that extent is an acknowledgment and ratification of the agency, and a recognition of the order for further negotiations to change the price of oats, expressing doubt as to being able to get the Surecropper corn at all, but even then not a refusal. There was considerable delay in answering, until December 26, 1917, wherein the reply was, "It will be satisfactory to charge 98 cents for the oats to fill out the car in weight, but we want the car shipped as ordered as we are depending on this shipment," and added certain other conditions thereto.

Again, on the 15th of December, 1917, plaintiff in error wrote, calling attention to the letter of the 8th of December, complaining there had been no reply to the letter of the 8th, stating the price for oats would be 98 cents, and saying: "Not hearing from you, we presume you want us to cancel. Please let us know about this." There was nothing said about not being able to furnish the Surecropper corn, nor that plaintiff in error desired to cancel the order. Defendant in error replied the price of oats was satisfactory and to ship car as ordered, as "we are depending on it," that "we would prefer that you increase the Red Top cane seed to 15,000 or 20,000 pounds so that you would not be required to put so many oats in the car at the same price as booked," and further said, "No. 2, about the Surecropper corn, we will expect this and would like to put a little June corn seed in at \$3.50, say about 50 bushels," then requested to know by wire "if you can increase this order on Red Top to 20,000 pounds and also 50 bushels of June corn." If it so desired, "Fill the car up with the Red Top and let the oats go, but the Red Top must be at \$7.00, and I would thank you to please wire me at once." On December 31, 1917, expressing surprise in the delay in answering the letters of 8th and 15th, it quoted prices on oats \$1, Surecropper, \$4 per bushel, \$8.50, on the Red Top, and \$7.75 on the Amber, and requested a wire upon the receipt of the letter. The reply is as follows:

"Victoria, Tex., Jan. 10, 1918.

"Pittman & Harrison Co., Sherman, Texas: This cancels all previous offers regarding specifications on car seed stuffs and feed oats booked with you. We want car shipped as per specifications and prices our order 3d ultimo. We have sold corn, cane, and oats in this car, and will have to make delivery, and want your confirmation wire immediately on shipment car as specified February 1st as per your order, December 3d.

"Knowlan Machine & Supply Company."

[4, 5] It is clear there was no new contract made or any merger of the original by one of any later date. Plaintiff in error refused to confirm the contract of December 3, 1917, in all particulars, but attempted to make a change therein by substituting a new price for oats, and in the subsequent correspondence change the price of other articles. Plaintiff in error never accepted or agreed upon the change of price of any article in the original order except upon condition. So it is clear that the minds of the parties never met on a new contract or in any novation of the first, and the result of this case must depend upon the validity of the original order of December 3d. It is shown the order was received in the due course of business dealings. The acts of C. F. Gribble, who signed its name to the order, was not repudiated, it did not then deny his agency or contend he was not authorized to make binding contracts, or claim that such had to be submitted to it for confirmation. It placed their refusal to confirm upon the ground that it might not get hold of the Surecropper corn and would have to charge 98 cents per bushel for the oats, made no mention of the Red Top or Amber cane, and desired to know "if you will want us to book on that basis."

It is not pleaded by defendant in error that there was any subsequent new contract made and entered into that in any way changed and canceled the original, but it is contended there was no contract at all as it was never confirmed. Nor does the defendant in error make such contention or insist upon any other contract or waive the one of December 3d. The contention is that there was but one contract, which was that of December 3d, and never released. The plaintiff in error contends further there was never any valid contract at all, because Gribble was not empowered or authorized to make such contracts, as he was making sales under limited authority, which required him to report all offers for confirmation, and his acts were never confirmed or ratified.

[6] The court has found from the evidence, in connection with the letters, there was a contract, and that Gribble was acting within the scope of his authority and in the capacity of a sales agent in negotiating and making valid sales as described. At least that is the effect of the judgment. These questions all involve findings of facts deducible from the evidence, and it will not be disturbed. If Gribble was not its agent, plaintiff in error should have promptly repudiated his agency at the time it received the order, and not have continued negotiations on it. In fact, it was never repudiated. *Brennan & Son v. Dansby & Dansby*, 43 Tex. Civ. App. 8, 95 S. W. 700.

The seventh assignment of error complains

that the court erred in assessing the damages at the difference between the price of 92 in contract of December 3d and market price February 10, 1918, date of delivery, because it had agreed to pay 98 cents.

This assignment cannot be sustained; for the evidence justified the court in finding that there was no novation of the contract. It is true the plaintiff in error submitted an offer at 98 cents, which was conditionally accepted, but conditions were embraced therein which were declined. So the minds of the parties never met, and no contract other than one of December 3, 1917, was ever made.

We have considered the assignments, and find no error in the judgment of the court, and it is affirmed.

#### WESTERVELT v. MEULY. (No. 6279.)

(Court of Civil Appeals of Texas. San Antonio.  
Nov. 19, 1919. Rehearing Denied  
Dec. 17, 1919.)

#### 1. NAVIGABLE WATERS $\Leftrightarrow$ 46(3) — CONSTRUCTION OF CONVEYANCE OF RIPARIAN RIGHTS.

A deed conveying "all that certain accretion, alluvial and riparian right" east of a described lot, consisting of "a width of fifty feet," and extending into the waters of a bay, together with a War Department permit issued to vendor, granting the right to fill in the riparian right conveyed, and to erect whatever the grantee desired, so long as the buildings or filling-in did not become an unreasonable obstruction to navigation, even when construed in connection with a mortgage by vendor to secure damages for breach of warranty by vendor within three years, held not to convey title to the fee of the submerged land, but merely a right in vendee to fill in and acquire title from the state in himself.

#### 2. COVENANTS $\Leftrightarrow$ 102(1)—BREACH OF WARRANTY; NECESSITY OF EVICTION.

Where a vendor of a riparian right does not warrant title to the submerged land, but merely the title and right necessary to acquisition of title by the purchaser, it being conceded that title to the fee is in the state, no recovery by the purchaser can be had for breach of warranty in the absence of any evidence of eviction or threatened suit by the state.

#### 3. COVENANTS $\Leftrightarrow$ 122—FRAUD $\Leftrightarrow$ 58(1)—EVIDENCE OF DAMAGES IN ACTION FOR FRAUD.

In counterclaim for damages for breach of warranty and fraudulent representations in a sale of riparian rights, evidence that 95 per cent. of the land sold was submerged and 5 per cent. not submerged did not afford any basis for estimating damages, as there could be no presumption that the unsubmerged land was worth only 5 per cent. of the purchase price, as a basis for estimating damages.

Appeal from District Court, Nueces County; W. B. Hopkins, Judge.

Action by A. H. Meuly against E. C. Westervelt, with cross-action by defendant against plaintiff. From a judgment for plaintiff and a denial of relief to defendant, defendant appeals. Affirmed.

E. P. Scott and J. D. Todd, both of Corpus Christi, for appellant.

E. B. Ward, of Corpus Christi, for appellee.

**MOURSUND, J.** Appellee sued appellant upon a promissory note for \$1,500 and to foreclose a vendor's lien retained to secure the payment thereof. Appellant sought to cancel the note and to recover \$2,000 out of \$2,500 paid by him for the premises, alleging that the title had been warranted and that appellee only had title to a small part of the premises described in the deed, which part was alleged to be worth \$500. He also alleged that certain representations had been fraudulently made to him concerning his ownership which were relied on by appellant and induced him to make the trade.

He also sued upon an instrument of even date with said deed, whereby appellee bound himself to pay \$4,000 to appellant as damages, if there was a breach within three years of the warranties made in said deed, which were undertaken to be described. By such instrument a mortgage lien was created upon certain real estate to secure the payment of said sum if it became payable under the conditions thereof, and appellant sought a foreclosure of such lien.

By supplemental petition appellee alleged that the matters set out in the answer as a defense and as ground for affirmative relief had been fully adjudicated, and the title conveyed sustained, and further that appellant accepted the property conveyed in said deed with full knowledge of all the facts as to the condition and location of the land.

The judgment, rendered upon an instructed verdict, awarded the appellee what he sued for, and denied the appellant any relief.

The property and rights conveyed are described in the deed as follows:

"All that certain accretion, alluvian and riparian right, east of lot numbered six (6), in water block numbered three (3), situated in the beach part of the city of Corpus Christi, in the county of Nueces, state of Texas, which said accretions, alluvian and riparian rights were acquired by me by virtue of a warranty deed from S. W. Rankin, a member of the Corpus Christi City & Land Company and which said deed of conveyance from S. W. Rankin is of record in the county clerk's office in the deed records of Nueces county, Texas; the accretions, alluvian and riparian rights herein vended consist of a width of fifty feet and extend out into the waters of Corpus Christi Bay, it being understood however that the property corner of the rights herein conveyed begin at the northeast corner of lot number six in said block numbered three in the Beach part of the city of Corpus Christi, Texas; also that the permit given by the United

States War Department to the vendor herein is hereby included in the rights herein vended and transferred to the said E. C. Westervelt, granting to the said E. C. Westervelt the right to fill in the said riparian right herein conveyed, but under the regulations stipulated in said United States War Department permit, and to erect thereon along the right herein conveyed whatsoever the said E. C. Westervelt may desire to erect thereon so long as such building, or buildings, or filling-in does not become an unreasonable obstruction to the free navigation of the waters of Corpus Christi Bay; all of which rights granted to me under the said United States War Department permit are herein and hereby conveyed unto the said E. C. Westervelt."

This description is easily understood when considered in connection with the evidence showing that at the time of the making of the deed, as appellant well knew, there was situated east of lot 6, block 3, only the small portion of land described in plaintiff's petition. It is evident that, as to the submerged land, the parties only contemplated, and there was conveyed, only the right to fill in such land under a certain permit. It is recited that under such permit appellant may erect along the "right herein conveyed" whatsoever he may desire so long as "such buildings, or filling-in, does not become an unreasonable obstruction to the free navigation of the waters of the bay." This language is inconsistent with any intention to convey title to the fee in the submerged land. As we understand appellant's contentions, he does not claim that he has shown any failure of title if the deed alone is looked to, but contends that descriptive matter contained in the mortgage should be considered in connection with the deed, and that, when the two instruments are considered together, it becomes plain that the title is warranted to a strip of submerged land 1,000 feet long. There are expressions in the mortgage which, taken alone, tend to support such contention; but these result from inaccurate statements of the provisions of the deed. On the other hand, the instrument discloses that it is the purpose of the grantee in the deed to fill in and reclaim the submerged land and assert ownership therein, and that the grantor obligates himself to guarantee and warrant such title and all rights and steps necessary for "the full acquisition thereof."

The distinction between the land conveyed and the riparian rights and rights given by the permit is disclosed throughout the instrument, and it was evidently contemplated that three years would be a sufficient time within which appellant could fill in the submerged land, and thus fully acquire the same.

[1] We conclude that, if the mortgage and deed are construed together, it still must be held that there was no warranty of title to

any submerged land, and that, even if it be conceded that the fee to such land is in the state, there has been no breach of warranty.

[2] The evidence fails to show any eviction or threatened suit by the state. It therefore appears that no recovery can be had in an action at law for breach of warranty. *Rancho Bonita Land Co. v. North*, 92 Tex. 72, 45 S. W. 994; *Blewitt v. Greene*, 57 Tex. Civ. App. 588, 122 S. W. 914.

[3] In so far as appellant pleads an equitable action, alleging fraudulent representations, the court did not err in refusing to submit issues to the jury for the reason that there was no proof of any such damages as are recoverable in actions of that kind. The proof that 95 per cent. of the land is submerged and 5 per cent. not submerged, affords no basis for any estimate, either under the measure of damages applicable in fraud cases or in cases of breach of warranty. *George v. Hesse*, 100 Tex. 44, 93 S. W. 107, 8 L. R. A. (N. S.) 804; *Hynes v. Packard*, 92 Tex. 44, 45 S. W. 562; *Northcutt v. Hume*, 174 S. W. 974. No presumption can be indulged that the unsubmerged land was worth only 5 per cent. of the purchase price.

So far as the action upon the obligations of the mortgage is concerned, it appearing that appellee had for the length of time stipulated in the mortgage complied with his obligations, the appellant was clearly not entitled to recover the penalty therein provided. Judgment affirmed.

#### KANSAS CITY, M. & O. RY. CO. OF TEXAS v. CLETT. (No. 1024.)

(Court of Civil Appeals of Texas. El Paso.  
Nov. 28, 1919.)

#### 1. CARRIERS ⇐211—REFUSAL TO PERMIT FEEDING AND WATERING OF STOCK SHIPMENT.

Where railroad's agents, knowing that train was delayed, refused to permit shipper to unload stock for feed and water, and where because of such refusal the stock stood in cars at certain station for about 17 hours without water, the railroad was negligent, even though the delay was unavoidable.

#### 2. CARRIERS ⇐228(5)—RECOVERY BY SHIPPER OF EXTRA FEED CHARGE CAUSED BY DELAY.

In live stock shipper's action against railroad to recover charge for extra feed necessitated by railroad keeping stock confined in cars pending delay in transportation, evidence held insufficient to show that the feed was an extra feed, or that the charge was a reasonable charge for the feed.

#### 3. EVIDENCE ⇐471(24)—CONCLUSION AS TO CAUSE.

In live stock shipper's action against railroad to recover charge for extra feed necessitated by delay in transportation, statement by witness

that necessity for extra feed was caused by the stock standing in the cars at point of delay held a mere conclusion.

#### 4. CARRIERS ⇐228(5)—DELAY IN LIVE STOCK TRANSPORTATION; INCREASE IN MARKET VALUE.

In action for damages from shrinkage in live stock because of negligence of railroad in keeping stock confined in cars without water pending delay in transportation, evidence held not to justify finding of an increased market value during the delay.

#### 5. APPEAL AND ERROR ⇐930(2)—PRESUMP- TION THAT JURY FOLLOWED COURT'S INSTRU- CTIONS.

Court on appeal will presume that jury followed court's instruction to disregard improper remarks of counsel, unless the contrary is made to appear.

Error from Pecos County Court; Howell Johnson, Judge.

Suit by Fred Clett against the Kansas City, Mexico & Orient Railway Company of Texas. Judgment for plaintiff, and defendant brings error. Affirmed subject to entry of remittitur; otherwise reversed and remanded.

See, also, 207 S. W. 166.

H. S. Garrett, of San Angelo, and Williams & Smith, of Ft. Stockton, for plaintiff in error.  
W. A. Hadden, of Ft. Stockton, for defendant in error.

WALTHALL, J. Fred Clett, as plaintiff, sued the Kansas City, Mexico & Orient Railway Company of Texas, as defendant, for damages which he alleges he sustained in the amount of \$363.34 and attorney's fees, by reason of a shrinkage of 6½ pounds per head for 466 sheep and 15 goats shipped from Ft. Stockton, Tex., over the lines of defendant and other roads to Kansas City, Mo., and extra feed charge of \$70. The cause of the shrinkage was alleged to be due to the negligence of the railway company in keeping the stock confined in the cars at Ft. Stockton without water from 6 o'clock p. m. January 12, to about noon January 13, 1917.

On a verdict of the jury in favor of Clett, judgment was rendered in his favor for the amounts sued for. A remittitur was thereafter entered for the amount found as attorney's fees. This is the second appeal of this case. The first is reported in *Railway Co. v. Clett*, 207 S. W. 166, to which we refer for a statement of the issues tendered.

[1] Plaintiff in error by its first assignment insists that the evidence shows beyond the point of difference between reasonable minds that the unusual delay in the shipment of 17 hours at Ft. Stockton was unavoidable. If it were conceded that the delay of the train from Alpine to Ft. Stockton was unavoidable, that one fact conceded would not

fully meet the issue of negligence assigned and submitted. Defendant in error alleged and so testified that the company's agent notified him to load the stock in the cars, which he did, at about 6 o'clock in the afternoon of January 12th, stating that there would be no delay in the train from Alpine. Cliett testified that the agent told him the train from Alpine would be back to Ft. Stockton about 11 or 12 o'clock that night, and would not wait for him to then load; that he did not want to load the stock until the train left Alpine, and asked the agent if he would then call him, which the agent refused to do; that he could have loaded the sheep in time after the train left Alpine; that he asked permission of the agent the next morning to unload the stock for feed and water, but was refused permission to do so. These facts were combated by the company both by allegation and evidence, but the jury found in favor of Cliett. Now, the agents of the company knew the stock had been loaded on the cars, and the time when loaded; knew at Alpine that by reason of delay of the train at Alpine the train could not, under the same crew, reach Hovey on its return where the relief crew were. The gist of the issue of the damages sustained as a result of the negligence assigned is that the sheep and goats were kept standing on the cars at Ft. Stockton without water for about 17 hours. The jury no doubt thought that under the facts shown the sheep and goats could and should have been removed from the cars, when the delay of the return train was known to the agents of the company. We believe that the delay of the train alone, if unavoidable, does not fully relieve the company from the negligence charged.

The second assignment is to the effect that no evidence was introduced to show that the stock were given an extra feed at McFarland, Kan., and that the evidence gives no measure by which the jury could determine the amount or reasonable value of the feed given; that from the evidence the jury were unable to separate the cost of feed which would have been required if the shipment was without delay from the amount required as a whole.

The stock reached Altus, Okl., on the afternoon of the 14th, where they were fed and watered. The stock left Altus on the morning of the 15th about 6 o'clock, arriving at McFarland on the afternoon of the 15th, and left there about daylight on the morning of the 16th. The feed at McFarland is the one claimed to be extra. Cliett testified:

"The feed at McFarland, Kan., was an extra feed, which I had to give my sheep on account of standing confined in the cars at Ft. Stockton, Tex. This feed cost me \$70."

[2, 3] The above is all the evidence offered on the item of extra feed. The assignment

must be sustained. The evidence and the facts in connection therewith do not show that the feed was an extra feed caused by the sheep standing in the cars at Ft. Stockton. The statement that witness had to give the feed might tend to show the necessity of feeding the sheep at that time, but the further statement that it was on account of the sheep standing confined in the cars at Ft. Stockton is a mere conclusion of the witness, without the statement of any fact from which the conclusion is drawn. The sheep had been watered, fed, and rested at Altus, leaving Altus on the morning of the same day they reached McFarland. Also, the statement that the feed cost \$70 does not show the cost to be a reasonable charge. The item of extra feed must be remitted. *Ft. Worth & D. C. Ry. Co. et al. v. Hill et al.*, 213 S. W. 952, and cases there used.

The sheep and goats were loaded on the cars for the Kansas City market on the 12th day of January. They were put on the market at Kansas City and sold on January 22d. The damage alleged is loss of shrinkage in weight by reason of delay. The value of the animals on the Kansas City market was fixed by price per hundredweight. The loss in weight was fixed at 6½ pounds per hundredweight. The uncontroverted evidence is that the market price of sheep on the Kansas City market steadily rose from January 12th to the 22d, the rise in price being about 25 cents per hundredweight. The sheep had been taken off the cars at Lawrence, Kan., and fed, watered, and rested for about five days for the market. The proposition is made under the third assignment that the fact that the shipment, if it was delayed, resulting in loss in weight, brought more at destination on account of such delay, and should have been considered in reduction of the loss, if any, sustained by shrinkage. The issue was submitted to the jury, but the jury made no allowance for the raise in value. We are referred to *Railway Co. v. Hughes*, 31 S. W. 411, and *Railway Co. v. Bivins*, 136 S. W. 1180. We regard the last-named case as not having such direct bearing on the facts or the proposition as to require a review. In the *Railway v. Hughes* Case the calves were worth more on the day they were marketed than on the day previous, the day on which they would have been on the market but for the delay. In that case the Austin court held, and we think properly so, that the fact that a part of the shipment brought more at the destination on account of the delay in their arrival should be considered in reduction on the loss on the others as a result of the delay.

[4] Here, the evidence does not justify the finding that an increased market value was found by reason of the delay. The evidence does not suggest a delay other than at Ft. Stockton. While the sheep were held on the cars there some 17 hours before starting on

their journey, the jury evidently concluded from the evidence that, regardless of the delay, Clett could not have put his sheep on the market earlier than the 17th of January, and possibly would not have done so earlier than he did, on the 22d. The evidence does not suggest an increase in the market value on the 22d from what it was on the 17th. The witness stating values said:

"It would be impossible for me to give the market value of the sheep and goats for January 12 to 27, 1917, but the general tone of the market during those dates \* \* \* shows prices actually advanced about 25 cents per hundred weight on sheep and lambs from the 15th to the 22d."

The fourth assignment has no merit. What we have said in discussing the third assignment applies to the fifth. There is evidence sufficient to sustain the alleged loss of weight.

[5] The sixth assignment complains of remarks of counsel during the argument. The court instructed the jury to disregard the argument; and, while the language used and the insistence on reading from the books were improper, we must presume that the jury followed the instruction of the court, unless the contrary is made to appear. For a fuller expression of our views on the general subject of improper remarks of counsel we refer to *El Paso Electric Ry. Co. v. Terrazas*, 208 S. W. 387, and cases there used.

We think the court's charge in paragraphs 5 and 6 sufficiently presented the issues referred to, and that it was not reversible error to refuse special charge No. 3, complained of in the seventh assignment. If defendant in error, within 15 days will enter a remittitur of the \$70, allowed for extra feed, the case will be affirmed; otherwise it will be reversed and remanded.

### ZUCHT v. BROOKS et al. (No. 6276.)

(Court of Civil Appeals of Texas. San Antonio. Nov. 19, 1919. On Motion for Rehearing, Dec. 17, 1919.)

#### 1. NEGLIGENCE $\Leftrightarrow$ 92—IMPUTED NEGLIGENCE OF JITNEY DRIVER.

Where plaintiff was injured while passenger in jitney by collision with defendant's automobile, which violated traffic ordinance in not passing center of street intersection before turning to the left, negligence of the jitney driver in violating the speed ordinance was no defense, unless defendant's negligence had not concurred with the jitney driver's negligence in causing the injury; the jitney driver's negligence not being plaintiff's negligence.

#### 2. MUNICIPAL CORPORATIONS $\Leftrightarrow$ 705(4)—VIOLATION OF TRAFFIC ORDINANCE NEGLIGENCE PER SE.

If defendant caused injury to plaintiff, a jitney passenger, by collision with the jitney,

by turning his automobile to the left before reaching the center of the street intersection, in violation of the traffic ordinance requirement, his act was negligence per se.

#### 3. MUNICIPAL CORPORATIONS $\Leftrightarrow$ 706(8)—PROXIMATE CAUSE OF AUTOMOBILE COLLISION.

If unlawful turning of defendant's automobile to left before reaching center of street intersection was cause of collision with jitney, injuring plaintiff, passenger in the jitney, it was the proximate cause, whether it was the sole cause or concurred with the jitney driver's negligence, and instruction submitting the issue whether such turning was the cause of the accident was sufficient, without submitting the issue whether the jitney driver's negligence caused the collision.

#### 4. TRIAL $\Leftrightarrow$ 280(3)—REQUESTS AS TO BURDEN OF PROOF SUFFICIENTLY COVERED BY CHARGE.

Where, in personal injury action, the trial court placed the burden of proof on plaintiffs as to every material allegation in their petition, it was unnecessary to repeat that instruction at defendant's request; there being no showing that the jury were misled as to the burden of proof being on plaintiffs as to defendant's negligence and amount of damages, which is the test.

#### 5. WITNESSES $\Leftrightarrow$ 406—IMMATERIAL IMPEACHING EVIDENCE.

Exclusion of evidence, in personal injury action, that plaintiff was conveyed from a house of ill fame shortly before the accident, was proper, as it would not tend to contradict her testimony that she had been receiving \$15 a week for piano playing in a theater.

#### 6. EVIDENCE $\Leftrightarrow$ 598(1)—NUMBER OF WITNESSES.

A verdict for plaintiffs in personal injury case is not contrary to decided preponderance of evidence, because appellees had only two witnesses to accident, one of whom was one of the appellees, while appellant had three disinterested witnesses.

#### On Motion for Rehearing.

#### 7. APPEAL AND ERROR $\Leftrightarrow$ 1005(3)—VERDICT APPROVED BY TRIAL COURT.

Verdict approved by trial court will not be disturbed on appeal, on the ground that the testimony offered by appellant should be accepted as true, and that of appellees rejected as unworthy of belief; the credibility of witnesses and the weight to be given their testimony being a matter for the jury.

#### 8. MUNICIPAL CORPORATIONS $\Leftrightarrow$ 706(5)—AUTOMOBILE COLLISION; EVIDENCE.

In action by jitney passenger for injuries from collision with defendant's automobile, evidence held to support verdict for plaintiff.

#### 9. TRIAL $\Leftrightarrow$ 351(5)—UNNECESSARY DUPLICATION OF SPECIAL ISSUES.

In jitney passenger's action for injuries from collision with defendant's automobile, where trial court submitted issue whether defendant turned to the left before reaching center of street intersection, it was unnecessary to further ask jury whether defendant went



straight ahead across the intersecting street on the right-hand side of the street he was on.

**10. TRIAL**  $\Rightarrow$  **§350(1)—AFFIRMATIVE SUBMISSION OF FACTS IN SPECIAL ISSUES.**

The rule as to the affirmative submission of each group of facts to the jury has no application to cases submitted on special issues.

**Error from Bexar County Court; John H. Clark, Judge.**

Action by Roberta Brooks and husband against A. D. Zucht and others, dismissed as to all except defendant Zucht. Judgment for plaintiff, and defendant Zucht brings error. Affirmed.

**Don A. Bliss, of San Antonio, for plaintiff in error.**

**FLY, C. J.** This suit was originally instituted by defendants in error, Roberta Brooks and Ed. Brooks, her husband, hereinafter called appellees to prevent confusion, against Cole Y. Bailey, Clemmie Bailey, Carson Colley, and A. D. Zucht, plaintiff in error, and hereinafter called appellant, to recover damages alleged to have arisen from personal injuries inflicted on the said Roberta Brooks through a collision of automobiles caused through the negligence of the defendants. The cause of action was dismissed as to all the defendants except A. D. Zucht, who, it was alleged, negligently ran into a jitney in which Roberta Brooks was riding and injured her, to her damage in the sum of \$990. The negligence was alleged to consist in violations of traffic ordinances of the city of San Antonio by appellant, in not having control of his car at the intersection of East Commerce and Mesquite streets, and in not passing the center of Commerce street when he desired to turn to the left. The cause was tried by jury, resulting in a verdict and judgment, in favor of appellees for \$490.

There was evidence tending to show that appellee Roberta Brooks was in a jitney car going east on East Commerce street, and when the jitney reached the intersection of Mesquite and Commerce streets it was run into by the automobile of appellant, who had been going north on Mesquite street and desired to turn west on Commerce street, and instead of passing the center of the street, as required by the traffic ordinance, appellant made a short turn to the west or left, and ran into the jitney car, and injured Roberta Brooks in the sum found by the jury.

[1] The first assignment of error complains of a refusal, by the trial judge, to place the following issue before the jury:

"In connection with question No. 2, you are instructed that, if you believe, from the evidence that the collision would not have occurred if the said Zucht had not turned his car to the left when he reached the intersection of said streets, and before he passed the center of Com-

merce street, you will answer said question 'Yes'; but if you believe from the evidence that it was the running of the jitney car at a high rate of speed that caused the collision, you will answer said question No. 2 'No.'"

That instruction proceeds on the assumption that appellant had violated the ordinance which required him, when he desired to turn to the left, to pass beyond the center of the street before turning, but, if the jitney driver had violated an ordinance as to rate of speed, then appellees could not recover. In other words, if the acts of two tort-feasors concurred in producing the collision, the innocent parties, who had nothing to do with causing the result, could not recover. That is not the law as applied to the facts in this case. The injured party was riding in a public conveyance, which was not under her authority or control, and the negligence of the driver of the public conveyance was not her negligence, and appellant could gain no advantage from the negligence of the driver, unless appellant's negligence had not concurred with that of the driver in producing the result. If both were guilty of negligence, both were liable to the injured party, and she could sue one or both as she saw fit. *O'Connor v. Andrews*, 81 Tex. 28, 16 S. W. 628; *hailway v. Vollrath*, 40 Tex. Civ. App. 46, 89 S. W. 279; *Ray v. Railway*, 40 Tex. Civ. App. 99, 88 S. W. 466; *Railway v. Mills*, 53 Tex. Civ. App. 339, 116 S. W. 852; *Railway v. Edwards*, 55 Tex. Civ. App. 543, 118 S. W. 838; *Moore v. Kopplin*, 135 S. W. 1033.

[2, 3] If appellant caused the accident by turning his car to the left before reaching the center of the street, his act, being in violation of an ordinance, was negligence per se, and the court was not called upon to submit any issue as to whether such act was negligent, and every issue in the case was clearly presented, when the court asked:

"On the occasion of the accident did A. D. Zucht turn his automobile to the left before it had passed the center of Commerce and Mesquite streets?" and "Did the turning of his automobile to the left before it had passed the center of Commerce street cause the accident?"

Under the facts of this case, if the car was turned to the left before reaching the center of Commerce street, it was in violation of law, and was negligence, and if such unlawful turning was the cause of the accident, it was the proximate cause, whether it was the sole cause, or concurred with the negligence of the jitney driver. It was unnecessary to submit an issue as to whether the jitney driver's negligence caused the collision, when the evidence showed and the jury found that appellant by his negligence caused the accident. Our conclusions dispose of the second, third, fourth, fifth, and sixth assignments of error, as well as the first.

[4] The court placed the burden of proof

upon appellees as to every material allegation in their petition, and it was unnecessary to repeat that instruction at the request of appellant. The seventh assignment or error is overruled. There is nothing that tends to indicate that the jury were misled as to the burden of proof being on appellees as to the negligence of appellant and the amount of the damages, and that is the test. *Railway v. Smith*, 65 Tex. 167.

[5] The eighth assignment of error is without merit. Evidence that Roberta Brooks may have been conveyed from a house of ill fame shortly before the accident would not tend to contradict her testimony to the effect that she had been receiving \$15 a week for playing a piano in a theater. The evidence was properly excluded.

[6] The ninth assignment of error proceeds upon the theory that the verdict is contrary to the decided preponderance of the evidence, because appellees had only two witnesses, Roberta Brooks and Polk, the jitney driver, while appellant had three disinterested witnesses. The jury evidently believed that the two witnesses for appellee had sworn truthfully, as they had the right and prerogative to do. One of the witnesses, Wesley Jackson, who is claimed by appellant, testified:

That he "saw an automobile coming east on the right-hand side of Commerce street; that another car burst out of Mesquite street, and kind of cut the car coming on Commerce street, and threw this car upon the track near the street car track."

The jury could have found that the evidence tended to corroborate the evidence of Roberta Brooks rather than that of A. D. Zucht.

The judgment is affirmed.

#### On Motion for Rehearing.

[7] The motion for rehearing is based upon the assumption that the testimony offered by appellant should be accepted as true and that of the appellee rejected as unworthy of belief. The jury and trial judge had the witnesses before them, and first the jury and then the judge, on motion for new trial, found that the testimony of the witnesses offered by appellee was entitled to credit and that of appellant was not. The credibility of witnesses and the weight to be given their testimony are matters placed exclusively in the hands of juries, and appellate courts have no authority under the judicial system of Texas to interfere with that privilege. This is a heritage from the common law, and is preserved in the federal Constitution, and in every state by Constitution or statute.

[8] In this case Roberta Brooks, who is made a competent witness by the laws of Texas, testified that appellant cut to the left when he reached the crossing of Commerce and Mesquite streets, and struck the car in which she was riding, and injured her. The jury could have based a verdict on her

testimony alone, but there was other testimony. Emmett Polk, the jitney driver, testified that he was driving on Commerce street, and blew his horn, about 50 feet from the corner of that street and Mesquite, and the car of appellant dashed to its left around the corner, and ran into his automobile, and carried it across the street car track, and that, when struck, his car was nearer the curb on the south side of Commerce street than it was to the street car track. Wesley Jackson testified:

That he was standing on the sidewalk on the south side of Commerce street, at the southeast corner of that street and Mesquite street; that he heard the horn and saw an automobile coming east on the south or right-hand side of Commerce street; "that another car burst out of Mesquite street and kind of cut the car coming on Commerce street, and threw this car upon the track, near the street car track; that the two cars had not passed the center of Mesquite street going east when the collision occurred."

It is true that this evidence was flatly contradicted by appellant, but the jury, in the exercise of their discretion, gave credit to the testimony offered by appellee. There was nothing unreasonable in the manner in which the discretion was exercised.

[9] The trial court was not requested by appellant to submit an issue as to whether the collision occurred on the east side of Mesquite street in Commerce street through the unlawful speed of the jitney, but endeavored to make an issue as to whether the car of appellant was struck on any part of Commerce street through the fast running of the jitney. If appellant ran to the left around the southwest corner of Commerce street, that would not save appellant from the effect of his negligence in violating an ordinance of the city. It is apparent from the evidence, believed to be true by the jury, that if appellant had run on the east side of Mesquite street, across Commerce street, the collision would not have occurred, and the jury was justified in finding that the negligence of appellant caused the collision.

[10] Much of a long and emphatic, if not intemperate and vituperative, argument assails the opinion of this court on the ground that it sustains a refusal of the trial judge to give an affirmative submission of appellant's theory of the case. Appellant seems to lose sight of the fact that this case was submitted on special issues, and not on a general issue, and that all the cases cited by him have reference only to the practice when a cause is submitted on a general charge. The court submitted to the jury the question as to whether appellant turned to the left in entering Commerce street, and an answer to that question disposed of every question that could arise as to how he got into or across Commerce street. Appellant, however, desired not only that the jury should be asked, Did appellant turn to the left into Commerce

street? but also, Did he go straight across Commerce street on the east side of Mesquite street? Special issues would be rendered farcial by such practice. If the jury answered that appellant did turn to the left, or did not turn to the left, that disposed of every issue. The matter presented by appellant is not new, and the position assumed by him has been overthrown by this and other courts. In the case of *Railway v. Dawson*, 201 S. W. 247, this court held, through its Associate Justice Swearingen, that the rule as to the affirmative submission of each group of facts to the jury has no application to cases submitted on special issues. This court said:

"We think that rule has no application where the case is submitted upon special issues. In accordance with a general charge, the jury is required to find for or against one of the parties; whereas, by special issues, 'the jury, as triers of facts solely, had nothing to do with the legal effect of their findings'"—citing *Fain v. Nelms*, 156 S. W. 281, and *Railway v. Hodnett*, 182 S. W. 7.

The instruction numbered 1, requested by appellant, was in effect that, if the jury found that he turned his car to the left, they should answer that he did so turn it, and, if they found that he did not turn to the left, they should say he did not so turn it. We fail to see that the instruction tended to throw any light on the subject, but would merely have tended to confuse the jury. If the jury found that appellant turned to the left at the corner of the street, it would not seem essential to have them answer that he did not go on the right side of the street across Commerce street, and yet that is what is requested by appellant, under cover of asking an affirmative presentation of a certain group of facts. If he turned to the left, he did not keep to the right, and, if he did not turn to the left, he did keep straight forward to the right. The court tersely and clearly presented every issue in the case.

The motion for rehearing is overruled.

#### STATE v. GUANA. (No. 6264.)

(Court of Civil Appeals of Texas. San Antonio.  
Nov. 19, 1919. Rehearing Denied  
Dec. 17, 1919.)

#### TAXATION — 642—NOTICE BEFORE SUIT TO FORECLOSE TAX LIEN.

In suit by state to foreclose tax lien for delinquent taxes for year 1915, where notice required by Acts 34th Leg. c. 147, § 1 (Vernon's Ann. Civ. St. Supp. 1918, art. 7687a), although not mailed to defendant by May 1, 1916, was mailed June 2, 1916, and suit was filed after 90 days from mailing of such notice, state was entitled to judgment and foreclosure, all other requirements of the law having been

complied with; the time of giving notice being immaterial, provided taxpayer has 90 days' time from such notice before suit is filed.

Appeal from District Court, Frio County;  
C. C. Thomas, Judge.

Suit by the State of Texas against Vencelado Guana. From a judgment for defendant, plaintiff appeals. Reversed and rendered.

Thos. H. Ward, of Pearsall, for the State.

COBBS, J. This was a suit brought on the 23d day of December, 1916, by the state of Texas, as plaintiff, against Vencelado Guana, as defendant, for the foreclosure of a lien for taxes on lots 2 and 3, in block 13, in the town of Dilley, in Frio county, Tex. Said suit was brought under and by virtue of chapter 15, title 128, Revised Statutes of Texas, as amended by sections 1, 2, and 3, chapter 147, Acts of the Legislature of 1915 (Vernon's Ann. Civ. St. Supp. 1918, arts. 7687a, 7687b, 7688a).

Said cause was called for trial on the 20th day of February, 1919, at a regular term of court. The state was represented by its attorney, but the defendant made default. The court thereupon rendered judgment that the cause be dismissed from the docket of said court, and that no costs of suit be collected from either the plaintiff or defendant. Plaintiff excepted to the judgment of the court, and gave notice of appeal. The suit was to recover delinquent taxes due for the year 1915.

Appellant filed a brief, but no brief is filed for appellee. Appellant concedes the notice required by section 1, chapter 147, of the Acts of 1915, had not been mailed to defendant by May 1, 1916. Appellant's proposition is that, inasmuch as the notice was mailed to appellee on the 2d day of June, 1916, and suit was filed after 90 days from the mailing of such notice to appellee, and before January 1, 1917, and all other requirements of the law had been complied with, appellant was entitled to the judgment and foreclosure; that the dates mentioned in the act of May 1, 1916, and thereafter on June 1st of each year, were not meant as periods of limitation, or as dates after which no notices might be mailed, and the effect of which holding of the court would be to deny to the state the right to recover taxes where the notices have not been sent out prior to May 1, 1916, or June 1st of each year thereafter.

In the case of *State of Texas v. Seidell*, 194 S. W. 1118, the exception was to the effect that the petition did not show that the defendant was given 90 days' notice of the alleged delinquency of taxes before suit was filed, nor allege as a reason for failing to give such notice that defendant's post office address and residence was unknown to the tax

collector. The contention, as shown by the exception, was that the suit was prematurely brought. In the judgment the court stated that he sustained the general and special exception for the reason that the petition failed to affirmatively show that the 90 days' notice had been given, or any reason for the failure to do so, and that therefore the suit was prematurely brought. The judgment of dismissal was affirmed by the court.

In the present case the petition shows that the defendant received the 90 days' notice, and that such notice was in compliance with the statute; but the date when it was mailed is not alleged, and the court upon the trial found that it had been mailed on June 2, 1916, instead of before May 1, 1916, as prescribed by section 1, chapter 147, Acts 1915. Because the notice was not mailed before May 1, 1916, and for that reason alone, the court dismissed the case after hearing the evidence. This was done in a desire to follow the case of *State v. Seidell*, and doubtless under the belief that the suit was prematurely brought.

The statute under consideration requires the tax collector to give the notice not later than May 1, 1916 (in counties of less than 50,000 inhabitants), and not later than the 1st day of June in every year following thereafter. The act was passed primarily to do away with the collection of taxes by contract as provided in article 7707, and to make the officers intrusted with duties with respect to the collection of taxes perform such duties. The substantial benefit conferred on delinquent taxpayers is that they shall have 90 days' notice before being sued. The tax collector fails to send him the notice by May 1, 1916. The following questions then arise:

(1) Does such failure preclude the state from recovering the taxes concerning which the notice should have been given?

(2) Does such failure postpone the right of the state to institute suit from year to year until the tax collector gives the notice at the time prescribed by the statute?

The first question must be answered in the negative. The act is not one of limitation, and its purpose was to insure the collection of taxes, and not to render it impossible to collect same, provided an officer neglected the sending of notice.

The second question is more troublesome,

but it should also be answered in the negative. All prerequisites to the institution of suit which may be deemed beneficial to the taxpayer should be complied with, but whether notice is mailed one day or another is immaterial, provided he is given the 90 days' time from such notice before suit is filed. This notice is simply a demand for payment of taxes, and, if not given within the 90 days prior to January 1st thereafter, no suit can be maintained. Under our statutes the suit has to be brought, as is any other foreclosure suit, and legal notice given by citation, and in which trial the defendant is entitled to make all his defenses. But this notice was given 90 days before suit was filed, and he was not deprived of any right of due process of law. Limitations of Taxing Powers, by Gray, §§ 1157 to 1163, and citations.

The *Seidell* Case was correctly decided, and has been cited with approval in *State v. Hunt*, 207 S. W. 636, and in *Barber v. State*, 212 S. W. 292. It is not authority here for the reason, as stated, the notice was given 90 days before the suit was filed prior to January 1st succeeding. The notice is a mere written advice that, unless the owner shall pay to the tax collector the amount of taxes, interest, penalty, and costs set forth in such notice within 90 days from date of notice, then in that event the county or district attorney will institute suits not later than January 1st for the collection of such moneys and for the foreclosure of the constitutional lien. If such notice had not been given at all, then no suit could be maintained until that was done properly so as to afford the opportunity to pay. The notice, as seen by the statute, is a prerequisite to the suit, and must be given 90 days before its institution. The court found the notice was given on June 2, 1916, and that suit was instituted on the 23d day of December, 1916, in the district court of Eril county; and further found the defendant to be justly indebted for taxes, interest, and penalty in the sum of \$5.73, together with interest thereon at 6 per cent. from December 23, 1916.

As the court heard the case fully and made complete findings, it is the opinion of this court that the case should be reversed, and here rendered for appellant.

Reversed and rendered.

## ROBBINS et al. v. UNION &amp; MERCANTILE TRUST CO. (No. 77.)

(Supreme Court of Arkansas. Dec. 22, 1919.)

## GARNISHMENT — 218 — LIEN OF ASSIGNEE, PRIOR TO LIEN OF GARNISHOR.

Evidence held to show that assignment of stock to intervener was prior to garnishment of dividends thereon.

Appeal from Pulaski Chancery Court; Jno. E. Martineau, Chancellor.

Action by the Union & Mercantile Trust Company against J. T. Hicks as defendant, and T. E. Helm, receiver of the Arkansas Life Insurance Company, as garnishee, in which E. A. Robbins for himself and another filed an intervention. From decree rendered, intervener appeals. Reversed, and judgment entered for intervener.

Brundidge & Neelly, of Searcy, and Gardner K. Oliphint, of Little Rock, for appellant.

J. C. Marshall, of Little Rock, for appellee.

SMITH, J. This is a garnishment proceeding brought by appellee against J. T. Hicks, as defendant, and T. E. Helm, receiver of the Arkansas Life Insurance Company, as garnishee. Hicks owned 50 shares of stock in the insurance company, and a judgment had been recovered by that company against him for the balance due on his stock subscription. After the company had been placed in the hands of the receiver, this judgment was paid by Hicks. In the meantime the receiver had collected and converted into cash sufficient assets of the company to pay a dividend to the stockholders, and the proportionate part to which Hicks was entitled was \$300. Hicks was indebted to both appellee and appellant, his note to the latter being indorsed by E. A. Robbins.

The garnishment was served on the receiver on February 10, 1919, and on February 27, 1919, the receiver filed an answer setting up the facts stated above, and on March 12th an order was made directing the receiver to pay the dividends to appellee, and this appeal is from that order.

Before the order appealed from was made, E. A. Robbins, for himself and the appellant bank, filed an intervention, in which he alleged an assignment of the stock to himself for the benefit of the bank before the garnishment proceeding was begun. It is also insisted that said fund, having been accumulated during the progress of the receivership, was not subject to garnishment. In answer to which it is said that the affairs of the company had been wound up and nothing remained but to pay over the balance to the proper parties, and that the fund was therefore subject to garnishment. In support of the decree below, it is also insisted that the

assignment of the stock did not antedate the garnishment, but that the assignment was made after Hicks was advised of the garnishment.

Assuming—without deciding—that the fund was subject to garnishment, we pass to the decision of the question of fact stated, as, in our opinion, it is decisive.

Upon the issue stated, the principal witnesses necessarily were Hicks and Robbins; the deposition of Hicks being taken upon interrogatories. Much of the cross-examination of Hicks was devoted to the inquiry as to the time when and the circumstances under which a letter was written, the insistence being that the letter was postdated. That letter is as follows:

"January 20, 1919.

"Mr. E. A. Robbins, Searcy, Ark.—Dear Ed: I have your letter of the 18th, replying to mine of January 9, advising that after investigation Mr. Deener did not think it advisable to undertake the purchase of the equity of Mr. Helm, receiver, in the Little Rock property which I conveyed to him. I had hoped that he would be willing to accept an amount for these equities which would enable you to realize something for the People's Bank, to be applied to my indebtedness, but feel sure that your decision in the matter is based upon sound judgment.

"Now that the judgment of the receiver is fully satisfied, and released, it is clear that I am entitled, as a stockholder of the Arkansas Life Insurance Company, to a proportionate share of the assets of the receivership estate when the receiver makes his final settlement. Whatever this amounts to, I desire that it should be paid to the bank, and applied to my indebtedness. I am accordingly sending you herewith certificate No. 124 for fifty shares of stock of the Arkansas Life Insurance Company dated September 19, 1910, and indorsed in blank. This will be your authority to collect from the receiver any amount that may be apportioned to this stock when the receiver makes his final settlement.

"Yours very truly,  
"JTH/LB. [Signed] Jno. T. Hicks."

We do not set out and discuss the various circumstances which, according to appellee, show that the letter was postdated. Hicks denied that he had done so, and we think the testimony, considered as a whole, does not warrant us in disregarding his statement. No personal advantage could result to him, as the only question involved is which of two creditors should have the right to apply the dividend to their debt. Stress is laid upon the fact that, after the date of the letter set out above, Hicks wrote the receiver in regard to the dividend and referred to it as belonging to himself. But we attach no special importance to that letter. There was no necessity for Hicks to advise the receiver of the assignment of the stock. The point to which the letter was addressed was that as between Hicks and the receiver the dividend belonged

to Hicks, as the judgment against Hicks had been paid.

Finding, as we do, from the testimony, that the assignment preceded the garnishment, the decree of the court below will be reversed, and judgment entered here for the intervenor.

**BUSH et al. v. DELTA ROAD IMPROVEMENT DIST. OF LEE COUNTY et al.**  
(No. 56.)

(Supreme Court of Arkansas. Dec. 15, 1919.)

**1. HIGHWAYS §90—ACT CREATING SPECIAL ROAD DISTRICT CONSTITUTIONAL.**

Road Acts 1919, vol. 1, p. 706, creating the Delta road improvement district of Lee county, is not unconstitutional as giving the commissioners' power to lay out and establish new public roads and taking away from the county court the exclusive jurisdiction over public roads vested in it by Const. art. 7, § 28.

**2. HIGHWAYS §90—SPECIAL ROAD LAW DIRECTORY AND NOT MANDATORY ON COUNTY COURT.**

Road Acts 1919, vol. 1, p. 359, § 3, creating road improvement district, provides that, if any part of the proposed road has not been laid out as a public road, it is the duty of the county court to lay out the same in accordance with Acts 1911, p. 364, and such section is merely a method of procedure for the guidance of the county court and is not mandatory so as to deprive the county court of its freedom of judgment in laying out new roads.

**3. CONSTITUTIONAL LAW §70(1)—FIXING OF BOUNDARIES OF SPECIAL ROAD DISTRICT AN EXERCISE OF LEGISLATIVE POWER.**

In Road Acts 1919, vol. 1, p. 706, the inclusion of the property within the boundaries of the road district created was an exercise of legislative power which the court cannot set aside.

**4. HIGHWAYS §139, 148 — ASSESSMENT OF BENEFITS AND DAMAGES; ACTION BEFORE ASSESSMENT PREMATURE.**

Taxation by special assessment is defensible only on the theory of corresponding special benefits to the property assessed, and the question of benefits to special road district is one of fact, and location and surface conditions of the lands are to be considered in assessing, and Road Acts 1919, vol. 1, p. 706, provides that the commissioners shall assess benefits and damages after due notice, giving owners full opportunity for complaint when lands are assessed, and an injunction suit brought prior to assessment is premature.

**5. HIGHWAYS §90—REPEAL BY IMPLICATION OF SPECIAL ROAD DISTRICT STATUTES.**

The Legislature has full power to establish local improvement districts and to abolish those already created, and, if it be assumed that a prior district was a valid one, the subsequent creation of a district including the former dis-

trict impliedly repealed the former statute so far as a construction of the latter road law is concerned.

**6. HIGHWAYS §90—STATUTE CREATING IMPROVEMENT DISTRICT; SUFFICIENCY OF DESCRIPTION OF BOUNDARIES.**

Road Acts 1919, vol. 1, p. 706, is not void because not definitely describing the boundaries of the district. The language "and that part of sections 21 and 22 on the left or east bank of the St. Francis river," read in connection with other parts of the description, means the east side of the river; the map showing that a part of each of such sections is on the east side of the river.

Appeal from Lee Chancery Court; A. L. Hutchins, Chancellor.

Suit by J. M. Bush and others against the Delta road improvement district of Lee county and others for injunction. Judgment dismissing complaint, and plaintiffs appeal. Affirmed.

Appellants, who are property owners within the proposed road improvement district, brought this suit in equity against appellees, who are commissioners of said proposed district, to enjoin them from proceeding to construct the road provided for.

Appellants set out in their complaint the several grounds which they claim render the district invalid, and there is an agreed statement of facts filed by the parties to the effect that the allegations are true. The several grounds of objections to the validity of the district will be stated separately and discussed in the opinion.

The chancellor was of the opinion that the district was valid, and it was decreed that the complaint should be dismissed for want of equity. The case is here on appeal.

C. W. Norton, of Forest City, H. F. Roleason, of Marianna, and Daggett & Daggett, of Marianna, for appellants.

House, Rector & House, of Little Rock, for appellees.

HART, J. (after stating the facts as above). [1, 2] The district in question was created by an act of the Legislature passed at its regular session in 1919 and approved March 8, 1919 (Special Road Acts of the Session of 1919, vol. 1, p. 706).

It is first earnestly insisted that the act is unconstitutional because it gives the commissioners power to lay out and establish new public roads and takes away from the county court the jurisdiction over public roads vested in it by article 7, § 28, of the Constitution of 1874.

The section complained of is section 2, and it reads as follows:

"Said district is hereby organized for the purpose of improving that part of the public

roads in Lee county, Arkansas (here follows detailed description of the roads). The improvements to be made by said district are to be made on the road as now laid out, or which may be laid out by the county court of Lee county, or substantially on this line, the nature of the improvements and any change in the line of said road to be approved by the county court of Lee county, Arkansas. The county court of Lee county shall lay out public roads along the lines selected by the board of commissioners in the manner provided by Act 422 of the Acts of 1911 of the state of Arkansas, being 'An act to amend section 7328 of Kirby's Digest of the statutes of Arkansas.' Said highway is to be constructed of macadam or such other material as the commissioners may deem best, and they are authorized to build such bridges and culverts as they may find desirable. Any bridges built shall be built as approved by the said county court. In building said highway, the commissioners may proceed by letting the work as a whole or in sections, or they may build the same, or any part thereof, with day labor and the use of such county and state convicts as may be conceded them by the state, or Lee county. In case bids are advertised for, the commissioners shall have the right to accept or reject any bid."

The proposed road which is to be constructed and improved is to be something over 12 miles in length, and provision is made for the laying out of a new road to the extent of 4 miles on each end thereof.

It is earnestly insisted by counsel for appellants that the act provides that the commissioners shall lay out the new road and make it mandatory upon the county court to establish the roads as laid out by the commissioners, and thus destroys the freedom of judgment of the county court in the matter.

In *Sallee v. Dalton et al.*, 213 S. W. 762, this court held that a special act of the regular session of the Legislature of 1919, creating a road improvement district in Randolph county, Ark. (Road Acts 1919, vol. 1, p. 356), which provided for the construction of new roads to be established as well as the improvement of old roads already established, did not violate article 7, § 28, of the Constitution of 1874, giving the county courts exclusive jurisdiction over roads.

Section 3 of that act provides that, if any part of the proposed road has not been laid out as a public road, it is hereby made the duty of the county court of Randolph county to lay the same out in accordance with Act 422 of the acts of the General Assembly of the State of Arkansas for the year 1911.

It is contended by counsel for appellants that, if this section had stood alone in that act, the court would have held it to be mandatory. We cannot agree with counsel in this contention. The court held that this section of the statute was merely a method of procedure for the guidance of the county court in laying out the new roads, and was not mandatory so as to deprive the county

court of its freedom of judgment in laying out new roads. This is shown both by the majority opinion and the dissenting opinion in that case.

Section 5 of the act provides that, if the commissioners deem it to the best interest of the district to vary the line of road, they may report that fact to the county court, and in that event, if the county court approves the report, it may make an order changing the route of the road, and, if necessary, it shall, in that event, lay out the new road in the manner hereinbefore provided. That is to say, that it should lay out the new road in the manner provided in section 3. The majority of the court held in that case that section 5 and section 3, when construed together, did not deprive the county court of the judgment and discretion in the establishment of new roads vested in it by the Constitution, and Judge Wood and the writer maintained the contrary view in a dissenting opinion. The court deliberately construed the statute, and no useful purpose could be served by going into the matter again. A careful reading of section 2 of the act in the case at bar will show that it is in no essential respect different from sections 3 and 5 construed in the case just referred to.

Here the section provides that the county court of Lee county shall lay out public roads along the lines to be selected by the board of commissioners in the manner provided by Act 422 of the Acts of 1911. It also provides that any change of line of the road is to be approved by the county court of Lee county. It provides that the bridges shall be built as approved by the county court. Therefore we are of the opinion that the present statute in the respect complained of is substantially like that construed in *Sallee v. Dalton*, supra, and that the decision in this case on this point is ruled by the decision in that case. Other recent cases sustaining *Sallee v. Dalton*, supra, are *Cummock v. Alexander et al.*, 213 S. W. 767; *Reitzammer v. Desha Road Imp. Dist. No. 2 et al.*, 213 S. W. 773, and *Hamby v. Pittman et al.*, 213 S. W. 755.

[3] The agreed statement of facts shows the following:

"That the construction of the proposed road is impracticable and not feasible. That large portions thereof run through low and swampy lands, and that roads thereon cannot be constructed without building such levees, embankments, bridges, and culverts to such a cost as would be far in excess of any possible benefit that might accrue to adjoining lands.

"That the whole of the roads to be constructed under said act lies within the eastern part of the boundaries of the district. That practically all of the lands within the western half of the district are inaccessible to the proposed roads on account of natural obstacles lying between such lands and the proposed route of the roads, and that by reason thereof such lands cannot be benefited in any

manner by the construction of the roads. It is claimed therefore that the assessment against lands in the eastern half of the district will be burdensome and amount to confiscation."

It is earnestly insisted by counsel for appellants that, under the agreed statement of facts just quoted, the court should have held the district unconstitutional. The act in the case at bar provides for the assessment of benefits by the board of assessors and for an equalization of these assessments upon a hearing given to all the property owners after due notice. The Legislature defined the boundaries of the district in the present case, and the inclusion of the property within the boundaries of the district was an exercise of legislative power which the court cannot set aside.

[4] In the case of *Coffman v. St. Francis Drainage District*, 83 Ark. 54, 103 S. W. 179, the Legislature created the district, fixed the boundaries thereof, and made the assessment. It was there claimed that the act of the Legislature was such an arbitrary abuse of the taxing power as would amount to a confiscation of the plaintiff's property without any benefit whatsoever to him. The court held that while the Legislature, in creating a drainage district, may provide what lands shall be assessed for the improvement, and the extent of such assessment, the court will interfere where the act of the Legislature is such an arbitrary abuse of the taxing power as would amount to a confiscation of property without benefits. In that case, as we have already seen, the assessment of benefits was made by the Legislature, and it was held that the courts could review the action of the Legislature upon proper allegations and proof showing that the proposed district amounted to a confiscation of the plaintiff's land.

In *Myles Salt Company, Limited, v. Board of Commissioners of Iberia & St. Mary Drainage District*, 239 U. S. 478, 36 Sup. Ct. 204, 60 L. Ed. 392, L. R. A. 1918E, 190, the court held that the Legislature of a state may constitute drainage districts and define their boundaries, or may delegate such authority to local administrative bodies; and that such action unless palpably arbitrary and a plain abuse, does not violate the due process provision of the fourteenth amendment.

The court further held that the action of the local administrative body in including land within a drainage district which is palpably arbitrary, such inclusion not being for the purpose of benefiting such land but for the purpose of obtaining revenue therefrom, amounts to a deprivation of property without due process of law under the Fourteenth Amendment. Mr. Justice McKenna, who delivered the opinion of the court, said:

"It is to be remembered that a drainage district has the special purpose of the improve-

ment of particular property and when it is so formed to include property which is not and cannot be benefited directly or indirectly, including it only that it may pay for the benefit to other property, there is an abuse of power and an act of confiscation. *Wagner v. Baltimore* [239 U. S.] p. 207 [36 Sup. Ct. 68, 60 L. Ed. 230]. We are not dealing with motives alone, but as well with their resultant action; we are not dealing with disputable grounds of discretion or disputable degrees of benefit, but with an exercise of power determined by considerations, not of the improvement of plaintiff's property, but solely of the improvement of the property of others—power, therefore, arbitrarily exerted, imposing a burden without a compensating advantage of any kind."

The effect of these and other decisions of the Supreme Court of the United States and of this court show that the property owner would be entitled to relief at some stage of the proceedings upon proper allegations and proof that his lands were not benefited, or that the proposed improvements taxed his lands so high as to amount to a confiscation of them. As we have already seen, under the provisions of the present act it is provided that the commissioners shall make the assessment of benefits and damages, and that due notice thereof shall be given to the property owner in order that he may be heard. This is the time and place for the property owner to show that his property is not benefited at all, or that it is taxed so high as to amount to a confiscation of it. Taxation by special assessment is defensible only upon the theory of corresponding special benefits to the property assessed. The question of benefits is a question of fact. The location and surface conditions of the lands are matters to be considered by the commissioners in assessing the lands. The present action is premature on this question. A full opportunity will be given to the landowner to make his complaint in this respect before the board of commissioners when his lands are assessed, and the action of the board is subject to judicial review within the limits above announced upon proper allegations and proof. Such is the effect of the holding of this court in *Harrison v. Abington*, 215 S. W. 255.

[5] It is next insisted that the present district is invalid because the lands of appellants are situated in another improvement district which had for its object and purpose the improvement of the proposed road in the present district as well as other roads in Lee county. The record does not show that the board of commissioners of that district have entered upon the work of constructing and improving the proposed road. Under the decisions cited in this opinion, as well as many other decisions of this court, it is firmly established that the Legislature has full power to establish local improvement districts and to abolish those already created. If it be as-



sumed that the prior district was a valid one, it may be said that the creation of the present district impliedly repealed it so far as the construction of the present proposed road is concerned. The two statutes in this regard would be repugnant to each other, and the latter act will repeal by implication the prior one.

[6] Finally, it is insisted that the boundaries of the district are not definitely described in the act, and for that reason the act is void. For instance, it is insisted that the act defining the boundaries of the district is made indefinite by the use of the following language: "And that part of section 21 and 22 on the left or east bank of the St. Francis river." The map shows that a part of section 21 is on the east side of the St. Francis river and part of it on the left side of the river. All of section 22 is on the east side of the river, a corner of the section only touching the river. When this part of the description is read in connection with the other parts, it is evident that the words, "east bank of the river," were used in the sense of east side of the river. The same reasoning applies to the description of the lands bordering on "Old river."

We have examined the description, and are satisfied that it is definite and certain.

It follows that the decree must be affirmed.

BARTON et al. v. MATTHEWS. (No. 58.)  
(Supreme Court of Arkansas. Dec. 15, 1919.)

SUBROGATION  $\Leftrightarrow$  28 — PAYMENT OF ENTIRE DEBT NECESSARY.

There can be no subrogation except in favor of one who has paid an entire obligation of a third person to another, payment of a portion only of the debt not giving rise to the right.

Appeal from Pope Chancery Court; Jordan Sellers, Chancellor.

Suit by Lavissa Matthews against L. E. Barton and Mary J. Matthews. From decree for complainant, defendants appeal. Affirmed.

R. S. Hudson, of Atkins, for appellants.

R. W. Holland, of Russellville, for appellee.

SMITH, J. A. J. Matthews in his lifetime owned the south half of the northeast quarter of section 34, township 8 north, range 20 west, and executed a mortgage thereon, in which his wife, Lavissa, joined, to one T. M. Neal, to secure a debt of \$1,650. Matthews died, and a suit was brought against his widow and heirs to foreclose this mortgage. In the decree rendered in that cause

it is recited that L. E. Barton tendered into court the sum of \$3,000 as his bid for the land, and that bid was accepted and a commissioner appointed to execute a deed to Barton. The mortgage debt, which appears to have been reduced to the sum of \$744.50, was ordered to be first paid, and the sum of \$1,600 was ordered appropriated and applied to the payment of the purchase price of the south half of the southwest quarter of section 26, township 8 north, range 20 west, which the widow had bought as a homestead for herself and her children, and the remainder was ordered to be paid to certain of the children. This decree was rendered December 11, 1916.

There were ten of these children, one of whom was named Mary J. Matthews and against whom a judgment for \$720 was rendered in the chancery court on September 16, 1916, in favor of one J. W. Turnbow. On November 1, 1916, Mary J. Matthews executed to her mother a deed to her interest in the land in section 34, and about that time the other adult children did likewise.

On September 13, 1917, an execution issued on the Turnbow judgment, which was levied on the undivided interest of Mary J. Matthews in the land in section 34, whereupon Barton brought suit to restrain the sheriff from selling that interest. A decree was entered in that cause on October 19, 1917, in which the court found that the interest of Mary J. Matthews in the land in section 34, after discharging the mortgage indebtedness, was \$200, and that Turnbow was entitled to receive, by virtue of his judgment and execution thereunder, the sum of \$200 from the sale of said land. The court thereupon ordered that Barton pay to Turnbow the sum of \$200, whereupon he "should be subrogated to all the rights of said J. W. Turnbow under said judgment to the extent of the present interest of the said Mary J. Matthews as heir at law of the said A. J. Matthews." No question is raised as to the validity of either of these decrees.

Thereafter Lavissa Matthews, the widow of A. J. Matthews, brought this suit against Barton and Mary J. Matthews to quiet her title to the land in section 26; and an answer and cross-complaint was filed by Barton, in which he prayed that he be subrogated to all the rights of J. W. Turnbow against the said Mary J. Matthews in and to her one-tenth interest in the estate of A. J. Matthews, deceased. The relief prayed by the widow was granted, and that prayed by Barton was denied, and this appeal has been prosecuted from that decree.

The court properly denied Barton's prayer for subrogation, for the reason that he had paid a portion only of the debt due Turnbow. In *Richeson v. National Bank of Mena*, 96

Ark. 601, 132 S. W. 915, we quoted from *Bank of Fayetteville v. Lorwein*, 76 Ark. 245, 88 S. W. 919, 6 Ann. Cas. 202, the following statement of the law:

"Before the surety can claim the right to the benefit of any of the securities, he must first pay the entire debt of the principal for the payment of which the securities were given. As is said in the case of *Bank of Fayetteville v. Lorwein*, 76 Ark. 245 [88 S. W. 919, 6 Ann. Cas. 202]: 'The right of subrogation cannot be enforced until the whole debt is paid, and until the creditor be wholly satisfied, there ought to and can be no interference with his rights or his securities which might, even by bare possibility, prejudice or embarrass him in any way in the collection of the residue of his claim.' Sheldon on Subrogation, § 127; 4 Pom. Eq. Jur. § 1419, 27 Am. & Eng. Ency. Law, 210; *McConnell v. Beattie*, 34 Ark. 113, and cases cited in *Bank of Fayetteville v. Lorwein*, supra."

See, also, Sheldon on Subrogation (2d Ed.) §§ 14, 70; *Jones v. Harris*, 90 Ark. 51, 55, 117 S. W. 1077; *Plunkett v. State Nat. Bank*, 90 Ark. 86, 88, 117 S. W. 1079; *State ex rel. Luck v. Atkins*, 53 Ark. 303, 13 S. W. 1097; *McConnell, Adm'r, v. Beattie, Adm'r*, 34 Ark. 113; *Schoonover v. Allen*, 40 Ark. 132, 137, 138; *Receivers of N. J. Midland Ry. Co. v. Wortendyke*, 27 N. J. Eq. 658; *Morrow v. United States Mortgage Co.*, 96 Ind. 21; *Lumberman's Ins. Co. v. Sprague*, 59 Minn. 208, 60 N. W. 1101; *Muller v. Flavin*, 13 S. D. 595, 610, 83 N. W. 687; *Featherstone v. Emerson*, 14 Utah, 12, 45 Pac. 713; *Kyner v. Kyner*, 6 Watts (Pa.) 221.

Decree affirmed.

#### TEAGUE v. STATE. (No. 46.)

(Supreme Court of Arkansas. Dec. 15, 1919.)

##### 1. ANIMALS — 34 — DUTY OF OWNER TO COMPLY WITH TICK ERADICATION LAW.

Under the Tick Eradication Law, and the rules and regulations prescribed by the board of control of the Agricultural Experiment Station for its enforcement, giving a formula for the dipping mixture, it is the duty of persons owning cattle to provide the means for dipping them, and it is not incumbent on the county inspector or other public authority to furnish facilities.

##### 2. ANIMALS — 34 — EXCUSE FOR FAILURE TO COMPLY WITH TICK ERADICATION LAW.

It is no excuse to an owner of cattle required to dip them, as prescribed by the Tick Eradication Law, under the rules and regulations promulgated by the board of control of the Agricultural Experiment Station that it is dangerous so to dip, and that injuries frequently result.

Appeal from Circuit Court, Clark County; Geo. R. Haynie, Judge.

John Teague was convicted of failing to dip cattle, and he appeals. Affirmed.

W. H. Mizell, of Arkadelphia, and D. D. Glover, of Malvern, for appellant.

Jno. D. Arbuckle, Atty. Gen., and Robert C. Knox, Asst. Atty. Gen., for the State.

MCCULLOCH, C. J. The charge against appellant is the failure to dip his cattle in accordance with the rules and regulations prescribed by the board of control of the Agricultural Experiment Station for the eradication of ticks. It was proved at the trial below that appellant failed to dip his cattle, and he admitted it, but contended that his refusal to do so was not willful, and that he was justified in failing to dip on the ground that the agent of tick eradication inspector of the county failed on request to come to the dipping vat nearest appellant's home for the purpose of giving instructions about preparing the dipping mixture. Another excuse given by appellant was that the vats in that locality had been blown up, and in some instances the mixture had been poisoned so that cattle were injured from contact with it, and that he was afraid to dip his cattle without some protection from the county agent, who declined to furnish him protection from that danger.

According to the undisputed testimony a dipping vat had been built in the immediate neighborhood of appellant's home, but that it had not been used on account of it not being supplied with the dipping liquid. Appellant was a member of the partnership or association which constructed this vat. It is also shown that there are two other vats in that locality, but several miles distant from appellant's home.

[1] It is not incumbent on the county inspector or other public authorities to furnish facilities for dipping cattle. The law (Acts 1917, p. 195, amending Acts 1915, p. 338) requires it to be done, and the board of control has prescribed rules and a formula for the dipping mixture, and it is the duty of persons owning cattle to provide the means for dipping their cattle. It is therefore no excuse to say that the proper facilities had not been furnished, as it is the duty of the cattle owners themselves to furnish those facilities and use them. *Ashcraft v. State*, 215 S. W. 688.

[2] Appellant offered to show that it was dangerous to dip cattle, and that injuries frequently resulted, but the court excluded the testimony. This was correct, as it is not a question for the jury to determine whether or not it was proper to dip cattle, for the language of the law compels obedience to the requirements of the board of control. *Boyer v. State*, 216 S. W. 17.

Appellant also asked the court to give instructions telling the jury in effect that the owner was not required to dip his cattle if damage to them would result from such dipping, but the court's ruling in refusing to give the instructions was correct.

Judgment affirmed.

# MINERS' BANK OF JOPLIN v. CHURCHILL et al. (No. 52.)

(Supreme Court of Arkansas. Dec. 15, 1919.)

## 1. APPEAL AND ERROR ¶80(1)—ORDER TO COMMISSIONER IN FORECLOSURE TO PAY TAXES APPEALABLE.

An order by a chancery court, on confirming a report of a commissioner in foreclosure proceedings, directing the commissioner to pay all costs and taxes due on the land out of the purchase money, *held* not final because it fails to adjudicate that any taxes were due, does not fix the amount, nor render judgment therefor.

## 2. APPEAL AND ERROR ¶8—MOTION TO CORRECT ERRONEOUS ORDER AS PREREQUISITE TO APPEAL.

Where, in foreclosure proceedings, the commissioner is ordered to pay taxes due out of the purchase money on a sale, such order will not be reversed in the absence of a motion to correct it in view of Kirby's Dig. § 1233, providing that there shall be no reversal for errors which could be corrected on motion until such motion has been overruled.

Appeal from Van Buren Chancery Court; Ben F. McMahan, Chancellor.

Proceedings between the Miners' Bank of Joplin and Harry Churchill and others. From an order of the chancery court confirming a commissioner's report on a foreclosure sale, the bank appeals. Dismissed.

Brundidge & Neely, of Searcy, for appellant.

M. P. Hatchett, of Clinton, for appellees.

WOOD, J. This appeal was from an order of the chancery court approving and confirming a report of its commissioner whom it appointed to make the sale upon decree of foreclosure.

The court directed that the commissioner make a deed to the purchaser named in said report upon his complying with the terms of his purchase, and present it to the court for its action thereon, and concludes as follows:

"And it is further ordered by the court that the commissioner pay all costs and taxes now due on said land out of the purchase money."

[1] The order here appealed from is not final, because it does not adjudicate that any taxes at that time were due and fix the

amount thereof and render judgment for the same. The appeal therefore is premature, as there was no final judgment or order fixing the amount of the taxes, if any, to be paid. See *Davis v. Hale*, 114 Ark. 426, 170 S. W. 99, Ann. Cas. 1916D, 701, and other cases in *First Crawford's Digest*, p. 130, Appeal and Error, § 22.

Furthermore, the order as to the payment of the taxes stands on the same basis as an order for the payment of costs.

[2] A party who conceived himself aggrieved by such order must move the court to correct the same before he has any standing in this court.

Section 1233 of Kirby's Digest provides:

"A judgment or final order shall not be reversed for an error which can be corrected on motion in the inferior courts until such motion has been made there and overruled."

See *Boone County Bank v. Byrum*, 68 Ark. 71, 56 S. W. 532; *Shinn v. State*, 93 Ark. 290, 124 S. W. 263.

The appeal is therefore dismissed.

# SHUFFIELD v. STATE. (No. 60.)

(Supreme Court of Arkansas. Dec. 15, 1919.)

## 1. JURY ¶72(6) — SELECTION OF TALESMEN BY SHERIFF.

Kirby's Dig. § 793, amended by Acts 1917, p. 1121, providing for the disqualification of sheriffs upon accused filing an affidavit of prejudice, etc., under which defendant sought to disqualify sheriff from selecting talesmen, refers only to the sheriff's power to issue process in vacation, and does not affect his actions during the actual trial.

## 2. JURY ¶72(6)—DISQUALIFICATION OF SHERIFF IN DISCRETION OF COURT.

After the beginning of a criminal trial, the disqualification of the sheriff is a matter addressed to the discretion of the court.

## 3. JURY ¶72(6)—DISQUALIFICATION OF SHERIFF TO SELECT TALESMEN.

Where accused's affidavit charged a sheriff with prejudice and bias, but no proof was offered to support the charge, the court did not abuse its discretion in refusing to disqualify the sheriff from selecting talesmen, although the sheriff was a witness at the trial and testified that he had watched accused's premises and arrested him for making intoxicating liquors.

## 4. INTOXICATING LIQUORS ¶236(5) — EVIDENCE TO SUSTAIN CONVICTION FOR MANUFACTURING LIQUOR.

Evidence that a still, mash, etc., was found near accused's residence, that whisky was found in his house, that accused and some of his family were arrested at the still, etc., *held* to sustain a conviction for manufacturing intoxicating liquors as against the defense that the still

belonged to another party who had given accused the whisky.

**5. INTOXICATING LIQUORS §137—NECESSITY OF SHOWING MANUFACTURE FOR USE AS A BEVERAGE.**

In a prosecution for unlawfully manufacturing intoxicating liquors, it is unnecessary to establish that the liquor was manufactured for use as a beverage.

**6. INTOXICATING LIQUORS §239(1)—INSTRUCTION REGARDING UNLAWFUL MANUFACTURE.**

An instruction that accused must be acquitted unless the evidence showed beyond a reasonable doubt that he had manufactured intoxicating liquors sufficiently advised jury that mere preparation for manufacture would not justify conviction.

Appeal from Circuit Court, Clark County; Geo. R. Haynle, Judge.

Henry Shuffield was convicted of manufacturing spirituous or fermented liquors, and appeals. Affirmed.

H. B. Means, of Malvern, T. N. Wilson, of Arkadelphia, and Chas. Jacobson, of Little Rock, for appellant.

Jno. D. Arbuckle, Atty. Gen., and Robert O. Knox, Asst. Atty. Gen., for the State.

**HUMPHREYS, J.** Appellant was indicted, tried, and convicted in the Clark circuit court, for manufacturing spirituous or fermented liquors, and, as a punishment therefor, was adjudged and sentenced to serve one year in the state penitentiary. From the judgment and sentence, an appeal has been duly prosecuted to this court.

[1-3] Appellant insists that reversible error was committed by the court in overruling his motion to disqualify the sheriff. During the impanelling of the jury, appellant filed a motion, in accordance with section 793 of Kirby's Digest, as amended by Act No. 206, Acts of 1917, to disqualify the sheriff from selecting talesmen from the bystanders, in accordance with an order of the court, and, because of such alleged disqualification, to permit the coroner to select said talesmen. The amended act referred to reads as follows:

"In all cases upon affidavit filed with the clerk of the circuit court, or any other court of record, of the partiality, prejudice, or relationship of the sheriff or deputy sheriff of any county where suit is brought or to be brought, or shall have been commenced, or where such affidavit is filed by the defendant in any criminal prosecution, the clerk shall issue and direct all process to the coroner who shall execute the same and discharge all duties in such criminal or civil prosecution or suit in the same manner that the sheriff could have done in like cases."

This act clearly refers to the issuing of process in vacation, and has no reference whatever to the conduct of a trial in the

presence of the court. After the beginning of a trial, the disqualification of the sheriff would be a matter addressed to the discretion of the court. The affidavit charges prejudice, partiality, and bias as a ground to disqualify the sheriff. No proof was offered to support this charge. It is true the sheriff became a witness and testified that he watched appellant's premises and finally arrested him at the still, where appellant made certain damaging statements to him and the constable of the township; but this evidence was far from showing any prejudice, partiality, or bias on the part of the sheriff toward appellant. Therefore there was no abuse of discretion by the court in overruling the motion to disqualify the sheriff.

[4] Appellant next contends that the evidence is not legally sufficient to support the verdict. The sheriff discovered a crude still about 300 yards north of appellant's residence. There were two barrels near it that contained mash, which consisted of corn meal, or chops, and water mixed. There were a box and keg on the ground. After the discovery, he visited the still day and night for several days and found two-thirds of the mash had been used from Friday night to the following Sunday morning. On Saturday afternoon, the still was hot. On Sunday morning, appellant appeared on the scene and moved the keg and box. He then started to leave the still, and the sheriff arrested him. The sheriff testified that appellant admitted that he had made a little run, about a half gallon to three quarts, and that the product was at his house in a tin bucket; that it was not very good, because it was not made at the right time; that it was sour, on account of his mash not being what it should be. The sheriff then sent appellant away with Mr. Dooley, the constable, and remained at the still. In about 15 minutes, appellant's daughters came to the still, carrying split pine wood, and threw it down near the still. When they started to leave, the sheriff arrested them and took them to the place where Mr. Dooley was guarding appellant. The sheriff started to go back, at which time, he testified, he was told by appellant that no one else would come to the still, unless it was some of his own folks, in order to carry out his directions. The sheriff and Mr. Dooley then took appellant and his daughters to the residence and left them in the yard in charge of Mr. Dooley. The sheriff searched the house and found four or five gallons of the manufactured article in tin buckets, and carried it out in the yard, where a bucket containing a gallon and a half was intentionally kicked over by appellant. The sheriff then went to the still and got all the manufactured product he could find there, and poured all that he had pro-

cured at both places in a keg and brought it to Arkadelphia. According to the sheriff's and Mr. Dooley's evidence, the product smelled and looked like whisky. A glass of it was exhibited to the jury at the trial.

Appellant's explanation, when on the witness stand, was that the still was the property of George Chaney; that George Chaney had made the stuff, and, upon finding it was of no value, had brought it down and left it near his fence, and had given him the mash to feed his hogs. He denied that he had made any admissions in the presence of the sheriff and Mr. Dooley to the effect that he had made the stuff himself. Other evidence was adduced, tending to corroborate that part of appellant's testimony, to the effect that the still belonged to George Chaney, and that he had given the output to appellant because a poor product. We think there was sufficient legal evidence to sustain the verdict that the appellant, at the time and place charged in the indictment, manufactured spirituous or fermented liquors.

[5, 6] Lastly, it is insisted that the court erred in refusing to instruct the jury that appellant could not be convicted unless the evidence showed that he had made liquor to be drunk as a beverage, and that it contained some per cent. of alcohol. We have examined the act under which appellant was indicted, and find no requirement therein to the effect that the liquor must have been manufactured to be drunk as a beverage before appellant could be convicted for manufacturing spirituous or fermented liquors. Therefore instructions Nos. 3, 4, and 5, requested by appellant and refused by the court, embracing that idea, were properly refused. The jury were instructed, at the request of appellant and on the court's own motion, to the effect that, unless the evidence showed beyond a reasonable doubt that appellant manufactured the alcoholic, vinous, malt, spirituous, and fermented liquors, they should acquit him. The jury must have understood from these instructions that it was necessary for appellant to actually manufacture such liquor before he would be amenable, and that a showing that he had merely made preparation for the manufacture thereof would not be a sufficient showing upon which to base a conviction.

No error appearing, the judgment is affirmed.

#### ZENOR v. GREEN. (No. 81.)

(Supreme Court of Arkansas. Dec. 22, 1919.)

APPEAL AND ERROR §702(1)—FAILURE TO ABSTRACT ALL INSTRUCTIONS PRECLUDES REVIEW OF INSTRUCTION COMPLAINED OF.

Refusal to give requested instruction will not be considered on appeal where appellant has

failed to abstract all the instructions given, since court in such case cannot determine, without exploring record, whether court had given other instruction covering same issue.

Appeal from Circuit Court, Sebastian County; Paul Little, Judge.

Suit by Martin Green against C. P. Zenor. Judgment for plaintiff, and defendant appeals. Affirmed.

John H. Vaughan, of Ft. Smith, for appellant.

Oglesby, Cravens & Oglesby, of Ft. Smith, for appellee.

HUMPHREYS, J. Appellee instituted suit against appellant before a justice of the peace in the Ft. Smith district of Sebastian county to recover \$72.20 for labor and material for automobile repairs.

Appellant filed an answer, denying the indebtedness, and a cross-bill, asking for judgment over in the sum of \$83.60, which represented an alleged expenditure required to put the automobile in good condition, on account of being dismantled by appellee without authority and improperly and defectively repaired by him.

Upon trial in the magistrate's court appellee recovered a judgment for \$65.30, from which an appeal was duly prosecuted by appellant to the circuit court. There it was submitted to a jury on the pleadings, evidence, and instructions of the court, upon which a verdict was returned and judgment rendered in favor of appellee in the sum of \$60. From the judgment an appeal has been duly prosecuted to this court.

While appellant has not attempted to abstract all the evidence in the case, he did abstract evidence tending to show that appellant authorized appellee to make certain repairs upon a Hudson automobile, which appellee advised would place the machine in good running condition; that, after being repaired, the machine failed to work satisfactorily, and that appellee authorized appellant to have the work done by some one else at his expense; that, pursuant to the instruction of appellee, appellant expended \$105 in putting the car in good running condition. Based upon this evidence, appellant requested the court to give instruction No. 6, which is as follows:

"If you find from a preponderance of the evidence that, after the plaintiff had worked on the car and turned it over to the defendant, said car did not work satisfactorily to the defendant, and you further find that the defendant complained to the plaintiff that said car was not working properly, and the plaintiff told the defendant to have said car fixed properly and deduct whatever it cost from his bill, then and in that event, if you find that the defendant was compelled to pay out sums of money to have

said car put in a good running condition, the defendant would be entitled to recover from the plaintiff the amount of such bill, up to the sum of \$72.20."

The court refused to give this instruction, and appellant insists that reversible error was committed on this account. It is clearly indicated by the number of this instruction that other instructions were given which appellant has failed to abstract. Conceding that the instruction is a correct declaration of law and responsive to the evidence in the case, we have no way of determining whether the court had already instructed on this issue, without exploying the record. The failure of appellant to abstract all the instructions given by the court precludes us, under the rules of practice, from passing upon the issue presented and argued on this appeal.

No error appearing, the judgment is affirmed.

#### CANNON et ux. v. FOSTER et al. (No. 84.)

(Supreme Court of Arkansas. Dec. 22, 1919.)

##### 1. DEEDS ¶211(3)—EVIDENCE OF MISREPRESENTATIONS.

In a suit to cancel on the ground of fraud a deed given in exchange of property, evidence that defendant misrepresented the quantity and condition of the land held sufficient to warrant rescission of the contract.

##### 2. COVENANTS ¶125(4)—LIABILITY FOR PARTIAL FAILURE OF TITLE.

Measured liability of landowner on her warranty, arising from the fact that she had no title to the part of the land conveyed, would be the proportionate value of the part of the land to which title had failed.

##### 3. VENDOR AND PURCHASER ¶351(6)—MEASURE OF DAMAGES FOR FAILURE OF DEED TO INCLUDE LAND SOLD.

Where, in a suit to cancel a deed given in exchange of lands on ground of fraud, it appeared that defendant falsely represented that a certain portion of the land would be embraced in the deed, he would be liable to plaintiffs for the difference in the value between the land which he represented would be conveyed and that which was in fact conveyed as of the date of the conveyance.

Appeal from Lee Chancery Court; A. L. Hutchins, Chancellor.

Suit by Sam Cannon and wife against Thomas P. Foster and another to cancel a deed. Decree for defendants and plaintiffs appeal. Reversed, with directions.

C. W. Norton, of Forrest City, for appellants.

W. L. Ward and Daggett & Daggett, all of Marianna, for appellees.

SMITH, J. Appellants, Sam and Caledonia Cannon, who are husband and wife, seek by this suit to cancel a deed executed by them, conveying two lots in the city of Marianna, and to recover the sum of \$725, which sum of money, together with the lots, furnished the consideration paid by appellants for a certain tract of land described as north of river, west half of the southwest quarter of section 17, township 2 north, range 4 east, containing 60 acres, according to the plat of the government survey.

Appellee Foster contracted to buy this land from his coappellee, Miss Pearce, for the sum of \$750, and he contracted to convey it to appellants for the sum of \$725 and their two lots, and these negotiations were consummated by a deed from Miss Pearce to appellants for the land and a deed from appellants to Foster for the lots together with the payment of \$725, the net result being that Foster acquired the two lots in Marianna as the result of the two deeds by the payment of \$25.

Appellants filed an amended complaint and several amendments to their complaint, and in these pleadings there were allegations of fraud and of mistake, and the court required an election upon the ground that these allegations were repugnant and inconsistent, and required appellants to elect upon which of said pleas they would rely. Having saved exceptions to this ruling, appellants elected to proceed upon the allegations of fraud. This appeal, however, brings the entire record before us for review, and the briefs discuss all the questions raised by the pleadings, or the testimony, and we proceed to a consideration of the entire cause de novo.

Appellants discuss the pleadings and the testimony under three heads, and say they are entitled to the relief prayed under either. It is first said there was fraud upon the part of the appellee Foster by showing to appellant Cannon a different piece of land from that he proposed to sell him; second, mistake upon the part of appellants as to the location of the land called for by the deed made to them, whether such mistake was or was not induced by fraudulent representations; third, a material failure of consideration or impossibility of performance by appellees, in that they cannot deliver title to at least a third of the land contracted to be conveyed.

The case presents a pure question of fact. The land in question is described as that part of west half of southwest quarter of section 17 north of the river; but a lake flows through this land and empties into the river on this land, and there is testimony showing that the land lying west of the lake is higher and better, and, consequently, more valuable than that east of the lake. The land in question adjoins the east half of the

southeast quarter of section 18, the west line of which 80-acre tract of land had been surveyed out and painted, and is referred to by the witnesses as the blue painted line. Appellant Sam Cannon testified that appellee Foster showed him this blue line, and told him it was the west line of the land he was buying, and he testified that he showed this line to his wife and one James Turner as the line to the land which he was buying a week before the delivery of the deeds. Caledonia Cannon corroborated her husband by testifying that he showed her the blue line as the west line of the land he was about to buy; and Turner gave testimony to the same effect. This blue line was not the west line of the land described in the deed. Had it been the line to the land which was intended to be conveyed, it would have embraced all of the east half of the southeast quarter of section 18 north of the river.

Appellant Sam Cannon testified that he thought all the land he was buying was west of the lake, and that he would not have bought but for this representation. On the other hand, Foster denied that he had made any such representation, and a disinterested witness testified that Foster told Cannon in his presence that there were only 15 acres west of the lake. It is said, however, that there is not even that quantity of land west of the lake; but no survey of this land has been made, and the witnesses vary in their estimates on that subject.

In the original opinion in this case the decree of the court below was affirmed upon the ground that the testimony did not show what quantity of land was in fact west of the lake, and we said the appellants must, therefore, fail for the lack of this proof, for we said we could not otherwise know to what extent, if at all, they had failed to receive the land called for in their deed.

In the petition for rehearing it is now pointed out that in a prior deed executed by Miss Pearce to another party she had conveyed all the land lying west of the lake—N. of R. west half southwest quarter section 17, township 2 north, range 4 east, and could not therefore have conveyed any land west of the lake to the Cannons, even though her deed may have described land which in fact was west of the lake. A closer examination of the description contained in this prior deed confirms the truth of the statement just made, so that we now conclude that the representation that there was any land west of the lake could not have been true.

We think the testimony shows a representation by Foster that as much as 15 acres of this land was west of the lake, and in our original opinion we did not reverse the decree because, as we then thought, the testimony did not definitely show that representation was false.

[1] With the facts before us as we now understand them appellants make a case for rescission, and would be granted that relief but for the further fact, which also appears, that the rights of innocent purchasers have intervened, and that relief could not be granted without injustice to these purchasers, with whom the greater equity lies.

[2] There is no showing that Miss Pearce made any representations to the Cannons, nor did Foster represent himself to be, nor was he believed to be, her agent; so that no liability attaches to Miss Pearce as Foster's principal in his dealing with the Cannons. Her liability, if any exists, will arise out of the breach of her warranty, and that liability depends on the question whether in fact any of the land described in her deed to the Cannons had been previously conveyed by her. If so, the measure of her liability will be the proportionate value of the proportion of the land, if any, which was twice conveyed at the time of the conveyance, because, to that extent, in that event, her deed will fail to convey the land which it describes.

[3] Foster's liability, however, is not thus limited. He may have been honestly mistaken about the land which would be conveyed under the description of N. of R. west half southwest section 17, township 2 north, range 4 east, and it may be found that Miss Pearce has not in fact twice conveyed the same land, yet this would not necessarily excuse Foster from liability. If, as the testimony establishes, Foster falsely represented that 15 acres west of the lake would be embraced in the description employed in the deed, then he is liable to the Cannons for the difference in the value between the land which he represented would be conveyed and that which was in fact conveyed as of the date of the conveyance.

As the testimony has not sufficiently developed the facts essential to be known to decide the questions stated we reverse the decree, with directions to the court below to make this finding, and to hear such additional testimony as may be necessary for that purpose.

**BLISS v. MANILA SPECIAL SCHOOL DIST.** (No. 69.)

(Supreme Court of Arkansas. Dec. 22, 1919.)

**1. SCHOOLS AND SCHOOL DISTRICTS — SEPARATE INSTRUMENTS EXECUTED BETWEEN SAME PARTIES SAME DAY CONSTRUED TOGETHER.**

A contract between plaintiff architect and defendant school district retaining him to prepare school building plans, with a provision that the contract was void if the district was unable to secure money on its bond issue, and another instrument between the same parties on the same day under which plaintiff agreed to buy the bond issue for a specified sum, etc., held to constitute one contract, so that instruments should be construed together.

**2. SCHOOLS AND SCHOOL DISTRICTS — ARCHITECT'S RIGHT TO FEE DEPENDENT ON HIS PERFORMING CONTRACT TO BUY SCHOOL BONDS.**

In an architect's action to recover a fee, an instruction that, if plaintiff duly made the plans and was prepared to buy defendant school district's bond issue pursuant to another instrument executed the same day, and if the school district failed to carry out its obligations, the plaintiff could recover, but that, if plaintiff failed to purchase the bond issue without the district's fault, to find for defendant, held proper, where the school building and bond issue agreements were signed the same day and constituted one contract.

Appeal from Circuit Court, Mississippi County; R. H. Dudley, Judge.

Action by James H. Bliss against the Manila Special School District. Judgment for defendant, and plaintiff appeals. Affirmed.

Ben F. Reinberger, of Little Rock, for appellant.

Buck & Lasley, of Blytheville, for appellee.

**WOOD, J.** This action was instituted by the appellant against the appellee to recover damages on account of an alleged breach of contract.

The appellant alleged that he entered into a contract with the appellee whereby he was employed by the latter as architect and as superintendent for a school building; that he was to receive for his services as architect the sum of 3 per cent. on the contract price when the plans and specifications were completed and the contract awarded, and if the contract was not awarded 3 per cent. of the estimated cost; that he was to superintend the erection of the building and receive for his services as superintendent the sum of 2 per cent. of the cost of the building; that he performed his part of the contract in preparing the plans and specifications; that the contract was awarded, and the building was to cost \$11,000; that the appellee refused to accept his services as superintendent, which

he was ready to perform, for the erection of the building, and failed to pay him his fee as architect and as superintendent, to his damage in the sum of \$554.50.

The appellee answered, admitting that it entered into the written contract as alleged, and alleged that the contract provided that the same was to be null and void if the school board was unable to get money on the bonds of the district which it proposed to issue and sell for the purpose of raising funds to erect the building. The answer denied that the appellant performed his part of the contract and denied that he was ready to perform the same.

The appellee further alleged that on the day of the execution of the contract set up in the complaint the appellee entered into a written contract with appellant whereby appellant agreed to purchase bonds of the district in the sum of \$12,000; that appellant was to receive the sum of \$400 and was to deliver the balance of the \$12,000 to the appellee on or before the date on which appellee would receive bids and let the contract for the erection of the school building; that at the instance of appellant the appellee issued the bonds and delivered the same to W. B. Worthen & Co., trustees; that on the 10th of October, 1917, at the instance of appellant, appellee entered into a written contract with one Thompson for the erection of the school building, the contract price being \$11,090. The contract provided that the building was to be completed within 90 days from the date of the contract; that Thompson, the contractor, was ready to comply with his contract, but was unable to do so because of the failure of appellant to accept and pay for the bonds according to his contract; that on account of such failure and neglect appellee was unable to dispose of the bonds until the latter part of February, 1918, when it did so, realizing thereon \$60 less than the price which appellant agreed to pay; that the contractor, on account of the delay in securing the funds realized from the sale of the bonds, canceled his contract and required appellee to pay him the sum of \$16 as damages for its breach of contract; that on account of the breach of contract by the appellant the appellee, in order to secure a school building with the amount of money that it had available, was compelled to have new plans and specifications drawn for a much smaller and cheaper building; that during the delay caused by failure of appellant to carry out his contract for the purchase of the bonds there was an advance in the price of labor and building material which made it impossible for appellee to construct the building according to the original plans and specifications supplied by the appellant and rendered such plans and specifications worthless to the appellee; that the contract for the sale of bonds and the serv-



ices of appellant as an architect grew out of the same negotiations and were so related that they should be treated as one contract.

Appellee made its answer a cross-complaint, and alleged that it was damaged by reason of appellant's breach of contract in the particulars set forth \$2,576, for which it prayed judgment.

The appellant testified that he was an architect and specialized in school buildings in Arkansas. He introduced in evidence the written contract between himself and the school board of date August 13, 1917.

The contract was as set forth in appellant's complaint and admitted by the appellee. It is unnecessary to set it out. It contained a provision as follows: "This contract is void if the board is unable to get money on bonds."

The appellant testified that he made the plans and specifications and placed them in the hands of the contractors and advertised for bids. The lowest bid was \$11,090. The contract was let on condition that money was obtained on the bonds. The bonds were sold, and the school board received about the sum of \$12,000. Appellant was not paid for his services.

The president of the appellee school board testified to the execution of the contract between the school board and the appellant for his services as architect and superintendent of the building. The blanks in the contract were filled out by the appellant. On the same day that the contract was entered into with the appellant for his services as architect and superintendent, the appellant submitted to the board of directors the following offer in writing:

"Gentlemen: For the sum of four hundred dollars (\$400) we will undertake to prepare the proper resolutions, deed of trust, form of bond, twelve thousand dollars (\$12,000) amount, and furnish the lithographed blank bonds ready for signature, together with the opinion of our special bond attorneys, Messrs. Read & McDonough, of Ft. Smith, Ark., for your proposed school loan. In connection with this proposal we will also pay you par for your bonds at the time of sale of said bonds when properly advertised according to the laws of the state of Arkansas now in force. In this way you will not be delayed indefinitely in getting your proceedings prepared and ready for the market, but will have salable bonds when time comes to ask for bids, bonds to be 6 per cent. and mature in the year 1932."

Witness further testified after the execution of the contract with appellant that he said he would prepare all papers and mail to the board and requested it to execute them and return to him promptly; that in the purchase of the bonds the board did not know that appellant was not working for himself; it relied upon his contract; that after the execution of the above contract relative to the bond issue papers began to come to the board, which papers it promptly executed

and returned, and thus carried out instructions from appellant. The board had executed all the papers by September 22d, and sent the same with the bonds to W. B. Worthen & Co., trustees. The board advertised the bonds for sale on the 26th of September. On October 10, 1917, Bliss had the board enter into a contract with one Thompson for erection of the school building, which was to be completed within 90 working days from that date. The board at that time had received no money from the bonds. The contractor would not begin working, and the board did not wish him to until it had received money for the bonds. Witness, as president of the board communicated with Bliss, who finally told witness that war conditions were such that he was unable to get the money on the bonds. The bonds remained with W. B. Worthen & Co., as trustees, until some time in December, 1917, when witness recalled them and canceled Thompson's contract for the erection of the building and wrote appellant that they considered the contract of the board with him null and void. The board paid Thompson \$16. After the bonds were returned, the board began to receive letters from Speer & Dow in regard to the bonds. The board finally sold them the bonds at par and accrued interest, less \$460, which was the best price it could get after it had endeavored to sell them to other people. The board paid \$60 more than it would have had it pay appellant if he had taken the bonds. Witness had considerable correspondence, at the request of appellant, with Speer & Dow. Witness did not know whom they represented or what arrangements had been made for the handling of the bond issue. Witness did not know at the time that appellant had attempted to assign his contract with Speer & Dow. The board looked to appellant for securing the funds. It understood that the reason that it corresponded with Speer & Dow was they were handling the matter for appellant; that is, before Speer & Dow made the board the last offer which was accepted. The board received the money for the bonds from W. B. Worthen & Co., trustees, on December 23, 1917. It appears that the written contract which was assigned by appellant to take the bonds was assigned to Speer & Dow August 15, 1917.

Appellant in rebuttal testified that he notified the board at his first meeting with them that Speer & Dow were to handle the bonds and buy them. The board afterwards wrote appellant, and also Speer & Dow, saying that it considered the contract canceled. In the meantime the Liberty Loans had come out, the bonds were not worth the money, and Speer & Dow sent the school board a telegram offering par and accrued interest less \$600 for the bonds. Witness told Speer & Dow that they must carry out the original contract for the sale of bonds and protect witness. Witness induced Speer & Dow to

renew the first proposition, because witness knew that he was still responsible to the bond on the first contract. It was witness' obligation over his own name.

There was correspondence between the school board and Speer & Dow tending to show that the board had accepted Speer & Dow as the assignees of the contract between it and appellant for the purchase of the bonds.

The testimony on behalf of the appellee, however, as above stated, tends to show that the appellee in this correspondence was treating Speer & Dow as representing appellant until it notified appellant and Speer & Dow that the contract with appellant was at an end.

The testimony of the president of the board of directors of the appellee district was to the effect that the contract made by the appellee with the appellant for services as architect and superintendent and the written proposal of the appellant to the appellee to buy the bonds of the district were executed on the same day, and that they were parts of the same contract; both papers being the result of the same negotiations.

There is no testimony abstracted in the record which disputes the above.

The contract for services as architect and superintendent recites:

"This contract is void if the board is unable to get money on the bonds."

The contract proposing to take the bonds recited, among other things:

"We will also pay you par for your bonds.  
\* \* \* In this way you will not be delayed indefinitely in getting your proceedings prepared and ready for the market, but will have salable bonds when the time comes to ask for bids."

[1] The court did not err in view of the above testimony in instructing the jury that the two separate papers offered in evidence were to be construed together and that they constituted one contract, that it was the duty of appellant to make a complete set of working plans and specifications, and that it was also the duty of the appellant to take the bond issue and furnish the money for the erection of the building in the sum of \$12,000.

The court correctly construed the two instruments as one contract. *Belding v. Vaughan*, 108 Ark. 69, 137 S. W. 400; *Brady v. Wiemer*, 127 Ark. 535, 193 S. W. 273. The court also correctly interpreted the mutual obligations of the parties to the contract.

[2] In another instruction the court told the jury that, if the appellant furnished the plans and specifications and was ready and willing to perform his contract and take the bonds and furnish the money to the appellee, and the appellee for any reason failed to carry out the contract with respect to its

obligations in the sale and disposition of the bonds, they should find for the appellant the 3 per cent. due upon the contract for the preparation of the plans; that, on the other hand, if the jury found from the evidence that the appellant breached his contract with reference to the purchase of the bonds and furnishing the money, and that this was in no way due to the fault of the appellee, they should find for the appellee.

The above instruction, as we understand the evidence, correctly submitted the issuable facts as to whether or not there was a breach of the contract and who breached the same.

We find no error in the instruction, and there was evidence to sustain the verdict that the appellant breached the contract, and that he was not, therefore, entitled to recover any sum under it.

Conceding, without deciding, that the contract is valid, and treating it as the parties have treated it, i. e., as a valid and binding contract, there was evidence to sustain the verdict in favor of appellees.

The judgment is therefore correct, and it is affirmed.

#### FEIBELMAN v. HILL. (No. 65.)

(Supreme Court of Arkansas. Dec. 22, 1919.)

#### 1. SPECIFIC PERFORMANCE ⇨121(10) — EVIDENCE OF MUTUAL RESCISSION OF CONTRACT.

In purchaser's action for specific performance defended on ground of rescission of contract by mutual consent, finding that there had been no rescission held not against the preponderance of the evidence.

#### 2. APPEAL AND ERROR ⇨1009(4)—REVIEW OF FINDING OF CHANCELLOR.

Finding of chancellor which is not against the preponderance of the evidence will be accepted as correct on appeal.

#### 3. VENDOR AND PURCHASER ⇨78—TIME NOT OF ESSENCE OF CONTRACT.

Time was not of the essence of the contract for sale of land for a price payable in five equal annual installments with interest at the rate of 10 per cent., where contract did not expressly so stipulate; such condition not necessarily resulting from the nature and circumstances of the contract.

#### 4. VENDOR AND PURCHASER ⇨185—PAYMENT BEFORE FORFEITURE SUFFICIENT WHERE TIME IS NOT OF ESSENCE.

Where time was not of the essence of contract for purchase of land, tender of payment by purchaser before vendor had made attempt to declare a forfeiture entitled purchaser to conveyance of land.

**5. APPEAL AND ERROR ②-1078(7)—HARMLESS ERROR IN EXCESSIVE ALLOWANCE ON SPECIFIC PERFORMANCE.**

In purchaser's action for specific performance of land contract, excessive allowance by court by way of abatement to extent of dower interest of vendor's wife in event of wife's refusal to join in conveyance was immaterial, where vendor declared that his wife was ready to join in the deed if court decreed specific performance.

Appeal from Chicot Chancery Court; E. G. Hammock, Chancellor.

Action by M. H. Hill against A. Feibelman. Judgment for plaintiff, and defendant appeals. Affirmed.

Streett & Burnside, of Lake Village, for appellant.

J. R. Parker, of Lake Village, for appellee.

**McCULLOCH, C. J.** This is an action instituted by appellee in the chancery court of Chicot county against appellant to compel specific performance of a contract entered into by these parties for the sale by appellant to appellee of a tract of land in that county containing 80 acres. There was a written contract dated July 21, 1913, whereby appellant agreed to sell the land in controversy to appellee for the price of \$1,000, payable in five equal annual installments, due December 1, 1914, and thereafter, with interest at the rate of 10 per centum per annum from date until paid, and agreed to execute to appellee a deed on payment of said notes at maturity. The clause in the contract with respect to appellant's obligation to convey the land reads as follows:

"Now, if the said promissory notes are paid at maturity, then and in that event I bind myself or heirs to make said M. H. Hill a quit-claim deed to the above described lands; and when said notes are paid according to the tenor of this instrument, then this instrument is to be null and of no effect."

Appellee alleged in his complaint the execution of the contract, his occupancy of the land thereunder, and the payment of some of the interest on the notes, and also alleged that he had on the 27th of November, 1918, made a tender to appellant of the full amount of the notes, together with the balance of the unpaid interest, but that appellant had refused to execute a deed in compliance with the contract. Appellant filed his answer and cross-complaint admitting the execution of the contract, but denying that appellee had paid anything on the notes, and alleging that in the year 1918 the contract had been rescinded by mutual agreement, and that appellee had agreed to pay rent for the year 1918. The prayer of the cross-complaint was that appellant recover the amount of rents, and also recover possession of the land in con-

troversy. The cause was heard on oral testimony, and the chancellor found in favor of appellee and decreed specific performance.

There is a sharp conflict in the testimony as to whether appellee paid any of the interest on the notes, and also as to the issue concerning the alleged rescission of the contract by mutual agreement. Appellee testified that he paid the interest on the notes due in 1915 and 1916, respectively, but had never paid any of the principal of the notes. He testified that in January, 1917, he went to see appellant and offered to pay all of the notes and interest, but that appellant declined to accept it or to make a deed, and that he also made a tender on November 27, 1918, and demanded a deed, which appellant refused to execute.

Appellant was a merchant, and, according to the testimony, appellee traded with him from year to year for supplies. Appellee testified that he spent a considerable sum of money in improvements, especially in building a house, and in rebuilding it after it was practically blown away by a storm in the fall of 1916. Appellant admitted that appellee offered in January, 1917, to borrow the money and pay off the purchase-money notes, but that he declined to accept payment on the ground that there had been a forfeiture, and that appellee agreed to pay rent. He testified that appellee remained in possession of the land during the year 1917 pursuant to his agreement to pay rent, but failed to pay the rent as promised, and in the early part of 1918 entered into another agreement to rescind the contract and to buy the place under a new contract for the price of \$3,000. This was all denied by appellee in his testimony, and there was no other testimony in the case corroborative of either of the parties, except that of Dr. Easterling, who testified that he accompanied appellee when he made the last tender to appellant, and that appellant did not make any claim concerning the alleged rescission of the contract, but refused to make the deed or accept the money on the ground that there had been a forfeiture.

[1-3] We cannot say that the chancellor's findings on the issues of fact were against the preponderance of the evidence, and we must therefore accept as correct the findings that there had been no rescission of the contract by mutual consent. Time was not of the essence of the contract, since the parties did not so expressly stipulate, nor does it necessarily result from the nature and circumstances of the contract. *Atkins v. Rison*, 25 Ark. 138; *Butler v. Colson*, 99 Ark. 340, 138 S. W. 467.

[4] Appellee continued in possession under the contract and made a tender of payment before there was any attempt to declare a forfeiture. The chancellor was therefore correct in refusing to uphold appellant's attempt to enforce a forfeiture and in decree-

ing specific performance. *Turpin v. Beach*, 88 Ark. 604, 115 S. W. 404.

[5] Appellee in his complaint alleged that appellant had a wife, and he asked the court to abate the purchase price to the extent of the value of the inchoate dower interest in the event appellant's wife refused to join in the conveyance, and the court made such finding and ordered the abatement in accordance with the prayer of the complaint in the event appellant's wife refuses to join in the conveyance. It is argued that there is no testimony in the record to support the finding of the chancellor as to the value of the inchoate dower right of appellant's wife; but it is unnecessary to go into this question, inasmuch as appellant declared before the court that he was ready to make the deed if the court so decreed, and that his wife would join in the conveyance. It became unnecessary, therefore, to take proof as to the value of the inchoate dower interest of the wife, and the excessive allowance made by the court by way of abatement is not material for the reason that it will not become effective, for the reason that appellant declared his purpose of delivering a deed in which his wife would join in accordance with the decree of the court.

The decree is therefore affirmed.

#### BAUM et al. v. INGRAHAM. (No. 55.)

(Supreme Court of Arkansas. Dec. 15, 1919.)

#### PARTITION $\hookrightarrow$ 81 — SALE SUBJECT TO UNASSIGNED DOWER ERRONEOUS.

Where surviving widow had conveyed her unassigned dower, court erred in decreeing a partition sale of the property subject to unassigned dower, since such sale, without first assigning dower, might have resulted in great prejudice to the heirs, and might have prevented other parties than purchaser of wife's dower interest from bidding at the sale.

Appeal from Sebastian Chancery Court; J. H. Vaughan, Special Chancellor.

Action by William Baum and another against Lee H. Ingraham. From decree rendered, plaintiffs appeal. Reversed and remanded, with directions.

T. P. Winchester, of Ft. Smith, for appellants.

Appellee, pro se.

HART, J. This is the second appeal in this case. The opinion on the former appeal was delivered on October 21, 1918, and is reported in 136 Ark. 101, 206 S. W. 67, under the style of *Ingraham v. Baum*. This suit was originally brought in equity by William and Marguerite Baum against Lee

H. Ingraham, to set aside a probate sale to certain lots, at which Ingraham became the purchaser at private sale and which the plaintiffs allege they had inherited from their father. The father of the plaintiffs died owning three lots in the city of Ft. Smith, Ark., being the property in controversy. His widow removed to the state of Oklahoma with her children and married again. Their stepfather was appointed guardian for the children, and procured an order of the probate court for the sale of the minors' interest in the land at a private sale. Lee H. Ingraham became the purchaser at the sale, and the sale was approved by the probate court, although it was made privately and no appraisement as required by the statute had been made. The dower of the widow was not assigned to her, and she conveyed it to Lee H. Ingraham. Mary Baum, the oldest child, conveyed her interest to Ingraham when she became of age. A mistake was made in the deed as to the description of her interest, and reformation of the deed was sought.

The chancellor held that the sale of the minors' interest in the land was void because it was made at a private sale. The chancellor, also, reformed the deed from Mary Baum so as to recite that she had conveyed all her interest in the land to Ingraham. The decree of the chancellor in both of these respects was affirmed in the Supreme Court. The chancellor also made a finding in regard to betterments, and the only objection made to the finding in this respect by either party on appeal was that the chancellor had made a mistake in his finding as to values, and this court held that the finding of the chancellor in this respect was not against the preponderance of the evidence, and was therefore affirmed. The opinion also recited that the complaint contained a prayer for the partition of the land, and that this was ordered subject to the widow's claim of dower and the lien for betterments. This court said that this was the proper order to make, inasmuch as the chancery court had power to grant full relief.

Upon remand of the case commissioners were appointed to make partition according to the respective interests of the parties and subject to the defendant's lien for betterments.

It will be remembered that the father of the minor plaintiffs died, leaving a widow and three children, all of whom were minors. The widow conveyed her unassigned dower to the defendant, Ingraham, and the oldest child conveyed her interest to him as soon as she became of age. Upon the remand of the case the chancery court first appointed commissioners to partition the

land according to the respective interests of the parties. The commissioners reported that the land could not be divided without injustice to the parties, and recommended a sale of it. The commissioners were discharged, and their report approved and confirmed. A commissioner was then appointed to sell the land subject to the dower interest which was owned by the defendant Lee H. Ingraham. L. H. Taylor bid off the property at the sale for the sum of \$4,000. He assigned his bid to Mrs. Lucie Ingraham, the wife of the defendant, Lee H. Ingraham. The court directed that a deed be executed to her subject to the dower interest of the widow, which was owned by Lee H. Ingraham as a separate estate. The court then proceeded to make a division of the proceeds between the parties according to their respective interests, taking into consideration the lien of the defendant Ingraham against the land for betterments or improvements.

The decision of the chancellor was wrong. This court in its former opinion said that the court had the power to grant full relief in making a division of the estate. The widow had conveyed her unassigned dower in the land to the defendant, Ingraham. It has been held that a conveyance by a widow of her dower in land before it has been assigned to her will be upheld in a court of equity, and her dower interest may be recovered by her allenee. *Weaver v. Rush*, 62 Ark. 51, 34 S. W. 256; *Griffin v. Dunn*, 79 Ark. 408, 96 S. W. 190; *Flowers v. Flowers*, 84 Ark. 557, 106 S. W. 949, 120 Am. St. Rep. 84; *Arbaugh v. West*, 127 Ark. 98, 192 S. W. 171.

The error of the court below consisted in not taking into account the unassigned dower of the widow which had been conveyed to the defendant, Ingraham. The sale was ordered made subject to her unassigned dower. This might have resulted in great prejudice to the plaintiffs, and might have prevented other parties than Ingraham from bidding at the sale. The court should have taken that into account in decreeing the partition of the land, and erred in decreeing the sale without assigning dower. It is true the land was struck off at the sale to a third party, but, without paying any part of the purchase money, he assigned his bid to the wife of L. H. Ingraham, and, under the circumstances as disclosed by the record, we think it may be taken as showing that L. H. Ingraham was the purchaser, and that the bid was made by a third party and assigned to his wife for him. In other words, we think the records show that he was the real purchaser, and that the bid of the third person and transfer to the wife of Ingraham was colorable merely.

It follows that the decree must be re-

versed, and the cause will be remanded for further proceedings in accordance with the principles of equity and not inconsistent with the opinions in this case.

### BROOKS v. STATE (No. 24.)

(Supreme Court of Arkansas. Dec. 1, 1919.  
Rehearing Denied Jan. 12, 1920.)

#### 1. HOMICIDE §17—"MURDER" WHERE THIRD PERSON KILLED BY ACCIDENT.

At common law, if a person shot at another with malice and by accident or mistake killed a third person, the offense was "murder."

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Murder.]

#### 2. HOMICIDE §17, 60—KILLING ONE PERSON IN ATTEMPT TO KILL ANOTHER.

Under the statute, a person will be held guilty of murder or manslaughter according to the circumstances of the killing, where in an attempt to kill one person he kills a third person by mistake, although there is no intent or design to kill such third person.

#### 3. HOMICIDE §254—MURDER IN SECOND DEGREE SUSTAINED BY EVIDENCE.

In homicide case, evidence held sufficient to sustain a conviction of murder in the second degree.

#### 4. HOMICIDE §13, 17, 138—INDICTMENT FOR MURDER WHERE THIRD PERSON KILLED BY MISTAKE.

Where accused shoots at one man and kills another, malice will be implied as to the latter, and a felonious intent is transferred, and in such case the indictment must allege that the assault was made on the party murdered, etc., in all respects just as if the party killed had been the party shot at.

#### 5. HOMICIDE §23(1)—MALICE NECESSARY TO MURDER IN SECOND DEGREE.

The leading characteristic of murder in the second degree is the presence of malice distinguishing it from manslaughter and the absence of premeditation or deliberation.

#### 6. HOMICIDE §340(1)—INSTRUCTION NOT REQUIRING MALICE IN MURDER IN SECOND DEGREE, PREJUDICIAL.

Where accused was convicted of murder in the second degree, an instruction, allowing the jury to find him guilty of such offense without requiring a finding of malice was necessarily prejudicial, because jury might have found him guilty of manslaughter.

#### 7. HOMICIDE §347—CURING ERRONEOUS INSTRUCTION BY REDUCTION OF SENTENCE ON APPEAL.

In homicide case, where accused was convicted of murder in the second degree, an erroneous instruction, permitting jury to find him guilty of such offense without requiring a find-

ing of malice, can be cured on appeal by reducing the judgment so as to sentence the defendant for manslaughter for the minimum term, the Attorney General consenting.

Appeal from Circuit Court, Lafayette County; Geo. R. Haynie, Judge.

Will Brooks was convicted of murder in the second degree, and appeals. Reversed and remanded, unless the Attorney General within 15 days elects that the judgment be modified so as to sentence the defendant for manslaughter.

A. H. Hamiter, of Lewisville, and Stevens & Stevens, of Magnolia, for appellant.

Jno. D. Arbuckle, Atty. Gen., and Robt. C. Knox, Asst. Atty. Gen., for the State.

HART, J. In the case at bar, Will Brooks prosecutes an appeal to reverse a judgment of conviction against him for murder in the second degree. The killing occurred in the nighttime, just before Christmas, in Lafayette county, Ark.

According to the testimony of John Law, a witness for the state, he started home with Irene Crawford from a party or ball at Sip Harrison's house. On their way home Terry Collins ran up to John Law and tried to take a pistol from him, saying that he was in a row with Willie Rushing and wanted the pistol on that account. Law refused to give Collins the pistol, and Collins tore Law's raincoat in trying to take the pistol away from him. Will Brooks ran up, and with an oath asked Law what he wanted to shoot Terry Collins for. Law answered that he did not want to shoot him. Brooks in reply said:

"You are a God damn liar; if you do not believe Mr. Brooks will do what he says he will I will show you."

About that time Brooks fired his pistol, and shot Irene Crawford in the stomach. When Brooks walked up to Law and commenced talking to him, Irene Crawford was standing by the left side of Law, with her arm on his shoulder. She said to Law, "Let's go," and back-stepped in front of him. Just at that time Brooks fired his pistol, and the ball struck her in the stomach. She said, "Oh, Bud (referring to Will Brooks), you shot me in the stomach," and fell. Brooks shot again, and then Law pulled his pistol in order to save his own life and shot at Brooks. After Irene Crawford fell she was carried into a house near by, and died in a short time as the result of her wound. Law said that he had not done anything to Brooks, and gave him no cause for shooting at him. There were several eyewitnesses to the killing, who corroborated the testimony of Law in every respect.

Will Brooks was a witness for himself. According to his testimony, John Law, Irene Crawford, and Terry Collins were standing

in the road fussing about something when he approached them. He asked them what was the matter with them. Law had his pistol in his hand, and said, "What in the hell have you got to do with it?" Brooks told him that he had nothing to do with it, and Law again cursed Brooks. Brooks then told Law not to curse him, and Law pulled the woman to one side and shot at Brooks. Brooks then stepped to the side of Irene Crawford and shot at Law. Law then made two more shots at Brooks. As soon as the woman said that she was shot, Brooks put his pistol in his pocket and went off to get a doctor. Other witnesses testified for the defendant and corroborated his testimony.

[1, 2] At common law, if a person shot at another with malice, and by accident or mistake killed a third person, the offense was murder. Under our statute a person will be held guilty of murder or manslaughter according to the circumstances of the killing, who, in the attempt to kill one person, by mistake kills a third person, although there was no intent or design to kill such third person. *Ringer v. State*, 74 Ark. 262, 85 S. W. 410; 21 Cyc. 712, and cases cited; *Wharton on Homicide* (3d Ed.) par. 360, and *Michie on Homicide*, vol. 1, § 17. The rule in such cases is comprehensively stated in volume 1, § 17, of *Michie on Homicide* as follows:

"If a man attempt to kill another without justification, without provocation, and not under circumstances of mitigation, and in pursuance of that effort hits and kills a third person, his guilt is measured by the same standard as though he had killed the person originally intended. Whether defendant who shot at one person and killed another is guilty of homicide in any of its grades or not depends on the character of his act, and his intent, whether criminal or not, as applied to the person whom he intended to shoot. The thing done follows the nature of the thing intended to be done, and the guilt or innocence of the slayer depends upon the same considerations that would have governed had the blow killed the person against whom it was directed. In determining the criminality of the act of killing it is immaterial whether the intent was to kill the person killed or whether the death of such person was the accidental or otherwise unintentional result of the intent to kill some one else. The purpose and malice with which the blow was struck is not changed in any degree by the circumstances that it did not take effect upon the person at whom it was aimed. The purpose and malice remain, and if the person struck is killed, the crime is as complete as though the person against whom the blow was directed had been killed, the lives of all persons being equally sacred in the eye of the law, and equally protected by its provisions. The general rule is that when one person is killed by mistake or accident, the character of the offense is the same that it would have been if the person intended had been killed."

[3] The doctrine of *Lacefield v. State*, 34 Ark. 275, 36 Am. Rep. 8, to the effect that when

one, intending to kill A., shoots and wounds B. he cannot be convicted of an assault with intent to kill B., does not apply in cases where the homicide was committed. Where there is no killing, the act fails of effect, and the presumption does not arise that every person is presumed to contemplate the ordinary and natural consequences of his acts. It follows that the evidence for the state, if believed by the jury, fully warranted it in returning a verdict of guilty of murder in the second degree.

[4] It is next insisted that the indictment is defective because it charges Will Brooks with killing Irene Crawford with a pistol, "with the willful, malicious, premeditated, and deliberate intent then and there to kill and murder her, the said Irene Crawford," etc. There was no error in the indictment. An indictment for homicide in a case like this must allege the assault as made on the person killed. Where the accused shoots at one man and kills another, malice will be implied as to the latter; and a felonious intent is transferred, on the same ground, as where poison is laid to destroy one person and is taken by another. Hence the felonious intent is thus transferred, and the indictment must be drawn accordingly. That is to say, it must allege that the assault was made on the party murdered, etc., in all respects just as if the party killed had been the party shot at. *State v. Clark*, 147 Mo. 20, 47 S. W. 886, and *Wharton on Homicide* (3d Ed.) par. 359.

The next assignment of error is that the judgment should be reversed because the court gave instruction No. 13, which is as follows:

"You are further instructed that if you believe from the evidence in this case beyond a reasonable doubt that the defendant, in Lafayette county, Ark., and within 3 years before the return of the indictment herein into the court, unlawfully, willfully, feloniously, but without premeditation or deliberation, shot at witness John Law, and killed the deceased, you will find him guilty of murder in the second degree, and assess his punishment at some period of time in the penitentiary, not less than 5 nor more than 21 years."

[5] It is insisted that the instruction is erroneous because it directs a verdict, if the jury should find that the defendant unlawfully, willfully, and feloniously killed the deceased, and leaves out of consideration the element of malice in the killing. Section 1761 of Kirby's Digest defines murder as the unlawful killing of a human being, in the peace of the state, with malice aforethought, either express or implied. The leading characteristic of murder in the second degree is the presence of malice distinguishing it from manslaughter, and the absence of premeditation or deliberation. *Reed v. State*, 102 Ark. 525,

145 S. W. 206. No killing is murder unless it is done with malice. *Sweeney v. State*, 35 Ark. 585.

[6] It follows that the court erred in giving the instruction, and it was necessarily prejudicial to the right of the defendant because, if the instruction had not been given, the jury might have found him guilty of manslaughter. It does not follow, however, that this prejudice cannot be cured.

[7] The jury found the defendant guilty of murder in the second degree, and fixed his punishment at 5 years in the penitentiary. They would have been warranted in finding the defendant guilty of manslaughter and any prejudice resulting to him may be cured by fixing his punishment at 2 years, the lowest punishment for manslaughter. If the Attorney General so elects, the judgment will be modified so as to sentence the defendant for manslaughter for a term of 2 years.

We have examined the other instructions given by the court, and find no prejudicial errors in them. The case was fully and fairly submitted to the jury under proper instructions upon competent evidence.

For the error in giving instruction No. 13 as above set forth, the judgment will be reversed, and the cause remanded for a new trial, unless the Attorney General within 15 days elects that the judgment be modified so as to sentence the defendant for manslaughter and fix his punishment at 2 years in the state penitentiary.

#### BOURLAND et ux. v. BAKER. (No. 6.)

(Supreme Court of Arkansas. Dec. 15, 1919.)

##### 1. HUSBAND AND WIFE §102—COMMON-LAW LIABILITY FOR TORTS OF WIFE ABROGATED BY STATUTE.

The common-law rule that the husband is liable for torts of his wife committed in his absence has been abrogated by the Married Woman's Act.

##### 2. APPEAL AND ERROR §930(4)—PRESUMPTION THAT ONLY GROUNDS OF NEGLIGENCE SUPPORTED BY EVIDENCE WERE CONSIDERED.

Though evidence was not introduced in support of every allegation of negligence, where the trend of the evidence limited the issues, it will be presumed on appeal, in the absence of specific objection to the general terms in which allegations of negligence were submitted, that jury considered only such grounds as were supported by the evidence.

##### 3. APPEAL AND ERROR §882(14)—ONE WHO REQUESTS SUBMISSION OF ISSUES CANNOT COMPLAIN THEREOF.

Defendant appellant, who requested and obtained instructions submitting separately each allegation of negligence, is in no position to

complain of an instruction on the ground that it submitted all the allegations of negligence, whether supported by the evidence or not.

4. TRIAL  $\Leftarrow$  296(3)—INSTRUCTION ON NEGLIGENCE OF AUTOMOBILE DRIVER NOT OBJECTIONABLE IN VIEW OF OTHER INSTRUCTIONS.

An instruction to effect that, if defendant operated her automobile in a negligent manner on the street as charged in complaint of plaintiff pedestrian and his injuries were the result of said negligence, jury must find for plaintiff, *held* not subject to objection that it imposed an extraordinary degree of care on defendant to prevent the injury in view of other instructions.

5. MUNICIPAL CORPORATIONS  $\Leftarrow$  706(8) — INSTRUCTION EXEMPTING FROM LIABILITY FOR COLLISION WITH PEDESTRIAN ERRONEOUS.

Instruction exempting defendant from liability for injuries due to her automobile colliding with plaintiff pedestrian if defendant temporarily took her eyes off street in front to give attention to her children in the automobile was properly refused, since such act might or might not have been negligent.

6. MUNICIPAL CORPORATIONS  $\Leftarrow$  706(8) — INSTRUCTION NOT SUBMITTING ISSUE AS TO DRIVING ON WRONG SIDE OF STREET.

Instruction to effect that, if defendant operated her automobile in a negligent manner upon the street as charged in complaint of plaintiff pedestrian and his injuries were the result of said negligence, jury must find for plaintiff, did not submit issue as to liability of defendant if she was driving on wrong side of the street.

Appeal from Circuit Court, Sebastian County; Paul Little, Judge.

Suit by A. A. Baker against James Bourland and wife. Judgment for plaintiff, and defendants appeal. Judgment affirmed as to defendant wife, but reversed and cause dismissed as to defendant named.

James B. McDonough and J. Sam Wood, both of Ft. Smith, for appellants.

Edwin Hiner, of Ft. Smith, for appellee.

HUMPHREYS, J. Appellee instituted suit against appellants in the Sebastian circuit court, Ft. Smith district, to recover \$11,000, on account of an injury received by him through the alleged negligent operation of an automobile by appellant Queen Bourland, wife of appellant James Bourland. The allegations of negligence in the complaint consisted: First, in driving the car at a high and dangerous rate of speed; second, in driving it on the left, instead of the right, hand side of the street, in violation of a city ordinance; third, in driving it without giving the proper warning or keeping the proper lookout when approaching appellant.

Appellants filed answer, denying the material allegations in the complaint, and pleading the negligence of appellee as the proximate cause of the injury.

The cause was submitted to a jury, upon the pleadings and evidence, and a verdict and judgment rendered in favor of appellee for \$2,000, from which an appeal has been duly prosecuted to this court.

Appellee was injured by an automobile driven by appellant Queen Bourland. When the injury occurred, he was walking south on the east side of North Thirteenth street, about midway between the suburban railway and North O street. Queen Bourland was on the front, and her little boy and infant on the back, seat of the chummy roadster she was driving. She was on the same side of the street and going the same direction appellee was walking. The street is straight, between the suburban railway and O street, and the distance between the two points about 200 yards. Appellee was near the curbing on the east side of the street. When struck, his legs were thrown under the car and his body on the outside, with his head lying very near the curbing. The car stopped just as the hind wheel reached him. He was severely injured, and, as no question is made in regard to the amount of damages recovered, it is unnecessary to set out the nature of the injury.

The evidence on behalf of appellee tended to show that the car was being rapidly driven and approached and struck him suddenly, without signal or warning, about 2 o'clock in the afternoon of September 17, 1918; that he heard the car, stepped to the east, giving almost the entire street, and did not look back because he expected it to pass around and not strike him; that the place where there should have been a sidewalk was rough and grown up in weeds; that the street was paved; and that he had chosen the east side of the street near the curbing upon which to travel, because automobiles usually traveled on the right-hand, or west, side of the street.

The evidence of appellants tended to show that, at the time of the injury, appellant Queen Bourland was driving her car at a slow rate of speed; that, when she reached and crossed the suburban, she looked in front and saw nothing; that she then looked back at the baby and told her boy to sit down; that she again glanced to the front and observed appellee immediately in front of her; that he had stepped in front of the car suddenly; that she did not see him at all until he stepped in front of the car; that she instantly shut off the engine, put on the brakes with both feet, and stopped the car; that the front wheel ran over appellee, but that the hind wheel stopped just as it reached him.

[1] It is first insisted by appellants that there is no foundation in the allegations and evidence justifying the rendition of a judgment against appellant James Bourland, the



husband of Queen Bourland. The verdict was returned and judgment rendered against James Bourland on the sole ground that a husband in this state is responsible for his wife's torts. At the common law, a husband was liable for the torts of his wife committed in his absence. That rule of liability is still in force in Arkansas, unless abrogated by Act 159, Acts of the Legislature of 1915, known as the Married Woman's Act. The reason existing for the rule at common law was the legal unity incident to the marriage relationship. It was reasoned that, on account of the unity, the husband could absolutely control his wife in and out of his presence. It followed that, because of this control, he could prevent his wife from committing a tort on another, even in his absence. The Married Woman's Act of 1915, as construed in the case of Fitzpatrick v. Owens, 124 Ark. 167, 186 S. W. 832, 187 S. W. 460, L. R. A. 1917B, 774, Ann. Cas. 1918C, 772, had the effect of absolutely and completely destroying the legal unity founded upon the nuptial contract. The act has effectually severed the legal unity between husband and wife in this state. In holding that the emancipation of the wife was so complete that the wife might sue the husband for a tort committed by him on her person, this court said, in the case of Fitzpatrick v. Owens, supra:

"These enactments [referring to the Married Woman's Acts antedating the act of 1915] left but little in the way of restrictions upon the rights of married women, but the Legislature deemed it proper to provide further legislation to completely emancipate her, and they did so by this statute [referring to the Married Woman's Act of 1915] which declares its purpose in the broadest terms to 'remove the disabilities of married women.' An analysis of the language of the statute shows that the Legislature meant to complete the work of emancipation and to give married women all the rights and remedies possessed by unmarried women. The words 'to sue and be sued,' when considered by themselves, merely enlarge the remedies of a married woman and do not enlarge her rights, but in considering the significance of those words we must do so in connection with the words which precede and which follow, and undoubtedly the use of those words serves to give a remedy for all the rights found to have been enlarged by the preceding words and those which follow. Now, the preceding words confer, in unqualified terms, the right of the married woman 'to contract and be contracted with,' and the words which follow declare in the very broadest terms her right 'in law and equity' to 'enjoy all rights and be subjected to all the laws of the state as though she were a feme sole.' If this language be given any effect at all in the light of preceding statutes enlarging the rights of the married woman, it necessarily means that a married woman is to enjoy in law and equity all the rights she would enjoy if she still remained a single woman, and that with respect to those rights she may sue and be sued. \* \* \*

It was evidently meant to confer upon her the

enjoyment of those rights and remedies, even against her husband, the same as if she were unmarried."

The legal unity, which was the reason of the rule fixing liability on the husband for his wife's torts, having been swept away by the act, the liability is swept away. The reason being dissolved, the rule cannot exist. It was therefore error to refuse to instruct the jury peremptorily to return a verdict for appellant James Bourland.

[2-4] It is insisted that the court erred in giving instruction No. 4. The instruction is as follows:

"Therefore, if you find from the evidence that the defendant Queen Bourland operated her car in a negligent manner at the time the plaintiff was injured, as charged in plaintiff's complaint, and that his injuries were the result of said negligence, you must find for the plaintiff, unless it affirmatively appears from the evidence that the plaintiff was at the time of his injury himself guilty of negligence contributing to the injury."

The instruction is assailed because, according to appellant's interpretation thereof, it submitted all the allegations of negligence set up in the complaint to the jury for consideration, whether supported by evidence or not. It is true evidence was not introduced in support of every allegation of negligence in the complaint. The trend of the evidence, however, limited the issues to whether the injury resulted from fast driving, failure to give a signal of warning, failure to keep a proper lookout, or whether due to appellee's own negligence; and, in the absence of specific objections to the general terms in which the allegations of negligence were submitted, it will be presumed that the jury considered only such grounds of negligence as were supported by the evidence. No specific objections were made to the instructions. Again, appellant Queen Bourland requested and obtained instructions submitting separately each allegation of negligence contained in the complaint, so said appellant is in no position to complain. The instruction is also assailed on the ground that it imposed an extraordinary degree of care upon said appellant to prevent the injury. It is contended the instruction must be read in connection with the allegation of the complaint to the effect that appellant Queen Bourland injured appellee "by her failure to keep a vigilant and constant lookout for persons lawfully upon the streets." This is only an allegation in an exaggerated form of a lack of ordinary care, and cannot be treated as an instruction imposing an extraordinary degree of care upon said appellant. No such inference could have been indulged by the jury in the face of positive instructions to the contrary. Instructions Nos. 2 and 7 necessarily enlightened the jury in this regard. The instructions referred to were as follows:

"Negligence," as defined and used in these instructions, is a failure to exercise ordinary care. 'Ordinary care' is such care as a reasonably prudent and careful person would be expected to exercise under the same or like circumstances."

"The rights of pedestrians and drivers of motorcars and other vehicles have equal rights to the use of the streets of the city. It is the duty of the one to use ordinary care and caution to prevent injury to another. It is likewise the duty of the other to use ordinary care and caution to avoid being injured."

[5] It is also contended by appellant Queen Bourland that the court erred in refusing to give instruction No. 11 requested by her. That instruction exempted Queen Bourland from liability if she temporarily took her eyes off the street in front to give attention to her children while driving along. Such an act on her part might, or might not, have been negligent, dependent upon all the circumstances in the case. The instruction was properly refused.

[6] It is also contended that the case was erroneously submitted upon the theory that appellant Queen Bourland was liable for the injury if driving on the left-hand side of the street. It was alleged in the complaint that she was driving on the left-hand side of the street, contrary to an ordinance of the city. No such proof was made, and, under our interpretation of instruction No. 4, no such issue was submitted to the jury.

The judgment is affirmed as to Queen Bourland, but is reversed and the cause dismissed as to James Bourland.

# WOFFORD v. DE QUEEN REAL ESTATE CO. (No. 68.)

(Supreme Court of Arkansas. Dec. 22, 1919.)

## 1. APPEAL AND ERROR ⇐1033(9)—VERDICT FOR LESS THAN APPELLEE ENTITLED ERROR FAVORABLE TO APPELLANT.

The jury having found for realty brokers suing for commission on the issue whether or not they had procured a purchaser ready, able, and willing to buy on the terms specified by defendant owner, the latter cannot complain because the jury by their verdict gave plaintiff brokers only \$400, when they were entitled to full commission of \$1,500.

## 2. APPEAL AND ERROR ⇐1002—VERDICT ON CONFLICTING EVIDENCE NOT REVIEWABLE.

Verdict of the jury, rendered under correct instructions on an issue whereon the testimony was in sharp conflict, is conclusive on appeal.

## 3. APPEAL AND ERROR ⇐216(3)—TRIAL ⇐278—INSTRUCTION AS TO FORM OF VERDICT GOOD AGAINST GENERAL OBJECTION.

The instruction that if the jury found for plaintiffs, their verdict would be, "We, the jury, find for the plaintiffs (and write therein any

sum which you may so find)," was in the usual form, and good against general objection; and defendant cannot complain on appeal for first time that he was prejudiced by the instruction, where he did not request the court to instruct that if the jury found for plaintiffs they should return verdict in the full sum of \$1,500 sued for.

## 4. APPEAL AND ERROR ⇐1033(5)—ERROR IN INSTRUCTION ON FORM OF VERDICT FAVORABLE TO APPELLANT.

An instruction on the form of verdict, erroneous as permitting the jury if they returned verdict in favor of plaintiffs to find for them in a much less sum than they were entitled to under the undisputed evidence, was harmless to defendant.

Appeal from Circuit Court, Sevier County; Jas. S. Steel, Judge.

Suit by J. S. Whitten and others, partners doing business under the firm name of De Queen Real Estate Company, against J. A. Wofford. From judgment for plaintiffs, defendant appeals. Affirmed.

J. S. Lake and B. E. Isbell, both of De Queen, for appellant.

Abe Collins, of De Queen, for appellees.

WOOD, J. This suit was instituted by J. S. Whitten, W. M. Gilstrap, and H. K. Ford, partners doing business under the firm name of De Queen Real Estate Company against J. A. Wofford.

It was alleged in the complaint that Wofford was indebted to the plaintiffs in the sum of \$1,500 for commission earned by the plaintiffs in selling a farm for the defendant Wofford. It is alleged that under the contract the farm was listed by the defendant with the plaintiffs to be sold at the net price of \$11,000, and that if plaintiffs should succeed in selling the place for an amount greater than \$11,000 they were to receive all in excess of that sum as a commission. They further alleged that they had found a purchaser who was ready, willing, and able to purchase the place for the sum of \$12,500, and that the defendant refused to carry out his contract and to accept the purchaser to whom the plaintiff had contracted to sell the farm, all to plaintiffs' damage in the sum of \$1,500, for which they asked judgment.

The defendant in his answer admitted that he had listed the farm with the plaintiffs for sale, but alleged that under the agreement he specifically stipulated he must have as much as \$3,000 of the purchase money in cash. He denied that this sum, or any other sum, in cash, was ever offered to him by the plaintiffs, or any one else for them, and he offered to deed the farm to the purchaser named by the plaintiffs if the sum of \$3,000 was paid to him and reasonable arrangements made for the deferred payments.

Upon the above issue evidence was heard and the cause was submitted to a jury, under instructions, which returned a verdict in favor of the appellees in the sum of \$400, for which sum judgment was entered in their favor. From that judgment is this appeal.

The appellant contends that under the undisputed evidence if the farm was sold at all by the appellees it was sold for the sum of \$12,500, and that the verdict, therefore, should have been for the full sum of \$1,500 or nothing; that there is no evidence to sustain a verdict for the sum of \$400.

The appellees introduced a contract executed by the De Queen Real Estate Company and one G. H. Pemelton, by which the company sold to Pemelton the Wofford farm. The contract recites a consideration of \$12,500 of which \$1,500 was cash in hand and the balance to be paid on receipt of the abstract of title and upon the execution of a warranty deed to any one whom Pemelton might name. The contract specified the amount of the deferred payments, and when they were to be made. The contract, among other things, recited, "Cash payment, above referred to, to be held by the party of the first part until the abstract of title is inspected by the party of the second part," and should it be impossible for the party of the first part to make a good title, the cash payment was to be refunded. This contract was executed on September 2, 1918. On the same day Pemelton executed to the De Queen Real Estate Company a bill of sale to an automobile, a pair of mules, a set of harness, bonds, and stamps, all for the aggregate sum of \$1,350, cash in hand paid.

The testimony of the appellees was to the effect that they executed the contract as above set forth; that Wofford said for appellees to go ahead and sell the farm on those terms; that after making the contract Pemelton turned over his car, and gave the bill of sale to the other personal property. Appellees were going to send for the mules, and he was to mail the stamps. After the contract was executed with Pemelton appellees presented it to Wofford, and he said it was all right, except he wanted another \$1,000 in cash. Wofford told appellees that he was to be paid \$2,000 in cash and stamps and bonds \$150, but that he could not take the other stuff, and appellees told him they would take it, and he said it was all right.

The testimony for the appellant tended to show that he made a verbal contract with the appellees to sell his farm; they were to have all they could sell it for over \$11,000. The appellant was to have one-third of the sale price of \$11,000 in cash and balance upon such terms as might be agreed upon. The appellees never offered appellant any cash. Appellant denied that he approved the contract entered into between the appellees and

Pemelton. Appellant's testimony was to the effect that he looked over it and told Gilstrap, who brought the contract to him, that he would not accept it at all; that he told Gilstrap that he would have to get the money or he would call the deal off; that they paid him nothing, but that if they would get him the money he would close up the deal. Appellees claim that appellant had authorized them to sell the place on a credit.

[1] It is true that under the undisputed evidence, if appellees had procured a purchaser for appellant's farm who was ready, willing, and able to buy upon the terms agreed upon between the appellees and appellant, appellees were entitled to the full sum of \$1,500, instead of \$400 awarded them by the verdict of the jury. But the fact that the jury returned a verdict in favor of the appellees shows that the jury believed and accepted the testimony of the appellees rather than the testimony of appellant on the disputed issue as to whether or not appellees had procured a purchaser who was ready, willing, and able to buy upon the terms agreed upon between appellant and appellees. Since the jury found for the appellees on this issue appellant is in no attitude to complain because the jury by their verdict gave the appellees only \$400 when they were entitled to \$1,500. As is said in *Stielwel v. Lally*, 89 Ark. 195, 209, 115 S. W. 1134, 1140, "Appellant cannot complain of this leniency shown him by the jury." See, also, *Arnold v. McBride*, 78 Ark. 275, 278, 93 S. W. 989; *Shapard v. Mixon*, 122 Ark. 530, 542, 184 S. W. 399.

The appellant further complains that there was no evidence to warrant the jury in finding that the appellant agreed to sell the place according to the terms of the contract which the appellees entered into with Pemelton. But an examination of the testimony set forth in the record, which it could serve no useful purpose to discuss in detail, convinces us that this was purely an issue of fact, which was sent to the jury under instructions of the trial court which correctly declared the law.

The principal issue in the case under the evidence is whether or not the appellant authorized the appellees to sell his farm to Pemelton upon the terms set forth in the contract between the real estate company and Pemelton, which the appellees introduced in evidence.

[2] The testimony, as we have shown, was in sharp conflict upon this issue, but as it was submitted under correct instructions, the verdict of the jury is conclusive here. We find no error in the rulings of the court in the admission of testimony or in the granting and refusing prayers for instructions.

[3, 4] Appellant contends that the court erred in instructing the jury as to the form

of the verdict, which instruction is as follows:

"If you find for the plaintiffs, your verdict will be: We, the jury, find for the plaintiffs (and write therein any sum which you may so find)."

Only a general objection was made to the instruction; it is in the usual form.

Appellant urges here for the first time that the instruction was erroneous for the reason that it permitted the jury, if they returned a verdict in favor of the appellees, to find for them in a sum less than they were entitled to under the undisputed evidence. But, as we have already shown, this instruction in this form could not have been prejudicial to appellant because it authorized the jury, if they found in favor of the appellees, to return a verdict in a much less sum than the appellees were entitled to recover if they were entitled to recover at all.

If the appellant conceived that he was prejudiced by the instruction, he should have made his objection specific by requesting the court to tell the jury that if they found in favor of the appellees they should return a verdict in the sum of \$1,500.

Appellees under the undisputed evidence are the only parties who were entitled to complain of the instruction as to the form of the verdict, and they are not appealing.

We find no errors in the record prejudicial to appellant, and the judgment is therefore affirmed..

#### GENERAL COOPERAGE & TIMBER CO. et al. v. HEDGES et al. (No. 74.)

(Supreme Court of Arkansas. Dec. 22, 1919.)

##### 1. SALES ⇨168(1)—BUYER HAS RIGHT OF INSPECTION WHERE CONTRACT EXECUTORY.

Where a contract for the sale of staves was an executory one, the purchasers had the right to inspect them in order to ascertain whether they conformed to the agreement.

##### 2. SALES ⇨87(3) — EVIDENCE TO SHOW AGREED PLACE OF INSPECTION.

In an action for breach of sale contract, evidence held sufficient to support by a preponderance the finding of the chancellor that the parties had orally agreed that the goods should be inspected at the place of manufacture, and not at the place of delivery.

##### 3. SALES ⇨359(3)—EVIDENCE OF PAYMENT.

Evidence as to alleged payment for goods sold held insufficient to show that the payment had been made.

##### 4. RECEIVERS ⇨220—EVIDENCE OF DAMAGES CAUSED BY RECEIVERSHIP.

Where the evidence shows that the receiver never actually took the property out of the owner's possession, but permitted him to contin-

ue to manage and operate it just as he had done before, the owner has not suffered any loss by the appointment, and the chancellor was correct in not allowing damages on account thereof.

Appeal from Ashely Chancery Court; E. G. Hammoch, Chancellor.

Suit by the General Cooperage & Timber Company and another against Z. T. Hedges and another. Decree for defendants, and plaintiffs have appealed, and defendants have taken a cross-appeal. Decree affirmed.

The General Cooperage & Timber Company and H. B. Carter brought this suit in equity against Z. T. Hedges and G. W. Moore to recover an amount alleged to be due them under a contract for the sale of certain staves. They alleged in their complaint that the defendants were insolvent and asked for the appointment of a receiver to take charge of the defendants' stove mill and a large quantity of staves on hand in it which are alleged to belong to the appellants. A receiver was duly appointed and took charge of the property. The appellees denied that they were indebted to the appellants, and by way of a cross-complaint allege that the appellants were indebted to them, and they also ask for damages which accrued by reason of the appointment of a receiver.

The original contract between the parties was duly signed by them and reads as follows:

"This memorandum of agreement made and entered into this — day of October, 1913, by and between Z. T. Hedges and George W. Moore, of Pulaski county, Ark., parties of the first part, and the General Cooperage & Timber Company of New Orleans, La., party of the second part, witnesseth: That for and in consideration of the sum of one dollar in hand paid by the party of the second part to the parties of the first part, the receipt of which is hereby acknowledged, the parties of the first part do hereby sell to the party of the second part, and the party of the second part hereby buys from the parties of the first part, the following staves, to wit: 200,000 34-in. x ¾-in. air dried and listed white oak whisky staves at the price of \$42 per 1,000 on basis of 4½-in. average, f. o. b. cars Wilmot, Ark., 100,000 34-in. x ¾-in. air dried and listed white oak barrel staves at the price of \$20 per 1,000 on basis of 4½-in. average, f. o. b. cars Wilmot, Ark., 100,000 staves, width may be either 34-in. x ¾-in. air dried and listed red oak at \$19 per 1,000 on basis of 4½-in. average f. o. b. cars Wilmot, Ark., or 30-in. x ¾-in. ash pork staves, air dried and listed at \$14 per 1,000 on basis of 4¼-in. average, f. o. b. cars Wilmot, Ark., or parties of the first part may deliver part red oak and part ash so that the total number of such staves delivered will not exceed 100,000.

"Inspectors shall be governed by the standard rules agreed to by the Tight Barrel Stave Manufacturers' Association and the National Coopers' Association.

"Party of the second part agrees to advance the parties of the first part the sum of \$1,000 cash; said \$1,000 to be used in the purchase and installation of a country stave mill, and upon the purchase of said plant the said first parties hereby agree to give to the said second party a mortgage covering the said stave mill outfit as a further protection of their note for \$1,000, payable at four months from date, and bearing interest at the rate of 6 per cent. per annum, which first parties agree to furnish upon the signing of this contract and before said sum of \$1,000 is advanced to said first parties.

"The second party also agrees to advance to the first parties the sum of \$17.50 per 1,000 on the white oak staves above purchased, \$15 per 1,000 on the red oak, and \$11 per 1,000 on ash, as they may be delivered to the railroad at Wilmot, Ashley county, Ark., when due as many as 50,000 have been so delivered; the object being that the second party shall make advances only upon lots of 50,000 or more.

"Second parties agree that upon the signing of this contract by the parties of the first part to furnish the sum of \$1,000 by their check mailed from their office in New Orleans promptly upon receipt by them of this contract properly executed.

"It is understood that the difference between the amount advanced as the staves are delivered to the railroad, and the contract prices shall be credited upon the note of \$1,000, which second party agrees to cash under the terms of this contract.

"It is understood and agreed by the parties hereto that the manufacture of staves herein contracted will begin as soon as possible and full delivery made not later than June 1, 1914.

"It is also agreed between both parties that no other staves shall be sold to or manufactured for any party by said first parties until this contract is completed and all obligation hereunder canceled.

"This contract is executed in triplicate.

"Witness the signatures and seals of the parties hereto this 15th day of October, 1913."

The General Cooperage & Timber Company advanced \$1,000 to G. W. Moore on the 15th day of October, 1913, and G. W. Moore and Z. T. Hedges gave their written obligation in payment therefor and agreed to give the General Cooperage & Timber Company a mortgage on the mill plant as security for the note. On the 15th day of October, 1913, G. W. Moore and Z. T. Hedges entered into a lease contract with H. B. Carter, which is as follows:

"Memorandum of agreement to the lease between Hedges & Moore, of Wilmot, Ark., as lessors, and H. B. Carter, of New Orleans, La., as lessee, entered into this 25th day of May, 1914.

"The said lessors hereby lease and demise to said lessee the following described premises for and in consideration of the sum of \$1 cash in hand paid to the lessors by the lessee, the receipt of which is hereby acknowledged: Five acres, more or less, located in the tract of land belonging to A. M. Kellar west of railroad in the town of Wilmot, Ark., the said five acres be-

ing located on the west end of said tract on lake bank and west of small ravine running to lake.

"Tract above described is more specifically set forth in lease from Maingault & Gorham to G. W. Moore dated November 5, 1913, to which reference is here made.

"It is agreed between the lessors and the lessee that this lease shall remain in effect and full force as long as any staves are piled on the herein described land on which moneys are advanced, under terms of a certain contract entered into between Hedges & Moore and the General Cooperage Company under date of October 15, 1913."

H. B. Carter by assignment succeeded to the rights of the General Cooperage & Timber Company in the original contract. The court found that all the staves involved in the controversy between the parties were, by the terms of sale, to be delivered, inspected, and accepted by appellants on the railroad at Wilmot, Ashley county, Ark., and that the items recharged to the defendants on account of the inspection and rejection of the staves at New Orleans, their point of destination, were not legitimate charges, and the defendants' exceptions thereto should be sustained.

The court found that the total charges against the appellees should aggregate \$10,763.70, and that the total credits to which appellees are entitled aggregate \$12,446.55, leaving appellants indebted to appellees in the sum of \$1,682.85. The court further found that the receivership and injunction obtained by the appellants at the beginning of this suit were wrongfully obtained, but that appellees had not been damaged thereby. It was therefore decreed that appellee G. W. Moore should recover of the appellants the sum of \$1,682.85, with interest at the rate of 6 per cent. per annum from August 11, 1915, until paid.

To reverse the decree, appellants have prosecuted this appeal, and appellees have taken a cross-appeal.

G. P. George, of Hamburg, and Geo. W. Hays, of Little Rock, for appellant.

Williamson & Williamson, of Monticello, and Compere & Compere, of Hamburg, for appellee.

HART, J. (after stating the facts as above). The parties to this lawsuit entered into a written contract whereby appellees agreed to sell the white oak, red oak, and ash staves which they should manufacture at their stave mill at Wilmot, Ark., to appellants for a stipulated price per thousand f. o. b. cars Wilmot, Ark.

The contract provides that the inspectors shall be governed by certain designated standard rules, but the contract is silent as to the place of inspection. Appellants agreed to advance appellees \$1,000 for the purpose of purchasing a stave mill, and ap-

pellees agreed to give appellants a mortgage on the mill. The contract further provides that appellants shall advance appellees a stipulated sum per thousand on the staves as they may be delivered to the railroad at Wilmot, Ark., when as many as 50,000 have been delivered, but that no advances shall be made on lots less than 50,000. The difference between the amounts advanced and the contract price was to be credited on the \$1,000 note. The manufacture was to begin at once, and full delivery made before June 1, 1914. The date of the contract was October 15, 1913. Under this contract appellants claim that the sum of \$14,484.40 was advanced to appellees, and that appellees delivered staves of the contract value of \$11,503.43, leaving a balance due to appellants of \$2,980.97. On the other hand, appellees claim that appellants advanced to them only the sum of \$10,246.36, and that they delivered to appellants staves of the contract value of \$12,446.55, leaving a balance due appellees by appellants of \$2,200.20, for which judgment is prayed in the cross-complaint.

The chancellor found that the amount advanced to appellees was \$10,763.70, and that the value of the staves shipped under the contract was \$12,446.55, leaving a balance due appellees of \$1,682.85; and a decree was entered accordingly. The finding of the chancellor was based on a holding that there was an understanding between the parties that all the staves were to be delivered, inspected, and accepted by appellants on the railroad at Wilmot, Ark.

There are some miscellaneous items to be taken into consideration in stating an account between the parties, but it is admitted by counsel on both sides that the correctness of the chancellor's finding in the main depends upon whether or not the inspection should have been made at the point of shipment, or at the place of destination. If the inspection ought to have been made at Wilmot, Ark., the appellants accepted the staves there, and could not afterwards make any charges against appellees on account of defects in the staves, which were discovered by a subsequent inspection made after the staves reached the point of destination. On the other hand, if the staves were not to be inspected until they arrived at New Orleans, the point of destination, the evidence of appellants shows that, when inspected there, they were found to be defective, and that, after throwing out the culls, appellants were only liable to appellees in the amount stated above, which was less than the amount advanced to appellees by appellants.

[1] It is conceded by counsel on both sides that, the contract for the sale of the staves being an executory one, appellants had the right to inspect the staves in order to ascertain whether they were such as the appellees had agreed to ship them, and such is

the law. *Deutsch v. Dunham*, 72 Ark. 141, 78 S. W. 767, 105 Am. St. Rep. 21, and *Ward Furniture Man. Co. v. Isbell*, 81 Ark. 549, 99 S. W. 845.

[2] The written contract contains a provision that the inspectors shall be governed by certain designated standard rules, but is silent as to the place where the inspection is to be made. In the case at bar, however, both parties testify that a separate oral agreement was made as to the place where the inspection was to be made; but their testimony is in irreconcilable conflict as to the terms of that agreement. Thomas Sanders represented appellants in the matter, and was asked if anything was said by appellees about inspecting the staves at Wilmot, Ark. He answered:

"No; on the contrary, it was distinctly understood that the staves were not to be inspected and graded at Wilmot, Ark., but were to be inspected and graded at points of destination—that is, at points where the staves were to be shipped. That is why Hedges & Moore provided for advances to be made by Mr. Carter on the staves. It was understood that the staves were to be examined as to quantity or number at Wilmot, Ark.; that advances of part of the purchase price were then to be made as soon as the staves were delivered to the railroad, and the balance of the purchase price was to be paid after the staves had arrived at destination and had been inspected and graded. If it had been agreed upon or understood that the staves were to be inspected and graded at Wilmot, Ark., then there would have been no provision or agreement about advances when delivered to the railroad at Wilmot, Ark., for, if the staves were to be inspected and graded at Wilmot, Ark., before delivery to the railroad, then the purchase price of the staves would have been due and payable, and the question of advances would not have arisen."

In addition it was shown by appellants that they had sold the staves to the Brooklyn Cooperage Company at New Orleans, and had directed appellees to ship the staves to that company; that on one occasion appellee G. W. Moore had been summoned to New Orleans on account of the inspector of the consignee finding so many defective staves; that the staves were then reinspected in the presence of both H. B. Carter and G. W. Moore; and that Moore had expressed himself as satisfied with the inspection.

On the other hand, G. W. Moore denies this. He admitted that he went to New Orleans, but his version of what occurred between him and Carter after arriving there is that he never expressed himself as being satisfied with any inspections there. He said he went to the factory where Carter said the staves were, and that Carter tried to show him the culls; that he asked Carter where the good staves were, and that Carter answered that they were in the dry kiln; that he turned to Carter and asked him how

he figured on him (Moore) inspecting staves in the dry kiln; that he then told Carter that he had not sold him finished staves, but rough ones, that there was no use to look any further, and that he looked to Carter to pay for all the staves that had been shipped under the contract; that the representative of the consignee asked him why he did not sell direct to a factory like itself instead of selling to a middleman like Carter; that he could make more money by doing so. Moore further testified that the agreement was that the inspection was to be made at Wilmot, Ark., and that appellants sent a man there every time he (Moore) drew a draft on them, and that the representative of appellants came and inspected and counted the staves at Wilmot, Ark.; that Mr. McQuay, Mr. Carter's son, and Mr. Baxter, who stayed at Wilmot about three months, were the representatives of appellants sent to Wilmot from time to time to inspect the staves; that Baxter made a report to appellants on every car and did his own inspecting and culling; that Baxter accepted the staves shipped and so reported to appellants.

Mr. McQuay testified for appellants that he was sent there once or twice to count the staves ready for shipment, but said that he had no directions with regard to inspecting them for quality and did not do so. Neither Carter's son nor Baxter were called as witnesses, nor was any attempt made to explain their not being called to testify.

Z. T. Hedges also testified in positive terms that the contract was that the inspection was to be made at Wilmot, Ark. He said that he owned the timber out of which the staves were to be manufactured and expected to get his pay therefor out of the staves which Moore would ship to appellants; that for this reason he was interested in the inspection being made at Wilmot, and was not willing to wait until the staves arrived at New Orleans.

It was shown that 23 carloads were shipped, and that the staves run all the way from 15,000 to 19,000 staves to the carload. The staves were hauled to Wilmot and deposited on the five-acre lease preparatory to inspection and shipment according to the testimony of appellees. They also stated that many culls were there after the shipment of staves was stopped.

The record shows that from time to time a bill of sale to the staves then deposited on the five-acre lease at Wilmot was made by appellees to appellants. Under this state of the record, it cannot be said that the finding of the chancellor that the parties agreed that the inspection should be made at Wilmot is against the preponderance of the evidence. The testimony of the parties to the agreement on this point is in direct conflict.

Moore and Hedges testify that the agree-

ment was that the inspection should be made at Wilmot, and that, pursuant to the agreement, appellants sent Mr. McQuay, Mr. Baxter, and H. B. Carter's son to Wilmot, and that they inspected the staves, took out the culls, and accepted the staves for appellants every time Moore drew on them for the purchase price of the staves.

Counsel for appellants point to the fact that McQuay testified that he was only sent there to inspect for quantity, and that he did not inspect for quality. Of course, this tended to contradict the testimony of Moore, but, on the other hand, neither Carter's son nor Baxter, who did the greater part of the inspecting, testified in the case, and no explanation is made as to why they were not called as witnesses relative to so vital a matter.

Again, it is said that Moore is contradicted by Carter and the representative of the factory to whom Carter had sold the staves in New Orleans. They both testified that Moore expressed himself as satisfied with the inspection made there. Moore denied this, and said he told Carter that he expected to hold him to the inspection made at Wilmot. The fact that a lot of culls were left on the five-acre tract of ground which appellants had leased at Wilmot for the purpose of having the staves deposited preparatory to shipment tended to corroborate Moore. The parties knew approximately how many staves a car would hold, and if quantity was all the inspection at Wilmot was to be made for, it seems that it was a vain and useless thing to do; for the bill of lading would show approximately the number of staves, and this could accompany the draft drawn by Moore on appellants for the purchase price of the staves. Then, too, several bills of sale were executed by appellees to appellants from time to time to staves piled on the five-acre lease. This indicated that these staves had been accepted by appellants. After a careful consideration of the testimony from its different angles, we cannot say that the finding of the chancellor with regard to the point of inspection is against the preponderance of the evidence.

[3] There were four items which are referred to as miscellaneous items and one of these is for \$400. Moore testified positively that he did not get this money. Appellants undertook to set out all the checks and drafts that they had paid in favor of Moore for staves. This one was not among them, and the chancellor was right in not allowing it. The other three items are small ones, and we do not think it can be said that the finding of the chancellor with regard to them is against the preponderance of the evidence. We do not regard them of sufficient importance to merit a separate and detailed discussion.

[4] Upon the cross-complaint but little

need be said. It is true Moore testified that he was solvent at the time the receiver was appointed, and has continued solvent since that time. But the evidence also shows that the receiver never actually took the property out of Moore's possession, and permitted him to continue to manage and operate it just as he had done before. Hence the appellees have not suffered any loss by the appointment of the receiver, and the chancellor was right in not allowing them any damages on account thereof.

Therefore the decree will in all things be affirmed.

### PINKERTON v. STATE. (No. 70.)

(Supreme Court of Arkansas. Dec. 22, 1919.)

#### 1. INTOXICATING LIQUORS §236(19) — EVIDENCE WARRANTS CONVICTION FOR MANUFACTURE OF SPIRITUOUS LIQUOR.

In prosecution for manufacturing spirituous liquor, contrary to Acts 1915, p. 98, evidence held to sustain verdict of guilty.

#### 2. CRIMINAL LAW §992—VERDICT OF GUILTY SUPPORTS JUDGMENT.

Verdict, "We, the jury, find the defendant guilty and assess his punishment at one year's imprisonment," was sufficient to support judgment and sentence to one year's imprisonment in the penitentiary; Acts 1915, p. 98, upon which prosecution was based, providing for but one punishment, namely, imprisonment in the penitentiary for one year.

Appeal from Circuit Court, Pike County; Jas. S. Steel, Judge.

John Pinkerton was convicted of manufacturing spirituous liquors, and he appeals. Affirmed.

Pinnix & Pinnix, of Murfreesboro, for appellant.

Jno. D. Arbuckle, Atty. Gen., and Robert C. Knox, Asst. Atty. Gen., for the State.

HART, J. John Pinkerton prosecutes this appeal to reverse a judgment of conviction against him for the crime of manufacturing spirituous liquors.

The sheriff of Pike county received information that a wild-cat still was located near the home of S. A. Morphew in Pike county, Ark., and with two deputies went there to investigate the matter. They located the still, which was of 150 gallons capacity, in a pasture about one-eighth of a mile from the residence of S. A. Morphew. They found a still full of mash and barrels and other things necessary to the operation of the still. The sheriff went off to get some breakfast for himself and deputies and left his two deputies to watch the still. According to their testimony, S. A. Morphew came early

in the morning and built a fire under the furnace. He then took the lid off of the still and began to stir the beer in it. After he had stirred the beer or mash for a while, the deputies arrested him and carried him off a short distance from the still, and one of them was left to guard him. Morphew had put the cap back on the still and laid the paddle down. After taking Morphew away, one of the deputies went back to watch the still. After he had stayed there some time, John Pinkerton, the defendant, approached the still and took off the cap which Morphew had placed on it before he left. Pinkerton then picked up the paddle which Morphew had left on the platform and went to stirring the mash or beer in the still just as Morphew had done. After he had stirred it for about five minutes, the deputy sheriff arrested him.

The sheriff testified that he was familiar with the operation of a wild-cat still, and that he found about a half of a quart of wild-cat liquor at the still.

Morphew was the father-in-law of the defendant, and the defendant lived at his house. Morphew was a witness for the defendant and testified that the defendant had been sent to the penitentiary for manufacturing whisky and had just come back from there the Christmas before the trial; that the defendant had lived at his house since he had been discharged from the penitentiary and was making a crop with him; that the defendant had nothing whatever to do with setting up the still, and, so far as he knew, the defendant did not know it was there; that he (Morphew) had set up the still by himself and had carried the mash from his dwelling house to the still; that both he and the defendant knew how to run a still and to manufacture spirituous liquors; that it is necessary in making liquor to keep the mash or beer stirred; that there was a dim path leading from his house to the place where the still was found in operation.

The defendant was a witness for himself, and admitted that he had been convicted of the crime of manufacturing intoxicating liquors and had been confined in the penitentiary for that offense. He also admitted that he knew how to make spirituous liquors and to operate a still, but he said that he had determined to quit the business after he was discharged from the penitentiary. He testified that on the morning in question he went down into the pasture to look for a mule and accidentally ran across the still; that the paddle was already in the mash, and he picked it up and stirred it around in there for a moment out of curiosity; that he did not stir the beer or mash and had no intention of helping to manufacture spirituous liquors. The defendant was found at the still early one morning in June, and it was a rainy, misty morning.



[1] The principal assignment of error relied upon by the defendant for a reversal of the judgment is that the testimony is not sufficient to warrant the verdict. Our statute makes it a felony to manufacture, or to be interested directly or indirectly in the manufacture of, alcoholic, spirituous, or fermented liquors. Acts of 1915, p. 98.

In Lowery v. State, 135 Ark. 159, 203 S. W. 838, the court held that it was a violation of the statute to run the beer or mash through the process of distillation one time. It is true that in the case at bar the mash or beer had not been run through the still one time, but there was a bottle of wild-cat whisky found at the still. It was shown that the still had been set up there for three weeks, and that there was plenty of wood with which to run the furnace, and of mash at the residence of Morpew with which to manufacture intoxicating liquors. Both Morpew and the defendant, who lived with him, knew how to operate a still. The still was situated in Morpew's pasture about one-eighth of a mile from his residence. These facts and circumstances were sufficient, if believed by the jury, to show that some one had manufactured spirituous liquors at the still, although both Morpew and the defendant denied that they had made or manufactured any spirituous liquors. Indeed, Morpew said that he had found the liquor in question at the still when he first procured the still some several weeks before that time. His testimony and that of the defendant, however, only went to contradict the other testimony and did not have the effect to wholly disprove it.

This brings us to the question of whether the proof was sufficient to show that the defendant was directly or indirectly interested in the manufacture of the liquor. It is true both he and Morpew testified that he was not interested in making the liquor, and that he did not know anything about the still being there until the morning in question when he was arrested; but they are contradicted by the other facts and circumstances in the case. The still had been set up only an eighth of a mile distance from the residence of Morpew, where the defendant also lived. It is hardly probable that any one living there and working in the fields on the place could do so without seeing the smoke or other indications which would point to the operation of a still to one who, like the defendant, knew how to run the still himself and make intoxicating liquors. The mash was kept in an outhouse in the yard. There was a path leading from the house to the still. The deputy sheriff testified that the defendant walked up to the still, took the cap off of it, and picked up a paddle lying there, and began to stir the beer or mash just like Morpew had done earlier in the morning. The defendant knew how to make whisky. Mor-

pew said that he was stirring the mash for the purpose of making whisky and that this was necessary to be done. Therefore the jury were warranted in believing that the defendant was assisting in the manufacture of the whisky on the morning in question and had assisted in making the wild-cat whisky which was found at the still. See Pinkerton v. State, 126 Ark. 201, 190 S. W. 110.

[2] The jury returned the following verdict:

"We, the jury, find the defendant guilty and assess his punishment at one year's imprisonment."

Judgment was pronounced upon the verdict, and the defendant was sentenced to one year's imprisonment in the state penitentiary.

Counsel for the defendant urges that the verdict is not sufficient to support the judgment of the court. We cannot agree with counsel in this contention. The statute provides but one punishment for the crime, and that is imprisonment in the state penitentiary for a period of one year. Hence there was no inconsistency between the verdict of the jury and the judgment and sentence of the court.

It follows that the judgment must be affirmed.

# ROBINSON v. SECURITY BANK & TRUST CO. (No. 82.)

(Supreme Court of Arkansas. Dec. 22, 1919.)

## 1. BANKS AND BANKING §148(1) — BANK LIABLE TO DEPOSITOR FOR PAYING FORGED CHECK.

Where plaintiff instructed his partner to deposit one-half of the proceeds of a certain cotton crop to plaintiff's credit in defendant bank, and the partner made such deposit, taking a passbook which he delivered to plaintiff, but afterwards, without authority, forged checks and drew out the money, the bank was liable to plaintiff for the money deposited; it not having been paid out on checks properly drawn.

## 2. BANKS AND BANKING §154(9) — EVIDENCE INSUFFICIENT TO SHOW RATIFICATION BY DEPOSITOR OF WRONGFUL WITHDRAWAL OF FUNDS.

Where plaintiff instructed his partner to deposit one-half of the proceeds of a certain cotton crop to plaintiff's credit in defendant bank, which the partner did, taking a passbook, and delivering it to plaintiff, but subsequently drawing out the money on forged checks, and plaintiff, after having discovered such withdrawal, waited eight or nine months before demanding payment from the bank, in an action against the bank for the deposit, evidence held not sufficient to show a ratification by plaintiff of his partner's unlawful act as a matter of law.

Appeal from Circuit Court, Phillips County; J. M. Jackson, Judge.

Action by Gilbert Robinson against the Security Bank & Trust Company to recover a deposit. Judgment for defendant, and plaintiff appeals. Reversed and remanded.

Sam Iatkin, of Little Rock, for appellant.  
P. R. Andrews and J. G. Burke, both of Helena, for appellee.

HUMPHREYS, J. Appellant instituted suit against appellee in the common pleas court of Phillips county to recover \$300, alleged to be due him for money deposited in appellee bank to his credit. A passbook showing a deposit of \$200 in his name on December 17, 1913, and a certificate of deposit for \$100, deposited in his name on the 16th day of January, 1914, were made the basis of the suit.

Appellee filed answer, denying any liability on account of the alleged deposits. Upon hearing a judgment was rendered dismissing appellant's complaint, from which an appeal was prosecuted to the Phillips circuit court, where a trial was had at the April 1919, term thereof. At the conclusion of the evidence the jury were peremptorily instructed to return a verdict for appellee, which was done; whereupon a judgment was rendered in favor of appellee, from which an appeal has been duly prosecuted to this court.

The evidence shows that two negroes, appellant and Will Boldin, raised a partnership cotton crop in 1913 on a farm belonging to Mr. Burke. Will Boldin took the cotton to Helena and sold it to Lee Pendergrass. Appellant instructed Will Boldin to deposit one-half of the proceeds to his (appellant's) credit in appellee bank. On the first sale of cotton \$200 was appellant's share, and Will Boldin deposited that amount to the credit of appellant, Gilbert Robinson, in the bank, and took a passbook showing the deposit, which he delivered to appellant. Out of the second sale of cotton appellant's share amounted to \$100, which was deposited by Will Boldin in the name of appellant, Gilbert Robinson, for which he took a certificate of deposit that was subsequently delivered to appellant. The first deposit was made on December 17, 1913, and the second on January 16, 1914. Thereafter Will Boldin drew the money so deposited out of the bank on checks to which he had signed appellant's name without his authority or consent.

Appellant testified that in the spring of 1914 he discovered that Will Boldin had drawn the money, and he made no mention to, or demand on, the bank for payment until 1915, some eight or nine months after he made the discovery; that Will Boldin told him he would replace the money, and requested him not to mention the matter to the bank, because it would ruin him; that he made no

promise to withhold information nor any contract with Will Boldin to look to the crop of that year for the payment of the money; that he did not testify to that fact in the common pleas court.

Louis Solomon testified on behalf of appellee that appellant gave testimony in the common pleas court to the effect that when he made the discovery he (appellant) agreed to look to Will Boldin for the amounts the following fall when he gathered his growing crop. Louis Solomon also offered to testify that the cashier of appellee had told him, when Will Boldin made the deposit, he represented himself to be Gilbert Robinson, and that both Will Boldin and Gilbert Robinson were strangers to the cashier at that time. This testimony was objected to by appellant and excluded by the court, upon the ground that it was hearsay.

Appellant insists that the court erred in peremptorily instructing the jury, for the reason that the evidence tended to establish material issues in his favor. As the record now stands, after excluding the irrelevant testimony to the effect that Will Boldin represented himself to be Gilbert Robinson at the time he made the deposit, the undisputed evidence established the relationship of debtor and creditor between appellant and appellee; in other words, the evidence indicates that Will Boldin deposited the money with appellee in the name of Gilbert Robinson, according to Gilbert Robinson's instruction; that the bank issued a passbook and certificate of deposit to Gilbert Robinson for the amount of the deposits; that afterwards, without any authority or right delegated by Gilbert Robinson, Will Boldin forged checks and drew the money out. It was said by this court in the case of Carroll County Bank v. Rhodes, 69 Ark. 43, 63 S. W. 68, and reiterated in Bank of Hartford v. McDonald, 107 Ark. 232, 154 S. W. 512, that:

"When money is placed as a general deposit in a bank, it is no longer the property of the depositor, but immediately becomes the money of the bank. The depositor becomes the creditor of the bank, and the bank his debtor; and the bank is bound by an implied contract to honor the checks of the depositor to the extent of his deposit. When his checks are drawn in proper form, the bank is bound to honor them."

[1, 2] Therefore, under the undisputed facts in this case, the relationship of creditor and debtor was established between appellant and appellee, and that the money was not paid out by the bank upon checks properly drawn, but was paid out by it on forged checks. Had this been the only issue, a peremptory instruction should have been given for appellant, but there was an issue of whether or not appellant ratified the unlawful and wrongful withdrawal of the fund by Will Boldin. We presume the court concluded that the undisputed evidence showed a

ratification by appellant of the unlawful act by Boldin in withdrawing the fund. We cannot agree with the court in this regard. It is true appellant did not demand the money as soon as he discovered Will Boldin had drawn it out on forged checks, and that he waited eight or nine months thereafter before demanding same. His explanation for this is that at the time he made the discovery the money had been drawn out of the bank, and that he desisted for a time because Boldin claimed a disclosure of the facts would ruin him, and because of his promise to return the money to the bank. Appellant denied that he stated in the common pleas court that he told Will Boldin it was all right, after he discovered he had drawn out \$50, and that he agreed to look to Boldin's crop in the year 1914 for the money. Had the record disclosed that appellee was prejudiced by appellant's failure to make disclosure promptly upon receiving the information, it might be said, as a matter of law, that appellant ratified the unlawful act of Boldin in withdrawing the fund; but, no prejudice being shown and no conduct disclosed indicating an approval and acquiescence by appellant in the unlawful act of Boldin in withdrawing the money, it cannot be said, as a matter of law, that appellant ratified the unlawful act. With reference to the ratification by a principal of the unauthorized acts of an agent, it was said in the case of *Lyon v. Tams & Co.*, 11 Ark. 189, that:

"The safer general rule, however, would seem to be that which Judge Story enunciates, and which is well sustained by almost all the authorities; that is, that the dissent must be expressed in a reasonable time after the information has been received, and thus the circumstances of each particular case will be regarded in determining the degree of promptitude incumbent upon the principal. As, if the danger of loss by delay be imminent, anything short of an instantaneous disavowal would be unreasonable, and if not so great, then a corresponding abatement of the rigor of the rule graduated upon principles of justice and fair dealing."

So we think the question of ratification in the case at bar was a question upon which the jury was entitled to pass, under proper instructions.

In dealing with the first issue, the suggestion made by this court that it would have been proper to give a peremptory instruction in behalf of appellant was based upon the facts before us, and can have no bearing upon a rehearing, if the record should disclose by competent evidence that Boldin represented to the cashier of the bank, at the time he made the deposit, that his name was Gilbert Robinson.

For the error indicated, the judgment is reversed, and the cause remanded for a new trial.

## SMITH v. MURPHY et al. (No. 80.)

(Supreme Court of Arkansas. Dec. 22, 1919.)

1. RECEIVERS  $\S$  142—PARTIES TO LEASE WITH RECEIVER BOUND TO NOTICE INCAPACITY TO CONTRACT WITHOUT COURT'S SANCTION.

Where a receiver in a partnership dissolution suit made a rental contract after a petition for sale of the partnership land had been filed, and subsequently, and before any arrangement had been made by the tenants, subtenants, and share croppers to cultivate the land, the court ordered the receiver not to rent the lands, such tenants contracted at their peril, and were bound to take notice of receiver's incapacity to conclude a binding contract without the court's sanction, since they became parties to the litigation with respect to the property.

2. JUDICIAL SALES  $\S$  51—THE COURT WILL ENFORCE PURCHASER'S RIGHT TO POSSESSION.

Since the purchaser at judicial sale has a clear right to possession as against all parties to the proceedings, which right the court will summarily enforce by writ of assistance, the only exigencies which will warrant a denial of the writ are where the parties in possession are not parties to the suit and claim by legal right, or are entitled to hold on account of equities paramount to the rights of the purchaser, but tenants of the receiver are not so situated.

3. APPEAL AND ERROR  $\S$  1175(1)—POSSESSION TO PURCHASER AT JUDICIAL SALE, JUDGMENT FOR RENTS GRANTED ON ERROR IN DENIAL OF.

Where the error of chancellor in refusing a writ of assistance to a judicial purchaser cannot be remedied by restoration of the lands to the appellant, because the rental year has about closed, a technical reversal of the decree can only result in judgment in favor of the purchaser for rents and costs, which judgment will be directed by appellate court.

Appeal from Jefferson Chancery Court; John M. Elliott, Chancellor.

Suit between J. Floyd Smith and William E. Murphy for dissolution of partnership, in which a receiver was appointed, and from a decree approving a rental contract made to the defendant Murphy and others and denying J. Floyd Smith a writ of possession, the latter appeals. Decree reversed, and judgment directed for the rental value of the lands.

E. B. Stokes, of Humphrey, and Crawford & Hooker, of Pine Bluff, for appellant.

Taylor, Jones & Taylor, of Pine Bluff, for appellees.

HUMPHREYS, J. Appellant and William E. Murphy formed a partnership in 1905 to buy, cultivate, and sell lands, and to raise, buy, and sell live stock. They continued the partnership business until November 30, 1910, when a bill was filed in the Jefferson chancery court to dissolve the partnership,

sell the personal property and place the real estate in the hands of a receiver for the purpose of rental, during the pendency of the proceeding. By consent of the parties, Dr. Arthur Fowler was appointed receiver. He accepted the trust and qualified by taking the oath and giving bond, after which he took charge of all the assets, sold the personal property, and applied the proceeds on the debts of the firm. He rented the lands from year to year up to and including the year 1919. His custom was to rent the lands in the fall for the succeeding year. On June 5, 1918, appellant applied for a sale of the lands in order to liquidate the unpaid indebtedness of the firm and wind up its affairs. Pending this application, either in the latter part of October or the first part of November, 1918, the receiver rented the lands known as the Murphy and Gross places to William E. Murphy and F. P. Bridge & Co. for the year 1919, at a rental of \$1,000 and necessary repairs. On the 5th day of December, 1918, the court made an order directing the receiver not to rent the lands for the year 1919. On January 4, 1919, by consent of parties, all the partnership lands were ordered sold. The lands were sold at public auction to appellant on January 29, 1919, for \$32,250. He executed a note with approved security for the purchase money, and the commissioner reported the sale to the court and asked a confirmation thereof. On February 11th thereafter appellees interposed, by petition, objections to the issuance of a writ of possession for the Murphy and Gross places, on the ground that they had rented the lands for the year 1919 from the receiver, and had made arrangements for the cultivation of same. Appellant filed a reply to the petition, setting up his purchase, the execution of an approved note for the purchase money, and asserting his right to a writ of possession. On February 14, 1919, the receiver filed a report, setting up the rental contract for the Murphy and Gross places to F. P. Bridge & Co. for 1919 for \$1,000, and asking that the contract and his tenants' possession be approved. The report of sale by the commissioner and of rental by the receiver, the petition and response thereto, requesting a refusal of the writ of possession, together with the evidence introduced for and against the issuance of the writ, were submitted to the court, upon which the confirmation of the sale of the lands was decreed, the rental contract approved, and a writ for the possession of the Murphy and Gross places denied. From the decree approving the rental contract and denying the writ of possession, an appeal has been duly prosecuted to this court.

Evidence was adduced in support of the rental contract tending to show that the tenants had rented and occupied the Murphy and Gross places for a number of years;

that it was the custom of the receiver to rent them in the fall for the following year; that the present contract was made in October or November, 1918, for 1919, in keeping with the custom, before the court made an order not to rent the lands for the year 1919; that the tenants had made sundry arrangements to, and they and their subtenants and share croppers were in possession of the lands, ready to cultivate them; that no other lands for miles around could be rented; and that the rental contract of \$1,000 and necessary repairs was a fair rental for the lands.

Evidence was adduced in support of the issuance of the writ, showing the sale, pursuant to a consent order, the purchase and execution of a secured and approved note for the purchase money, and tending to show that \$1,000 and necessary repairs was not a reasonable rental value of the place for the year 1919.

[1] The sole issue presented by this appeal is whether the court erred in refusing the writ of possession for the Murphy and Gross places. This contract of rental was made with the receiver after a petition for the sale of the lands had been filed. On December 5, 1918, before any arrangements had been made by the tenants, their subtenants, or share croppers to cultivate the lands, the court had ordered the receiver not to rent the lands for the year 1919. This order was clearly a disapproval of the rental contract made in the latter part of October or the first part of November. The general rule of law is that—

"All persons dealing with receivers \* \* \* do so at their peril, and are bound to take notice of their incapacity to conclude a binding contract without the sanction of the court." *High on Receivers* (2d Ed.) § 186; *American & English Enc. of Law*, vol. 23, p. 1066.

[2] Not only the receiver, but also all parties who contract with him in relation to the property in controversy held by him, become parties in litigation in respect to the property, and must be governed by the orders concerning it. It is a well-recognized principle of law that—

"The purchaser at a judicial sale has a clear right to the possession of the property sold as against all parties to the proceeding in which the sale is made, and this right the court will summarily enforce by writ of assistance, or in some other appropriate manner." *Am. & Eng. Enc. of Law* (2d Ed.) vol. 17, p. 1014.

It is true that a writ of assistance does not go as a matter of course, but it is also true that it is never withheld unless the exigencies of the particular case require it. The only exigencies which will warrant a denial of the writ are where the parties in possession are not parties to the suit and claim by legal right, or where they are en-

titled to hold on account of paramount equities to the rights of the purchaser at the sale.

[3] We think the finding of the chancellor to the effect that \$1,000 and repairs was a reasonable rental for the places for the year 1919 is supported by a preponderance of the evidence. The year has about closed, so the error of the chancellor in refusing the writ cannot be remedied by restoration of the lands to appellant. At this late date a technical reversal of the decree can result only in a judgment in favor of appellant for rents and costs.

For the error indicated, the decree is reversed, and judgment is directed here for \$1,000, the rental value of the places, together with his costs.

# WATSON v. BOYDSTUN et al. (No. 47.)

(Supreme Court of Arkansas. Dec. 15, 1919.)

## 1. PLEADING $\S$ 214(8)—EFFECT OF OVERBUL- ING DEMURRER TO ANSWER.

Demurrer to the answer having been overruled, the facts set forth in the complaint and answer must be taken as true.

## 2. HIGHWAYS $\S$ 90 — LIMITATION ON CON- STRUCTION COST IN ROAD IMPROVEMENT DIS- TRICT; "LAST COUNTY ASSESSMENT."

In Acts 1919, p. 105, creating the Monette Road improvement district, the words "last county assessment," in section 14, limiting the construction cost to 30 per cent. of district realty values as shown by the "last county assessment," mean, not the last assessment preceding the construction of the improvement, but the last assessment preceding the enactment of the statute (the 1918 assessment); the statute contemplating immediate initiation of the improvement.

Appeal from Craighead Chancery Court; Archer Wheatley, Chancellor.

Action by F. H. Watson against C. M. Boydston and others. From judgment for defendants, plaintiff appeals. Reversed and remanded, with directions.

Huddleston, Fuhr & Futrell, of Paragould, for appellant.

A. P. Patton, of Jonesboro, for appellees.

McCULLOCH, C. J. The General Assembly of 1919 (regular session) enacted a statute creating a road improvement district designated as "Monette Road improvement district," composed of lands in Craighead county. Acts 1919, vol. 1, p. 105. The statute contains a description of the boundaries of the district, the route of the road to be improved, the names of the commissioners, and the authority to construct the improvement, borrow money, and levy and collect assessments on the benefits accruing to the lands in the dis-

trict. The statute provides for a board of assessors to value the anticipated benefits. Section 14 of the statute, to the interpretation of which the present controversy relates, reads as follows:

"The state highway department shall at all times render any assistance within its power, and if called upon by the district, shall have general supervision of the work of the engineer employed by the district. The construction cost of the improvements of the road herein called for, not including interest on borrowed money, shall not exceed in cost thirty per cent. (30%) of the values of all lands and real estate and real property in the district, as shown by the last county assessment; and in arriving at the proportion of the assessed value of any railroad, part of whose line or property is used for railroad purposes, within the district, the rate of value per mile of said railroad fixed by the state tax commissioner shall be used for each mile or fraction of a mile, or railroad or sidetracks within the district."

Appellant is the owner of real property in the district, and instituted this action in the chancery court of Craighead county to restrain proceedings under the statute on the ground that appellees, who are the commissioners of the district, have made plans and are about to construct the improvement at a cost largely beyond the limits prescribed in that section of the statute.

[1] The facts bearing on the point in controversy are set forth in the complaint and answer and must be taken as true, the court having overruled appellant's demurrer to the answer.

[2] The commissioners have adopted plans and reported same to the county court for the construction of the improvement at a cost of \$452,650, and the assessments on real property in the district for the year 1918 for state and county taxation, including tramways and railroads, amounts to the sum of \$939,795.00, and 30 per centum thereof is \$281,938.50. The cost of the improvement is, therefore, largely in excess of 30 per centum "of the value of all lands and real estate and real property in the district as shown by the last county assessment" of the assessments for the year 1918 are to be considered as the basis. It is, however, alleged in the answer that the assessment for the year 1919, which was then in progress at the time this suit was pending in the court below (June 1919), would amount to the sum of \$1,539,545, and that the cost of the construction of the improvement would not, according to the plans adopted, amount to more than 30 per centum of that sum.

The question in the case, then, is whether the words "the last county assessment," in section 14 of the statute, relates to the last assessment preceding the enactment of the statute, or whether it means the last assess-

ment preceding the construction of the improvement.

We are of the opinion that the special statute in question relates to an assessment already in existence, and that it fixes the completed assessment for state and county taxation for the year 1918 as the basis for limiting the total cost of the improvement authorized by the statute. This is a special statute, it will be noticed, and contemplates immediate initiation and progress in making the improvement prescribed, and it is evident that the lawmakers intended to fix a definite basis for the limitation of the cost of the construction. It is left to the commissioners to form the plans for the improvement and to carry them out to completion, but this limitation was set by the lawmakers in the very beginning for guidance of the commissioners in determining whether or not the work could be done.

Counsel for appellees rely on the case of *Improvement District v. Offenhauser*, 84 Ark. 257, 105 S. W. 265, where we construed a section of the general statute relating to improvement districts in cities and towns, which reads as follows:

"It shall be provided by ordinance that the local assessment of benefits shall be paid in successive annual installments, so that no local assessment shall in any one year exceed twenty-five per centum of the assessed benefits accruing to said real property. The ordinance shall fix the day in each year when the local assessments for the year shall be paid, and the day fixed for the payment of the first installment shall not be later than sixty days from the date of the ordinance making the local assessment; provided, no single improvement shall be undertaken which alone will exceed in cost twenty per centum of the value of the real property in such district as shown by the last county assessment." Kirby's Digest, § 5683.

We decided in that case that the words "last county assessment" meant the last completed assessment in force, with additions made by the board of equalization, at the time of the passage of the ordinance levying the assessments of benefits. The statute there construed was a general and continuing one for the organization of improvement districts in cities and towns, whilst the statute now under consideration is a special one directly conferring authority to immediately proceed with the construction of the authorized improvements. It is clear that the general statute dealt with in the case cited above fixed a future date for the test in limiting the assessments on benefits according to the facts in each particular case at the time of the enactment of the ordinance levying the assessments, and it is equally clear that the present statute looks backward and refers to the last assessment already in ex-

istence at the time of the passage of the statute in creating a test for the limitation upon the authority of the commissioners with respect to the amount of the cost of improvement.

Counsel also rely on expressions in the case of *McDonnell v. Improvement District No. 145*, Little Rock, 97 Ark. 334, 133 S. W. 1126; but in that case we were dealing with another subject, and nothing akin to the point involved in the present case was involved in that case.

According to the admissions in the answer, the commissioners are exceeding the limitation in the statute with respect to the cost of the improvement, and the court should have sustained the demurrer. The decree is therefore reversed, and the cause remanded, with directions to the chancery court to sustain the demurrer to the answer, and for further proceedings not inconsistent with this opinion.

PEAY et al. v. SOUTHERN SURETY CO.  
(No. 59.)

(Supreme Court of Arkansas. Dec. 15, 1919.)

1. ESTOPPEL §92(1)—OF PRINCIPAL TO DENY RATIFICATION OF PAYMENT BY SURETY.

Where, after a surety on the bond of a contractor, who was constructing municipal water and sewer system, had made payment to municipality in compromise of its action for nonfulfillment of the contract, the contractor recovered judgment against the city in the federal court, which judgment was rendered pursuant to a settlement specifically including any claim against the city on account of the surety's payment, held, that the contractor, having received benefit of the payment, was estopped from denying the surety's authority to make the same.

2. PRINCIPAL AND SURETY §86(2), 183 — SURETY'S LIABILITY MEASURED BY PRINCIPAL'S; RECOVERY OF VOLUNTARY PAYMENT FROM PRINCIPAL.

Generally the liability of the principal is the measure of the liability of the surety, and if a surety pay where no liability exists against the principal, such payment will be treated as a voluntary payment, not recoverable from the principal.

3. PRINCIPAL AND SURETY §183—LIABILITY OF PRINCIPAL FOR PAYMENT MADE BY SURETY FOR WHICH PRINCIPAL WAS NOT LIABLE; EFFECT OF CONTRACT.

Where a contractor's application for an indemnity bond provided that, in any accounting between the contractor and the surety, the surety should be entitled to credit for any and all disbursements made in good faith under the belief that it was liable, or it was necessary to make the same, the surety, having in good

faith made the payments and incurred expenses in investigating claims against the contractor for nonperformance, *held* entitled to recover the same, regardless of the general rule that the liability of the surety is that of the principal.

**4. MORTGAGES ⇨308—ABANDONMENT OF INDEMNITY MORTGAGE LIEN.**

Where a contractor executed a mortgage to protect a surety on his bond, *held*, that the fact that the surety, which had made payments, etc., filed an intervention asserting rights in a judgment recovered by the contractor against the municipality, for which he was performing the work, was not an abandonment by the surety of its mortgage lien.

**5. PRINCIPAL AND SURETY ⇨185—RECOVERY OF ATTORNEY'S FEES AND EXPENSES INCURRED BY SURETY ON CONTRACTOR'S BOND.**

Under the terms of the indemnity agreement, *held*, that a commercial surety was entitled to recover from its principal, a contractor for municipal work, the amount expended on attorney's fees and traveling expenses in defending suits, etc.

**6. PRINCIPAL AND SURETY ⇨57—RECOVERY OF ADDITIONAL PREMIUMS BECAUSE LIABILITIES OCCURRING WITHIN YEAR FOR WHICH PREMIUM WAS PAID, WERE NOT ADJUSTED FOR SEVERAL YEARS.**

Where a contractor for municipal work paid a single year's premium to a surety company, and defaults for which the company was liable occurred within that year, the company is not entitled to premiums for subsequent years, because the liabilities growing out of the defaults were not adjusted for several years.

Appeal from Pulaski Chancery Court; J. E. Martineau, Chancellor.

Suit by the Southern Surety Company against Nick Peay and others. From a judgment for plaintiff for part only of the relief sought, defendants appeal, and plaintiff cross-appeals. Affirmed on direct appeal, and reversed and remanded on cross-appeal.

J. A. Comer and Mehaffy, Reid, Donham & Mehaffy, all of Little Rock, for appellants.

Buzbee, Pugh & Harrison, of Little Rock, for appellee.

**HUMPHREYS, J.** This suit was instituted in the Pulaski county chancery court by appellee against appellants to recover \$6,393.26 from Nick Peay, and to foreclose a mortgage given by Nick Peay and R. B. Malone, on the 30th day of January, 1913, to secure said indebtedness. Prior to the institution of the suit, R. B. Malone had died, and the administrator of his estate and his minor heirs, through their guardian, were made parties defendant to the suit, and are a part of the appellants herein. The other appellants, in

addition to Nick Peay, were made parties defendant in the suit on account of alleged mortgage and judgment liens held by them upon the same property. There is no controversy in this court concerning the respective priorities of the lien claimants. The only issues involved on the appeal grow out of the judgment rendered against Nick Peay and the lien declared upon the land to secure same. It was alleged in the complaint that appellee had expended the amount aforesaid in liquidation of claims against Nick Peay, growing out of an attempted performance of a contract made by him to construct a water and sewer system for the city of Eufaula, Okl.; that said amounts were paid pursuant to and within the terms of an application for and an indemnity bond executed by appellee to said city of Eufaula to guarantee the proper construction of said water and sewer systems, in accordance with the contract between said city and Nick Peay. The written application for and the indemnity bonds given by appellee to the city of Eufaula and the state of Oklahoma were made parts of the complaint. That portion of the application fixing the liability between appellant, Nick Peay, and appellee, Southern Surety Company, in case of default in the construction of the water and sewer systems, or in case of failure to pay for labor and material used in the construction thereof, reads as follows:

"\* \* \* Will at all times indemnify and keep indemnified the company, and hold and save it harmless from and against any and all liability, damages, loss, costs, charges, and expenses of whatsoever kind or nature, including counsel and attorney's fee, which the company shall or may at any time sustain or incur by reason or in consequence of having executed the bond herein applied for, or by reason or in consequence of the execution by the company of any and all other bonds executed for us at our instance and request, and that we will pay over, reimburse, and make good to the company, its successors and assigns, all sums and amounts of money which the company or its representative shall pay, or cause to be paid, or become liable to pay, on account of the execution of any such instrument, and on account of any liability, damage, costs, charges, and expenses of whatsoever kind or nature, including counsel and attorney's fees, which the company may pay, or become liable to pay, by reason of the execution of any such instrument, or in connection with any litigation, investigation, or other matters connected therewith, such payment to be made to the company as soon as it shall have become liable therefor, whether the company shall have paid out said sum or any part thereof or not. That in any accounting which may be had between us and the company the company shall be entitled to credit for any and all disbursements in and about the matters herein contemplated, made by it in good faith under the belief that it is or was liable for the sums

and amounts so disbursed, or it was necessary or expedient to make such disbursements, whether such liability, necessity, or expediency existed or not."

The items alleged to have been paid, pursuant to the contract and under the terms of the bond, consisted of \$2,500 paid to compromise a \$40,000 suit, which had been brought by the city of Eufaula against Nick Peay, alleging improper construction of the systems and a failure to clean them out, with the costs accruing in the case; a number of payments for labor and materials, alleged to have been used in the construction of the systems; telegraph, railroad fares, special fees for investigating the claims, and lawyer's fees in defending suits and adjusting claims.

Appellant Nick Peay filed an answer, denying that he had made default in any particular in the performance of his contract with the city of Eufaula, or that he had failed to pay for any material or labor used in the construction of water and sewer systems for said city.

The cause was submitted to the court, upon the pleadings, exhibits thereto, the evidence of the witnesses, and documents adduced and identified by them, from which the court found that appellant Nick Peay was indebted to appellee in the sum of \$4,626.83, on account of amounts paid for him under the terms of the application and bonds it had executed for him to the city of Eufaula and the state of Oklahoma; that, to secure due payment of said sum, the mortgage sought to be foreclosed was executed by Nick Peay and R. B. Malone in his lifetime; that appellee was entitled to a lien upon the land for that amount and a decree of foreclosure. The decree was rendered in accordance with the findings of the chancellor, from which findings and decree an appeal has been prosecuted to this court by appellants. The court found that appellee was not entitled to recover on account of the following claims paid by it: \$150, lawyer's fees to W. T. Hutchings; \$9.44, for his traveling expenses; \$7.35, for the traveling expenses of J. H. Wall, an attorney to assist Hutchings; and \$600, additional claims by appellee for premiums on the indemnity bonds, alleged not to have been paid by appellant Peay. From the dismissal of appellee's bill, claiming these amounts, the cross-appeal has been prosecuted to this court. The whole case is therefore before us for trial *de novo*.

The evidence on behalf of appellee tends to show that it received notice from the mayor of Eufaula about March 9, 1914, to the effect that appellant Peay had violated his contract with the city; that in April following it received notice from attorneys claiming the non-payment by Peay of labor and material claims; that it immediately gave Peay notice of these claims, but that he paid little or no

attention to them; that it then employed E. J. Franklin to go upon the ground and make a thorough investigation of the claims; that on July 14, 1914, the city brought a suit against it for \$40,000, on account of Peay's failure to construct the sewer and water systems in accordance with his contract; that soon thereafter a number of other suits were brought against it for claims on account of labor, materials, moneys advanced, and rents due on machinery used in the construction of the systems; that immediately upon the institution of these suits it gave appellant Peay notice to adjust or defend them; that he employed C. J. Tisdale, who rendered advice and assistance in most of the adjustments and settlements; that the claim of Eckelcamp Hardware Company, for \$386.54, was investigated and settled for \$228.85, on the advice of Tisdale and Hutchings; that the claim of C. K. Baker for a pay roll, representing \$655.05, which had been O. K'd as correct by W. A. Wood, appellant Peay's superintendent, was settled for \$200; that the claim of the Rogers Lumber Company, for \$73.85, was O. K'd by Mr. Wood, but was settled, after judgment was rendered thereon, and after it was ascertained that the material sued for was delivered on the job, for \$90.26; that the Eufaula National Bank suit, for \$3,233.33, and the suit of the Municipal Excavator Company, for \$1,500, on account of rents for the use of machinery used in the construction of the work, brought against appellee under the bond, were defeated through the efforts of an attorney, who was paid \$150 fee, or \$75 in each case, and additional smaller items for expenses for himself and assistant attorney; that appellant's attorney, Tisdale, was present and assisted in the defense of these cases; that the suit for \$40,000, brought by the city of Eufaula against Nick Peay, was settled on a basis of \$2,500, after an inspection by D. D. Smith, an engineer sent by appellee to inspect the systems, and after a thorough investigation by Franklin, and upon the advice of both Tisdale and Hutchings that a large judgment would be more than likely rendered against appellee on its indemnity bond; that it paid E. J. Franklin a fee of \$500 for his investigations and assistance in compromising and settling the claims, including the \$40,000 suit by the city of Eufaula against appellee, which investigations and services covered a period of about two years; that the other items it expended were for telegraph and traveling expenses of its engineers and lawyers, and costs incident to the litigation growing out of the adjustments of the claims; that the item of \$2,500 paid out by it in settlement of the \$40,000 suit brought by the city of Eufaula against it on the indemnity bond was afterwards utilized by appellant Peay in the adjustment and settlement of a suit which he had brought in the



United States District Court for the Eastern District of Oklahoma against the city of Eufaula, for the balance due him upon his contract for constructing the water and sewer systems; and that by the use of the item he secured a compromise judgment for \$2,500 more than he would have otherwise obtained.

The following clause appeared in the judgment rendered in favor of Nick Peay against the city of Eufaula in the United States Court for the Eastern District of Oklahoma:

"It is especially agreed that this settlement includes the payment in full of all right of action or claim against the city of Eufaula on the part of the Southern Surety Company for the sum of \$2,500, under a judgment formerly rendered in favor of the city of Eufaula and against the Southern Surety Company, as surety of said Nick Peay; and thereupon the parties have further stipulated and agreed in open court that judgment might be rendered herein against the city of Eufaula in the sum of \$6,000."

The testimony of appellant Nick Peay tended to show that he constructed the water and sewer systems in accordance with his contract, and that the city was indebted to him for a large sum at the time it brought suit against his bondsman, the appellee herein; that he so informed appellee, and advised it not to pay anything for an acquittance; that he employed an attorney to defend the suit; that he owed no balance for labor and material that entered into the construction of the systems, and so advised appellee; that he rendered every assistance to defeat the claims; that the employment of parties to investigate the claims and of attorneys to defend against them was without his consent. The record in the case is voluminous, and for that reason we have not attempted to set the evidence of each witness out in detail.

[1] It is insisted by appellant Peay that appellee failed to establish by the weight of evidence that he owed the amounts it expended for him, and that the evidence conclusively shows said appellant was not indebted to the city of Eufaula when the appellee paid the \$2,500 item in settlement of the \$40,000 suit brought on the bond by said city against appellee. The basis of the latter contention rests on the fact that, after the payment, appellant Peay recovered a judgment of \$6,000 against said city in the United States Court for the Eastern District of Oklahoma for a balance of \$6,000 due him for constructing the water and sewer systems. We think Peay is clearly estopped from raising any question as to his liability on the \$2,500 payment. It is apparent from the face of the judgment in the United States court that he received the benefit of the payment in the compromise settlement, thereby increasing his judgment to that amount. The

acceptance of a benefit under necessarily amounted to the ratification of the payment.

[2, 3] The liability for the other payments must be determined on the interpretation of the contract and an analysis of the evidence. Generally the liability of the principal is the measure of the liability of the surety; so, if the surety should pay where no liability exists against the principal, it would be treated as a voluntary, nonrecoverable payment. This rule, however, may be modified by contract. For example: In the case of the United States Fidelity & Guaranty Co. v. Baker, 136 Ark. 227, 206 S. W. 314, a provision in an indemnity bond was held to be legal which provided that a voucher showing payment by the guarantor to the guarantee should be conclusive evidence (except for fraud) as to the fact and the amount of the liability of the principal to said guarantor. A very similar provision was incorporated in the contract between Peay and appellee. It is as follows:

"In an accounting which may be had between us and the company, the company shall be entitled to credit for any and all disbursements in and about the matters herein contemplated, made by it in good faith under the belief that it is, or was, liable for the sums and amounts so disbursed, or it was necessary or expedient to make such disbursements, whether such liability, necessity, or expediency existed or not."

This language is quite broad, and our interpretation of it is that Nick Peay is responsible to appellee for all good-faith payments it made in absolving itself from the claims made against it on account of the guaranty bonds it executed to the city of Eufaula and the state of Oklahoma, guaranteeing the proper construction of the sewer and water systems in said city, and the payment of all labor and material that entered into the construction thereof. We have carefully read and analyzed the evidence, and our conclusion is that, when measured by the contract fixing the liability of Peay, as interpreted above, it cannot be said that the finding of the chancellor against Peay is contrary to the weight of the evidence. On the contrary, we are convinced that appellee paid only such amounts to claimants under the bonds as it believed in good faith Peay owed, after making a very careful investigation, and after making every effort to settle the claims for as little as possible. Insistence is also made that the court erred in allowing the items of attorney's fees, costs, charges for inspection, investigation, and traveling expenses. Again appellant is met with the terms of his contract by which he must abide. The contract provides that appellee may recover from Peay any—

"damage, costs, charges, and expenses of whatsoever kind or nature, including counsel and attorney's fees, which the company may pay \* \* \* in connection with any litigation or other matters connected therewith."

[4] It is suggested, however, that appellee has abandoned its right to a lien under its mortgage in this state by filing an intervention, seeking satisfaction out of the fund deposited in the United States District Court for the Eastern District of Oklahoma to pay the \$6,000 judgment recovered by Nick Peay against the city of Eufaula. The issues involved in the instant case have not been adjudicated in that court, so appellee is not precluded from prosecuting this suit under the doctrine of res adjudicata, and we do not think it can be said with reason that a creditor abandons his security by attempting to collect his claim from another source or out of different property from that on which his lien exists.

[5] Under the cross-appeal, it is insisted that the court erred in refusing a judgment for \$150, attorney's fees to W. T. Hutchings, traveling expenses of \$9.44 paid to him, and \$7.35 to his assistant, J. H. Wall. These

expenditures were made in defending suits which were brought against appellee on the bonds, and were within the terms of the contract between appellee and Peay. Judgment should have been rendered for them.

[6] It is also insisted on the cross-appeal that the court erred in refusing a judgment for additional premiums. Appellant Peay paid the premium for one year. The record shows that the defaults of Peay under his contract with said city, for which appellee became responsible, occurred within the year, and that appellee received notice of said defaults and failure to pay claims for material and labor within that time. After notice to appellee of Peay's defaults, it could not charge and collect second, third, and fourth year premiums, just because the liabilities growing out of the defaults were not adjusted for several years. The liabilities accrued during the first year, and appellee had notice of them during that time. *Southern Surety Co. v. Perdue*, 134 Ark. 458, 203 S. W. 576.

The decree on the direct appeal is affirmed, and on the cross-appeal is reversed and remanded, with directions to enter a judgment in accordance with this opinion.

## SOUTHERN RY. CO. v. VANN et ux.

(Supreme Court of Tennessee. Oct. 31, 1919.)

## 1. RAILROADS ⇨69—DEED OF RIGHT OF WAY CONVEYS EASEMENT.

A deed by the owner of the fee to a railroad company for right of way for railroad purposes conveys only an easement.

## 2. ADVERSE POSSESSION ⇨60(6) — OF RAILROAD RIGHT OF WAY BY OWNER OF FEE.

The owner of fee, subject to a railroad company's easement of right of way, can subject the land to any use, except railroad purposes, which does not interfere with the railroad company's use of such right of way, so that the owner's occupation for many years is not adverse, and is no bar to the railroad company's right to recover possession of the right of way.

## 3. RAILROADS ⇨68 — WIDTH OF RIGHT OF WAY GRANTED BY DEED.

Where a right of way for a "railroad, according to the provisions of the charter," was conveyed by a deed, in which the width of the right of way was left blank, *held* that the deed did not convey merely the width of the main line and side track, but it conveyed a right of way of the width of 200 feet, as determined by the railroad company's charter, though a later deed described a depot site 175 feet wide on one side of the track.

## 4. RAILROADS ⇨82(2) — ABANDONMENT OF RIGHT OF WAY NOT SHOWN BY NONUSER AND ADVERSE HOLDING BY FEE OWNER.

The fact that a railroad company does not require the full width of its right of way at a particular time for railroad purposes is no evidence of an abandonment which involves an intention to cease maintaining and operating the road over the right of way, and an adverse holding of the land's surface by the fee owner, and the acquiescence of the railway company therein, do not indicate an abandonment.

## 5. LIS PENDENS ⇨5—ADVERSE CLAIMANT TO RIGHT IN LAND.

An adverse claimant to a right in land is not affected by the pendency of a suit about the land unless he is a party thereto.

## 6. RAILROADS ⇨68 — ESTOPPEL TO CLAIM RIGHT OF WAY GRANTED.

An agreement by a railroad company with the owner of the fee as to the description of his land, or an agreement with another in respect thereto, such as a lease with a description not inconsistent with the use of the right of way granted, cannot estop the company, and thereby disqualify it to discharge its obligations to the public, but such agreement, if possible, will be referred to the owner's right to use the fee subject to right of way.

## 7. RAILROADS ⇨82(1)—COMPANY CANNOT DIVEST ITSELF OF RIGHT OF WAY.

A railroad company is without power to divest itself or any part of its right of way so as

to cripple it in the discharge of its duties to the public.

Appeal from Chancery Court, Greene County; Hugh M. Tate, Chancellor, sitting by interchange because of the disqualification of Chancellor Haynes.

Suit by the Southern Railway Company and Walker D. Hines, as Director-General of Railroads, against F. A. Vann and wife. Decree for defendants, and plaintiff appeals. Decree of the chancellor and Court of Civil Appeals reversed, and decree entered for complainant.

L. D. Smith, of Knoxville, and Susong & Biddle, of Greeneville, for Southern Ry. Co. Shoun & Trim, of Greeneville, for Vann and others.

LANDSEN, C. J. This suit was brought by the Southern Railway Company to have its rights declared under two certain deeds executed to it for railway purposes by Thomas D. Arnold. The pleadings present the question of whether the railroad company is entitled to 100 feet on each side of the center line of its main line, or whether it is only entitled to enough land for a main line and a switch track. The defendants claim the lands through Arnold, and their answer makes the issues just stated. There is also a question of estoppel, which will be referred to later.

Arnold made two deeds to the complainant's predecessor in title, one dated March 18, 1853, and the other dated March 29, 1853. The material parts of the deed dated March 18, 1853, are as follows:

"This indenture, made and entered into this second day of March, in the year 1853, between Thomas D. Arnold, of the county of Greene and state of Tennessee, of the one part, and East Tennessee & Virginia Railroad Company of the other part, witnesseth that the said Arnold, for the consideration of the benefit conferred upon the public, as well as myself, I have by these presents bargained and conveyed, and do hereby bargain and convey, unto the said East Tennessee & Virginia Railroad Company, and their successors in office during the continuance of said road, the right of way through my tract of land, situate and lying in the county aforesaid, and containing about 70 acres, being in the Greeneville district, and a part of it within the corporation of the town and adjoining the Hawkins road on the N. east, and the Wyley's Mill road on the S. west, and to include the right of way as laid down and located by the company at this time, — feet on each side of the center of said road; and the said company, by themselves, their agents or contractors under them, shall have full power and authority to enter upon the said land, and to build and construct the said road, by the removal of earth, rock, timber, and any and everything which may be necessary to remove to make a

perfect and complete railroad according to the provisions of the charter of said company, shall have good right and title to the land hereby conveyed for a right of way, and shall have, hold, and enjoy the same as long as the same may be used for the purposes of a railroad, and no longer, and I will hereby warrant and defend the title to the same against the lawful claims of all persons, and I do further convey to the said company a sufficient quantity of ground anywhere on the line of said road on my said tract of land for the purposes of a depot and for nothing else, and no building shall be erected thereon except it be indispensable to the depot; and if said road shall at any time cease to be used as a railroad, or the said depot should be changed or cease to be used, then the ground hereby conveyed for the right of way, as well as for a depot, with all the houses and other appurtenances and fixtures, shall revert to me and my heirs forever."

This deed was executed before any work was done in Greene county towards the construction of the railroad. But afterwards a question arose in the minds of some of those interested as to the exact meaning of the references in the foregoing deed to the depot site. To clarify this, and to make his meaning plain, Gen. Arnold executed the following deed dated May 29, 1858:

"Whereas, heretofore, to wit, upon the second day of March, 1853, I was requested by Dock Samuel B. Cunningham, Major John McGaughey, and others, stockholders and directors of the East Tennessee & Virginia Railroad, to make a deed conveying to the company the right of way through my lands within the corporate limits of Greeneville, and also for a depot and depot purposes, assuring me that if I gave them the right of way and land for the depot I would lose nothing in the end; and, being thus assured, I made a deed to the company as requested, giving them full scope and verge for both right of way and also for a depot and depot purposes.

"And whereas, sundry carping and discontented persons in the company and out of it have found much fault and have questioned my sincerity, the arrangements and the deed which Dock Cunningham accepted as all he wished or desired, and I understand that Dock is still well satisfied with the arrangement, but others are not, and say I endeavored to make one too indefinite, and that they desire a more limited and definite boundary; and whereas, I am a man of peace and conciliation, and also a warm friend of the road and the present board, and being very anxious to produce harmony and fraternal feeling to the end that the business of said road may go on prosperously and successfully, I have agreed to narrow down and modify my former deed, and said company through their president accepting this modification in writing; that is to say, I agree that the company may occupy under the deed I made the following boundaries for a depot and depot purposes:

"Beginning at a stake on the outside rail of the side track one hundred and seventy-six feet from my southwest line or line running

between myself and Ephraim Davis, therewith said rail three hundred and two feet to a stake by the side of the rail, then at right angle to the railroad to a stake one hundred and seventy-nine feet, then three hundred and two feet parallel with the said track to a stake, then to the beginning.

"This ground was laid off by Mr. John Ingle, Esq., Daniel Kennedy, and Dock Cunningham was present, and I also was present, and one and all agreed to it as a final settlement of the depot questions, with additional agreement that the house is to be one hundred and forty feet long, and if it is not that long then ten feet off of each end of this lot is to be dropped by the company and to revert to my use and benefit. And I further agree that on the southwest end and west of the track there is to be a wagon road along the track and as near the track as it can safely be. I also agree that the ground occupied by the wood-house or the temporary depot that is there now, and also the land occupied by the turntable and the bed of the road, is to remain vested in the company as by my deed referred to above. I also agree to open a street on the line of the railroad lot west of the depot, fifty feet wide and running clear through my land, the company agreeing that half of that street shall be on the depot grounds as far as they go, the right to all else under said deed is hereby relinquished to said Arnold and his heirs forever. I do further agree that the company, if it shall desire it, shall at all times have the privilege of loading stock from my wagon yard at the northeast of my ground adjoining the road. The company providing the necessary platform and other appliance for loading from said yard."

The East Tennessee, Virginia & Georgia Railroad Company was the immediate predecessor of complainant. It was chartered by chapter 120, Acts of 1847 and 1848, and in section 23 thereof it was provided that the railroad company should have a right of way of 100 feet on each side of the center of the road, unless a contract with the owner of the land specified a different amount. The language of the charter upon this point is as follows:

"In the absence of any contract with the said company in relation to lands through which the said road may pass, signed by the owner thereof or his agent, or any claimant or person in possession thereof, which may be confirmed by the owner, it shall be presumed that the land upon which the said road may be constructed, together with the space of one hundred feet on each side of the center of said road, has been granted to the company by the owner thereof, and the said company shall have good right and title thereto, and shall have, hold, and enjoy the same as long as the same be used only for the purposes of said road, and no longer."

[1-3] It is contended by defendants that this charter provision applies only in event the railroad company should acquire the land by condemnation. It is contended by

the complainant that the provision applies not only to condemnation cases, but to every case in which the company acquires land, either by condemnation or contract, and the width of the roadway is not defined by the contract conveying the land.

We are of opinion that the rights of complainant under the two deeds set out must be determined from a proper construction of the contracts between its predecessor in title and Gen. Arnold. The Legislature did not intend to write a description of the land conveyed into a deed which is silent upon the subject, and, indeed, it is doubtful if the Legislature could do so. The provision of the charter above referred to is valuable in that it shows the width of the roadway which the state and the incorporators deemed necessary for the proper construction and operation of the road. It is manifest, and is not disputed in this case, that the deed from Arnold to the company conveys only an easement of way in the land. This is important only with reference to the statute of limitations. *Railroad Co. v. Telford*, 89 Tenn. 294, 14 S. W. 776, 10 L. R. A. 855; *Railroad Co. v. French*, 100 Tenn. 209, 43 S. W. 771, 68 Am. St. Rep. 752; *Railroad Co. v. Donovan*, 104 Tenn. 465, 58 S. W. 309; *Railroad v. Crow*, 108 Tenn. 17, 64 S. W. 485; *Railroad Co. v. Telegraph Co.*, 101 Tenn. 63, 46 S. W. 571. These authorities also hold that the owners of the fee have the right to the use of the land so long as such use does not interfere with the necessary operation of the railway. As owner of the fee, subject to the easement, the grantor can subject the land to any use which he sees proper, but so as not to interfere with the use of the land by the railroad company for railroad purposes. Such occupation by the grantor is not adverse to the claim of the company. The claim of the two are consistent, and it is only the occupation which can become inconsistent. The use of the land by the owner of the fee for any purpose, except railway purposes, is not inconsistent with the right of the railway company to exercise its easement in the land for the construction and operation of its road. The nature of a conveyance to the corporation for railroad purposes prevents the corporation from claiming or occupying the land for other purposes, and restricts its claim to the occupancy of the land to the needs of the company for proper and legitimate use of its road. Therefore the fact that the defendants have occupied the land for many years is no bar to the right of the complainant to recover, if it is otherwise entitled to relief.

Reverting to the deed from Arnold to the railroad company dated March 18, 1853. The consideration expressed in the deed is the benefit which the grantor and the public will receive from the construction of the

road. The description of the land conveyed is "a right of way through my tract of land, \* \* \* and to include the right of way as laid down and located by the company at this time, \* \* \* feet on each side of the center of said road." This deed was executed before any work was done toward locating the road on Gen. Arnold's land. This requires a construction of the deed without reference to any physical fact which may have existed at the time. None is shown in the record. The deed also confers upon the company, their agent or contractors, full power and authority to enter upon the land, and to build and construct a road by the removal of earth, rock, timber, etc., so as to make a "complete railroad according to the provisions of the charter of said company."

The descriptive words are vague and indefinite, without reference to a definition of a right of way of the company. The conveyance of a right of way will have reference to the charter definition of such right of way, unless there is something in the conveyance which gives it another meaning. We have seen that the Legislature granted the company the right to acquire 100 feet on each side of the center line of the road-bed, and Gen. Arnold conveyed to it a right of way through his lands, and authorized it to enter upon the land, and to build and construct the road, so as to make a perfect and complete railroad according to the provisions of the charter. Of course, the grantor could have conveyed a right of way of such width as the railroad company would have accepted. The case of which we are speaking is a case in which the conveyance does not specify any width for the right of way. In such a case the natural meaning of the conveyance is to convey to the railroad company such width of way as is defined in its charter. *N. C. & St. L. Railway Co. v. McReynolds (Ch.)* 48 S. W. 258; *Railroad Co. v. Raine*, 114 Tenn. 569, 86 S. W. 857; *Southern Railway v. H. W. Pardue, MS.*; *C., N. O. & T. P. Railway v. Sharp*, 207 S. W. 728.

The Court of Appeals held that the conveyance granted to the company a right of way the width of its railroad track and a switch track. It based its conclusion partly upon the deed and partly upon the facts arising after the execution of the deed. We do not think that the fact that the width of the right of way is left blank in the deed evidences an intention to convey only the width of the main line and side track. It means that the grantor conveyed a right of way "located by the company at this time." No right of way was located upon the ground at the time, and no other location is shown in the record, except that contained in the charter.

The fact that the company constructed cer-

tain buildings and platforms upon the right of way, and that defendants constructed certain fences near the track, cannot reflect upon the meaning of the deed, because it is not doubtful, and at most all that could be said of such subsequent transactions is that they are constructions of the instrument placed upon it by the parties. It appears, however, that the parties soon disagreed about the meaning of the deed as to the width of the right of way, and these subsequent acts are inconsistent with each other. They are not mutual constructions of the deed, and appear to have been constructions which each party placed upon it for himself.

The second deed executed by Arnold to the company was executed for the sole purpose of locating and describing a lot upon which to erect a depot. This deed describes lot of land to be used for depot purposes, and begins at the track, and runs from the track 175 feet. It is said by defendants that this subsequent act of Arnold and the company shows that they both understood that the first deed did not extend from the center of the track 100 feet, because a right of way of such width would be sufficient for a depot. The lot conveyed by the second deed extends more than 100 feet from the center line of the track. The record does not show the width of land needed by the company for depot purposes other than what is shown by the deed. It shows clearly that the company desired more than 100 feet. This deed also provides for a wagon road along the track, and as near the track as it can safely be. It is argued by defendants that this shows that the parties understood the former deed to convey a width of way equal to the main line and the side track. But in the next sentence Gen. Arnold recites that the ground occupied by the woodhouse or the temporary depot that is there now, and the land occupied by the turntable, and the "bed of the road is to remain vested in the company as by my deed referred to above." This sentence would indicate that the first depot, the turntable, and the bed of the road were conveyed by the former deed, because they were to remain vested in the company. After providing in the second deed that he was to open a street on the line of the railroad west of the depot 50 feet wide, and running through his land, he then stipulated, "The right of all else under said deed is hereby relinquished to said Arnold and his heirs forever." It might be said that this expression implied that other lands were conveyed in the first deed than those referred to. But such expressions may be misunderstood if literally applied to particular things, because they are often used as an omnium gatherum out of the abundance of caution. We hold that, upon a proper construction of

the deed, the width of the right of way conveyed by Gen. Arnold must be determined by the charter provision, and is therefore 200 feet.

[4] The defendants insist that notwithstanding the above construction of the deeds the complainant is estopped to claim more than the right of way at present occupied, because of certain facts set out in the record. The Court of Civil Appeals finds these facts as follows, and holds that the complainant is estopped:

"The lease by the railroad to Doughty and O'Keefe in 1887 of two lots originally belonging to the Arnold estate, the boundaries of which lots are within the two hundred foot limit; the institution by the railroad company in the chancery court at Greenville in 1872 of a suit against the Arnold heirs and Hirsch, by which the railroad company asserted its right to a two hundred foot strip of land, and, upon answer filed by the defendants denying such right, the railroad allowed the suit to remain upon the docket for eight years, and then, under a rule to prosecute, the case was dismissed at complainant's cost; the lease by the railroad, in 1890, to W. A. Godfrey of a piece of ground thirty by twelve feet in dimension, the same being described in the lease contract as adjoining the Godfrey lot, the Godfrey lot being now Mrs. Vann's lot and the lot in controversy; the lease by W. E. Milburn to the railroad company in 1891 of a warehouse standing within ten or fifteen feet of the end of the cross-ties, and within the two hundred foot strip of ground.

"These and other circumstances, which the proof abundantly establishes, would undoubtedly estop the complainant if it were an individual, and we confess that we can see no reason why the fact that the complainant is a railroad company should render it immune to this well-settled doctrine. The railroad has too often and in too many ways distinctly recognized complainant's title to now be heard to dispute it, and we hold that the defenses of estoppel, abandonment, and surrender are well established by the proof and sustained by the law. \* \* \*

"We hold that the railroad company lost whatever right it may have had in the land in controversy, or any easement it may have had therein, when it abandoned the turntable, platform, and the temporary station which were located thereon. This abandonment occurred many years ago, probably more than forty years ago, and after this great lapse of time, and after having once by legal proceedings attempted and failed to assert its rights to this strip of ground, and after having repeatedly recognized the rights of adversary parties, to allow the railroad company at this late date to claim this ground would be, we think, a violation of the plainest principles of equity and justice.

"The deed upon which complainant relies provides expressly that the property shall revert to the grantor in case of abandonment, and we hold and find that the railroad has long since abandoned the land it now seeks to recover.

"We furthermore are of the opinion that the railroad having more than twenty years ago received actual notice of the hostile character of the claim of defendants and of those under whom they hold, and having acquiesced during this long period of time therein, without actively asserting whatever rights it may have had, is barred by the statute of limitations."

The Court of Appeals was of opinion that the case of *Railway Co. v. Telford*, 80 Tenn. supra, was authority for the proposition that, when the owner of the fee has possession claiming adversely to the railroad, the possession so held would complete the bar of the statute of limitations, and was also evidence of an abandonment by the company. We think this is a misconception of the *Telford* Case and other cases. *Telford* had had possession of the railway's right of way for sufficient time to complete the bar of the statute if the possession had been adverse in its nature. But after the company acquired an easement of way the landowner remained the owner of the fee, and his possession of that part of the land not needed by the company for railway purposes was not inconsistent with the company's claim to its easement. Therefore no length of possession would bar the right of the claim. It was for this reason that the court said in the *Telford* Case that the possession was not had under a notice to the owner of the easement that the possession was adverse to his rights. Abandonment referred to is not nonuser merely. It must be an abandonment of the right of way for railroad purposes. The fact that the company does not require the full width of the right of way at any particular time for railroad purposes, and therefore does not use it in connection with the construction and operation of its road, is no evidence whatever of an abandonment. Before an abandonment can be established there must be shown the intention upon the part of the company to cease maintaining and operating its road over the right of way. The adverse holding of the surface of the land by the owner of the fee, and an acquiescence therein by the railway company, are no indications of an abandonment. There is no inconsistency in the claim of the feeholder to the railway company.

[5, 6] In considering the defense of estoppel it is necessary to have in view the nature and objects of the railway company. It is created by the law to serve the public in transportation of freight and passengers. The main object of this creation is the public service. Of course, the stockholders are permitted to make a profit upon the investment; but this is incidental to the granting of the charter, and is not the reason impelling the Legislature to create the company.

It has been given its extraordinary powers for the benefit of civilization. *Lumber Co. v. Railroad*, 129 Tenn. 178, 165 S. W. 224; *M. & P. R. Co. v. Jacobson*, 179 U. S. 287, 21 Sup. Ct. 115, 47 L. Ed. 194. In the first case cited it was held that the foregoing was the law of their creation, and that this consideration enters into and controls every facility of transportation which the railroad company acquires to aid it in the performance of its duty to the public.

It is elementary that an adverse claimant to a right in land is not affected by the pendency of a suit about the same land unless he is a party thereto. Therefore the pendency of the case of *Arnold v. Arnold* did not affect the rights of the railway company for the reason that it was not a party thereto. It should be remarked that at the time of the pendency of this suit the railroad company had a suit pending against the *Arnold* heirs, in which it made the same claim as to the width of the right of way that it is making in this suit. This suit was dismissed without a decree upon its merits, and therefore nothing was adjudicated. Nor do we think that the lease by the railroad to *W. A. Godfrey* of a piece of ground as set out above effects an estoppel. It is true that the description of this lease called for adjoining the land in controversy, but this description is not inconsistent with the use to which the railroad intended to put the right of way when its uses required its possession. The owner of the fee had the right to occupy the surface of the land until the railroad desired it for railroad purposes.

We think it is questionable if the railroad company could estop itself by an agreement as to the description, use, and occupation of the fee. It has a duty to perform to the public, and its agreements about the fee of the land with the owner thereof will not be ascribed to an intention upon its part to estop itself in the use of its right of way. Its agreement about its right of way, in order to estop it, must be with reference to the right of way itself, and also to one authorized to appropriate and use the right of way. An agreement by the railroad company with the owner of the fee as to the description of his land, or an agreement by it with another in respect thereto, cannot estop the railway company, and thereby disqualify it to discharge its obligations to the public. Such agreements, if possible, will be referred to the landowner's right to use the fee subject to the railroad's right to use its right of way. We do not say whether the railroad company had the power to divest itself of any of its functions as a common carrier by estoppel.

This holding is abundantly supported by authority, both in our own state and in other jurisdictions. *Railroad v. Telegraph Co.*,

supra; Lumber Co. v. Railroad Co., supra; N. P. R. Co. v. Townsend, 190 U. S. 268, 23 Sup. Ct. 671, 47 L. Ed. 1044; McLucas v. Railway Co., 67 Neb. 603, 93 N. W. 928, 97 N. W. 312, 2 Ann. Cas. 715; Roberts v. Railway Co., 73 Neb. 8, 102 N. W. 60, 2 L. R. A. (N. S.) 272, 10 Ann. Cas. 992; N. P. R. Co. v. State, 84 Wash. 510, 147 Pac. 45, Ann. Cas. 1916E, 1166.

[7] We are therefore of opinion that both the chancellor and the Court of Civil Appeals were in error in holding that the complainant is estopped by any of the acts set out in the opinion of the Court of Civil Appeals. Those acts are not inconsistent with

the company's subsequent claim to the right of way, conceding that the company could estop itself as to its functions as a common carrier. We are further of opinion that the complainant is without power to divest its or any part of its right of way so as to cripple it in the discharge of its duties to the public. It is agreed in the record that the occupation of the lot in question by the railway company is necessary for the proper discharge of its duties as a common carrier. The decrees of the chancellor and the Court of Civil Appeals are reversed, and a decree will be entered here for the complainant, with cost.



HAYTI DEVELOPMENT CO. v. BARNES.  
(No. 19906.)(Supreme Court of Missouri, Division No. 1.  
Dec. 1, 1919.)1. RAILROADS ⇨46—CONTRACT FOR DEED OF  
LAND PROPERLY DISCLAIMED FOR NONPER-  
FORMANCE BY GRANTEE.

Where landowner contracted to plat and convey land to a railroad in consideration that it build its road to the point where the R. survey struck the H. road, and construct a depot there, such owner could disclaim and refuse to convey, where the road was deflected from the R. survey and crossed the H. road three miles away from the point fixed by the contract, and the depot was built 1,300 feet from such point, and about as far from the land; the landowner being entitled to a substantial compliance.

2. VENDOR AND PURCHASER ⇨231(16)—RE-  
CORDED CONTRACT NOTICE TO PURCHASER.

A purchaser of land is charged with constructive notice of the contents of recorded contract to convey.

Appeal from Circuit Court, Mississippi County; Frank Kelly, Judge.

Action by the Hayti Development Company against Seth S. Barnes. Judgment for plaintiff, and defendant appeals. Affirmed.

This is an action brought by plaintiff in the circuit court for Pemiscot county July 15, 1915, under section 2535 of the Revised Statutes of 1909, to try the title of the respective parties plaintiff and defendant to 20 acres of land in the town of Hayti included in "Oates' Second addition to the town of Hayti (Gayoso), Mo." The petition states that plaintiff is the owner of the land, and that the defendant claims to have some right, title or interest in and to the same, which claim is unfounded and untrue. The prayer asks that the court "hear and determine the right, title, claim, and interest of the parties, plaintiff and defendant, \* \* \* and to adjudge the same by decree of this court." The answer admits that plaintiff is a corporation, and that defendant "claims title to each and every odd-numbered lot in all the blocks or parts of blocks in all of the 20 acres as described in plaintiff's petition" as per the plat of Oates' Second addition, and avers "that he is the owner" of each and every one of said lots. It denies that plaintiff has any interest in any of said lots, and denies each and every other allegation of the petition. The prayer is as follows:

"Wherefore defendant prays the court to hear and determine the right, title, claim, and interest of the parties plaintiff and defendant herein, and to adjudge and decree defendant to be the owner of each and every odd-numbered lot in all of the blocks or parts of blocks in said 20 acres as described in plaintiff's peti-

tion, \* \* \* and for such other and further relief as to the court they seem equitable in the premises."

The cause was removed by change of venue to the circuit court for Mississippi county, where it was tried, and on July 5, 1916 the court found and adjudged the entire title to all the lots in the 20 acres to be vested in the plaintiff, and concluded as follows:

"It is therefore determined, ordered, and adjudged and decreed that the plaintiff be, and it is hereby, determined and decreed to be owner in fee-simple title in and to the above-described premises, and that the defendant has no right, title, interest, or estate, either legal or equitable, present or contingent, vested or remainder, in and to said land, and defendant is hereby barred and precluded from setting up any right, title, interest, or claim in and to the same or any part thereof, and that the whole of said title is hereby decreed to be well vested in the plaintiff."

It was admitted at the trial that the common source of all the title and interest claimed by the respective parties was Laura M. Oates, Mamie A. Oates, and Anna G. Oates, who are called in the record the Oates sisters. Anna died in July, 1902, and her title inured to her sisters by inheritance. The plaintiff claims under a deed of trust "in the usual form" executed by the Oates sisters to one Diggs, trustee, conveying the land in controversy, with several hundred acres of other lands in the vicinity, to secure to the Commercial Bank of New Madrid, Mo., the payment of certain notes described therein. This deed of trust was dated July 25, 1905, and was filed for record on the 28th of the same month in the recorder's office of Pemiscot county; also a trustee's deed from said trustee to M. J. Conran, dated March 25, 1908, and filed for record in the recorder's office of said county on the next day, conveying the same lands; also a quitclaim deed from Conran to the plaintiff corporation dated January 26, 1912, and filed for record in said county on March 11th following. Although another deed of trust from the Oates sisters and foreclosure thereunder were included in the proof of plaintiff's title, its description is unnecessary to the determination of these issues.

The defendant claimed under a contract between the Oates sisters and himself dated August 15, 1900, and duly acknowledged by all the parties on the same day and filed for record in the office of the recorder of deeds of Pemiscot county on May 6, 1901. This contract recited a consideration of \$1 paid by defendant—

"and the promotion, extension, and construction of the tracks of the Memphis & St. Louis Railroad Company by said company to a point on the north line of the St. Louis & Southern Railroad where the line of the said Memphis &

St. Louis Railroad as surveyed by Engineer E. C. Randolph intersects said right of way of the St. Louis, Kennett & Southern Railroad."

By its terms the three sisters agreed to plat the land as an addition to Gayoso City, laying it out in town lots, and—

"to make, execute, deliver to Seth S. Barnes, for said consideration expressed, a good and sufficient warranty deed to each and every odd-numbered lot in all of the several blocks or parts of blocks included in said platted addition as herein contracted for as soon as the track of the Memphis & St. Louis Railroad shall be made to said above-described points on the north line of the right of way of the said St. Louis & Southern Railroad and depot established on said line of the said Memphis & St. Louis Railroad at a point about 300 yards north of the south line of section 34 of township 19 of range 12 east. The cost of surveying, platting, filing, and recording of said described tract or town plat or addition shall be borne equally by the said parties to this contract."

The 20 acres was platted by the Oates sisters in accordance with the terms of this contract, but it is questioned in the evidence whether defendant paid any part of the cost. He had, through the corporation named in it and of which he was the beneficial owner of the entire capital stock, proceeded with the construction of the road, completing about 6 miles, and had secured the right of way along the Randolph survey to the Hayti terminus, on June 17, 1901, when he sold the capital stock of the company to Brinkerhoff, Cunningham, and others, promoters and controllers of another railway company to whom the capital stock and physical property of the Barnes Company were delivered. Its contract of sale provided for the completion of the line located by the Barnes Company, and also contained the following provision:

"It is further agreed that all donations of every kind and character heretofore made, and promised to be made, and which have not been collected, shall be collected by the purchasers, and they shall be entitled to retain the same for their own use, except as to such collections as shall be made from donations at Hayti, one-half of the amount collected by the purchasers shall be paid to the vendors."

The Brinkerhoff-Cunningham Company completed the line to and through Hayti, where there was a divergence of from 60 to 100 feet from the line surveyed by Randolph, and some change, which will be noticed in the opinion if necessary, was made in other respects in Hayti.

The defendant introduced upon the trial a duly certified copy of a decree of the circuit court for Butler county purporting to have been entered at the October term thereof, 1913, and recorded in the office of the recorder of deeds for Pemiscot county. This decree was made upon the trial of a cause

in which Seth S. Barnes was plaintiff, and Laura M. Trautman and Mamie A. Dunn, the surviving Oates sisters, were defendants, and purported to adjudge and decree that the plaintiff was the owner of the odd-numbered lots involved in this suit and described in the Oates-Barnes contract, that the defendants in said suit had no right or interest in said lots, and that the defendants make, execute, and deliver to the plaintiff a good and sufficient deed conveying each of said lots to plaintiff. No other lands are mentioned in the decree than these lots in Pemiscot county. It recites the appearance of the defendants in person at the trial. No other portion of the record of that case was introduced or offered, but the parties assume in argument, and there is parol evidence tending to show, that such a cause was instituted in Pemiscot county and transferred by change of venue to Butler county, where final judgment upon voluntary dismissal was entered on May 28, 1908, and that it was reinstated by the Butler circuit court during the term at which it was tried.

Oliver & Oliver, of Cape Girardeau, and E. F. Sharp, of Marston, for appellant.

R. L. Ward, of Caruthersville, and Thomas Gallivan, of New Madrid, for respondent.

BROWN, C. (after stating the facts as above). 1. This suit was instituted and prosecuted to the judgment now before us for review under the provisions of section 2535 of the Revised Statutes of Missouri 1909. It cannot be denied that the plaintiff, by its evidence, proved a perfect legal title from the Oates sisters, the common source, through mesne conveyance culminating in its deed from Conran.

The defendant claims from the same common source by a contract duly executed by the Oates sisters to himself, whereby they agreed that, upon the full completion on his part of a railroad expected to develop these same lands, they would upon its completion convey him each and every odd-numbered lot in the survey of said land which should be made. It is needless to say that this contract did not invest him with a legal title. It did not purport to do so. In fact, its purport was directly to the contrary. It only bound the Oates sisters, when he had finished the work which was agreed should constitute the actual consideration, to make, execute, and deliver to him for such consideration a good and sufficient warranty deed to the lots. This was the manner and time chosen by the parties for vesting the legal title, which remained in the original owners. The effect of the contract was to give the defendant, when he should have performed it on his part and the owners had refused to perform on theirs, a remedy by suit in equity to enforce such performance and thereby

secure the legal title. This was his situation when this suit was instituted by plaintiff, which had acquired the entire legal title, as we have stated. It instituted this action against him as an adverse claimant of some interest in the land, to have their respective interests adjudicated as provided in that section. It asserted its legal title. On the other hand, defendant, by answer, asserted that he was the legal owner of the title, and it was upon this plea that issue was joined. The respondent asserts that appellant cannot have the relief to which he claims the evidence entitles him under these pleadings, and the court evidently so adjudged, and from that judgment he has taken this appeal, and presents the same question here; that is to say, whether he is entitled to a judgment of the court either compelling the plaintiff to transfer or judicially transferring to him the title he does not possess.

This same question was lately before this court in *Wimpey v. Lawrence*, 208 S. W. 54. It arose in a case involving the effect of a judgment of this character tried upon a legal issue, upon an equitable claim subsequently asserted. In that case, after a careful examination of the history of legislation which culminated in the present provisions relating to this remedy, we held, following the decision of this court in *Brandt v. Bente*, 177 S. W. 377, that in a suit brought under this act:

"The issues must be confined to the pleadings, that the character of the suit, whether legal or equitable, must be determined by the pleadings, and that, where these disclosed that the respective claims were legal only, such issues could not be changed by the introduction of evidence tending to show a right to equitable relief"—citing also *Thompson v. Stilwell*, 253 Mo. 89, 94, 161 S. W. 681; *Graves v. Chapman*, 248 Mo. 83, 154 S. W. 61; *Cousins v. White*, 246 Mo. 296, 151 S. W. 737.

We also cited and distinguished *Hutchinson v. Patterson*, 226 Mo. 174, 126 S. W. 403.

These cases settle the proposition that sections 2535 and 2536 were not intended for an ambush from which either party might raid the title of the other, and that they not only contemplate, but expressly require, the same honest pleadings as are required by the Code where the same remedies are sought in other forms of action. In this case both parties, by their pleadings, stand upon their legal title alone. They assert ownership. This issue, for the purposes of the trial, is no broader than would be the same issue in ejectment, and the defendant cannot support it by proof of facts showing himself entitled to a decree which would confer the title it pleads. He stands no better than he would stand upon a general denial of the title of his adversary.

2. The defendant, for the evident purpose of placing himself in the position of owner

as alleged in his answer, introduced a certified copy of a decree of the circuit court for Butler county appearing from its title to have been entered in a suit pending in that county in which he was plaintiff and the two surviving Oates sisters were defendants, for the specific performance of the contract under which he claims. This record purports not only to decree the execution of a conveyance by the defendants therein to the plaintiff, but also to vest the title to the same odd-numbered lots in the plaintiff, who is defendant in this suit. No part of the judgment roll is introduced showing the jurisdiction of the court, but there is some oral evidence tending to show that the suit was instituted in Pemiscot county four or five years before the entry of this decree in 1913, was thereupon taken by change of venue to Butler county, where it was dismissed by the plaintiff, and about four years afterward was revived by consent of the parties and tried with the result shown in the decree. These facts are, in effect, admitted in argument. It is not necessary for us to search the woods to find whether or not a decree so entered might not, as between the parties thereto, under possible conditions not shown in this record, come within the jurisdiction of the court which entered it, and which was without jurisdiction for the purpose of its institution. *R. S. 1909, § 1753; Castleman v. Castleman*, 184 Mo. 432, 83 S. W. 757; *Ensworth v. Holly*, 83 Mo. 370. It is sufficient to say that at the time of its institution the legal title to the land had passed by conveyance from the Oates sisters to Diggs, under whom the plaintiff claims, placing him and the beneficiaries of his trust to the extent of their interest in the shoes of the Oates sisters. So far as it affected the title of Diggs and of this plaintiff, claiming under him, it was a nullity. The Oates sisters are not parties to this suit.

It follows from what we have said that the judgment of the Mississippi county circuit court is for the right party, and it is therefore affirmed.

RAGLAND and SMALL, CC., concur.

PER CURIAM. In the foregoing opinion of BROWN, C., BLAIR, P. J., concurs in a separate opinion in which WOODSON, GRAVES, and GOODE, JJ., concur.

BLAIR, P. J. [1, 2] Appellant's right to a conveyance of the odd-numbered lots he now claims depended upon his substantial compliance with his contract to build his road to the point where the Randolph survey struck the Houck road and to build a depot near that point. Instead of following the Randolph survey the line of road was deflected eastwardly therefrom and crossed the Houck road 3 miles east of the point fixed by the

contract. The depot was built 1,800 or 1,400 feet east of the place where the Randolph survey reached the Houck line and about as far from the tract in suit. In the circumstances this was not a substantial compliance with the contract. That contract was of record, and respondent had constructive notice of it. It was also open to the most casual observation that appellant had not complied with it. The Oates sisters could have accepted what appellant did and might have conveyed to him. They did not do this, but elected to disaffirm and convey to a third party under whom respondent claims. In my opinion, the case is justly decided on the facts without regard to the questions of pleading. I concur in the result. The judgment should be affirmed.

WOODSON, GRAVES, and GOODE, JJ., concur herein.

WHITWORTH et al. v. DAVEY. (No. 19899.)  
(Supreme Court of Missouri, Division No. 1.  
Dec. 1, 1919.)

1. USURY  $\S$ 55—COMMISSION PAID TRUSTEE UNDER MORTGAGE.

Where one is acting merely as trustee under trust deed, and not for lender, the lender is not liable for such trustee's exaction of a commission and fees for publication of notice of sale not actually made because of discharge of debt by payment and such exaction does not render the loan usurious.

2. USURY  $\S$ 1—No USURY IN ABSENCE OF STATUTE.

In the absence of a law limiting the rate of interest, there can be no usury.

3. USURY  $\S$ 42—RATE CHARGED MUST EXCEED STATUTORY MAXIMUM.

Unless the rate of interest exceeds the applicable statutory maximum, there is no usury.

4. USURY  $\S$ 49 — COMPOUNDING INTEREST SEMIANNUALLY.

In contract fixing rate at 8 per cent. provision for compounding semiannually was void.

5. USURY  $\S$ 102(1)—COMPOUNDING INTEREST DOES NOT WORK FORFEITURE OF EXCESS OF INTEREST OVER LEGAL RATE.

Rev. St. 1909, § 7182, gives a right to recover all interest charged in excess of the legal rate solely for a violation of sections 7179, 7180, 7181, and does not give such right of recovery for a violation of section 7185, prohibiting compounding interest oftener than once a year.

6. USURY  $\S$ 49—COMPOUNDING INTEREST NOT USURY.

Compounding interest in violation of Rev. St. 1909, § 7185, prohibiting compounding oftener than once a year, is illegal, but is not of itself usury.

7. INTEREST  $\S$ 80—RIGHT TO COMPOUND INTEREST STATUTORY.

The right to compound interest is a creature of the statute.

8. USURY  $\S$ 102(1)—No FORFEITURE WHERE AMOUNTS PAID DO NOT EXCEED PERMITTED CONTRACT RATE.

Though contract provided for compounding of interest semiannually, there can be no recovery under Rev. St. 1909, § 7182, of all interest charged in excess of the legal rate, where amounts paid do not aggregate a sum equal to the amount of the principal note, with interest at 8 per cent. compounded annually.

Appeal from Circuit Court, Jasper County; Joseph D. Perkins, Judge.

Action by A. M. Whitworth and others against T. N. Davey. Judgment for defendant was reversed and remanded by the Court of Appeals, which certified the case to the Supreme Court as involving a conflict of decisions. Judgment affirmed.

Frank L. Forlow, of Webb City, for appellants.

Paul N. Davey, of Joplin, and R. A. Mooneyham, of Carthage, for respondent.

BLAIR, P. J. This cause was heard in the Springfield Court of Appeals (185 S. W. 241), and was certified here because one of the judges deemed the opinion to be in conflict with decisions of this court.

On March 14, 1910, appellants executed a note for \$8,850, payable April 1, 1913, to L. N. Manley, with interest "from date at the rate of 8 per cent. per annum, payable semiannually according to the tenor and effect of the interest coupons hereto attached and bearing even date herewith." Six coupon notes were executed. The first was for \$378.76 and represented the interest on the principal note from March 14, 1910, to October 1, 1910. Each of the five remaining coupons was for \$346, six months' interest on the principal note. The five fell due, respectively, on April 1, 1911, October 1, 1911, April 1, 1912, October 1, 1912, and April 1, 1913. Each coupon note was expressed to bear interest at 8 per cent. from maturity. April 11, 1911, new notes were given to cover the interest to April 1, 1911. Each of these drew interest at 8 per cent., compounded annually. June 18, 1912, appellants made the first cash payment, \$1,539.97. A second cash payment of \$717.53 was made April 29, 1913. May 7, 1914, a final payment of \$9,413.79 was made. Of this sum \$87.75 was for publication of trustee's notice of sale and trustee's commission, which was paid directly to the trustee, who had advertised a sale, but did not actually make it, because the debt was discharged by payment on the day set therefor. The sums paid respondent were therefore \$1,539.97 on June 18, 1912, \$717.53

on April 29, 1913, and \$9,826.04 on May 7, 1914.

The petition alleges that the "bond or obligation and coupons \* \* \* was and is usurious and unenforceable on its face in requiring the plaintiffs to pay more than 8 per cent. per annum, payable semiannually, for the money loaned to them, and in compounding interest oftener than once a year," and that by reason thereof respondent was entitled to no more than his principal and 6 per cent. simple interest, whereas he demanded and was paid the sum of \$718.91 in excess of that amount. Judgment for that amount and for costs, expenses, and a reasonable attorney's fee is prayed. The trial court gave judgment for defendant.

[1] I. We agree with the Court of Appeals (185 S. W. loc. cit. 247) that the sums paid the trustee for commissions and expense of publication of notice cannot be charged against respondent.

II. The petition alleges and appellants' evidence shows that the overpayment which they contend resulted from a usurious exaction was made to cover semiannual interest upon interest. As pointed out by the Court of Appeals, this is an action under section 7182, R. S. 1909. This section provides for the recovery by the payor of any sum paid in excess of the rates prescribed by the "three preceding sections." These sections provide that: (1) In the absence of an agreed rate, 6 per cent. shall be collectible on moneys due on written contracts and accounts and in other cases in which interest is agreed to be paid, but the rate is not fixed; (2) the parties may agree in writing for the payment of interest, not exceeding 8 per cent., "on money due or to become due upon any contract"; and (3) interest upon judgments upon contracts bearing more than 6 per cent. shall bear the contract rate, and other judgments shall bear 6 per cent.

In 1845 (R. S. 1845, §§ 6 and 7, p. 615) provisions permitting the compounding of interest once a year were enacted. Section 7185, R. S. 1909, reads as follows:

"Parties may contract, in writing, for the payment of interest upon interest; but the interest shall not be compounded oftener than once in a year. Where a different rate is not expressed, interest upon interest shall be at the same rate as interest on the principal debt."

[2-4] Under these sections it is lawful for parties to contract in writing for interest at the rate of 8 per cent. per annum, compounded annually. In this day and age, in the absence of a law limiting the rate of interest, there can be no usury. *Newton v. Wilson*, 31 Ark. 484. Further, unless the rate of interest exceeds the applicable statutory maximum,

there is no usury in a particular case. *Black's Law Dictionary*; *Webster's International Dictionary*; *Parham v. Pulliam*, 45 Tenn. (5 Cold.) 497; *Rosenstein v. Fox*, 150 N. Y. 354, 44 N. E. 1027; *Kreibohm v. Yancey*, 154 Mo. 67, 55 S. W. 260. The interest contract in this case is in writing, and it fixed an 8 per cent. rate, to be compounded semiannually. The provision for compounding oftener than once a year was void. *Western Storage Co. v. Glasner*, 160 Mo. loc. cit. 46, 47, 68 S. W. 917.

[5, 6] Section 7182, R. S. 1909, under which this action is brought, gives a right of action, by specific reference, solely for violation of sections 7179, 7180, and 7181. It does not purport to give a cause of action for a violation of section 7185, which prohibits compounding interest oftener than once a year. Compounding interest in violation of section 7185 is illegal, but it is not of itself usury. Such is the necessary effect of the ruling in *Western Storage Co. v. Glasner*, supra, and that rule has the support of reason and the great weight of authority. *Webb on Usury*, § 127; *Tyler on Usury*, p. 243; *Moury v. Bishop*, 5 Paige, Ch. (N.Y.) loc. cit. 103; *Palm v. Fancher*, 93 Miss. 785, 48 South. 818, 33 L. R. A. (N. S.) 295, and note.

[7, 8] The collection of compound interest is the sole basis of the charge of usury in this case. The right to compound interest is a creature of the statute. Courts denied it, not because it constituted usury, but on the ground that it was harsh and oppressive and "tended to usury." A computation discloses that the amounts paid on the notes do not aggregate a sum equal to the amount of the principal note with interest at 8 per cent., compounded annually. In view of this fact and of the principles stated, there can be no recovery in this case under section 7182, since every right of action under that section must be grounded on usury actually paid to the creditor, and the test of usury under that section is the payment of interest in excess of the applicable statutory rate.

III. With most of the opinion of the Court of Appeals we agree. In our opinion, it fell into error when it held, as we understand its holding, that a payment of compound interest constitutes usury in every case in which it exceeds the written contract rate, although the total amount paid does not exceed the amount which could lawfully be exacted and paid on a written obligation. Other than the semiannual compounding feature of the contract, there is no suggestion that there was any trick, fraud, or intent to cover up or secure usurious interest. This disposes of the only question raised by appellants.

The judgment is affirmed.

All concur.

**READER et al. v. WILLIAMS. (No. 20104.)**

(Supreme Court of Missouri, Division No. 1.  
Dec. 1, 1919.)

**1. FRAUDS, STATUTE OF §63(1)—ACQUISITION OF TITLE BY ADVERSE POSSESSION NOT AFFECTED BY STATUTE OF FRAUDS.**

The statute of frauds constitutes no obstacle to the acquisition of title by adverse possession.

**2. ADVERSE POSSESSION §64 — POSSESSION UNDER PAROL GIFT ADVERSE FROM INCEPTION.**

When one is put into possession of lands under a parol gift, the possession of the donee is adverse from its inception.

**3. ADVERSE POSSESSION §85(4)—SHOWN BY POSSESSION UNDER PAROL GIFT.**

That one is put in possession of land under a parol gift is itself evidence of adverse possession.

**4. ADVERSE POSSESSION §115(5) — PAROL GIFT OF LAND QUESTION FOR JURY.**

In a suit to quiet title based on adverse possession of land under a parol gift, the question whether there was a parol gift held, under the evidence, for the jury.

**5. APPEAL AND ERROR §1010(1)—FINDING SUSTAINED BY SUBSTANTIAL EVIDENCE WILL NOT BE DISTURBED.**

In a law action a finding sustained by substantial evidence will not be disturbed on appeal.

**6. ADVERSE POSSESSION §109—RECOGNITION OF TITLE IN ANOTHER AFTER STATUTORY PERIOD IMMATERIAL.**

Where title to realty has vested after 10 years, under the statute, a mere recognition of another's title thereafter cannot of itself re-vest it.

Appeal from Circuit Court, Macon County;  
Nat M. Shelton, Judge.

Suit by John Reader and others against James E. Williams. Judgment for plaintiffs, and defendant appeals. Affirmed.

Newlan Conkling and S. J. & G. C. Jones, all of Carrollton, for appellant.

Ed. S. Jones, of Macon, for respondent.

**BLAIR, P. J.** This is a suit to quiet title to 40 acres of Macon county land. Respondents, the surviving husband and children of Jennie Reader (née Williams), deceased, had judgment, and this appeal followed. The petition alleges, in substance, that in 1901 Jacob S. Williams, Mrs. Reader's father, made a parol gift of the land to her and put her in possession; that she occupied the land as hers until her death in 1912; that plaintiffs have had possession since and are now in possession; and that title has vested under the 10-year statute of limitation. Appellant

claims under a deed from his father, Jacob S. Williams, executed after Mrs. Reader's death.

I. Appellant's principal contention is that the evidence is not sufficiently "clear, cogent, and convincing" to establish a parol gift. Typical of the cases cited are *Johnson v. Quarles*, 46 Mo. 423; *Russell v. Sharp*, 192 Mo. 270, 91 S. W. 134, 111 Am. St. Rep. 496, and *King v. Isley*, 116 Mo. 155, 22 S. W. 634. These are cases to establish trusts and for specific performance of oral contracts for conveyances of land. In such cases the gift or contract is the basis of the claim, and its enforcement in equity is the thing sought. Appellant's argument seems to assume this is such a case. The contrary is true. The respondents rely upon a title by adverse possession purely legal in its nature. The petition alleges respondents had acquired title by force of the 10-year statute. There is no allegation grounded upon equitable rights growing out of the gift and subsequent possession, improvements, etc. The cases cited have no application.

[1] II. No investiture of title by or through the gift is asserted. The statute of frauds constitutes no obstacle to the acquisition of title by adverse possession.

III. It is said there is no evidence tending to prove title by adverse possession. Appellant does not argue the question, nor does he cite cases in support of this position. There is ample evidence that Jacob S. Williams, in 1901, bought the land for \$200; stated he intended to give it to his daughter, Jennie Reader, for a home; subsequently stated he had given it to her; the land was poor and unimproved and uncleared; the Readers fenced it, cleared it, put it in cultivation and in pasture, built a three-room house and a barn and corn cribs on it, dug a well and set out a small orchard, occupied it continuously until Jennie Reader's death in 1912, and the family have occupied it since; that Reader paid the back taxes for 1900 and the taxes for 1901 to 1910, inclusive, except for 1904, for which year Jennie Reader paid them, personally; that the property was assessed to John Reader for the year of the trial; and that Jacob S. Williams paid no taxes and exercised no rights over the property after putting his daughter and her family in possession in 1901. Jennie Reader and Jacob S. Williams both died before the trial. For defendants there was evidence tending to show statements and actions of Jacob S. Williams inconsistent with the idea of a parol gift of the land to his daughter; evidence that he, in 1910, had notice served on John Reader, the husband, to vacate the property, and that Reader had admitted he did not claim the land. A letter written by Mrs. Reader in March, 1912, was offered, in which, among a great many other things not relevant in this case, she wrote:

"We are still on the 40. Father hasn't made a move since the notice, and if he only would and have it over with, I'd feel so much better. I wrote to Charlie telling him how I felt & begging him to tell father & ask him to put us off but so far have heard nothing. I really think father isn't treating me right. He knows how poorly I've been & how the mind affects the body & this way I'm worried and uneasy all the time. John won't get off till he is put off if he lives here 40 yrs. & I tell him I am going to move to or very near New C. before garden making time & I am. He said he knew I wouldn't stay by him but I begged him to go with us so we could all be together, told him how his people gave us nearly all our fruit & we could get so much more if we didn't live so far away."

Appellant also introduced a letter from Reader to his brother-in-law, C. S. Williams. This indicates a friendly attitude to the addressee, and refers to usual topics, until in closing Reader writes that Jacob S. Williams and appellant have lied to him and tried to cheat him out of all he has made in 10 years, and are trying to "rob the boys so they will be left at the mercy of the world." The letter concludes with some threats. This was dated November 8, 1913.

[2, 3] The law of this state is that when one is put in possession of lands under a parol gift the possession of the donee is adverse from its inception. *Rannels v. Rannels*, 52 Mo. loc. cit. 114; *Hargis v. Railway*, 100 Mo. loc. cit. 217, 13 S. W. 680. The fact that one is put in possession under a parol gift is itself evidence of adverse possession. *Allen v. Mansfield*, 108 Mo. loc. cit. 348, 351, 18 S. W. 901. This is in accord with the weight of authority. *Campbell v. Braden*, 96 Pa. loc. cit. 390; *Thomson v. Thomson*, 93 Ky. 435, 20 S. W. 373; *Sires v. Melvin*, 135 Iowa, 460, 113 N. W. 106; *Stewart v. Duffy*, 116 Ill. loc. cit. 51, 6 N. E. 424; *Trotter v. Neal*, 50 Ark. loc. cit. 345, 7 S. W. 384; *Owsley v. Owsley*, 117 Ky. loc. cit. 63, 77 S. W. 397; *Davis v. Bowmar*, 55 Miss. loc. cit. 767; *Craig v. Craig*, 8 Sad. (Pa.) loc. cit. 362, 11 Atl. 60; *Lee v. Thompson*, 99 Ala. loc. cit. 98, 11 South. 672; *Wilson v. Campbell*, 119 Ind. loc. cit. 290, 21 N. E. 893; *Steel v. Johnson*, 86 Mass. (4 Allen) 425; *Sumner v. Stevens*, 6 Metc. (Mass.) loc. cit. 338; *Sumner v. Murphy*, 2 Hill Law (S. C.) loc. cit. 488, 27 Am. Dec. 397; *Pope v. Henry*, 24 Vt. loc. cit. 565; *Wheeler v. Laird*, 147 Mass. loc. cit. 421, 18 N. E. 212; *Harvey v. Harvey*, 2 S. E. 81; *Schafer v. Hauser*, 111 Mich. 622, 623, 70 N. W. 136, 35 L. R. A. 835, 66 Am. St. Rep. 403; *Clark v. Gilbert*, 39 Conn. loc. cit. 97, 98.

\*Reported in full in the *Southeastern Reporter*; reported as a memorandum decision without opinion in 26 S. C. 608.

The entry under the gift discloses the intention which "guides the entry and fixes its character." *Vandiveer v. Stickney*, 75 Ala. loc. cit. 227.

[4] (a) In this case the issues are at law. The question whether there was a parol gift, there being substantial evidence thereof, was one for the trier of the facts in the circuit court. In a suit in equity in which the same question arose (*Bank v. Fife*, 95 Mo. loc. cit. 124, 126, 8 S. W. 241), this court applied the usual rule concerning the weight of evidence required to establish a fact in suits in equity. The fact that there was a parol gift does not end the case. It merely goes to the intent of the donee in taking possession. If intent in taking possession, in case a parol gift has been made, must be proved by a weight of evidence greater than is required in other cases involving proof of an intent to hold adversely, neither decision nor reason is advanced for that conclusion. No claim is based upon the gift except that it evidences intent.

[5] (b) In this case it in fact makes no difference whether or not the law requires the trier of the fact to be convinced of the existence of a parol gift by more than a mere preponderance of the evidence. There was substantial evidence tending to prove the gift. Even in criminal cases, in which proof beyond a reasonable doubt is required, a jury's verdict will not be disturbed for lack of evidence if there is substantial evidence of guilt. Therefore, if it be conceded that in this action at law the gift, proved solely to characterize an entry, must be proved by more than a preponderance of the evidence, the presence of substantial evidence of its having been made precludes our interfering with the finding on that ground, since this is not a suit in equity and the facts are not open to review on their weight.

[8] IV. Jennie Reader's letter does not directly recognize her father's title. At most it was, on its face, no more than evidence that she did not claim adversely. It was clearly subject to another construction as well. Further, it was not written until the 10-year period had elapsed. If title vested in 10 years, a mere recognition of another's title could not, of itself, revest it. On this view also the letter was but evidence to be considered in solving the question whether there was a gift and adverse possession. Reader's letter seems rather to support respondent's claim. No instructions were asked or given. A jury was waived, and the cause tried to the court. No error justifying a reversal is called to our attention.

Judgment is affirmed.  
All concur.

**AMERICAN FOREST CO. v. HALL et al.**  
(No. 19500.)

(Supreme Court of Missouri, Division No. 1.  
July 9, 1919. On Motion for Rehear-  
ing, Dec. 1, 1919.)

**1. BILLS AND NOTES ⇨443(2) — PAYEE CAN STRIKE OUT HIS INDORSEMENT ON REDELIVERY TO HIM.**

Where a payee indorsed and delivered a note, payee could subsequently, on obtaining possession of the note, have stricken out the indorsement so as to make a proper title to the notes for purposes of suit but without such possession payee had no such right.

**2. BILLS AND NOTES ⇨443(4) — ACTION BY PAYEE NOT SUIT UPON NOTE AS TRUSTEE OF EXPRESS TRUST.**

In an action upon notes, facts as to payee's indorsement and delivery and alleged redelivery held not to bring the case within the rule that the assignee of commercial paper may place the same in the hands of assignor and direct him to bring suit, and thus authorize a suit by assignor as trustee of an express trust without joining beneficiaries. Rev. St. 1909, § 1730.

**3. BILLS AND NOTES ⇨443(2) — PAYEE CAN SUE ON NOTES INDORSED TO PAYEE'S CREDITORS ON THEIR CONSENT.**

Where payee indorsed notes to creditors who held them as collateral, and such creditors consented to payee's suit upon the notes, such consent was not sufficient to authorize payee to sue on the notes so long as such creditors held possession.

**4. BILLS AND NOTES ⇨443(2) — BY UNCONDITIONAL NEGOTIATION PAYEE LOST AUTHORITY TO SUE ON NOTES.**

In view of Rev. St. 1909, §§ 10002-10004, relating to indorsement of negotiable instruments, and section 10001, making indorsement and delivery constitute a negotiation, where payee lost all title to notes by a general indorsement and delivery to payee's creditors, the notes were unconditionally negotiated, and payee lost all title to them and all right to sue upon them, notwithstanding their face value was in excess of payee's debt to holding creditors.

**5. BILLS AND NOTES ⇨443(2) — NECESSITY OF REDELIVERY OF NOTES TO PAYEE TO AUTHORIZE HIM TO SUE THEREON.**

Where payee's indorsements and delivery of notes placed not only the title but the right to sue thereon in payee's creditors, in the absence of payee having become a trustee of an express trust for such creditors, payee cannot sue thereon, not being the real party in interest, and the loaning of the notes to payee for the purpose of protest did not entitle payee to sue.

On Motion for Rehearing.

**6. PLEDGES ⇨30(1) — WHERE NOTES ARE NOT PLEDGED BUT FULLY TRANSFERRED BY PAYEE, PAYEE CANNOT SUE THEREON.**

Where notes were indorsed by payee in blank, their delivery to payee's creditor carried

full title and interest, and, in payee's suit on the notes in which payee failed to show redelivery, no case of pledgor or pledgee was made out, so as to give the payee right to sue thereon.

Appeal from Circuit Court, Jackson County; Harris Robinson, Judge.

Claim by the American Forest Company again Josephine R. Hall and another, administrators of the estate of John C. Hall, deceased. In the probate court there was judgment for defendants, and upon trial de novo upon appeal to the circuit court there was also judgment for defendants, and plaintiff appeals. Affirmed.

Bryan, Williams & Cave, John A. Hope, and William M. Fitch, all of St. Louis, for appellant.

Charles H. Winston, of Kansas City, for respondents.

GRAVES, J. There is a mass of record in this case, and brief for respondent (we mean designated as "Statement, Brief and Argument") of 198 pages. The pertinent facts are within a small compass, as also are the legal questions involved.

On December 1, 1910, the Chicot County Cotton-Alfalfa Farm Company (a Missouri corporation) made and executed four notes of \$15,000 each to the "American Forest Company" (a New York corporation). These four notes were secured by deed of trust on some lands in the state of Arkansas. The maker of these notes, as appears on the face thereof, was the farm company, supra. On the back of each note appeared the names of Wallace Estill, John C. Hall, and Odon Guiltar, Jr. We take it from the record that such was the condition of the paper when delivered to the American Forest Company. The notes were due respectively in three, four, five, and six years. Before the maturity of either of said notes, the American Forest Company indorsed the note due in three years, by signing its name on the back thereof, and delivered the same to the Broadway Bank, of St. Louis, as collateral security for its note to such bank for some \$15,000. In like manner, the other three were indorsed and delivered to the St. Louis Union Trust Company as collateral security to a note of large proportions held by that company, and executed by the American Forest Company.

There is a long history preceding the giving of the four \$15,000 notes, signed as aforesaid, but most of it is immaterial to the real issues here. So far as material (if at all), it will be left for the proper points in the opinion. The notes upon their face referred to the deed of trust aforesaid, and the deed of trust contained a provision as follows:

"It is expressly agreed and understood that failure to pay the interest upon said notes, or



any of them, annually, when due, and continuance in such default for a period of thirty (30) days, shall cause all of said notes to become immediately due and payable though not then due by the tenor, terms and effect thereof."

The deed of trust, in describing the four notes which it was given to secure, says:

"Whereas, the said Chicot County Cotton-Alfalfa Farm Company is indebted to the said party of the third part, the American Forest Company, in the sum of sixty thousand (\$60,000) dollars, evidenced by four (4) certain negotiable promissory notes of even date herewith for the sum of fifteen thousand (\$15,000) dollars each, and due and payable respectively in three, four, five and six years from their date, with interest at the rate of five (5) per cent. per annum from date until paid, interest being payable upon said notes annually, and each of said notes being indorsed by Wallace Estill, of Estill, Mo., Odon Guitar, Jr., of St. Louis, Mo., and John C. Hall, of Kansas City, Mo., and all of said notes being payable at the office of said American Forest Company in St. Louis, Mo."

Both the notes and the deed of trust referred to in the face of the notes placed the signers upon back thereof in the capacity of indorsers, as we formerly understood that term.

July 30, 1913, John C. Hall died intestate, and his widow and son were made the administrators of his estate in the Jackson county probate court. On July 20, 1914, the American Forest Company presented a demand against the John C. Hall estate, in which it sought an allowance of \$57,919.73 in its behalf, alleging that—

"The said John C. Hall during his lifetime, to wit, on the first day of December, 1910, made, executed and delivered, at the city of Kansas City, Missouri, for value received, his four (4) certain negotiable promissory notes for the sum of fifteen thousand dollars (\$15,000) each, payable on or before three (3), four (4), five (5) and six (6) years, respectively, after said December 1, 1910, to the order of American Forest Company, with interest at the rate of five per cent. (5 per cent.) per annum from date; copies of which said notes are hereto attached and marked Exhibits 'A,' 'B,' 'C,' and 'D,' respectively."

And further pleading the deed of trust, the said demand avers the maturity of all the notes, and the ownership of the notes in form as follows:

"And this claimant avers that the recitals in said deed of trust were made a part of each of the several notes hereinbefore referred to, as made, executed and delivered by said John C. Hall, by recital and reference in each of said notes to said deed of trust, as will more fully appear by the copies of said notes hereto attached.

"Claimant further avers that it still is the legal holder and owner of all of said notes.

"Claimant further avers that the first of the

aforesaid notes is overdue and unpaid, according to the face and reading thereof, and the three remaining notes have been duly and legally declared due by the undersigned as the holder thereof, because of the failure to pay the interest due annually, and the default thereof for a period of thirty days thereafter, in accordance with the provisions of the deed of trust securing same, referred to and described in the face of said notes, a copy of which is hereto annexed; all four of which notes have been duly presented for payment, and payment thereof having been refused, have been duly and formally protested for nonpayment, and the maker and indorsers duly notified thereof."

Unverified copies of the four notes and copy of the deed of trust were attached to the demand, as was also a notice of demand. The notice above thus describes the liability of John C. Hall, on the four notes:

"Josephine R. Hall, administratrix of the estate of John C. Hall, deceased, will take notice that the undersigned, American Forest Company, a corporation, has a demand against said estate for the sum of sixty thousand dollars (\$60,000) and for interest thereon from December 1, 1912, to date, amounting to the sum of thirty-four hundred forty-six dollars and twenty-five cents (\$3,446.25) with protest fees of twelve dollars (\$12.00), founded on four promissory notes indorsed by John C. Hall, of which the following are copies."

The copies are the same as those attached to the demand or claim. Upon trial in the probate court, judgment went for defendants. Upon trial de novo in the circuit court (to which appeal was taken from the probate court) there was a like result. In the circuit court trial was had without the intervening of a jury. Instructions given and refused indicate in a way the views of that court. The instructions, both given and refused, upon both sides are as follows:

"Thereupon, plaintiff asked the court to declare the law to be as set forth in the following three declarations of law, numbered respectively 1, 2, and 3 to wit:

"Refused: No. 1. The court declares that under the law, the pleadings, and the evidence in the case, the claimant, American Forest Company, is entitled to recover, and that the four notes presented for allowance herein must be allowed and classified in the fifth class as demands against the estate of John C. Hall, deceased, for the full amount thereof, less any payments which the court may find to have been made thereon.

"Refused: No. 2. If the court finds that the estate of John C. Hall, deceased, is liable on the four notes involved herein, then the claimant, American Forest Company, is a proper party to present and have the said notes allowed in its name as claim against said estate; notwithstanding the court may further find and believe from the evidence that one of said notes was and is now pledged to the Broadway Bank as collateral to secure a debt of said Forest Company to said bank of less amount than the pledged note, and notwithstanding also that the three remaining notes were and are

now pledged to the St. Louis Union Trust Company as collateral to secure a debt of said Forest Company to said trust company of less amount than said three pledged notes.

"Given: No. 3. Notwithstanding the court may find and believe from the evidence that the American Forest Company was a New York corporation and maintained an office and had business transactions in this state, yet, if the court further finds and believes from the evidence that such maintenance of an office and business transactions were merely incidental to and connected with commerce or business transactions done or had in other states, then said American Forest Company was engaged in interstate commerce and was not subject to the statutes of this state concerning foreign corporations doing business in this state, and was not required to comply therewith, and it is no defense to the claims sought to be allowed herein that the said American Forest Company had not complied with the statutes of this state relating to foreign corporations doing business in this state.

"And at the same time defendants asked the court to give the following seven declarations of law, numbered respectively I, II, III, IV, V, VI, and VII, to wit:

"Given: I. The court declares the law to be that under the law and the evidence in this case the American Forest Company cannot recover, and the finding must be for the appellees.

"Given: III. The court declares the law to be that, having written its name 'American Forest Co., J. H. Byrd, Pres.,' on the backs of each and all of the four promissory notes, Exhibits 1, 2, 3, and 4 read in evidence, and having thereupon delivered the first note due, said Exhibit 1, to the Broadway Bank of St. Louis, Mo., so indorsed, for a valuable consideration, and having also thereupon delivered said other three notes, Exhibits 2, 3, and 4, to the St. Louis Union Trust Company of St. Louis, Mo., so indorsed for value, appellant cannot recover herein.

"Given: VI. The court declares the law to be that the American Forest Company cannot have or maintain action as a pledgee of the four notes in the sum of \$15,000 each, read in evidence, without joining the Broadway Bank and the St. Louis Union Trust Company as coplaintiffs, with appellant in this action in the probate court; and that inasmuch as said Broadway Bank and said St. Louis Union Trust Company were not joined with the American Forest Company as plaintiffs in said probate court, the finding must be for appellees.

"Refused: II. The court declares the law to be that appellant's claim or demand as pledgor of the four notes of \$15,000 each is not the same claim or demand as that stated in the petition filed in the probate court by American Forest Company on the 20th day of July, 1914, but in another and different claim or demand or cause of action from that set forth and contained in said petition; and that therefore the claim or demand of appellant as a pledgor of said four notes cannot be allowed by the circuit court on this appeal.

"Refused: IV. The court declares the law to be that, if American Forest Company had any right of action against Chicot County Cotton-Alfalfa Farm Company on the four notes, Ex-

hibits 1, 2, 3, and 4, read in evidence, or on either or any thereof, then the right of action against the appellees herein on the cause of action stated in appellant's petition, filed July 20, 1914, in the probate court in this suit, is barred by statute of limitations and the estate of John C. Hall, deceased, is exonerated from any and all liability.

"Refused: V. The court declares the law to be that inasmuch as neither of the four promissory notes, Exhibits 1, 2, 3, and 4, read in evidence, was ever filed in the probate court of Jackson county at Kansas City, Mo., and neither thereof is or has been filed in this the circuit court of said county in this suit, and inasmuch as appellant has not filed with said notes the affidavit required by R. S. Mo. 1909, §§ 201 and 202, neither said probate court nor the circuit court can allow said notes as a claim or demand herein.

"Refused: VII. The court declares the law to be that the American Forest Company was a foreign corporation doing business as such in the state of Missouri without any license therefor at the time when the four promissory notes and the deed of trust, Exhibits 1, 2, 3, 4, and 5, read in evidence, were made and delivered in said state of Missouri, and that said promissory notes are and ever were void in so far at least as concerns the American Forest Company; and that by reason thereof appellant cannot recover herein."

From the adverse judgment in the circuit court, the American Forest Company has appealed. It should be added that from the time the American Forest Company indorsed the notes, and delivered the one to the Broadway Bank and the other three to the St. Louis Trust Company, the possession of the same has been in those two financial institutions, and in addition the debts for which they were held as collateral have only been partially paid. This outlines the case.

[1, 2] It is clear from instructions 3 and 6 given by the trial court for the defendant that the court took the position that the pledgor, the American Forest Company, could not (acting alone) maintain this action. This is the crucial question in the case, as we see it. A few additional facts should be stated. Whilst the notes were pledged, yet, at the time this action was begun, the notes, in amounts, exceeded the debts for which they were pledged. That is to say, the note pledged to the Broadway Bank exceeded by a \$1,000 the debt for which it was pledged, as such debt existed at the institution of this suit. So, also, the three notes with the trust company exceeded by several thousand dollars the debt for which they were pledged. In addition, the pledgees of the notes consented to and aided in this action by the pledgor. The pledgees not only turned over the notes for the purpose of protest, but through their own counsel had the notes present for the trial. In short, they not only consented to, but assisted in, the prosecution of the action in the name of the pledgor.

Were these two instructions proper under these facts?

The plaintiff first contends that it is a trustee of an express trust, and can maintain this suit without joining its beneficiaries, and call our attention to R. S. 1909, § 1730. The question is whether or not the evidence in this case makes the American Forest Company a trustee of an express trust. The evidence shows that the two pledgees permitted the American Forest Company to have the notes for the purpose of protest, after which the possession was reverted to the pledgees. It is clear that the pledgees did not turn over the physical possession of these notes to the pledgor at the institution of the suit. The notes were not filed with the claim. Only copies thereof were filed. In fact, the evidence tends strongly to show that, whilst the pledgees were assisting in the prosecution of the claim, yet they held on like grim death to the possession of the notes. When introduced in evidence on the trial, they came from the possession of the pledgees. After being introduced in evidence, they were not left with the court, or with the papers in the case, but again reverted to the possession of the pledgees. There can be no doubt that the pledgees might have turned over these notes to the pledgor for suit in its name, and that under such circumstances the pledgor would be a trustee of an express trust, and could sue without joining the pledgees. This was expressly ruled by this court in *Springfield, to Use of, v. Weaver*, 137 Mo. loc. cit. 670, 37 S. W. 512, whereat this court said:

"The evidence shows that the bank, which held the tax bills as collateral, turned them over to Reilly, the payee, for collection, and authorized the suit to be instituted if necessary. This authority constituted Reilly the trustee of an express trust under the decisions of this court and gave him the right to sue in his own name under express provisions of the statute. He had possession of the bill and held the legal title, and the fact that it was impressed with a trust to the bank did not deprive him of the right to sue in his own name. R. S. § 1991; *Snider v. Express Co.*, 77 Mo. 527, and cases cited; *Fisher v. Patton*, 134 Mo. 32 [33 S. W. 451, 34 S. W. 1096]."

This was a tax bill, and our court (*Dickey v. Porter*, 203 Mo. loc. cit. 23, 101 S. W. 536) has drawn a distinction between commercial paper and a tax bill; but, on the idea that the delivery by the pledgee or assignee to the pledgor or assignor of the instrument for the purpose of bringing suit upon and collecting it would make the pledgor or assignor a trustee of an express trust, we take it the rule would be the same in each case. In other words, had the pledgees or assignees of these notes redelivered them to the American Forest Company for the purpose of having that company sue upon and collect them, there would be no question that the American Forest Company could maintain the suit in its

name, as a trustee of an express trust. This, because of the agreement between the parties. But the evidence in this case discloses no such facts. Here the pledgees or assignees were holding on to the possession like grim death. They seemingly encouraged the suit, but did not turn over the possession to the American Forest Company prior to the suit for the purpose of maintaining the suit. They hung to the possession even during the trial, as they did before and as they did thereafter. If they ever had an idea of making the American Forest Company a trustee, they evidenced but little confidence in their trustee. The facts in evidence do not bear out the theory of a trustee of an express trust. If they did, there would be no trouble with the case for the plaintiff. Such a relationship must have some evidence to sustain it. The record here shows no such understanding or agreement as to make the American Forest Company a trustee of an express trust. A condition precedent is absent; i. e. the transfer of the possession of the notes to the American Forest Company. This was emphasized in the case of *Springfield, to Use of, v. Weaver*, supra. Whilst the *Dickey-Porter Case*, supra, is broader and holds that the payee in a tax bill (pledged for less than its amount) has a right to sue on the bill, the court clearly recognizes a distinction between pledges of this kind (taxbills) and assigned notes or commercial paper.

The rule as to who can sue is well stated by *Brown, O.*, in *Carter v. Butler*, 264 Mo. loc. cit. 325, 174 S. W. 408 (Ann. Cas. 1917A, 483), thus:

"In *Dugan v. United States*, 8 Wheat. 172 [4 L. Ed. 362], perhaps the leading modern case upon the subject, the Supreme Court of the United States formulated the rule as follows: 'After an examination of the cases on this subject (which cannot all of them be reconciled), the court is of opinion that if any person who indorses a bill of exchange to another, whether for value or for the purpose of collection, shall come to the possession thereof again, he shall be regarded, unless the contrary appear in evidence, as the bona fide holder and proprietor of such bill, and shall be entitled to recover, notwithstanding there may be on it one or more indorsements in full subsequent to the one to him, without producing any receipt or indorsement back from either of such indorsees, whose names he may strike from the bill, or not, as he may think proper.' This case was decided in 1818. In 1859 Mr. Story, in his excellent work on *Promissory Notes*, § 452, said of it that it seemed to be the better opinion maintained in America, notwithstanding some early doctrine the other way. In the same year the doctrine to its fullest extent was unqualifiedly indorsed by this court in *Beattie v. Lett*, 28 Mo. 596, and it has now been placed entirely beyond our control by the Legislature, in section 10018, Revised Statutes 1909, which is as follows: 'The holder may at any time strike out any indorsement which is not necessary to his title. The indorser whose indorsement is struck out,

and all indorsers subsequent to him, are thereby relieved from liability on the instrument.' Section 10160 defines 'holder' to be 'the payee or indorsee of a bill \* \* \* who is in possession of it.' This definition was evidently intended to meet the legal situation we have just been considering by excluding from its terms all payees and indorsees not in possession, as well as by including the payee or indorsee in possession for the time being."

So in the case at bar, had the American Forest Company (after its assignment of the notes) become possessed thereof, it could have brought and maintained the suit, notwithstanding its name as indorser was written thereon. With possession, it could have stricken out the indorsement and made a paper title to the notes. But it must be borne in mind that the condition precedent to all this is the possession of the notes by the person suing. Without this possession the right to strike out indorsements does not exist. The mere introduction of the instruments in evidence, coming as they did from the hands of the pledgees or assignees, did not either in law or in fact remove the indorsement. On the other hand, the source from which the instruments came at the trial indicated that possession had never been surrendered, and that the indorsements were in full force and effect. So that whilst we recognize to its fullest extent that the assignee of commercial paper may place the same in the hands of the assignor or pledgor and direct him to bring suit, and thus authorize a suit in the name of the pledgor as a trustee of an express trust, yet the facts of this case do not bring it within the rule. At the bottom of the rule stands the transfer of the possession, and the facts of this case thoroughly negative the transfer of possession. The theory of a trustee of an express trust is not in the case.

[3] II. It is urged that the pledgees were willing to have the pledgors bring the suit, and consented to the suit; but this is not sufficient, so long as they hold on to the possession. It required the transfer of possession to give the pledgor the right to sue, on the theory of a trustee. This we suggest in addition to what is said in paragraph 1, *supra*.

[4] It is also urged that, because the notes for which the notes in suit were pledged did not equal the notes involved here, this surplus left in the pledgor the right to sue. *Dickey v. Porter*, *supra*, is cited as an authority. That was a tax bill, and falls within a different category. Such instruments are choses in action, but not commercial paper. The *Dickey-Porter* Case recognized a difference, as does also *Richardson v. Ashby*, 132 Mo. loc. cit. 245, 33 S. W. 806. The blank indorsement of these notes and the subsequent delivery thereof to the Broadway Bank and the St. Louis Union Trust Com-

pany placed the right to sue in those corporations. By section 10001, R. S. 1909, it is provided:

"An instrument is negotiated when it is transferred from one person to another in such manner as to constitute the transferee the holder thereof. If payable to bearer it is negotiated by delivery; if payable to order it is negotiated by the indorsement of the holder completed by delivery."

By section 10002, R. S. 1909, it is further provided:

"The indorsement must be written on the instrument itself or upon a paper attached thereto. The signature of the indorser, without additional words, is a sufficient indorsement."

And by section 10004, R. S. 1909, it is provided:

"An indorsement may be either special or in blank; and may also be either restrictive or qualified, or conditional. A special indorsement specifies the person to whom or to whose order the instrument is to be payable; and the indorsement of such indorsee is necessary to the further negotiation of the instrument. An indorsement in blank specifies no indorsee, and an instrument so indorsed is payable to bearer, and may be negotiated by delivery."

The instruments before us were indorsed in blank and delivered as aforesaid before maturity. They were therefore fully negotiated, within meaning of our statutes. It is true that section 10003, R. S. 1909, says:

"The indorsement must be an indorsement of the entire instrument. An indorsement, which purports to transfer to the indorsee a part only of the amount payable, or which purports to transfer the instrument to two or more indorsees severally, does not operate as a negotiation of the instrument. But where the instrument has been paid in part it may be indorsed as to the residue."

But no such indorsement was made here. The indorsement and delivery of these notes constituted a negotiation of them under the statutes. They would thereafter pass by delivery, it is true. R. S. 1909, § 10001.

But under all the evidence in this case there was no redelivery of these notes to the original payee, in the sense of transferring any kind of title. By the indorsements and delivery, first made, the payee, American Forest Company, lost all title to the notes. They were unconditionally negotiated. The said original payee could not sue thereon. In an early case (*Brady v. Chandler*, 31 Mo. loc. cit. 29), *Scott, J.*, said:

"The instrument sued on was a note, and the justice of the peace had jurisdiction of the action. *McGowen v. West*, 7 Mo. 569 [38 Am. Dec. 468].

"Before the action was brought, *Brady & Bro.* had assigned the note to *William Brady*. After the assignment, there was no title in *Brady & Bro.*, legal or equitable. They then had no right to bring this action. They were the plaintiffs

as the cause stood. The indorsing a suit for the benefit of another is a matter of no importance in determining who are the real parties to the suit. Although the action was stated to be to the use of William Brady, that did not make him a party. The suit should have been brought in the name of William Brady. Jeffers v. Oliver, 5 Mo. 433."

It is true in this case that the payees, Bradley & Bro., had made what our section 10004, R. S. 1909, denominates a special indorsement. They had indorsed to Wm. Brady. But whilst in the case at bar the indorsements were in blank, the delivery carried the title to Broadway Bank and St. Louis Union Trust Company just as effectively as if the indorsement had been special. It required a redelivery to transfer the title back to American Forest Company, and no such redelivery was ever made or attempted to be made.

In *Hutchings, to Use of Blackford, v. Weems et al.*, 35 Mo. loc. cit. 286, this court said:

"This was a suit commenced in a justice's court upon an instrument in the nature of a promissory note. There was judgment in the circuit court for the plaintiff, and the defendant moved in arrest of judgment for the reason that the suit was improperly brought in the name of *Hutchings* to the use of *Blackford*. The motion was overruled, and the defendant appealed. The motion should have been sustained. The law is imperative that suits must be brought in the name of the real parties in interest (excepting the few cases specially provided for by statute).

"Judgment will be reversed, and the cause remanded to the circuit court, where the record can be so amended as to make the real party in interest the plaintiff, if that court find that it should be done in furtherance of justice."

[8] *Blackford* was the assignee of the instrument, and *Hutchings* was the payee. This suggestion makes the quotation, *supra*, clear. Our statutes contemplate the bringing of the action by the party in interest. It does not exclude, but includes, the trustee of an express trust. Absent this relationship, as we hold in this case, then the actual party in interest must bring the suit. In the instant case the indorsements and delivery of these notes placed not only the title, but the right to sue in the *Broadway Bank* and the *St. Louis Union Trust Company*. That title and that right might have been reinvested in the *American Forest Company* by a redelivery of the negotiated notes to it, but this was not done. A loaning of the notes for purpose of protest did not meet the situation. Nor did the production of the notes at the trial by the pledges meet the situation. The evidence fails to show further negotiation of these notes by delivery.

In the claim filed, the *American Forest Company* asserted, as it was bound to do, that it was the legal owner and holder of

notes. This it failed to prove. From it all we feel constrained to hold that the peremptory instruction to find for defendants was properly given. With this view the other instructions drop out of the case.

Judgment is affirmed.

BLAIR, P. J., concurs. BOND, J., concurs in result.

#### On Motion for Rehearing.

GRAVES, J. We are confronted with a vigorous motion for rehearing in this case, and the vigor of it occasions this opinion.

I. It is first urged in the motion that—

"The denial of plaintiff's right to sue on the pledged notes is based in the opinion upon a theory of the law which has no application. The opinion follows *Brady v. Chandler*, 31 Mo. 29; *Hutchings v. Weems*, 35 Mo. 286; and *Carter v. Butler*, 264 Mo. loc. cit. 325, 174 S. W. 399, Ann. Cas. 1917A, 483. In each of these cases the situation before the court was that of a complete transfer or assignment of the whole ownership and possession of the note. In such cases the question as to who can sue on the note is, of course, controlled by the ordinary law of negotiable instruments and possession by the plaintiff at the time of the commencement of the action and thereafter is necessary."

[9] The trouble with our learned Brothers is that they have overlooked an express statute on the subject of commercial paper. They have made out no case of pledgor or pledgee in the literal and true sense of those terms. They show notes indorsed in blank, which when delivered (as was true here) carries the full title and interest. The only error we have discovered in the opinion is where we use in the statement the words "pledgor" and "pledgee," when we should have used the "assignor" and "assignee."

In the opinion we called to counsel's attention several sections of our Negotiable Instruments law, but these are overlooked by our learned Brothers at the bar.

Section 10003, R. S. 1909, among other things says: "The indorsement must be an indorsement of the entire instrument." The previous sections designate how indorsements shall be made and the effect thereof. Under section 10001, R. S. 1909, these notes were fully and completely negotiated in law, when they were indorsed in blank, and delivered. There is no dispute that the notes were indorsed in blank and delivered. Under the law the negotiation of the notes stands admitted. This negotiation of the notes, under these statutes, carried all of the *American Forest Company's* rights therein. Section 10004, R. S. 1909, seems to contemplate "restrictive or qualified or conditional" indorsements, but the *American Forest Company* did not so indorse. It may be (a question we do not decide) that the *American Forest Com-*

pany might have so indorsed these notes as to have retained title or interest in them, but they did not do so. This company fully negotiated these notes, and it never afterward acquired possession thereof. How we can say in one breath that our commercial paper has been fully negotiated (as were these notes), and then in the next breath say the payee therein has an interest in them, is beyond our reasoning. "Negotiated" as written in our statute means something. It is meaningless in the view of learned counsel. The statute says that it means that the transferee is the holder thereof. The holder thereof is the person possessed of the right to sue. We reiterate that Gantt, J., in *Dickey v. Porter*, 203 Mo. 1, 101 S. W. 586, recognizes clearly the distinction between negotiable and nonnegotiable instruments. He was dealing with a pledged tax bill, and not a negotiated note, as we have here. His ruling is authority for our ruling; and not adverse to it.

II. We did not discuss (it is true) the question as to whether or not the banks by their conduct might not have been estopped from suing upon these notes, had the American Forest Company obtained judgment. That question was not a vital one in the case. In fact, it is not a question at all. The question here is the right of the American Forest Company to sue upon these notes, and not whether or not, by acts in pais, the banks have estopped themselves from suing thereon. Live and vital issues of the case are the ones for discussion in the opinion and not side and irrelevant issues. Whether the conduct of the banks might have estopped them from further action in the premises should be left to a case where the question is vital. The question here is: Did the American Forest Company, after negotiating these notes, have the right to sue upon them? When this question is kept in mind, the case is a simple one, as under our law as to negotiable instruments they had parted with all their rights in and to these notes. There is no restriction in their indorsement, so far as this record shows.

To clarify the situation, suppose the banks had sued upon these notes, and the defendants had suggested by their answer that there was a defect in the parties plaintiff, in that the American Forest Company was a party in interest and should have sued along with the banks? What should a court do in this situation, with the clear and unqualified indorsement of the notes, and the delivery admitted? The question answers itself.

There is no substance in the motion for rehearing, and it should be overruled. If the mistake in thus bringing the suit works a hardship, it is not one brought about by law or this court. Let the motion be overruled.

BLAIR, P. J., and WOODSON, J., concur.

**RICE v. JEFFERSON CITY BRIDGE & TRANSIT CO. (No. 20301.)**

(Supreme Court of Missouri, Division No. 1  
Dec. 1, 1919.)

**1. TRIAL  $\S$ 244(4)—INSTRUCTION SINGLING OUT PARTICULAR FACT ERRONEOUS.**

An instruction that in determining whether a motorman used ordinary care they could take into consideration "the darkness of the night, the presence of weeds or grass, the speed of the car, the natural excitement under which an ordinary person would labor in coming suddenly upon a person in so great a peril," etc., was erroneous in singling out particular facts and giving them undue prominence.

**2. TRIAL  $\S$ 191(8)—INSTRUCTION ASSUMING AS TRUE DISPUTED FACT ERRONEOUS.**

In an action for death of one killed on track by an electric car, an instruction, assuming that plaintiff's deceased was lying in weeds near the track and was not standing up just prior to being struck, held erroneous; the fact being disputed.

**3. RAILROADS  $\S$ 396(1) — PRESUMPTION OF CARE ON PART OF OPERATORS OF CAR.**

The presumption that servants on an electric car which ran over and killed a person on the track performed their duty in a proper manner and without negligence applies only to cases where nothing is shown but the bare fact of an injury for which redress is sought.

**4. TRIAL  $\S$ 296(7) — CONSTRUING TOGETHER INSTRUCTION AS TO HOW INJURY HAPPENED.**

Part of an instruction in a negligence case, "You would not be warranted in surmising a state of facts as to how the injury might have happened, but it devolves on the plaintiff to show by the evidence adduced facts which constitute negligence as defined by these instructions," was not erroneous as suggesting to the jury that there was an absence of proof as to how the injury occurred, when construed in connection with the other instructions.

**5. RAILROADS  $\S$ 356(3)—EXTENT OF PERMISSIVE PUBLIC USE OF TRACK.**

If the public indiscriminately had been, prior to the time of the killing of deceased, and then was, using a track as a footway with the knowledge and consent of the railroad, then deceased had an implied license to so use it, even though the use by the public was not so extensive as to have become notorious.

**6. RAILROADS  $\S$ 356(2)—IMPLIED LICENSE TO USE TRACK.**

In order to show that the public has impliedly been given a license by a railroad company to use its track as a passway, it is necessary to show the public use itself, the knowledge of the company thereof, and its consent thereto.

**7. RAILROADS  $\S$ 397(5) — CIRCUMSTANTIAL PROOF OF IMPLIED LICENSE TO USE TRACK AS PASSWAY.**

Knowledge of a railroad company that the public was using its track as a passway and

consent thereto cannot ordinarily be established by direct proof, but must be inferred from circumstances such as long acquiescence of the railroad in the open, known, free, continuous, and extensive use of its track by the public as a footway.

8. EVIDENCE  $\S$ 219(1)—ADMISSION OF NEGLIGENCE BY CONCEALMENT OF ACCIDENT.

Where a railroad ran down and mortally injured one on its track, evidence that the railroad's physician attempted to hide from the deceased's relatives the fact of the injury and death, and from the public at large the cause of death, was admissible in evidence in an action for damages, being in the nature of an admission by the railroad of a consciousness of being negligent.

9. TRIAL  $\S$ 194(17)—INSTRUCTION AS INVASION OF PROVINCE OF JURY.

In an action for death on railroad track, an instruction that failure of the railroad to notify relatives of the deceased that he was injured should not be considered as tending to show negligence on the part of the railroad, under certain circumstances, *held* erroneous, as being an invasion of the province of the jury.

10. RAILROADS  $\S$ 397(5)—EVIDENCE OF IMPLIED LICENSE TO USE TRACK.

In an action for death on track in the nighttime, it was error to exclude testimony as to the use of the track during the daytime by pedestrians, where the evidence tended to show that a large number of pedestrians passed over the track during both day and night to meet trains at the junction of defendant's line and another railroad.

11. RAILROADS  $\S$ 369(3)—DUTY TO DISCOVER TRESPASSER LYING ON OR NEAR TRACK.

Where one who trespassed upon the right of way of a railroad and laid down upon or so near the track that he was struck and injured, the railroad was not liable, unless the railroad's employees discovered his perilous position, and could by the exercise of reasonable care have avoided striking him.

12. RAILROADS  $\S$ 401(1)—INSTRUCTION AS TO TRESPASSER KILLED ON TRACK ERRONEOUS.

An instruction that, if the locus in quo "had not, for a long time prior to the date of the injury, been used as a passway by a large number of pedestrians with the knowledge and consent of defendant," the deceased was a trespasser, and defendant was not required to keep a lookout for him, and that if they found that as soon as he was seen the motorman used ordinary care to avoid striking him, they should find for defendant, was erroneous in that the latter hypothesis was correct only if the first one be true.

13. TRIAL  $\S$ 191(8) — INSTRUCTION ON LAST CLEAR CHANCE DOCTRINE ERRONEOUS AS ASSUMING A FACT.

In an action for death on railroad track, an instruction on the last clear chance doctrine was erroneous as assuming as true the disputed fact that deceased was not seen by the

motorman until the car was within 30 feet of him.

14. TRIAL  $\S$ 186, 240—INSTRUCTION ERRONEOUS AS BEING A COMMENT ON EVIDENCE AND ARGUMENTATIVE.

In an action for death on track, an instruction, pointing out that there was a gravel road on the right of way running along and parallel with defendant's track "which was convenient for and was used by pedestrians," and then telling the jury that if pedestrians did not frequently and continuously use the track deceased had no implied license to use it, was erroneous, as being a comment on the evidence and argumentative.

15. TRIAL  $\S$ 244(4)—INSTRUCTION ERRONEOUS AS GIVING UNDUE EMPHASIS TO DEFENDANT'S THEORY.

In an action for death on track, a group of instructions as a whole *held* erroneous by reason of their number and reiterations, giving undue emphasis to defendant's theory that the deceased was a trespasser, and consequently that defendant owed him no duty until after he was actually seen by the motorman in a position of peril.

16. RAILROADS  $\S$ 370 — DUTY TO MAINTAIN LOOKOUT FOR PERSONS USING TRACK BY SUFFERANCE.

If at the place of an injury there had been such use of the track by pedestrians, known to the railroad, that their presence there was naturally to be expected, the railroad was bound to keep a lookout for them, whether they were trespassers or licensees or quasi licensees.

17. RAILROADS  $\S$ 400(1)—DEATH ON TRACK; NEGLIGENCE FOR JURY.

In an action for death on a railroad track, whether or not defendant was negligent *held* for the jury.

Appeal from Circuit Court, Callaway County; David H. Harris, Judge.

Suit by Frankie Rice against the Jefferson City Bridge & Transit Company. Judgment for defendant, and plaintiff appeals. Reversed and remanded.

This is a suit wherein the plaintiff seeks to recover damages in the sum of \$10,000 for the alleged negligent killing of her husband. On June 21, 1914, and prior thereto, the defendant operated an electric railroad along the streets of Jefferson City across its bridge over the Missouri river and on to North Jefferson, a station on the Missouri, Kansas & Texas Railway, about a mile and a half distant. Defendant used a public road for its track for the distance of about a half mile from the northern end of the bridge to where said road turns east; from there on to North Jefferson it had a private right of way, inclosed by a fence with cattle guards at the entrance of its tracks. Along this private way defendant maintained a gravel road from two to four feet from and parallel with its track, which road was used by express wagons. At the wagon entrance and

adjacent to the cattle guards there was a big gate, which was usually kept locked. According to plaintiff's evidence both the gravel road and the railroad track had for many years been used indiscriminately by pedestrians, both by day and by night, in going back and forth between Jefferson City and North Jefferson, and such use had been continuous and extensive and was known to and acquiesced in by defendant.

Plaintiff's evidence tended to further show: Rice, the deceased, lived in Hartsburg, a small village 11 miles west of North Jefferson on the Missouri, Kansas & Texas Railroad; he came to Jefferson City about noon on Saturday, June 20, 1914, where he remained during the afternoon and evening of that day, and about 11:30 p. m. he went into a saloon near the entrance to defendant's bridge across the river, and wanted to buy some whisky on credit. The bartender declined to let him have any, and Rice left by the rear door, saying that he was going home, and walked toward the bridge. Later, between 12 and 1 o'clock, Rice was struck and injured by one of defendant's cars; he was picked up and carried on the car to the Missouri, Kansas & Texas Railroad station at North Jefferson, where he was taken off the car and laid on the platform. At that time he stated to persons standing around that his back hurt; that his name was Parmer Rice; that he lived at Hartsburg; and that he wanted to go home. A west-bound Missouri, Kansas & Texas train was then due. The defendant's physician reached there in a short time, however, and, after examining Rice, had him put in an automobile, and conveyed him to St. Mary's Hospital in Jefferson City. In making the trip the doctor had a Mr. Branch assist him. Branch sat on the back seat of the automobile, and Rice on the floor of the car between Branch's legs. Before starting Rice called for a drink, said his back hurt him, and tried to sit up, but could not. Sunday afternoon, June 21st, the defendant's physician telephoned the county undertakers that a "bum" had died at St. Mary's Hospital, and to come out and get the body. While the undertakers were preparing the body for burial, some one came in who recognized the deceased, and his death was at once communicated to his family. At a post mortem examination it was ascertained that one of the vertebrae in the spinal column of deceased was dislocated, the spinal cord severed, and that this was the cause of his death. There was a bruise on the forehead, one on the back, and one on the leg. One ear had been nearly severed and sewed on again. The bruise on the back was as though made by a square lick, and was such a one as a man would receive if standing upright and struck by a hard substance. His clothes were not torn. Deceased had a father and two brothers living in Hartsburg, and both he and they were

well known there. He also had two brothers living in Jefferson City, who had telephones in their residences and whose names were in the city directory. The record at the hospital, which it is customary to make when a patient is received, showed his correct name, age, address, and wife's name. But neither the defendant nor its physician at any time communicated either deceased's injury or death to his wife or relations.

Defendant's physician first certified to the Bureau of Vital Statistics that the cause of deceased's death was "alcoholism and probably internal injuries." After the post mortem examination, being asked to correct it, he at first demurred, saying that he would have to see "our attorneys." Later he filed a supplemental certificate, in which he gave the cause of death as "alcoholism and probably internal injuries. Said injuries being caused by being struck by a street car."

Plaintiff's evidence was to the further effect that Rice was a strong man, in good health, 34 years of age, employed as a section foreman; that he at times drank to excess, but was never known to be under the influence of liquor to such an extent that he could not walk or take care of himself; that for a quarter of a mile south of where he was struck defendant's track is straight and level; that a car traveling along that portion of the track at the rate of 15 miles an hour could be stopped within 30 or 40 feet; and that the headlight enabled the motorman to see a man 100 yards down the track.

There was evidence on the part of defendant tending to show that its railroad track after it enters its private inclosure was not filled in; that it was grown up with grass as high as the top of the rails; that there was tall grass upon either side of the car track; that the track was about 4 feet from the gravel road; that the pathway used by pedestrians was along the center of the gravel road; that the witnesses who testified for the defendant had never seen any one walking upon the track either by day or night; that the car that struck the deceased was equipped with a headlight, and that it was running about 15 miles an hour; that the motorman in charge was keeping a lookout ahead, and that he saw a dark object at the side of the track which he at first glance thought was a shadow; that this object was lying on the outside of the south rail in the weeds between the rail and the gravel road; that when the car got within about 30 feet it made a dipping motion, and the motorman discovered that the dark object was a man; that his feet were lying towards the south, or the direction from which the car was approaching and his head towards the north; that the motorman immediately reversed his power, applied the brake, and brought the car to a stop as soon as possible; that the car passed 8 or 10 feet beyond the point where the man was lying



before it came to a stop; that the deceased's position at the time he was picked up had been reversed, and his feet were to the north and his head towards the south; that he made no statement, and they picked him up, put him on the car, carried him to the station at North Jefferson, where they laid him on the platform; that deceased moved his feet and legs after he was placed in bed at the hospital; that defendant's surgeon was of the opinion that Rice was not seriously injured, and so informed defendant's superintendent; that they did not know or inquire his name, for the reason they supposed he was more intoxicated than hurt by being struck by the car, and for this reason no effort was made to locate any of his family; that neither the defendant's surgeon, motorman, or superintendent knew deceased, or knew where he lived, or that he was related to any one living in Jefferson City; that the bruised places on his back could have been made by the bending of his back, and that, had he been standing upon the track at the time he was struck, he would have been knocked forward and run over, and not knocked to one side and outside the rails where he was found lying; and that there were no external injuries which could have been discovered before death which would have warranted defendant's surgeon in the conclusion that deceased's spinal cord had been severed. The foregoing is the general tenor of the evidence. Other facts necessary to an understanding of the questions involved will be stated in the course of the opinion.

No question is raised in respect to the pleadings. The petition avers, in substance, "that for a long time prior to the 21st day of June, 1914, the defendant permitted and suffered persons to walk on, along, and upon said tracks"; "that a great many persons did walk on, along, and upon said tracks"; that while Rice was walking on said tracks he was struck by one of defendant's cars; and that defendant's agents in control of the car saw, or by the exercise of ordinary care could have seen, him in time to have avoided striking him, but that they negligently failed to do so. The answer admits the striking and injury, but denies all other allegations.

At the request of the defendant the court gave to the jury 13 instructions. No complaint is made of the one numbered 2, the others are as follows:

"No. 1. The court instructs the jury that it is conceded and admitted upon the part of the plaintiff that the deceased, Parmer Rice, came to his death by reason of his own negligence directly contributing thereto, but that, notwithstanding such negligence upon the part of the deceased, plaintiff contends that the striking and injury could have been avoided upon the part of the defendant by the exercise of ordinary care after the said Parmer Rice was discovered in this position of peril, or might have been discovered by the exercise of

ordinary care on the part of the motorman in charge of defendant's car. In this regard you are instructed that if by reason of the position in which the deceased had placed himself upon or near the track he was not seen by the motorman until he was in close proximity to where the said Rice was, because of the construction or position of the track, the presence of grass or weeds, or the darkness of the night and direction in which headlight was projected, and that he was not seen until it was too late to stop the car prior to the time it struck and injured him, then there can be no negligence attributed to the defendant, even though you find that the car tracks of defendant had been and were frequently used by pedestrians with the knowledge of defendant, provided you further find that at the time of the accident defendant's motorman was keeping a lookout for persons on said track, for in such case if the motorman exercised reasonable and ordinary care under the circumstances to stop his car after the said Rice was actually discovered, then there was no negligence upon the part of the defendant. In determining whether or not the motorman did use reasonable and ordinary care in undertaking to stop the car after the discovery of the said Rice in his position of peril, you will take into consideration the distance which the said car was from the said Rice at the time he was discovered, the darkness of the night, the presence of weeds or grass, the speed of the car, the natural excitement under which an ordinary person would labor in coming suddenly upon a person in so great a peril, together with all the other facts and circumstances in the case, and if, after fully considering all these facts and circumstances, you find that the motorman did exercise the care which would have been exercised by an ordinary prudent person acting under like circumstances, then you will find that there was no negligence on the part of the defendant in stopping the car. It is not the province of the jury to guess or speculate that the car might have been stopped in time to have avoided the collision by the application of some other means other than that used by the motorman in his efforts to stop the car, but, on the contrary, the sole question as to this issue which you are to determine is whether or not the motorman operating said car undertook by the ordinary means at hand to save the life of the deceased and make an honest effort to avoid the striking and injury."

"No. 3. The court instructs the jury that if you find and believe that the deceased, Parmer Rice, entered upon the right of way of the defendant company and was a trespasser thereon, as explained in other instructions, and that he lay down upon or so near the track of the defendant company, and that by reason of his proximity to the track he was struck and injured by one of the defendant company's cars, you will then find the issues for the defendant, unless you further find from the evidence that after the motorman of defendant's car discovered the perilous position of said Parmer Rice, said motorman could by the exercise of ordinary care in the management of his car have avoided striking and injuring said Rice.

"No. 4. The court instructs the jury that the law presumes that the servants of the defend-

ant company performed their duty in a proper manner, and without negligence upon their part. In this behalf you are further instructed that, before the plaintiff can recover, the burden of proving negligence rests upon the plaintiff, and she is required to show by the greater weight of the evidence that the motorman of the street car company did not use ordinary care, both in undertaking to discover the presence of the deceased in a place of danger, and that he was negligent and failed to use ordinary care in undertaking to save the life of deceased after he was discovered in a position of peril. You would not be warranted in surmising a state of facts as to how the injury might have happened, but it devolves upon the plaintiff to show by the evidence adduced, facts which constitute negligence as defined by these instructions.

"No. 5. The jury are instructed that in order to constitute the deceased, Parmer Rice, a licensee and not a trespasser upon the track and right of way of the defendant railroad company, at the time he was injured, you must find by the greater weight of the testimony that the track of defendant at and near the place where said Rice was injured had been theretofore and was then constantly used by pedestrians to such an extent that the use thereof had become notorious, and that the defendant company knew of such usage and acquiesced or consented thereto.

"No. 6. The jury are instructed that the defendant railroad company was and is entitled to the exclusive use of its tracks and private property at places where the public have no right to go; and, when a person having no business with a railroad company goes upon its tracks or private property, he is a trespasser, and the railroad company is not required to police its tracks for the purpose of keeping off intruders or to keep a watch out for the convenience or safety of trespassers, and in this case, if you believe and find from the evidence that that portion of defendant's railroad track at and near where the deceased, Parmer Rice, was struck had not, for a long time prior to the date of the injury, been used as a passway by a large number of pedestrians with the knowledge and consent of the defendant railroad company or its agents, servants, and employes, then the said Parmer Rice at the time he was injured was a trespasser upon the right of way and track of the defendant company, and defendant was not required to keep a lookout for his presence on the track, and if you believe and find from the evidence that, as soon as he was actually seen or discovered upon the track by the motorman in charge of defendant's car, said motorman used ordinary and reasonable care to avoid striking and injuring said Parmer Rice, then the defendant company did all that the law required of it, and your verdict should be for the defendant.

"No. 7. The jury are instructed that the only duty a railroad company owes a trespasser is to exercise ordinary care to prevent injuring him after his peril is discovered. A railroad company is under no duty to exercise ordinary care, or any care, to discover the presence of a trespasser on the track. It is under no duty to anticipate his presence on the track. It may proceed about its business without giving any

thought or care to trespassers until after their presence and danger has been discovered, and it is only when the presence and danger of a trespasser has been discovered that the duty arises to exercise ordinary care to avoid injuring him. And in this case, if you find that Parmer Rice, at the time he was struck and injured, was a trespasser on defendant's track and right of way, as explained in other instructions, then defendant's motorman was not required to keep a lookout for him, and the mere fact that said Rice was not seen by the motorman until the car was within 30 feet of said Rice does not constitute or indicate negligence on the part of said motorman; and, unless you further find that, after Rice was actually seen or discovered by the motorman, said motorman by the exercise of ordinary care could have stopped the car in time to have avoided striking said Rice, then your verdict should be for the defendant.

"No. 8. The court instructs the jury that if you find that there was a macadam or graveled road leading along and parallel with the street car tracks of the defendant company, which was convenient for and was used by pedestrians in passing from South Jefferson or from Jefferson City to North Jefferson, and that a large number of pedestrians did not frequently and continually walk upon and along that part of the car tracks of the defendant company at or near which deceased was injured, then the deceased, Rice, had no implied license to use said track as a pedestrian, and it was not incumbent upon the defendant company to keep a lookout for him upon the track of the defendant company.

"No. 9. The court instructs the jury that it is admitted in this case that the death of Parmer Rice was caused by being struck by a street car operated by the defendant company, and it is immaterial that the physician called to treat him immediately after the injury may have thought from the examination made by him that his death was caused both by the injury received by the collision and from the use of alcoholic drinks.

"No. 10. The court instructs the jury that the fact, if it be a fact, that the defendant or its agents failed to notify the wife or relatives of the deceased that he was injured prior to the time of his death, and that such failure was due to the fact that the defendant or its agents did not believe that the said Parmer Rice was seriously injured until shortly before his death, or was due to the fact that they were not advised as to who the said Parmer Rice was, then such failure to notify the family or relatives of deceased should not be considered by you as tending to show any negligence on the part of the defendant company.

"No. 11. The court instructs the jury that in determining whether or not the railroad track, at or near the place where the deceased was struck, was frequently and continuously used by a large number of pedestrians, you will exclude from your consideration all testimony offered in evidence as to persons walking or seen walking upon said track during the day time.

"No. 12. If the jury find from the evidence that the deceased laid down near the railroad track and was struck and injured by one of the cars of the defendant company, and that he

was not seen by the motorman in time to have avoided the injury by the exercise of ordinary care, then it is immaterial how he came to place himself in that position, and it is immaterial whether he did so by reason of his intoxication or by his voluntary act.

"No. 13. The court instructs the jury that, even though you may believe that a large number of persons did continuously and for a long period of time use the gravel road as a foot-path in passing from South Cedar to North Jefferson and past the point where the deceased was injured, and that the defendant acquiesced therein, yet such use of the gravel road would not warrant you in finding that the deceased had the right to use any other part of the right of way other than the gravel road, and you are further instructed that no negligence can be imputed to the defendant by reason of its having allowed the weeds and grass to grow up between and adjacent to its tracks."

The jury returned a verdict for the defendant. From the judgment rendered in accordance therewith the plaintiff in due course prosecutes this appeal.

Appellant assigns as error the giving of each of the above instructions.

N. T. Gentry, of Columbia, for appellant.  
Irwin & Haley, of Jefferson City, for respondent.

RAGLAND, C. (after stating the facts as above). [1, 2] 1. It was appellant's contention at the trial that the deceased was standing or walking on or near the track when he was struck by respondent's car, and not lying in the weeds just outside of the south rail, as testified by the motorman. This contention was based for the most part on the evidence that the deceased had a bruise on his back of such a character as to indicate that he had been struck square lick with a hard substance while standing in an upright position; that a vertebrae of the spinal column was dislocated and the spinal cord severed; that there was a bruise on his forehead; that no bones were broken; and that his clothes were not torn. From the conceded facts that deceased's clothes were not torn and there were no external evidences of injury, except the wounded ear and some bruises, appellant urges that it is inconceivable that he was lying at length just outside of the rails when struck; that as the rails were  $4\frac{1}{2}$  inches high, with the ties extending 18 inches outside of them, and as the bolts and carriage springs of the car extended about 4 inches beyond the rails and down almost level with the top of them, it would have been impossible for the car to have passed over him, if in the position described by the motorman, without stripping him of his clothes and mangling his body. If the deceased was standing or walking on or near the track just prior to and at the time of the collision, he could have been seen by the motorman while the car was yet 100 yards distant from

him; if he was lying in the weeds just outside the rails, it is probable that he could not have been seen until the car was right on him. This issue was vital, and it was sharply contested. Instruction 1, taken as a whole, in effect assumes that Rice was lying in the weeds just outside the rails, and the only question submitted under the instruction for the jury's determination was whether "the motorman did use reasonable and ordinary care in undertaking to stop the car after the discovery of said Rice in his position of peril." The instruction also pointed out to the jury the improbability of the motorman's having seen Rice until the car was in close proximity to him, "because of the construction or position of the track, the presence of grass or weeds, the darkness of the night, and direction in which the headlight was projected," and told them that in determining whether the motorman used ordinary care to take into consideration "the darkness of the night, the presence of weeds or grass, the speed of the car, the natural excitement under which an ordinary person would labor in coming suddenly upon a person in so great a peril," etc., thereby singling out particular facts and giving them undue prominence. Both because of its assumption as true of a disputed fact and its palpable comment on the evidence, the giving of the instruction was error. *Miller v. Busey*, 186 S. W. 983; *Barr v. Kansas City*, 105 Mo. 550, 16 S. W. 483.

[3, 4] 2. Instruction 4 is subject to the criticism that it advised the jury as to a legal presumption applicable only to cases where nothing is shown but the bare fact of an injury for which redress is sought. Appellant, however, complains only of the last sentence, and this on the ground, as she claims, that it suggested to the jury that there was an absence of proof as to how the injury occurred, and that it, in effect, required the plaintiff to establish defendant's negligence by direct proof. This sentence, fairly construed in connection with the entire instruction, seems to do no more than tell the jury that their finding should be based on the evidence, nor does it limit the character of such evidence to direct as distinguished from inferential. The point is ruled against the appellant.

[5-7] 3. Instruction 5 undertook to distinguish between a licensee and a trespasser within the purview of the issues, and in doing so it told the jury that, in order for them to find that the deceased was a licensee and not a trespasser, they must find that defendant's track at the place where he was struck had theretofore been, and was then, constantly used by pedestrians to such an extent that the use thereof had become notorious, and that the defendant knew of such use and consented thereto. In requiring the jury to find that the use of the track was so extensive as

to have become notorious, the instruction placed an unwarranted burden on the plaintiff. If the public indiscriminately had been, prior to the time of the deceased's injury, and then was, using the track as a footway with the knowledge and consent of the defendant, then deceased had an implied license to so use it, even though the use by the public was not so extensive as to have become notorious. In order to show that the public has impliedly been given a license by a railroad company to use its track as a passway, so far as the same is pertinent in cases of this kind, it is necessary to show the public use itself, the knowledge of the company thereof, and its consent thereto. These latter elements ordinarily cannot be established by direct proof, but must be inferred, if they exist, from other facts, as, for example, the long acquiescence of the company in the open, known, free, continuous, and extensive use of its track by the public as a footway. *Frye v. Railway*, 200 Mo. 377-401, 98 S. W. 586, 8 L. R. A. (N. S.) 1069; *Eppstein v. Railway*, 197 Mo. 720-734, 94 S. W. 967. In such case, however, it is only necessary to bring knowledge of such use home to the railroad company. It may or may not be notorious.

[8, 9] 4. It is unquestioned that the defendant did nothing to inform Rice's friends or family of his injury or death. If it did not know either his or their identity, it did not make the slightest effort to ascertain such identity, either before or after his death. The evidence was ample to justify the jury in believing that the fact of his injury and death was purposely kept from his relations, and that the true cause of his death was attempted to be concealed and attributed to something else. It tended to show, among other things, that, while Rice was lying injured on the station platform at North Jefferson, he stated to persons standing near that his name was Farmer Rice, that he lived at Hartsburg, that his back hurt him, and that he wanted to go home; that Branch, who accompanied Rice and defendant's physician to the hospital, told defendant's superintendent, when he joined them at the bridge, that the injured man's name was Rice; that when Rice died, early in the afternoon of the same day that he was injured, defendant's physician called the county undertakers over the telephone and told them that a "bum" had died at the hospital, and to come and get the body; that in the certificate of death the defendant's physician ascribed the cause of death to "alcoholism and probably internal injuries"; that after the post mortem disclosed a dislocated vertebra and a severed spinal cord, he was asked to file an amended certificate; that he declined to do this until after he had conferred with defendant's attorneys, and within two or three days afterward reluctantly filed a supplementary certificate, in which he stated that deceased's death was caused by "alcoholism and probably internal injuries; said injuries being caus-

ed by being struck by a street car." The conduct on the part of the defendant tended to be shown by this evidence was in the nature of an admission by the defendant of a consciousness of being in the wrong. *Rice v. Transit Co.* (App.) 186 S. W. loc. cit. 573, and authorities cited. To minimize the effect of this evidence, the defendant procured the giving of instructions 9 and 10. No. 9 after putting the court's interpretation on a part of the evidence, in effect withdrew it from the jury. No. 10 told the jury that if defendant's failure to notify the wife and relatives of the deceased was due to the fact that it did not think him seriously injured until a short time before his death, or to the fact that it was not advised as to who he was, then such failure should not be considered as tending to show negligence on the part of defendant. This instruction is faulty in many respects, but its chief vice is that it effected an invasion of the province of the jury by the court. It was for the jury to say from the evidence as a whole whether the defendant intentionally attempted to conceal the real cause of Rice's death, and, if that were true, whether the inference should be drawn that the defendant in so attempting such concealment to any extent admitted its own culpability. It was also for the jury, and not the court, to say whether the fact, if a fact, that the defendant did not think Rice seriously injured until just before he died, or the fact, if a fact, that the defendant was not advised as to who Rice was, so fully explained or accounted for defendant's conduct in the premises that an inference unfavorable to defendant would not be drawn from it.

[10] 5. Instruction 11 withdrew from the consideration of the jury all testimony as to the use of the track during the daytime. Evidently this was given on the theory that knowledge of the nighttime use of the track would not be inferred from its daytime use. There is an intimation of this view in the *Frye Case*, supra. There are no doubt many instances where schools, factories, or recreation places are situated near a railroad track, where during certain hours of the day, or at definite seasons of the year, the track is used by pedestrians as a passway in going to and returning from such places, and where at such times the railroad company and its employees would reasonably anticipate the presence of persons on its tracks, but they would not infer from the use of its track by specific classes of persons at fixed times or intervals the use by other persons at other times. At such other times they might reasonably expect a clear track. But in the case at bar the evidence furnished no basis for such distinction, at least as between a daytime and a nighttime use. On the part of the plaintiff it tended to show that a large number of pedestrians passed over the track at the place in question during both day and night; that the majority of these persons were going from Jefferson City to the Missouri, Kansas

& Texas Railway station, or coming from the station to Jefferson City; that it cost 35 cents to ride on defendant's cars, while the walking was free, except for 5 cents bridge toll, so that a large number walked; that the only purpose for which defendant ran its cars over the portion of the track in question was to convey passengers, baggage, and mail between Jefferson City and the incoming Missouri, Kansas & Texas Railway trains; that these trips were made both during day and night; and that as the majority of the pedestrians who used the track were likewise going to or coming from the Missouri, Kansas & Texas trains, they were using defendant's track at approximately the same times as defendant itself, regardless of whether it was day or night. The use that the evidence tended to establish, therefore, was that of pedestrians in passing over the track in going to and coming from the trains at North Jefferson without distinction as to whether in the daytime or at night, and the plaintiff was entitled to have the jury consider all the evidence having a bearing in that respect. For that reason this instruction should not have been given.

[11-16] 6. Instructions 3, 6, 7, 8, 12, and 13 from various angles and in different phraseology deal with the question as to whether the deceased was a licensee or a trespasser, and, if the latter, the circumscribed duty owed to him as such by the defendant. No. 3, considered by itself, is unexceptional. No. 6 tells the jury that, if the locus in quo "had not, for a long time prior to the date of the injury, been used as a passway by a large number of pedestrians with the knowledge and consent of defendant," that the deceased was a trespasser, and the defendant was not required to keep a lookout for his presence on the track, and that if they found that as soon as he was seen the motorman used ordinary care to avoid striking him they should find for defendant. This latter hypothesis is correct only if the first one be true, and it should have been conditioned on an affirmative finding of the first by the jury. No. 7 assumes as a fact that Rice was not seen by the motorman until the car was within 30 feet of him, and in this respect was erroneous. Instruction 8 points out that there was a gravel road running along and parallel with defendant's track, "which was convenient for and was used by pedestrians," and then tells the jury that, if pedestrians did not frequently and continuously use the track, deceased had no implied license to use it. This instruction as phrased is not only a comment on the evidence, but it is an argument. If it was given for the purpose of advising the jury that a license to use the gravel road did not imply a license to use the track, that phase of the case was fully and correctly covered by instruction 13. No. 12 assumes, regardless of facts in dispute, either that the motorman was under no duty to have kept a lookout for persons on the track, or that

if he had done so he could not have seen the deceased in time to have avoided injuring him, if the latter was lying down near the track. This was erroneous. This group of instructions as a whole, by reason of their number and reiterations, gives undue emphasis to defendant's theory that the deceased was a trespasser, and consequently that defendant owed him no duty until after he was actually seen by the motorman in a position of peril. The essential thing for determination by the jury in respect to the matters covered by these instructions was whether at the place of injury there was and had been such a pronounced use of the track by pedestrians, known to defendant, that their presence there was naturally to be expected. If there was no such use, the defendant had a right to expect a clear track; if there was, and had been such use, the defendant was bound to anticipate the presence of persons on the track and keep a lookout for them, and, primarily, it is of no importance whether such persons were trespassers or licensees or quasi licensees. Instructions submitting this ultimate issue directly to the jury would have been less confusing than the circuitous method adopted. *Murphy v. Railroad*, 228 Mo. 56-84, 128 S. W. 481; *Ahnfeld v. Railroad*, 212 Mo. 280-300, 111 S. W. 95; *Morgan v. Railroad*, 159 Mo. 262, 60 S. W. 195; *Dalton v. Railroad*, 208 S. W. 828-830.

[17] 7. Respondent insists that it is immaterial whether the instructions given the jury at its instance were right or wrong, because the plaintiff failed to make out a case, and that as a consequence the judgment is for the right party, and should be affirmed. At the close of all the evidence the defendant asked, and the court refused to give, a peremptory instruction in its behalf in the nature of a demurrer to the evidence. There was a previous trial of this case in which plaintiff had judgment; from that judgment defendant prosecuted an appeal to the Kansas City Court of Appeals. On that appeal the defendant sought a reversal on the ground that under all the evidence the plaintiff was not, as a matter of law, entitled to recover. The evidence is very fully set out and clearly analyzed in the opinion of that court, and the conclusion reached that the plaintiff had made a case entitling her to go to the jury. *Rice v. Transit Co.*, supra. Practically the same evidence was given on the second trial, and for the reasons stated in the opinion of the Court of Appeals we rule this contention against respondent.

For the errors noted in the giving of instructions, the judgment is reversed, and the case remanded for another trial.

BROWN and SMALL, CO., concur.

PER CURIAM. The foregoing opinion of RAGLAND, C., is adopted as the opinion of the court.

All the Judges concur.

**ALFORD v. NEW YORK LIFE INS. CO.**  
(No. 19933.)

(Supreme Court of Missouri, Division No. 1.  
Dec. 1, 1919.)

**1. INSURANCE —125(1)—LAWS CONTROLLING POLICIES.**

A life insurance policy is governed by the laws in force when issued.

**2. INSURANCE —368(1)—RIGHTS OF INSURED ON DEFAULT IN PREMIUMS IN LIFE POLICIES.**

Prior to the amendment in 1895 of Rev. St. 1889, § 5859, a life insurance company and an insured could not avoid the effect of sections 5856-5858, relating to nonforfeiture of policies on failure to pay premiums, by agreeing to substitute the reserve values fixed by the laws of the state of the insurer's origin.

**3. INSURANCE —368(1)—PAID-UP INSURANCE ON DEFAULT IN FOURTH ANNUAL PREMIUM ON LIFE POLICY.**

The proviso in the amendment of 1895 to Rev. St. 1889, § 5859, did not automatically transform a foreign life policy which did not provide for temporary or paid-up insurance of a value equal to that under the law, though the law of the insurer's state authorized such value in case of a default in payment of the fourth annual premium, into a paid-up insurance of the net value prescribed in section 5856; the word "entitle," as used in such proviso, meaning only that insured is "furnished with grounds" for having the policy transformed into paid-up insurance.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Entitle.]

Appeal from Circuit Court, Pike County; Edgar B. Woolfolk, Judge.

Action by Susie M. Alford against the New York Life Insurance Company. Judgment for plaintiff, and defendant appeals. Reversed.

Jones, Hocker, Sullivan & Angert, of St. Louis, Hostetter & Haley, of Bowling Green, and James C. Jones, Jr., of St. Louis (James H. McIntosh, of New York City, of counsel), for appellant.

J. S. Fitzgerald, of Bowling Green, and Wm. A. Dudley, of Troy, for respondent.

**BLAIR, P. J.** This is an appeal from a judgment for the beneficiary in a 20-year endowment policy of insurance for \$5,000 on the life of W. C. H. McPike. The policy was delivered October 13, 1896. Three annual premiums were paid. Insured defaulted in the payments due September 25, 1899, and thereafter, and died November 26, 1911. Appellant is a New York corporation, and was licensed to do business in Missouri. McPike was a citizen of this state. When the policy was issued, the laws of New York provided that, after any policy had been in force for three full years and default was made in payment of premiums thereafter, the reserve should,

on demand made, with surrender of the policy within six months, be taken as a single premium at the company's published rates, and applied, as agreed in the application or policy, either to purchase extended insurance for the amount of the policy or paid-up insurance in such amount as the reserve would purchase; that, if no agreement appeared in the application or policy, then the "owner of the policy" might exercise his option on demand within six months. The law admitted to be then in force is section 88 of article 2, c. 690, Laws of New York of 1892, as set out in full in *Nichols v. Ins. Co.*, 176 Mo. loc. cit. 364, 365, 75 S. W. 664, 62 L. R. A. 657. The policy in suit contained the following agreement:

"This policy cannot be forfeited after it shall have been in force three full years as herein-after provided:

"First. If any subsequent premium is not duly paid this policy will be endorsed for the amount of paid-up insurance specified in the table on the preceding page, less the value of any indebtedness on this policy, provided demand is made therefor with surrender of this policy within six months after such nonpayment—such paid-up insurance being payable either if the insured shall die before the 25th day of September, 1916, or if the insured then be living—or,

"Second. If any subsequent premium is not duly paid, and if this policy is not surrendered as provided in the preceding clause the insurance under this policy will, after the repayment of any indebtedness, be extended without request or demand therefor, for the amount of five thousand dollars, during the term provided in the table on the preceding page, payable only if the insured dies within said term. At the end of said term the insurance shall cease, and the amount provided in the last column in said table will become payable if the insured is then living.

"Third. The insurance provided for in the two preceding clauses shall be based upon completed insurance years only, and shall be subject to the conditions of this policy, but without further payment of premiums and without loans or participation in surplus."

The amount of the available reserve under this policy was, in fact, somewhat less than it would have been if computed under the laws of this state then in force. Nevertheless, though so computed, the resultant sum would not have carried the policy to the time of McPike's death. No demand for a paid-up policy was made, and there was no communication with the company after McPike's death in 1911 until in July, 1913. The first petition in this case was drawn upon the theory that the policy was kept in force by the nonforfeiture laws of this state until McPike's death. The amended petition, on which the case was tried, proceeds upon the theory that upon default in payment of the fourth annual premium the reserve on the policy was automatically converted, without demand, into paid-up

insurance for the sum of \$1,630.80. It was this sum, with interest, for which respondent had judgment.

[1] The law in force when the policy was issued controls (*Liebing v. Ins. Co.*, 269 Mo. loc. cit. 521, 191 S. W. 250) and must govern in this case. Sections 5856, 5857, 5858, and 5859 (as amended in 1895, Laws 1895, pp. 197, 198), R. S. 1889, were then in force. Section 5856 provided that no policy of life insurance, after two premium payments, should be forfeited for nonpayment of additional premiums, but that it should be commuted into extended insurance, proportioned to the net value of the policy less authorized deductions, if any. Section 5857 provided that, after the payment of two annual premiums and default, the legal holder of the policy might, within 60 days from the beginning of the extended insurance period as provided in section 5856, demand a paid-up policy which must be issued of the value prescribed by the section. Section 5858 prescribes the rule of payment on commuted policies. Section 5859 as amended in 1895 reads as follows:

*"The three preceding sections shall not be applicable in the following cases, to wit: If the policy shall have been issued by any company authorized to do business in this state, and organized under the laws of another state of the United States which prescribes a surrender value or paid-up or temporary insurance in case of default in payment of premiums, and shall contain an agreement for such surrender value, temporary or paid-up insurance, as prescribed by such other state as a part of said policy, or if the policy shall contain a provision for an unconditional cash surrender value at least equal to the net single premium for the temporary insurance provided hereinbefore, or for the unconditional commutation of the policy for nonforfeitable paid-up insurance, or if the legal holder of the policy shall, within sixty days after default of premium, surrender the policy and accept from the company another form of policy, or if the policy shall be surrendered to the company for a consideration adequate in the judgment of the legal holder thereof, then, and in any of the foregoing cases, this act shall not be applicable: Provided, that in no instance shall a policy be forfeited for nonpayment of premiums after the payment of three annual premiums thereon; but in all instances where three annual premiums shall have been paid on a policy of insurance, the holder of such policy shall be entitled to paid-up insurance, the net value of which shall be equal to that provided for in section 5856 of this article."*

The italics indicate parts added in 1895. By the same act a clause was eliminated. In section 5859, R. S. 1889, prior to 1895, the clause relating to paid-up insurance read:

*"Or for the unconditional commutation of the policy to nonforfeitable paid-up insurance, for which the net value shall be equal to that provided for in section 5857."*

In the act of 1895 the last italicized clause was omitted.

[2] It will be observed that section 5859, R. S. 1889, as it stood before amendment in 1895, exempted policies from the operation of sections 5856, 5857, and 5858, R. S. 1889, only when such policies contained (1) provision for an unconditional cash surrender value at least equal to the net single premium for the temporary insurance "provided hereinbefore," or (2) for the unconditional commutation of the policy to nonforfeitable paid-up insurance "for which the net value shall be equal to that provided for in section 5857," or (3) if the legal holder, within 60 days after default, exchanged the policy for another, or (4) if the legal holder surrendered the policy for a consideration he deemed adequate. The amendment of 1895 made three changes. The first consisted of a provision which on its face, if considered without reference to the proviso also added, would have had the effect of rendering sections 5856, 5857, and 5858 inapplicable in the case of any policy issued by any company of another state whose laws prescribed (1) "a surrender value or (2) paid-up or (3) temporary insurance in case of default in payment of premiums," and which policy contained "an agreement for such surrender value, temporary or paid-up insurance as prescribed by such other state as a part of said policy." Prior to this amendment, the company and the insured could not avoid the effect of sections 5856, 5857, and 5858, R. S. 1889, by agreeing to substitute the reserve values fixed by the laws of the state of the company's origin. By this amendment, unless the proviso is held to qualify it very materially, they were permitted, under stated conditions, to agree in the policy to abide the nonforfeiture laws of the company's state. Respondent concedes the policy agreement conformed to the laws of New York, but contends the proviso in the act of 1895 automatically, upon default in 1899, converted the policy in suit into paid-up insurance, "the net value of which" was equal to that provided in section 5856, R. S. 1889; i. e., \$1,630.80.

[3] We understand respondent's position to be that section 5859, R. S. 1889, as amended in 1895, governs this case, but that since the policy did not provide for unconditional paid-up insurance and did not provide for temporary insurance of the value prescribed by section 5856, R. S. 1889, therefore the proviso in the act of 1895 automatically converted the policy into paid-up insurance of the net value prescribed in section 5856. In other words, respondent's contention is that in every foreign policy issued while the act of 1895 was in force, which policy did not provide for temporary or paid-up insurance of a value equal to that under our law, though the law of the company's state authorizes such value, the proviso in that act, in case of default as therein provided, automatically transformed such policy into paid-up insurance of the net value prescribed in section 5856, R. S. 1889.

The whole burden of this contention rests, in the last analysis, upon the word "entitled" as it appears in the proviso in question. The word is susceptible of more than one meaning. It might be used to mean that "a right or title" is given, is vested; or it might mean that one is "furnished with grounds for seeking or claiming with success." Webster's New International Dict.; *Reed v. Bank*, 29 Grat. (Va.) loc. cit. 723, 724; *English v. McNair*, 34 Ala. loc. cit. 48, 49; *Robertson v. R. R.*, 63 N. H. loc. cit. 548, 3 Atl. 621; *Hibberd v. Slack* (C. C.) 84 Fed. loc. cit. 579. In determining the meaning to be given to the word in this case, it is desirable to examine the effect produced by an acceptance of respondent's interpretation. It has been already decided that the proviso "applies to all policies, whether foreign or local." *Nichols v. Ins. Co.*, 176 Mo. loc. cit. 375, 75 S. W. 664, 62 L. R. A. 657, citing *Epperson v. Ins. Co.*, 90 Mo. App. 436. If respondent's contention be sustained, then every policy, foreign or local, which falls within the act of 1895, after payment of three premiums and default thereafter, must necessarily be converted by the proviso into paid-up insurance of the prescribed value. It would make no difference what the laws of the foreign state prescribed nor what agreement the policy contained, whether the contract value was greater or less than that of our laws. The language of the proviso contains no exceptions. It would apply even in case the holder surrendered the policy and accepted another or accepted some other consideration adequate in his judgment. He might contract in his policy for temporary insurance in accordance with the laws of another state, and the policy might provide for the stated cash surrender value. None of these would avail, since, so construed, the proviso would step in in every case under the act and convert the reserve into paid-up insurance without regard to what the parties had agreed or had done by way of settlement after default. If the proviso be so construed, the preceding provisions of the amended section could be construed only as defining the classes of policies which would be, by default, transformed by the act into paid-up insurance. The holding of this court that the first amendment added by the act of 1895 authorized the parties to contract with respect to the nonforfeiture laws of the state of the company's origin is obviously unsound, if the proviso is to be construed as respondent contends. Such contract, in that event, would be denied all force as a contract and applied simply to catalogue policies to be governed by the proviso. Further, it is not reasonable to say the Legislature intended to convert into paid-up insurance a reserve which the parties had converted by agreement after default into a policy of another kind, or which

the holder had adjusted with the company for a consideration he deemed adequate. Nor could any company be induced to issue another policy or pay a consideration in adjustment of a reserve already converted by the statute into paid-up insurance and liability thereunder already fixed by the proviso. Further considerations arise out of a study of the present statute (section 6949, R. S. 1909), wherein the proviso is as it was, save that it provides that the holder "shall be entitled to paid-up or extended insurance" in case of default after three payments.

We are of the opinion that respondent's position is untenable. It seems probable that the Legislature meant by the proviso that, in cases to which the act applied, the holder, in the designated cases, should have the right to claim or demand paid-up insurance of the value fixed by the proviso, if he desired to do so, in any case in which he had contracted otherwise in his policy and concluded he preferred the statutory rather than the purely contract right; the proviso being a part of his contract. It entitled him to claim such paid-up insurance, but did not require him to accept it whether he would or no. There may be other reasonable constructions. Some are suggested. It is unnecessary to decide between them in this case. By none of these is the judgment authorized. The insured had the full benefit of his policy agreement; and, had he died during the period of temporary insurance, his beneficiary could have collected the face of the policy. He did not die until after the expiration of that period. The judgment is reversed.

All concur, except GOODE, J., not sitting.

#### WIGGINTON et al. v. BURNS. (No. 19592.)

(Supreme Court of Missouri, Division No. 1. Oct. 10, 1919. Motion for Rehearing Denied Dec. 20, 1919.)

#### 1. JUDGMENT §707—JUDGMENT NOT BINDING ON ONE NOT A PARTY.

In a suit to set aside a deed for vendor's mental incapacity, the decision of the court need not be controlled by a former decision of the court in a law case as to vendor's mental incapacity to make a will, where defendant was not a party and could not appear, particularly since the jury's verdict in a law case would not require reversal because it was against the weight of the evidence.

#### 2. JUDGMENT §713(1)—DECREE INVALIDATING WILL FOR INCAPACITY NOT CONCLUSIVE OF CAPACITY TO MAKE PRIOR DEED.

In a suit by vendor's heirs to set aside a warranty deed on the ground that vendor was mentally incompetent, a decision in another action in the same court that such vendor was



not mentally competent to make a will does not settle the matter of mental capacity to convey.

**3. INSANE PERSONS ⇨61—DEED OF INSANE PERSON IS VOIDABLE ONLY.**

A deed is not void merely because grantor was an insane person not under legal guardianship, but is only voidable, and can only be set aside in equity.

**4. DEEDS ⇨17(2), 68(4)—INADEQUACY OF CONSIDERATION ALONE NOT GROUND FOR SETTING ASIDE DEED.**

Where parties to a transaction stand upon equality with each other, equity will not dictate the price of real estate sold nor exercise extraordinary powers to give vendor a season for repentance, but equity recognizes that all men are not equal in strength, and that all commercial transactions would be subject to revision by equity courts were the strong not permitted to deal fairly and honestly with the weak.

**5. APPEAL AND ERROR ⇨1009(1)—FINDING OF CHANCELLOR DEFERRED TO.**

Deference will be given chancellor's finding to the extent of taking into consideration the trial judge's advantage in having heard and observed the witnesses.

**6. DEEDS ⇨210—EVIDENCE SUFFICIENT TO SHOW CONSIDERATION ADEQUATE.**

In a suit to set aside a deed on ground of mental incapacity of grantor, evidence held sufficient to support chancellor's finding that the consideration shown by the evidence was a fair and adequate price for the land.

**7. DEEDS ⇨211(1)—EVIDENCE SUFFICIENT TO SHOW MENTAL CAPACITY OF GRANTOR.**

In a suit to set aside a deed because of grantor's mental incapacity, evidence held to show that grantor understood what he was doing and acted within his rights in the execution of the deed.

**8. DEEDS ⇨211(1)—EVIDENCE INSUFFICIENT TO SHOW DEED RESULTED FROM GRANTOR'S INSANE DELUSION.**

In a suit to set aside a deed on ground of grantor's mental incapacity, evidence held insufficient to show that the deed was the product of grantor's insane delusion.

Appeal from Louisiana Court of Common Pleas; Edgar B. Woolfolk, Judge.

Suit by Ed. B. Wigginton and another against Douglas Burns. Judgment for defendant, and plaintiffs appeal. Affirmed.

Pearson & Pearson, of Louisiana, Mo., for appellants.

Robert A. May, of Louisiana, Mo., and Hostetter & Haley, of Bowling Green, for respondent.

**BROWN, C.** This is a suit begun July 25, 1915, by plaintiff, sole heirs of Calvin Wigginton, deceased, to set aside a warranty deed made by the said deceased to defendant on the 1st day of August, 1914, conveying 240 acres of land in Pike county, Mo.,

sometimes known as the Griffith farm, for the consideration of \$16,800.

The petition states, in substance, that the land was at that time reasonably worth \$24,000; that the grantor was then 78 years old, weak and enfeebled in mind and body, and did not have mental capacity to make the deed, nor to attend to his own business, and did not know and was not capable of knowing the value of his own property, and was laboring under an insane delusion which affected him in the sale of the property and his knowledge of its value; that the grantee was a shrewd business man about 50 years old, and was acquainted with the value of the farm and took advantage of the grantor's insane delusion and weak mental condition in purchasing the land at that price, and knew, or by the exercise of ordinary observation could have known, of the mental and bodily condition of grantor and that he was possessed of an insane delusion, "for he, the said Burns, knew that if the said deceased, Wigginton, had been in his normal condition of mind, he never would have sold the farm which he was then executing and delivering a deed to for the consideration therein expressed, and which he, the said Burns, contracted to pay for the same"; that the deed should be held voidable, and the defendant should be required to account for the rents and profits during such possession; that plaintiffs have offered and are still ready and willing to pay back the said purchase price and accumulated interest thereon upon condition that defendant would reconvey the said land, but that defendant has refused and still refuses to do so, and they renew their offer in the petition, and pray that the sale and deed be set aside and the title to the land vested in plaintiffs and for general relief.

The answer, after denying all the allegations of the petition except the purchase of the land for the sum therein named, pleads at length that at the time of the negotiation and purchase the deceased was in good mental condition, was capable of understanding and did understand this as well as all other business transactions, that the negotiation was fair and open, and that the consideration paid was the fair value of the premises at the time, which was denied by replication. The court found the issues for defendant, "and that on August 1, 1914, Calvin Wigginton conveyed to defendant, Douglas Burns, the land described in plaintiffs' petition, by the deed therein set forth; that at said time the said Calvin Wigginton was the owner of said land; that he, the said Calvin Wigginton, conveyed the same to the said defendant, Douglas Burns, for a fair and adequate consideration, by said deed duly executed; that said transaction was

conducted in a fair and ordinary manner, and at the time of the execution of said deed by the said Calvin Wigginton to the said defendant, Douglas Burns, the said Calvin Wigginton was capable of transacting ordinary business affairs, and fully understood and knew the nature and effect of the said transaction and of the business in which he was then engaged."

Mr. Calvin Wigginton, the grantor in this deed, was at the time of its execution about 78 years old, had been a widower for many years, and had long resided in Pike county. He had the reputation of being a good business man and had accumulated considerable property, much of which consisted of lands in that county, including the tract in controversy. He had two children, the plaintiffs Ed. B. Wigginton and Addie V. Goodman, the wife of Edwin Goodman, her guardian, by whom she sues. She had one child, a daughter, Mary Goodman, who at the time of the death of Mr. Wigginton was about 17 years old. He attended personally to his business affairs up to the time of his death, which resulted from suicide by shooting on August 26, 1914. On July 6, 1914, he had given to his son Ed. a valuable farm near Clarksville of 130 acres and seven shares of the par value of \$100 each of bank stock, the value of which is not in evidence otherwise than that it was worth much more than par. He had also on May 26, 1914, given to his nephew, Bob Beasley, whom he had raised from infancy as his own child, 400 acres of land known as the "old home place," reciting the consideration to be love and affection. During the 14 years next preceding his death his son-in-law, Edwin Goodman, had resided with his family upon the farm in question, paying no rent otherwise than by boarding him and his horse and furnishing him a room in the house. He complained of his son-in-law's treatment of the farm in the respect that he had let it run down.

On August 8, 1914, he made his last will, reciting that he had already made provision for his son, and appointing E. B. Rule, of Louisiana, Mo., its executor. The disposing paragraph is as follows:

"All the rest, residue, and remainder of my estate, whatsoever, and wherever situate, I direct shall be held in trust by my executor, hereinafter named, and to be loaned as, in his judgment, may be to the best advantage, the income of which shall be paid by him annually, or oftener if necessary, toward the maintenance of my daughter, Addie V. Goodman, in such sums as may be necessary to properly care for her. And all of such income, over and above what may be necessary to properly provide for my said daughter, shall be paid annually, to my granddaughter, Mary O. Goodman. And at the death of my said daughter, Addie V. Goodman the whole of said income shall be paid annually to my said granddaughter, Mary O. Goodman, during her natural life, and at

her death said trust fund shall be paid to the bodily heirs of said Mary O. Goodman, and in case she shall die leaving no bodily heirs, then I direct that said trust fund shall be distributed as follows: One-sixth thereof to each of the following named persons, to wit: My son, Ed B. Wigginton and my nieces, Callie Elizabeth Thomas, Olca N. Wigginton, Lucy Wells, Juda Wigginton and Zula Wigginton.

"To have and to hold unto them, their heirs and assigns forever."

He had already made two wills during the same year and gave as his reason for making these changes the fact that he had already made disposition of his land.

This will was after his death contested by these plaintiffs in the circuit court for Pike county. The contest was tried before Judge Woolfolk, who tried this cause in the court of common pleas, and resulted in a verdict and judgment that the instrument was not the will of Calvin Wigginton. The cause was appealed to this court, and the judgment was sustained in Division No. 2 in an opinion by Williams, J., which is reported in *Wigginton v. Rule*, 275 Mo. 412, 205 S. W. 168. Of this opinion these appellants in their statement say that, although several witnesses testified in this case to the mental condition of Mr. Wigginton, who did not testify in that case, they adopt the summary of Judge Williams in his opinion as an accurate and impartial statement of testimony in the case before us. We will therefore, do the same, referring, however, to the present record in our opinion as may be necessary.

[1] 1. Although this is a case in which all the issues appeal to the equity power of the court, and the relief asked is purely equitable in its nature, the appellants are insisting that it must be controlled by the former decision of this court in the matter of the contest of the will of Calvin Wigginton (275 Mo. 412, 205 S. W. 168), to which this defendant was not a party, and in which he could not, under the law, have been permitted to appear, and could not have lawfully answered if he would. We have frequently held that, the contest being a proceeding at law in which a trial by jury is provided, the finding of the court or jury must be treated accordingly, and that the judgment would not be reversed upon appeal because it was against the weight of the evidence. *Lyne v. Marcus*, 1 Mo. 410, 13 Am. Dec. 509; *Trotters v. Winchester*, Id. 413; *Swain v. Gilbert*, 8 Mo. 347; *Harris v. Hays*, 53 Mo. 90; *Young v. Ridenbaugh*, 67 Mo. loc. cit. 589; *Appleby v. Brock*, 76 Mo. 314; *Garland v. Smith*, 127 Mo. 567, 28 S. W. 191, 29 S. W. 836; *Hans v. Holler*, 165 Mo. 48, 65 S. W. 308. In *Garland v. Smith*, supra, the court took occasion to cite *Gay v. Gillilan*, 92 Mo. 250, 5 S. W. 7, 1 Am. St. Rep. 712, in which *Sherwood, J.*, said, "Courts of law, when called upon for redress in such cases, give

it on precisely the same principle that guides courts of equity in analogous cases," and to say that this remark was not intended to apply to a review of the evidence as in equity cases. In *Wigginton v. Rule*, supra, this principle was expressly recognized by the court, which confined its consideration with respect to the evidence to the one inquiry as to whether the evidence was sufficient to authorize the submission to the jury of the following questions: (1) whether at the time of the execution of his will the testator had the mental capacity to make a will; and (2) whether he was suffering from an insane delusion which controlled him in the disposition of his property. The questions presented as well as the form of the trial were purely legal. The plaintiffs claim title by inheritance, which is the naked act of the law. The defendant claimed under a will which is the creature of the law designed by the state to authorize the owner of property to direct its disposition when his own ownership has been extinguished by his death. While it is true that one may bind himself in a contract to make a will in his lifetime and to preserve it intact until his death shall give it effect, and that such contracts are cognizable in equity, yet equity acts upon the contract which attaches itself in his lifetime to the estate which the law administers at his death. The sole issue was testamentum vel non, and was founded upon the charge that at the time the will was executed the testator did not have the mental capacity which the law requires of one whom it permits to direct the disposition to be made of his property after his death.

[2] In this case the issue is the validity of a deed executed to the defendant by Mr. Wigginton in his lifetime and the cause of action, if any, was perfect in the grantor upon the delivery of the deed. It made no difference whether or not it would have been transmitted by the will had that instrument been valid. The defendant had no interest whatever in the result of the will contest. Had that instrument been sustained, it might be interesting to inquire whether such cause of action would have been transmitted by its terms or would remain in the heirs. That question has been settled as between the parties to that suit. The nonexistence of the will, and that point only has been settled as to all the world. It is not entirely outside the issues of this case to refer to the fact that it has been settled in favor of Ed. B. Wigginton, the son who voluntarily received from his father a deed to a valuable farm under circumstances which he admits in his testimony to be the same as those attending the execution of the deed which he now attacks, except that he paid no pecuniary consideration therefor. It has also been settled in favor of the plaintiff Edwin Goodman, who is not an heir, but brings his

insane wife and only daughter, the beneficiaries of the whole estate, into court, apparently for the sole purpose of protecting his own marital interest. It is settled as to this defendant to the extent of determining the proper parties to this suit.

[3] 2. The plaintiffs in their petition plant themselves squarely upon the ground that the defendant's deed is "voidable" (not void). It alleges no fraud other than what might be implied from the statement that he knew or by ordinary observation should have known of the grantor's alleged enfeebled condition and insane delusion, and knew that he was getting the property at a grossly inadequate price. No principle of law is better settled in this state than that a deed is not void merely because it was executed by an insane person not under legal guardianship, but is only voidable and can only be set aside in equity. *McKenzie v. Donnell*, 151 Mo. 455, 52 S. W. 214; *Jamison v. Culligan*, 151 Mo. loc. cit. 416, 52 S. W. 224; *McAnaw v. Clark*, 167 Mo. loc. cit. 446, 67 S. W. 249; *Wells v. Mutual Benefit Ass'n*, 126 Mo. loc. cit. 633, 29 S. W. 807; *Rhoades v. Fuller*, 139 Mo. loc. cit. 187, 40 S. W. 760.

[4] The general rule applicable in such cases is clearly stated in *Pomeroy's Equity Jurisprudence* as follows (3d Ed. § 947):

"It is well settled that there may be a condition of extreme mental weakness and loss of memory, either congenital, or resulting from old age, sickness, or other cause, and not being either idiocy or lunacy, which will, without any other incidents or accompanying circumstances, of itself destroy the person's testamentary capacity, and a fortiori be ground for defeating or setting aside his agreements and conveyances. It is equally certain that mere weak-mindedness, whether natural or produced by old age, sickness, or other infirmity, unaccompanied by any other inequitable incidents, if the person has sufficient intelligence to understand the nature of the transaction, and is left to act upon his own free will, is not a sufficient ground to defeat the enforcement of an executory contract, or to set aside an executed agreement or conveyance. If, as is frequently if not generally the case, the mental weakness and failure of memory are accompanied by other inequitable incidents, and are taken undue advantage of through their means, equity not only may, but will, interpose with defensive or affirmative relief."

As to inadequacy of consideration as an incident calling for equitable relief in such cases, the same author says (Id. § 928):

"If there is nothing but mere inadequacy of price, the case must be extreme, in order to call for the interposition of equity. Where the inadequacy does not thus stand alone, but is accompanied by other equitable incidents, the relief is much more readily granted. But even here the courts have established clearly marked limitations upon the exercise of their remedial functions, which should be carefully observed."

The relief cannot stand upon either of these grounds alone. The principle is that, where the parties to a transaction stand upon an equality with each other, equity will not dictate the price for which one shall transfer his property to another, nor will its extraordinary powers be exercised for the purpose of giving him a season for repentance. On the other hand, it recognizes that all men are not equal in strength, and that all commercial transactions would stand subject to revision by the courts of equity were the strong not permitted to deal fairly and honestly with the weak. It is by these simple principles that this controversy must be judged.

[5, 6] Assuming, then, that the inadequacy of the consideration of \$16,800 for which this conveyance was made is a mere incident of the constructive fraud charged, which would be harmless without it, we will risk the danger of seeming to put the cart before the horse by first considering that question. In doing this we are more or less impressed by the fact that the execution of this deed was contemporaneous with the beginning of the great war which during the next four years shook the foundation upon which values had long quietly rested by increasing the consumption and diminishing the production of everything the ground produces. Whether this had anything to do with the dissatisfaction shown by the institution of this suit is of little importance in this case. We notice it simply on account of the strenuous insistence of the appellants that the weight of the evidence should be considered in the light of their desire to secure the judicial cancellation of the deed and urge us to presume that there is something more than sentiment in their persistence. An eventful year had elapsed between the execution of this deed and the filing of this petition.

Much testimony was introduced as to the value of this farm. About 40 witnesses were examined on that question, and we have examined that evidence with care and interest and observe its range between \$50 to \$100 per acre. Appellants urge that the testimony of their witnesses, although they are not quite so numerous, is entitled to greater weight than the testimony of the witnesses of respondent, for the reason that they were owners of farms in the immediate vicinity of the one in question, who were not called upon to prepare by making an examination of this particular tract for that reason. They were acquainted with the value of lands in the immediate vicinity and could speak from the standpoint of their own ownership. While some of the witnesses for respondent could speak from the same standpoint, others were taken from among dealers in land, some of whom owned large farms in the county, some were public officers, including the as-

essor, while others occupied the position of mere investors. All were called upon to acquaint themselves, if not already acquainted, with the condition of the surface of this tract and all its improvements. This all suggests four standpoints from which the value of land may be appraised. One is the standpoint of the owner who desires neither to buy nor to sell, but simply contemplates in its ownership the value of his own possession; another is the standpoint of one who desires to sell; another the one who desires to buy; and the fourth is the dealer who considers it a market proposition of turning money into land and land into money. It is this last capacity which the law favors. Its value is the price upon which buyer and seller can find common ground. The chancellor who tried this cause seems from the record to have been actuated by this principle. The land was in his circuit where the witnesses all resided. He found the price paid by the respondent and received by the grantor was "a fair and adequate consideration." We are bound to defer to this finding to the extent of taking into our consideration the superior advantage, which the trial judge enjoyed of having the witnesses before him and observing their appearance and manner upon the stand. We would not be justified in incumbering the record with comments upon the testimony of each, or even its tabulation for the purpose of showing the numerical strength of the respective parties, but will content ourselves with saying that the opinion formed from reading it is in full accord with the finding of the chancellor, and therefore hold that the consideration shown by the evidence was fair and adequate.

[7] 3. The petition charges no misrepresentation, concealment, oppression, or other element of fraud in procuring the conveyance. It simply charges that the mind of the grantor was weak, and controlled by an insane delusion in the execution of the deed. In noticing the evidence in support of this charge we do not wish to be understood as deciding that it entitles the appellant to relief unsupported by the charge and proof of inadequacy of the consideration paid—that is to say, of pecuniary injury. We simply lay hold of the horn of the legal dilemma so presented which grows out of the merits of the transaction—the condition of Mr. Wigginton and the circumstances of the deal in issue, depending principally upon the facts presented by the appellants.

He had resided in Pike county for 50 years or more, was pleasing in appearance, and intelligent and attentive and successful in business. He and his wife had two children, Addie and Ed., plaintiffs in this case. He had a married sister named Beasley, who died when her child, Bob Beasley, was a baby, and Mr. Wigginton and his wife took

the child into their home and raised him, giving him the advantage of a college education. Mr. Wigginton loved the boy as his own child, which he practically was. The daughter, Addie, married Edwin Goodman, and became insane, and he appears among the appellants in this suit as her husband and legal guardian.

In 1900 Mrs. Wigginton died. Mrs. Goodman was then in poor health, and her father purchased the land in controversy, which was a pleasant place, for a residence, and arranged with Mr. Goodman that he and his family, consisting of his wife and daughter Mary, who was then a small child, should live upon it without paying any other rent than the board of the father and his horse, the father to pay the taxes and repairs upon the premises, which he did. They lived together as an affectionate family. Mrs. Goodman's health declined, her mind became affected, and she was finally sent to the Fulton Asylum for the Insane, where she still remains. During her sickness Mr. Wigginton paid the expense of her treatment. The farm prospered so that at the time of Mr. Wigginton's death it was producing in the neighborhood of \$800 or \$900 per year above the expense of cultivating it. Mr. Goodman took into the family a young girl, Bertha Howell, who seems to have been about the same age or a little younger than his daughter Mary, to raise and assist in the housekeeping, and she remained as long as Mr. Wigginton was a member of the household.

About May, 1914, this girl, innocently enough as appears from the record, became the cause of friction between Mr. Wigginton, who took a great interest in her, and Mr. Goodman, and this friction naturally came to include Mary. Bertha slept in the general sitting room, and Mr. Goodman was in the habit of leaving his shoes by the stove in that room when he went upstairs to bed. He was naturally the first one up, and came into the room, shook down the fire, opened the draft, and put on his shoes. Mr. Wigginton saw something in the proceeding which aroused his suspicions. He thought his son-in-law was not treating Bertha properly and said so. Mary slept with Bertha. She was coming out in social matters, and used frequently to be out at night, and sometimes visited her friends and stayed away during the night. Mr. Wigginton attempted on Bertha's account to have her abandon her habit in this respect, but she gave him no encouragement whatever. In fact, it appears from her own statement that, while she listened to these remonstrances, she took little part in discussing them. Mr. Wigginton not only remonstrated with Mr. Goodman, but complained about what he considered to be an impropriety to friends outside, which coming to Mr. Goodman's ears he remonstrated so

earnestly that with profane embellishment he accused Mr. Wigginton of having lied. Mr. Goodman's account of the interview stops here, and Mr. Wigginton, being dead, did not give the court the advantage of his relation of the interview, but the evidence discloses that he did not refrain from telling his friends and acquaintances that he had been shamefully treated and cursed by his son-in-law, that it had raised an impassable barrier between them, and that he believed Mr. Goodman had shamefully treated the girl. He also stated freely, in effect, that he did not intend that his son-in-law should have the handling of his property. From the correspondence in evidence it seems that Mr. Wigginton dearly loved his granddaughter, and she, of course, took the side of her father. These circumstances are the foundation of the charge that an insane delusion actuated Mr. Wigginton in the execution of this deed. From this time on he took an interest in the final distribution of his property to natural and well chosen beneficiaries. During the same month he conveyed one of his farms containing 400 acres, worth \$16,000, to his nephew, Mr. Beasley. On July 2d he conveyed another farm of 130 acres to the plaintiff Ed. Wigginton, who values it at \$15,600, and also gave him seven shares of bank stock at the par value of \$100 each, and which are admitted to have been worth more. On the 1st day of August following he conveyed the farm in question to the defendant, who had been negotiating for it during the previous ten months for a consideration paid of \$16,800, \$15,000 of which was already invested in an interest-bearing security which is unquestioned, and the remainder in cash. Eight days later he made his will, taking the appellant Ed. Wigginton to the attorney's office with him. He explained that he desired to make a change in a former will which he had executed on July 9th, for the reason that he had disposed of the farm to Mr. Burns. He explained that he desired to have it fixed in such a way that if his granddaughter should die without issue the property given her would go to his son and five of his nieces whose names he had with him, as he did not desire that it should go to her father because he had cursed him and told him that he might take his property and go to hell with it. By this will he left all his property to Mr. Rule in trust for the maintenance and care of his daughter, the remainder of the income, if any, to be paid annually to Mary, and if she should die without issue to go to his son and five nieces. When all this had been reduced to writing it was read to Ed., and his father asked him if he was satisfied, and he said he was, that anything that satisfied his father satisfied him. A fair copy of this was made, signed, and executed.

As to the ability of Mr. Wigginton to fully

understand the nature of all the transactions we have mentioned, the evidence leaves no doubt upon our minds. They were the acts of a sane man intimately acquainted with the nature and value of his property to the minutest detail, and comprehending every natural object of his solicitude or bounty. Mathematically it was a perfect expression of equality. The plaintiff son not only received the farm and bank stock which had been given him without protest or mention of the incapacity of his father to make the transfer, but was kept informed of the disposition of his property at every stage. He made with care and accuracy the division of his entire estate into three equal parts with judgment and precision. No fault is found or can be found with his classification of Mr. Beasley among his children. He had no other parent from his earliest infancy, and the provision was only an honest recognition of the relation which existed in fact, if not in law. The granddaughter frankly states in her testimony for her father that outside the one subject relating to Bertha her grandfather seemed rational. The statement of the appellant Edwin Goodman that he profanely accused Mr. Wigginton, who had been very kind to him, of lying, should weaken his statement that he knew the old man at the time to be in such a condition of mental weakness that he could not comprehend the nature and quality of his acts. Such a pitiable condition would cause sorrow rather than anger. We think Mr. Wigginton understood perfectly what he was doing, and acted within his rights in the execution of the deed.

[8] It only remains to notice the contention that this deed was the product of an insane delusion. We cannot gather from the evidence that Mr. Wigginton ever charged any act discreditable to the girl Bertha, who was a child of 15. With an old-fashioned sense of chivalry he thought that she should be protected, and that the conduct of his son-in-law did not serve that purpose. A covert attempt to discredit her was made in the testimony of a banker called by the appellants, who stated, in substance, that Mr. Wigginton came to his bank with a letter, a portion of which was read to him. He did not remember the name of the writer, but had an impression that the first name might have been Bertha; that it referred to the purchase of a farm that could be secured for \$3,000, and Mr. Wigginton talked to him about loaning him the money to be secured by farm mortgage. This circumstance recalls a statement of his granddaughter, who testified that on Thursday of the chataqua which began in Clarksville on

Sunday, August 2, 1914 (some days after this deed was made), she conversed with her grandfather on the subject of the sale to Mr. Burns of their home, and that he had expressed great contrition and grief at having sold it, and she asked him why he did not go and buy it back; while the appellant Ed. Wigginton testified that his father told him he had tried to do so, offering Mr. Burns \$3,000 for his bargain. Having failed, he made his will and went to Eureka Springs, his son going with him. It was on this trip that his father spoke of the great temptation to throw himself under the wheels of the cars. After he returned, and on the day of his death, he wrote three postal cards to Mary, two of which were sent, and the other was found in his pocket after his death. These were filled with expressions of love and tenderness to the child and grief for what he had done to her. One cannot read these pathetic notes without the impression that his talk with Mary at the chataqua and his inability to comply with her request had greatly agitated him.

In Mr. Wigginton's objection to his son-in-law's conduct with reference to Bertha we see no evidence whatever of insanity. He may have been unnecessarily circumspect, but that is a matter of training and temperament, and, in this instance, perhaps of courtesy. The instinct of modesty is not to be denounced by the law. We cannot look at the situation from the standpoint of Mr. Wigginton, for his mouth is closed, but he has left in his record his statement in writing that he was actuated in the disposition of his property to some extent by the discourtesy and abuse of his son-in-law, who admits that he used language toward him that we all recognize as insulting. He had the right to resent this by providing for his daughter and grandchild without the intervention of the husband and father, and he had the right for that purpose to convert the land in question into securities appropriate for that purpose. The court found from the evidence before it that the transaction was fair, and that he fully understood and knew its nature and effect, and we see no reason to interfere with its finding.

The judgment of the Louisiana court of common pleas is therefore affirmed.

RAILEY, C., concurs.

PER CURIAM. The foregoing opinion of BROWN, C., is adopted as the opinion of the court. BLAIR, P. J., and WOODSON and GRAVES, JJ., concur.

**STATE ex rel. HAGERMAN, Collector, v. ST. LOUIS & E. ST. L. ELECTRIC RY. CO. (No. 20171.)**

(Supreme Court of Missouri, Division No. 1. July 9, 1919. Appellant's Motion for Rehearing and Motion to Transfer to Court en Banc Denied Dec. 1, 1919.)

**1. TAXATION ⚡592—COPY OF TAX BILL NEED NOT ACCOMPANY PETITION IN ACTION FOR TAX.**

Under Rev. St. 1909, § 11593, in suits against railroads for delinquent taxes, a copy of the tax bill need not be filed with the petition.

**2. TAXATION ⚡47(4)—ASSESSMENT TO RAILROAD OF RIGHTS IN BRIDGE ALREADY TAXED NOT DOUBLE TAXATION.**

Taxation of an electric railroad company owning under contract with the owners certain easements in a bridge was not double taxation, and therefore violative of the Constitution, because the bridge was also assessed for taxation against its owners.

**3. TAXATION ⚡40(5)—NO LEGAL DISCRIMINATION THROUGH OMISSION OF BOARD TO ASSESS OTHER COMPANIES LIABLE.**

If Rev. St. 1909, §§ 11551, 11552, providing for the taxation of franchises other than that of corporate entity, were valid and applicable, taxes assessed thereunder against an electric railway company were lawful, though the state board of equalization omitted to make assessments under the same statutes against other railroads liable.

**4. TAXATION ⚡151 — OF "FRANCHISE" OF ELECTRIC RAILWAY IN BRIDGE.**

When a street railway obtained permission to operate on a public bridge for 50 years, the legislative grant vested in the railway a valuable "franchise," wholly distinct from its franchise of artificial entity, and specifically assessable for taxation under Rev. St. 1909, §§ 11551, 11552; a "franchise" implying a privilege conferred by law to do that which does not belong to the citizens of the country generally as a common right.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Franchise.]

**5. TAXATION ⚡151—ASSESSMENT OF STREET CAR TRACKS ON BRIDGE BETWEEN STATES.**

Assessment by the state board of equalization, under Rev. St. 1909, §§ 11551, 11552, of thirty-six hundredths of a mile of railroad on a bridge between Missouri and Illinois, owned and operated by an electric railway in the city of St. Louis, held not invalid as an attempt to tax property outside the jurisdiction of the state.

**6. COMMERCE ⚡72—TAX ON RAILROAD NOT BURDENING INTERSTATE COMMERCE.**

Assessment and taxation by the state board of equalization, under Rev. St. 1909, §§ 11551, 11552, of thirty-six hundredths of a mile of railroad on a bridge between Missouri and Illinois, lying wholly in Missouri and owned and operated by an electric railway, as well as money on deposit in banks, the franchise of operating

its road, etc., held not to impose a direct burden on interstate commerce, in violation of Const. U. S. art. 1, § 8.

**7. CONSTITUTIONAL LAW ⚡283 — TAXATION ⚡87—ASSESSMENT AGAINST STREET RAILWAY NOT A TAKING WITHOUT DUE PROCESS.**

Assessment by the state board of equalization, under Rev. St. 1909, §§ 11551, 11552, of the tangible property and franchises of an electric railroad owning and operating thirty-six hundredths of a mile of track on a bridge between Missouri and Illinois at the city of St. Louis, held constitutional as against objection that it takes the property of the railroad without due process.

Appeal from St. Louis Circuit Court; Wm. M. Kinsey, Judge.

Suit by the State of Missouri, on the relation of James Hagerman, Jr., Collector, city of St. Louis, against the St. Louis & East St. Louis Electric Railway Company. From judgment for plaintiff, defendant appeals. Affirmed.

Dawson & Garvin, of St. Louis, for appellant.

Thomas G. Rutledge and J. M. Lashly, both of St. Louis, for respondent.

**BOND, J. I.** This is a suit by the collector of the city of St. Louis for taxes for the year 1907, assessed by the state board of equalization against .864 of a mile of railroad owned and operated by the defendant corporation in the city of St. Louis.

The case was submitted to the trial judge, a jury being waived, upon an agreed statement of facts. The finding and judgment of the court were rendered in favor of the plaintiff for taxes and interest in the sum of \$8,356.19, to which was added \$1,000 attorneys' fee, allowed and taxed as costs.

Defendant duly appealed.

The agreed statement of facts, or so much thereof as is pertinent, will be stated in connection with the rulings made upon the errors insisted upon in the brief and argument of appellant.

II. It is claimed that plaintiff failed to prove the case stated. The defendant procured a charter from the state of Missouri in the year 1889, as a railway company, with its western terminus in Missouri, and an eastern terminus in Illinois. It has exercised the franchise granted thereunder by entering into contracts with the St. Louis Bridge Company, a corporation organized in Missouri and Illinois, and the owner of a toll bridge known as the Eads Bridge, extending from the city of St. Louis, Mo., to the city of East St. Louis, Ill., the Missouri Pacific Railroad Company, and the Wabash Railway Company, by virtue of which contracts the defendant, in consideration of a certain division of the fare collected from

passengers which it should transport across the upper deck of said bridge, was permitted to operate thereon electric trolley cars. In April, 1902, these contracts were canceled, and a new one made by defendant with the Terminal Railroad Company of St. Louis, which had previously acquired the leasehold of said bridge. This "said substitute agreement is of date April 11, 1902, and permits defendant to operate electric cars on the upper roadway of said bridge for fifty years unless sooner terminated by said Terminal Company." Two connecting street railways, both Illinois corporations, are made parties to this contract, the object of their joinder being to secure to the passengers carried by them a continuous passage over defendant's electric trolley car railroad running over said bridge and terminating in St. Louis, Mo. In this connection the agreed statement of facts further recites:

"Under said agreement the said Terminal Association retains ownership and control of the tracks over which said trolley cars are to be run for passenger traffic only; said passengers are to be carried for a certain division of the fare of not less than five nor more than ten cents per passenger, as determined by said Terminal Company to be paid by said bridge passengers for riding across said Eads Bridge; said electric cars to be run between the termini of said bridge; and for refusal, inability, or failure of the other parties to direct travel destined to pass by way of East St. Louis to or from said city of St. Louis exclusively to said Eads Bridge, or to keep the other conditions of said agreement, said Terminal Company reserves the right to declare said agreement terminated and canceled."

The defendant company was incorporated originally for \$100,000. Its capital stock was subsequently increased to \$250,000 in 1890, and in 1902 to \$500,000. Its bonded indebtedness is \$500,000, on which it pays five per cent. interest, and has always paid dividends on its stock.

The tax bill sued on contains itemizations, according to the statute, of the nature and valuation of defendant's property, and the rate of taxation levied thereon for that year, showing the aggregate amount sued for. The original bill was not filed, but a copy, admitted to be correct, was filed with the petition. The petition is substantially in the form prescribed by section 11593 of the Revision of 1909.

In assessing the property of defendant for the year 1907, the board of equalization specified the value of its passenger cars, its money on hand, the proportion of its rolling stock in this state, the proportion of its roadbed and superstructure in this state, and, lastly, "all other property" at \$500,000.4625 per mile, which last item, computed at the length of the road in this state, amounted to \$173,000.16. The addition of all the items

at \$186,019.98 is the basis of the taxes levied.

The agreed facts show that at the time of this assessment defendant—

"owned property in the state of Missouri consisting of certain poles and overhead trolley wires erected and maintained on the west end of said Eads Bridge as a necessary working part and continuation of other poles and overhead trolley wires erected and maintained on the east or Illinois end of said bridge, all under said agreement of July 26, 1889, and said substitute agreement, and also \$26,524.55 on deposit on June 1, 1906, in ——— Bank of the city of St. Louis, Mo., which proceeds of said business done on said bridge under said agreements and also two cars valued at \$850 each."

The property, tangible and intangible, owned and operated in this state by defendant, possessed great value and earning power, and, to provide for its taxation, the statutes relating to the taxation of franchises other than that of corporate entity were enacted. Laws 1901, p. 232 (R. S. 1909, §§ 11551, 11552). The method and plan of assessment and valuation prescribed in these statutes was scrupulously followed by the state board of equalization. The record of its action was filed with the auditor (R. S. 1909, § 11573), whose certificate thereof is made prima facie evidence of the facts therein recited. R. S. 1909, § 11577; State ex rel. v. Met. St. Ry. Co., 161 Mo. 188, 61 S. W. 603. We think this and other evidence in the agreed statement of facts sufficed to make a prima facie case for plaintiff.

[1] We have not overlooked the contention that the admittedly correct tax bill copied in the agreed statement was not filed with the petition. That is not required by the statutory form applicable to suits against railroads for delinquent taxes. R. S. 1909, § 11593; State ex rel. v. Railroad, 113 Mo. 297, 21 S. W. 14.

[2] III. It is insisted by appellant that the tax assessed in this case is void because double taxation, in that the bridge, subject to the easements evidenced by the contract under which defendant conducts and operates its electric railway, was also assessed for taxation against the grantors of the defendant.

It will be observed that in the assessment of the property of defendant the state board of equalization left out of view all of the structural elements essential to the purposes for which the bridge was built, and the uses to which it was to be put, and confined its view exclusively to those things which were descriptive of the separable ownership of the defendant under and by virtue of the contract possessed by it to operate and conduct its electric railway over the upper surface of the bridge, and those things which it had placed on the bridge to facilitate the operation of its electric trolley railway.

It is perfectly plain from the agreed state-



ment of facts that the owners of the bridge were not the owners of the rolling stock, the metals or rails over which the trolley line ran, nor the right of user thereof, nor the trolley poles and wires, and it was these, coupled with the franchise value arising from the use and operation of them by the defendant railroad, which the board of equalization intended to assess as the property of defendant. And it is equally clear that in its separate assessment of taxation on the bridge itself, against the owners thereof, the board did not take cognizance of the property and franchises assessable to the owners of the trolley company. There is nothing in this method of taxation which militates against the doctrine stated in *State ex rel. v. Railroad*, 196 Mo. 523, 94 S. W. 279, where it was correctly held that a bridge as an entirety, having been taxed once, could not, without violating the constitutional principles forbidding double taxation, be taxed a second time against the lessor. In the case at bar the bridge as a bridge, embracing its multifarious uses as such, was taxed against the owners thereof; but that assessment in no wise precluded the state board of equalization from making another assessment against the corporate grantee of a contract of user of a right of way for its electric trolley line over said bridge. The properties taxed were distinct, and the ownerships were different, and there is nothing in the agreed statement of facts which shows that the board of equalization had in mind the values of the property belonging to defendant when it assessed the bridge property against its separate owners.

Our conclusion is that the action of the state board of equalization in levying the assessment sued for did not contravene the constitutional inhibition against double taxation.

[3] IV. There is no merit in the contention of unjust discrimination in this case. Whether defendant is taxable depends wholly upon the provisions of sections 11551, 11552, of the Revision of 1909 (Laws 1901, p. 232). If those statutes are valid and applicable, then the taxes assessed against defendant in this case were lawfully made, irrespective of the omission of the state board of equalization to make assessments under the same statutes against other railroads liable to assessment thereunder. The cases cited by appellant on this point are wholly irrelevant, in that they refer to the invalidity of a law or city ordinance which, by its terms, was not uniform as to the same classes. Here there is no dispute as to the validity of the statutes requiring taxation of franchises, for the only point made is that the board neglected to assess others liable under a valid law.

[4] V. Appellant insists that the tax assessment is illegal because the defendant owns

no railroad franchises except the franchise to be a corporation, which is a nontaxable one. This is a misconception. The defendant does own railroad franchises other than that implied in that of a grant of a charter to it. It possesses, by the terms of its charter, the right to contract and operate a railroad. The bridge over which its track is laid is, in a general sense, a public highway. Under the Constitution of this state, its right to operate its street railway over the public highway (the bridge) could only be exercised by the consent of the local authorities having control of the highway proposed to be occupied by such street railway. Const. art. 12, § 20. When it obtained this permission to operate its street railway on this public highway for 50 years, the legislative grant instantly became effective, and vested in appellant a valuable franchise, wholly distinct from its franchise of artificial entity (*State ex rel. v. Railroad*, 140 Mo. loc. cit. 549, 41 S. W. 955, 38 L. R. A. 218, 62 Am. St. Rep. 742), and one which is specifically assessable for taxation under the terms of the statutes providing for taxation of franchises. *State ex rel. v. Wiggins Ferry Co.*, 208 Mo. 622, 106 S. W. 1005. Proceeding under these statutes, and in accordance with the method prescribed in a subsequent section (11559, R. S. 1909), the board of equalization assessed and adjusted the taxes laid on defendant's franchises on a mileage basis, and after the hearing of evidence, and in so doing it arrived at the conclusion that the value of the intangible property of defendant in Missouri was \$173,000.16. It referred to this specific assessment as one made on "all other property" of defendant, a method of distinguishing the various items approved in *State ex rel. v. Wiggins Ferry Co.*, 208 Mo. 622, 106 S. W. 1005. In the present case, as has been seen, the franchise to operate a railroad, resting primarily in legislative grant, became consummate when the consent to occupy the bridge for that purpose was obtained; for then it ripened into a legislative privilege, and fell within the correct meaning of the term "franchise," which implies a privilege conferred by law to do that which "does not belong to the citizens of the country generally as a common right." 12 R. C. L. 173, § 1 et seq.; *State ex rel. v. Weatherby*, 45 Mo. loc. cit. 20. According to the agreed facts, this franchise vested in appellant was a practical monopoly with a possible life of 50 years.

[5] VI. Nor are we able to concur in the view that in the assessment sued on in this case the board of equalization undertook to tax property outside the jurisdiction of the state of Missouri. On the contrary, the description of the property taxed, the itemization of amounts, discloses that they were referable only to tangible and intangible prop-

erty of defendant within the territorial limits of this state.

[8, 7] VII. It is finally insisted by appellant that the taxation sued upon is void under the federal Constitution vesting in Congress the power to regulate interstate commerce, and prohibiting the states from taking property without due process.

It is not within the power of the states to put a direct burden on interstate commerce, the exclusive regulation of which is granted to Congress by the Constitution of the United States. U. S. Const. art. 1, § 8. But this provision does not prevent the assessment of property situated in the several states, because it is a part of a unified system which is appropriated to interstate commerce. In such cases the property—

"may be taxed at its value as it is, in its organic relations, and not merely as a congeries of unrelated items, (for) taxes on such property have been sustained that took account of the augmentation of value from the commerce in which it was engaged." *Adams Exp. Co. v. Ohio State Auditor*, 165 U. S. 194, 17 Sup. Ct. 305, 41 L. Ed. 683; *Adams Exp. Co. v. Kentucky*, 166 U. S. 171, 17 Sup. Ct. 527, 41 L. Ed. 960; *Fargo v. Hart*, 193 U. S. 490, 24 Sup. Ct. 498, 48 L. Ed. 761. So it has been held that a tax on property and business of a railroad operated within the state might be estimated *prima facie* by gross income, computed by adding to the income derived from business within the state the proportion of interstate business equal to the proportion between the road over which the business was carried within the state to the total length of the road over which it was carried. *Wisconsin & M. R. Co. v. Powers*, 191 U. S. 379, 24 Sup. Ct. 107, 48 L. Ed. 229. Since the commercial value of property consists in the expectation of income from it, and since taxes ultimately, at least, in the long run, come out of income, obviously taxes called taxes on property, and those called taxes on income or receipts, tend to run into each other somewhat as fair value and anticipated profits run into each other in the law of damages. The difficulty of distinguishing them became greater when it was decided, not without much debate and difference of opinion, that interstate carriers' property might be taxed as a going concern." *Galveston, etc., Railroad Co. v. Texas*, 210 U. S. 217, 227, 28 Sup. Ct. 638, 52 L. Ed. 1031.

Under the agreed statement of facts appellant owned a usufruct in about one-third of a mile of railroad track on that portion of the bridge within the limits of Missouri. It it also owned, as stated before, the rails, the superstructure, and wires which enabled it to operate its trolley cars over this line. It also owned money on deposit in banks in Missouri; also the franchise of operating its railroad, granted to it by the Legislature of the state, and consented to by the local authorities in charge of the bridge. All of

this property was within the territory of this state, and therefore its assessment for taxation did not impose a direct burden upon interstate commerce under the principles declared and the rule stated in the foregoing quotation from the opinion of the Supreme Court of the United States and the authorities therein cited. The imposition in the case at bar was purely a tax on property as such, locally situated, and upon a Missouri franchise locally enjoyed. It was assessed in strict accordance with the provisions of the statutes of this state, and the board of equalization, in making this assessment, was entitled to consider the increase in value of the property assessed by reason of its being an integral part of a railroad engaged in interstate traffic, and they were entitled to discern the value of the property in Missouri from that of the other property of which it was a part, in the manner prescribed in the statute providing for its assessment, and sanctioned by the foregoing decision of the Supreme Court of the United States. This, we think, was substantially done in the present case. We find nothing in the agreed statement of facts which tends to show that this assessment was so laid as to take the property of appellant without due process.

Our conclusion is that the judgment of the trial court must be affirmed. It is so ordered.

BLAIR, P. J., and GRAVES, J., concur.

#### BRAMHALL v. BRAMHALL et al. (No. 20526.)

(Supreme Court of Missouri, Division No. 1.  
Dec. 1, 1919.)

#### 1. REMAINDERS ⇐6—DEED TO LIFE TENANT OF CONTINGENT REMAINDERS.

In view of Rev. St. 1909, § 2872, deeds to a life tenant; executed by remaindermen, vest in the life tenant in fee the contingent interests of the remaindermen.

#### 2. JUDGMENT ⇐251(1) — CONFORMITY TO PLEADING.

A judgment reforming a deed *held* based on a finding of mutual mistake, as alleged, and not on a finding of fraud, a matter not pleaded.

#### 3. REFORMATION OF INSTRUMENTS ⇐17(1), 18 — GRANTED BY REASON OF MISTAKE IN ESTATE CONVEYED.

When by mistake in drawing a deed, it does not convey the estate intended by the parties, it may be reformed to accomplish their intention, whether the mistake be one of law or fact in writing out the agreement made.

#### 4. LIFE ESTATES ⇐8 — POSSESSION OF LIFE TENANT NOT ADVERSE.

Possession by life tenant is not adverse to remaindermen.

**5. LIMITATION OF ACTIONS** **§60(6)—ACTION TO REFORM DEED ON DISCOVERY OF MISTAKE.**

The statute of limitations is no defense to an action brought by one in possession of land under a deed giving him a life estate against persons which the deed made remaindermen; plaintiff being ignorant of the effect of the deed until shortly before he sued, and the interest of the defendants in the land being acquired through mistake of the scrivener, who drew up the deed, in view of Rev. St. 1909, § 2535.

**6. REFORMATION OF INSTRUMENTS** **§32—LACHES.**

One holding land under a deed giving him a life estate was not guilty of laches in failing for a number of years to bring an action to reform the deed to exclude the remaindermen from any interest in the land; plaintiff having never acquiesced in the effect of the deed, and being ignorant of its effect until shortly before he sued, and none of the remaindermen being prejudiced by the delay.

Appeal from Circuit Court, Sullivan County; Fred Lamb, Judge.

Suit by Robert M. Bramhall against Hiram W. Bramhall and others. Judgment for plaintiff, and certain defendants appeal. Affirmed.

Higbee & Mills, of Lancaster, for appellants.

N. A. Franklin and J. C. McKinley, both of Unionville, for respondent.

GOODE, J. This suit was to reform a deed made by John P. Bramhall, one of the defendants, and his wife Edyth Walcott Bramhall, to plaintiff, on December 5, 1903, to divest the defendants of any title or interest in the premises conveyed by said deed, and to have ascertained and determined the estate, title, and interest of all the parties to the action in and to said premises. Such, in substance, is the prayer of the petition.

The land involved is in Putnam county (where the action was filed), and comprised about 176 acres. The suit was subsequently transferred by change of venue to Sullivan county, where it was tried and resulted in a judgment for plaintiff.

There are eight defendants, all of them children of plaintiff; but only three of them answered in the case, the others having previously executed quitclaim deeds to relinquish to plaintiff whatever interests they had acquired by the deed from John P. Bramhall to plaintiff, of which reformation is asked.

The court made detailed findings of the facts, but we do not consider it necessary to set out these findings in full.

Plaintiff and his second wife, Althea Bramhall, were unable to live together in peace, and in September, 1902, agreed to separate, and agreed also upon terms of separation. She consented to accept \$300 which was paid

to her on some day in that month, and on the same day (which is not stated in the record) she and her husband (the plaintiff) executed and delivered to the defendant John Bramhall a conveyance of the land involved in this suit. Her testimony about that transaction is as follows:

"Q. You settled with Uncle Robert, and he paid you the \$300? A. Yes; he did.

"Q. And that was before you made this deed, you and Mr. Bramhall, to John? A. Yes; he paid me when I signed the deed.

"Q. He paid you before you signed the deed, didn't he? A. No; he didn't.

"Q. All done there together at the same time? A. Yes, sir.

"Q. And that was what you and he agreed on? A. Yes."

That testimony is quoted, for the reason that it is contended (although no defense of fraud in the transaction is pleaded) the conveyance by plaintiff to his son John was for the purpose of defrauding plaintiff's wife; and so John P. Bramhall testified. He stated, among other things:

"I understood that he was attempting to defraud her (meaning the wife of plaintiff) out of her interest in this property.

"Q. And you were helping him; did you make yourself a party to that? A. Knowing and understanding that it was made to me, for the purpose of protecting the other members of the family."

John Barnett, the justice of the peace who took the acknowledgment of the deed by which plaintiff and his wife conveyed to John P. Bramhall, testified the deed was made when plaintiff and his wife were on the eve of separating, and when they—

"were settling the property question between themselves; that he paid over to her for plaintiff the amount which they had agreed she should receive."

John P. Bramhall was at the time a lawyer, living at Highland, Putnam county, and plaintiff testified his son John represented that, notwithstanding the settlement, plaintiff's wife later would demand more from him, and persuaded him, against his first inclination, to convey the land to his said son; he relying on the knowledge of the latter as an attorney and having confidence in his honesty. On the other hand, John says the deed was made at the request of his father, but admits advising the latter about it. He testified regarding what transpired when the deed was executed, namely, at the very time of the settlement with Althea Bramhall:

That nothing was then discussed; "the whole thing had been discussed before, and the question about what should go in it, or what it should be made for, was concluded before the acknowledgment was taken there, and before Mr. Barnett came down to take the acknowledgment."

The testimony of plaintiff, who was corroborated by the subsequent acts, and in a measure by the testimony of John P. Bramhall, was that it was agreed John Bramhall should reconvey the land to plaintiff after he had procured a divorce from his wife; that before conveying to John he demanded of the latter a bond to reconvey, but John put him off, saying he would give the bond later; there was no hurry.

Barnett, the justice of the peace, stated in answer to a question about John's executing a bond to reconvey:

"Mr. Bramhall spoke about his giving bond for making the return deed.

"Q. Well, what did John Bramhall say to that? A. He said we'd hardly have time at the present time, but that he would do it later."

Barnett further said he understood, from the talk which occurred between the parties when he took the acknowledgment of plaintiff and his wife to the deed to John Bramhall, that the latter was to reconvey to his father.

Plaintiff obtained a decree of divorce, November 27, 1903, and afterwards requested his son John to reconvey the land to him, and pursuant to said request John Bramhall and his wife, Edyth W. Bramhall, on December 5, 1903, signed and acknowledged a deed conveying the land involved in this action, not to the plaintiff in fee simple, but to him "and the heirs of his body forever." Soon thereafter, and after this deed had been recorded, plaintiff learned John P. Bramhall's deed had not conveyed a fee simple to plaintiff, but an estate for life to him, with remainders over in his children; and thereupon, on January 25, 1904, he wrote to John, complaining there was too much in the deed. On receiving this complaint John P. Bramhall and wife executed a second deed, dated January 30, 1904, and acknowledged February 2d, by which they released and quitclaimed their interest in the land to plaintiff, reciting that said second deed was made—

"for the purpose of correcting a deed from said first parties to said second party, dated December 5, 1903, and recorded in Book 8 of Quitclaim Deeds, at page 34, of Putnam county, Missouri, records, as in writing said deed the granting clause by clerical error says: 'Is hereby granted to said party of the second part and to the heirs of his body forever' (instead of to said second party, his heirs and assigns)."

The second deed was preceded by a letter, signed "John P. Bramhall and wife," and admitted by the former to have been written by him, wherein he said the conveyance of only a life estate by John P. Bramhall's first deed could be easily corrected by another deed, which he would make, and that no suit to correct the first one was necessary, promising to make the deed of correction when he ob-

tained the description of the land. The second deed was accompanied by a letter, signed by John P. Bramhall and which he admitted writing, wherein he said the second deed "will complete your [i. e., plaintiff's] title just as it was before you were married"; further, that the first deed was not written by John P., but by the typist of Mr. Ferris, to whom John P. gave the description, and that the typist had followed the form of another deed, "and that will account for the error." John Bramhall testified over and over again that he made the second deed, and wrote the accompanying letter, simply to "appease" his father; "just to appease him; that was all, because I knew the time would come when these children at home would thrust him out, and he would have to live on the government."

From the time the second deed was made until February, 1916, a few months before the present action was instituted, plaintiff supposed the second deed from John P. conveyed the fee-simple title and had left no interest outstanding in any of his children. He only learned of his error when he attempted to obtain a loan on the property for a prospective purchaser who needed a loan in order to make the purchase. Meanwhile plaintiff had been continuously in possession of the land, claiming title in fee, as he had been since 1878.

The finding below of a mistake in the quantity of the estate conveyed by John Bramhall's first deed (or the one of December 5, 1903), was as follows:

"Acting on said request [plaintiff's request to reconvey] said defendant executed and delivered to plaintiff a deed conveying said lands to plaintiff and the heirs of his body, when it was mutually intended to convey to plaintiff the title in fee to said land; said deed being dated December 5, 1903, and recorded in Quitclaim Deed Record, book 8, at page 34, in the office of recorder of deeds in Putnam county, Missouri."

The court adjudged that the deed of December 5, 1903, be corrected and reformed, so as to convey the fee-simple title to the lands described in and to the plaintiff; further adjudging that such title be vested in the plaintiff, to have and to hold to him and his heirs forever, and that defendants, and each of them, be divested of any right, title, or interest, present or future, in and to the lands, and be forever barred from having or claiming any right, title, or interest.

David S., Alexander I., and Jarnada D. Bramhall appealed; the other defendants having previously relinquished their interests to plaintiff.

[1] I. The second quitclaim deed of John P. Bramhall and wife, together with the quitclaims made by four other children of plaintiff, revested in him, in fee, their contingent interests in the land, but left remainders out-

standing in the three children who refused to reconvey, to wit, the appellants. R. S. 1909, § 2872; Wood v. Kice, 103 Mo. 329, 15 S. W. 623. The petition alleges, in effect, that John P. had agreed to convey the fee-simple title to plaintiff, and by the deed of December 5, 1903, undertook to convey a title and estate in fee simple; that plaintiff undertook to receive such an estate and title, but by mistake the draftsman of the deed drew it to convey the premises to plaintiff and the heirs of his body, and by mistake plaintiff accepted and recorded the deed as thus drawn.

[2, 3] It is argued the court below determined the case on an issue not tendered in the petition; and instead of resting the judgment on a finding of mutual mistake in the execution and acceptance of John Bramhall's first deed, found the deed was executed by John P. Bramhall in the way it was drawn, for the purpose of defrauding plaintiff, by vesting in him only a life estate, with remainders over in his children, and decreed relief to plaintiff against that fraud. The judgment does not support this contention. We have quoted the finding below as to why said deed was made to plaintiff and the heirs of his body, which was that the parties mutually intended the deed should convey to plaintiff a title in fee. The court's finding of fraud on the part of John Bramhall related to his later conduct in representing to his father that the second deed of quitclaim, executed to correct the first one, passed to plaintiff the title in fee, whereas in fact it left remainders in seven of the children. The evidence is convincing that plaintiff, when he settled with his wife, conveyed to his son pursuant to the advice of the latter and his positive agreement to reconvey to plaintiff the same title plaintiff had held previously. When, by mistake in drawing a deed, it does not convey the estate intended by the parties, it may be reformed to accomplish their intention, as was decided in *Leitendorfer v. Delphy*, 15 Mo. 115, 55 Am. Dec. 137, a case where failure to pass the fee occurred from the omission of the word "heirs" after the grantee's name; "heirs" being then necessary to create an estate in fee simple.

Appellants say plaintiff, by acceptance of the first deed, was charged with knowledge of its contents; but this doctrine is inapplicable to the present action. The rule applicable is that if, after an agreement has been made, a mistake, either of law or fact, occurs in writing it out, so that it fails to express the contract of the parties, equity will reform it. 2 Pomeroy, Eq. Jur. (4th Ed.) § 845. That doctrine as thus stated in the treatise cited was followed in *Williamson v. Brown*, 195 Mo. 313, 93 S. W. 791, where a deed executed pursuant to an intention to convey a life estate in lands to a husband with a remainder to his wife and her heirs, was drawn by mistake, so as to convey to the husband

the fee to the land. The deed was reformed to carry out the intention of the parties. In the present case there is the additional fact of plaintiff's confidential relation to his son as an attorney and his reliance on his son's superior knowledge of the law.

[4] II. The statute of limitations is invoked as a defense; more than 10 years having elapsed from the date of the erroneous deed of December 5, 1903, to the filing of this action. This defense must be considered in connection with plaintiff's uninterrupted possession of the lands—a possession not adverse to the title of the three appellants as remaindermen, but none the less an actual possession.

[5] It has been held the statute of limitations is no defense to an action brought simply to ascertain and quiet title under the statute enacted for that purpose; that is, an action under the first part of section 2535 of the Revision of 1909. *Armor v. Frey*, 253 Mo. 447, 474, et seq., 161 S. W. 829, and *Powell v. Powell*, 267 Mo. 117, 129, 183 S. W. 625, 188 S. W. 795, wherein remarks looking the other way were treated as dicta. Both plaintiff and appellants pray relief appropriate to said statute as amended in 1909. But appellants' theory is the action is one of original equity cognizance, as plaintiff asks reformation of a deed and divestiture of the color of title the deed gives to the appellants, and it is insisted the statute of limitations bars equitable as well as legal actions, and even one to reform a deed. *Stark v. Zehnder*, 204 Mo. 442, 102 S. W. 992. If this theory is accepted, plaintiff, although continuously in possession, will have lost title by not suing within the limitation period to reform the erroneous deed, and the appellants' remainders having been ascertained in this action, those who survive plaintiff will take the interests conveyed to them as heirs of his body by the deed of December 5th. Whatever has been ruled regarding the bar of the statute in equitable actions was not meant to ignore the effect of possession, where the title to land is involved. The question has been before this court in several instances where deeds were reformed, notwithstanding the limitation plea; it appearing the party asking the relief was in possession and had been all along. In *Michel v. Tinsley*, 69 Mo. 442, the defendants, by cross-bill, prayed for correction of a deed assailed by the plaintiffs as fraudulent, and plaintiffs set up in bar the statute of limitations. The court disposed of the plea in this passage of the opinion:

"It is not easy to see upon what principle it is that the plaintiffs invoke the statute of limitations to bar the correction of these mistakes in the deed. The defendants, who are purchasers for value, directly or indirectly, from Tinsley, have never been disturbed in their possession. No eviction has occurred—nothing, in short, requiring any affirmative action on their part, till the institution of this suit, against those who then, for the first

time, discover the defects or omissions in the trustee's deed. They are, in our opinion, clearly entitled to have the deed corrected, unless, as is assumed as the basis of all argument to the contrary, it was concluded, by the court, that the sale from Hunter to Tinsley was the result of a fraudulent conspiracy. But the circuit court found that there was no such conspiracy or fraud, and we concur in this finding. The defendants were then entitled to have the deed corrected. *Bartlett v. Judd*, 23 Barb. [N. Y.] 270; *Mastin v. Halley*, 61 Mo. 198."

To the same effect are *Cooper v. Deal*, 114 Mo. 527, 22 S. W. 31, and *Epperson v. Epperson*, 161 Mo. 577, 583, 61 S. W. 853.

Answering the same contention the Kentucky Court of Appeals, in a case where reformation of a mistake in a deed was sought by a party more than 10 years after its execution, he having been in possession meanwhile, the court said the argument was a novel one "that one out of possession, claiming a right to possession under a fraudulent \* \* \* conveyance, \* \* \* can have such conveyance ripened by time into a perfect one," further holding that the statutes of limitations do not apply as respects property in favor of one not in possession. *Sewell v. Nelson*, 113 Ky. 171, 180, 67 S. W. 985, 987. The Supreme Court of Nebraska has so held, saying the statute begins to run against a plaintiff out of possession whenever the defendant's possession becomes adverse; but as to the party in possession, whose title becomes clouded, the cause of action to remove does not necessarily accrue once for all the instant the cloud is cast, but, as the effect of the cloud continues, the right to sue to have it removed is available at any time. *Batty v. City of Hastings*, 63 Neb. 28, 29, 88 N. W. 139. In another case the court said the cause of action was not the creation of the cloud, but its existence and effect on the owner's title. *Schooner v. Lissauer*, 107 N. Y. 111, 117, 13 N. E. 741.

[8] The appellants not having been in possession of the lands, they have acquired no interest therein except the apparent title in remainder conveyed by the deed of December 5th. Plaintiff has never acquiesced in the effect of that deed, for he was ignorant of its effect until shortly before he sued. Neither is his action barred by laches, for he was not to blame for the delay in suing, nor has the position of appellants been prejudiced thereby. The parties confront each other without an interest acquired by either through adverse possession, but, in consequence of a mistake in a deed, with an apparent interest in the appellants, which constitutes a cloud on plaintiff's title; and whether this action is regarded as one in equity purely or as based on our statute for quieting titles, it is not barred by the statutes of limitations, according to the decisions of this court applicable to either view.

III. Complaint is made of the admission in evidence of John P. Bramhall's second deed, and the letters that preceded and accompanied it, over the objection that they were hearsay as against the appellants, who are the real parties in interest. Suffice to say, as to this objection, there is ample evidence to support the finding and judgment apart from those documents. The recitals in said deed and the letters tended to show plaintiff was kept by his son in error regarding the effect of the title, but John's own testimony showed as much.

The judgment is affirmed.

All concur.

### McCOY v. JAMES T. McMAHON CONST. CO. (No. 19785.)

(Supreme Court of Missouri, Division No. 1. Dec. 1, 1919.)

#### 1. RELEASE ⇨18—DURESS.

Duress might be such as to render a settlement void at law, the actual application of force to compel the act of signing a release constituting an instance.

#### 2. CONTRACTS ⇨98, 265 — TO AVOID CONTRACT FOR DURESS OTHER PARTY PLACED IN STATU QUO.

Ordinarily duress renders a contract voidable, not void, and the same duty arises to put the other party in statu quo before avoiding the contract as exists in cases of fraud in the treaty.

#### 3. RELEASE ⇨21—RATIFICATION OF RELEASE OBTAINED BY DURESS.

One ratifies a release obtained through duress by using the money paid to him under the release.

#### 4. CONTRACTS ⇨95(3)—DURESS PER MINAS.

Duress per minas is ordinarily not predicable of a mere threat to exercise a clear legal right.

#### 5. RELEASE ⇨18—DURESS BY THREATS TO AVOID LEGAL LIABILITY.

The mere fact that one was liable for damages and for expenditures for medical services would not render void a release obtained under threat that the doctor's bill and hospital bill would not be paid, and the injured party would have to get out of the hospital, especially where leaving the hospital would not have injuriously affected the injured person.

#### 6. RELEASE ⇨24(2)—TENDER AS CONDITION PRECEDENT TO AVOIDANCE OF RELEASE.

If the instrument or agreement relied upon as a release never existed in fact, or is void at law, no tender can be required; but, if there is fraud in the factum, no tender is necessary, while fraud in the treaty merely renders the release voidable, in which case tender is a prerequisite to an action on the original cause.

**7. RELEASE  $\S$ 24(2)—AVOIDANCE ON TENDER OF CONSIDERATION; UNDISCLOSED EXPENDITURES.**

Tender of money paid plaintiff personally under a release signed by him would be a sufficient tender before suit, although the payment of hospital and doctor's bills was also a part of the consideration for the release, where defendant would not advise plaintiff as to the amount of such bills.

**8. RELEASE  $\S$ 24(2) — AVOIDANCE; TENDER NOT EXCUSED BY LACK OF KNOWLEDGE OF AMOUNT OF EXPENDITURES.**

The release being only voidable and not void, the injured party was not excused from tendering back the amount of cash paid him personally by reason of the fact that he did not know what the amount of the hospital and doctor's bills were, and could not get the information from defendant.

**9. RELEASE  $\S$ 24(2)—AVOIDANCE; TENDER AS AFFECTED BY DECEIT OF COUNSEL AFTER SUIT BROUGHT.**

Deceit of counsel for defendant, after suit brought, as to the amount of the hospital and doctor's bill, could not relate back and vest the plaintiff with a cause of action he did not have when he sued by reason of failure to tender back the amount of cash personally received by him before suit.

**10. TENDER  $\S$ 16(2).— FAILURE TO ACCEPT TENDER MADE IN REPLY NOT CONCLUSIVE OF REFUSAL BEFORE SUIT.**

A failure to accept a tender made in the reply cannot be held conclusively to show that a tender before suit would have been refused, and hence one suing on a cause involving a voidable release cannot, under Rev. St. 1909, § 1812, avoid the release by making a tender in his reply, on the ground that he did not know what the entire consideration for the release was until after suit.

**11. RELEASE  $\S$ 22 — PLEADING  $\S$ 237(7)— PLEA OF FALSE RELEASE; AMENDMENT TO CONFORM TO PROOF.**

Where defendant, in action for personal injuries, pleaded that the consideration for a certain release was a certain amount of money and payment of hospital and doctor's bills, plaintiff cannot complain that a false release was pleaded, although the written release recited only the sum paid directly to plaintiff, defendant after the evidence was in being permitted to conform the answer to the writing and to plaintiff's objection.

Appeal from St. Louis Circuit Court; Leo S. Rassieur, Judge.

Action by William McCoy against the James T. McMahon Construction Company. From an order overruling a motion to set aside an involuntary nonsuit, plaintiff appeals. Affirmed.

John A. Blevins and E. E. Schowengerdt, both of St. Louis, for appellant.

Kelley & Starke, of St. Louis, for respondent.

BLAIR, P. J. This is an appeal from an order overruling a motion to set aside an involuntary nonsuit in an action for damages for injuries appellant alleges he suffered by reason of respondent's negligence in failing to furnish him, as its employé, a safe place to work. Respondent was engaged in constructing a sewer. Appellant signed a release. The consideration he received therefore was not returned or tendered to respondent before this action was begun. The principal question argued here is whether the failure to make such return or tender justified the trial court's ruling. In support of his contention that it did not do so, appellant argues that (1) the release was obtained by fraud and coercion; (2) he was unable to discover before he brought his action what the consideration for the release was; (3) after suit brought he was misinformed by respondent's then counsel as to the consideration for the release; (4) no tender is necessary under section 1812, R. S. 1909; (5) respondent's failure to accept the tender made in appellant's reply shows a tender before suit would not have been accepted; (6) respondent's failure to state whether it would accept the tender in the reply constituted a waiver of any right to rely upon a want of tender before the action was begun; (7) respondent pleaded a false release in its answer, and therefore ought not to be permitted to rely upon any release.

I. Appellant states his first point thus:

"The record shows that plaintiff was in the hospital, sick, in bed, with his head all bandaged up, and worn out from loss of sleep, and suffering from the injury to his eye. The defendant's claim agent and the doctor appeared upon the scene, and at the first interview insisted upon him signing the paper they had. The plaintiff testified: 'I told him I was sick, and didn't know anything about the paper; didn't feel like talking. I told him—I says, "You come back some other day." No; I must sign the paper now if I wanted the money, and if I didn't sign the paper, why the company would stop the doctor's bill and cut the hospital bill out.' On cross-examination he testified: 'He told me that the company sent him out here to pay me \$75; that if I didn't take that, I wouldn't get nothing; and that he had the release for me to sign, and said if I didn't sign this release he would cut the doctor's bill out, and cut the hospital bill off, and I would have to get out of the hospital.'"

Counsel contend this discloses the release was signed "under threats and coercion," and "is absolutely void, and gives the defendant no rights whatever before suit brought or afterward."

[1-5] (a) Duress might be such as to render a settlement void at law. The actual application of force to compel the act of signing a release would constitute an instance. Ordinarily duress renders a contract voidable, not void, and the same duty arises to put the oth-

er party in statu quo before avoiding the contract as exists in cases of fraud in the treaty. *Wood v. Telephone Co.*, 223 Mo. loc. cit. 563, 564, 123 S. W. 6; *Bushnell v. Loomis*, 234 Mo. loc. cit. 381, 382, 137 S. W. 257, 36 L. R. A. (N. S.) 1029. Even if the evidence on which appellant relies tends to prove duress, the rule of these decisions would be applicable. Further, appellant testified that after his subsequent discharge from the hospital he used the money respondent paid him. He thus ratified the contract so far as the claim of duress is concerned. *Bushnell v. Loomis*, supra. Again, duress per minas is ordinarily not predicable of a mere threat to exercise a clear legal right. In this case there is no evidence respondent was under any legal obligation to furnish appellant with medical attention. If liable for damages for his injury, it was also liable for his expenditures for such service, but not obligated, merely for that reason, to provide it in the first instance. Neither did it appear that had appellant been compelled to leave the hospital his condition would have been affected injuriously. The claim of duress cannot aid appellant on this record.

[8] (b) Upon the same evidence appellant contends the release was fraudulently procured, and therefore no tender was necessary. Before the rule requiring tender before suit becomes applicable there must be a release. If the instrument or agreement relied upon never existed in fact or is void at law, no tender can be required. Fraud in the factum renders the contract void, and no tender is necessary. Fraud in the treaty renders it merely voidable, and, absent some other ground dispensing with the rule, tender is prerequisite to an action on the original cause. *Malkmus v. Cement Co.*, 150 Mo. App. loc. cit. 453, 454, 131 S. W. 148; *Putnam v. Boyer*, 173 Mo. App. loc. cit. 398, 158 S. W. 861 et seq.; *Althoff v. Transit Co.*, 204 Mo. loc. cit. 170, 102 S. W. 642; *Och v. Ry.*, 130 Mo. loc. cit. 46 et seq. loc. cit. 69, 31 S. W. 962, 36 L. R. A. 442 et seq.; *Wessel v. Walke & Co.*, 196 Mo. App. loc. cit. 592, 190 S. W. 628 et seq.; *Reid v. R. R.*, 187 S. W. loc. cit. 17. The testimony appellant relies upon has no tendency to prove the release was signed in ignorance of its contents, fraudulently induced by respondent. Neither is it seriously contended the evidence tended to show an incapacity to contract.

[7, 8] II. Appellant insists the record shows he was unable to discover, before he sued, what the consideration was, and therefore tender was impossible and unnecessary. The testimony quoted shows he knew he was receiving, and did receive, \$75. He contends the payment of the hospital and doctor's bills was also a part of the consideration. If he

in fact did not know what these sums were, and could not get the information from respondent, a tender of the amount paid him personally would have answered all purposes. *Treadway v. Mill Co.*, 84 S. C. loc. cit. 44, 45, 65 S. E. 934. The fact that the respondent did not advise him of the amount of these payments did not alter his knowledge that he himself had received \$75 of the consideration. This he should have tendered before beginning this action.

[9, 10] III. (a) The misinformation, if any, given appellant by respondent's former counsel, was not conveyed to him, if at all, until after this action was begun. The record shows there was no deceit intended. The whole consideration of the release included the hospital and doctor's bill. The release itself made no reference to anything except the \$75 paid appellant. After suit brought counsel gave appellant information showing the whole consideration. No deceit was shown. In any event, this could not relate back and vest appellant with a cause of action he did not have when he sued. (b) Section 1812, R. S. 1909, does not deal with the matter of tender. It settled a matter of practice. *Lomax v. Ry.*, 119 Mo. App. loc. cit. 198, 199, 95 S. W. 945. (c) If a failure to accept a tender made in the reply be held conclusively to show a prior tender would have been refused, and was therefore useless and obviates the necessity of tender, the rule as to tender disappears from our law; for, under such a holding, if the tender is accepted, the release is eliminated; and if it is not accepted, then, under the proposed rule, the tender was unnecessary. This contention cannot be sustained. *Carroll v. United Rys.*, 157 Mo. App. loc. cit. 295, 137 S. W. 303. (d) Respondent, upon the trial, went at once into the question of tender, and made clear its insistence upon that question as a decisive issue.

[11] IV. The contention that a false release was pleaded is based upon the fact that respondent first pleaded the full consideration, which included hospital and doctor's bills. The written release recited only the sum paid directly to appellant. After the evidence was in respondent was permitted to conform the answer, as to consideration, to the writing and to appellant's objection. In our opinion, the charge that a false release was pleaded cannot be sustained. The amendment did not injure appellant. It brought the answer into accord with appellant's own testimony.

V. In view of what has been said, the question of ratification need not be further discussed. In the preceding paragraph appellant is given the benefit of his offers of proof of additional facts.

The judgment is affirmed.

All concur.



STATE ex rel. SMITH v. REYNOLDS et al.  
Judges, etc. (No. 21546.)

(Supreme Court of Missouri, Division No. 1.  
Dec. 1, 1919.)

**1. COURTS ⇨231(4)—CORRECTNESS OF DECISION DOES NOT AFFECT CONFLICT OF DECISION GIVING SUPREME COURT JURISDICTION.**

On certiorari directed to the judges of one of the Courts of Appeals for examination with reference to the jurisdiction of such court, in that its judgment is in conflict with and fails to follow the last and controlling decisions of the Supreme Court, the Supreme Court cannot determine whether the judgment was right or wrong, but can only decide whether or not the judgment contravenes a previous decision of the Supreme Court upon the same point. (Per Goode, J.)

**2. COURTS ⇨231(4)—DECISION NOT IN CONFLICT WITH PRIOR DECISION OF SUPREME COURT.**

Decision of Court of Appeals relating to the interpretation of Rev. St. 1909, §§ 9909, 10022, 10024-10026, in regard to the burden of proof in an action on a note, where it is questioned whether the plaintiff is a holder in due course, held not in conflict with another decision on that subject, so as to confer jurisdiction on the Supreme Court.

Proceeding in certiorari by the State, on the relation of Thomas Smith, directed to George D. Reynolds and others, as Judges of the St. Louis Court of Appeals, to review a decision of that court in a case wherein the German-American Bank is plaintiff and the relator is defendant. Writ quashed.

In obedience to our writ of certiorari directed to the judges of the St. Louis Court of Appeals, the record of that court in the case lately pending therein, wherein the German-American Bank is plaintiff and this relator, Thomas Smith, is defendant, is now before us for examination with reference to its jurisdiction. The writ issued at the relation of the defendant Smith, charging that the decision and judgment of the Court of Appeals in said cause is in conflict with and fails to follow the last and controlling decisions of this court, namely, *Hamilton v. Marks*, 63 Mo. 167, *Kelm v. Vette*, 167 Mo. 389, loc. cit. 399, 87 S. W. 223, and cases there cited, *Dalton v. City of Poplar Bluff*, 173 Mo. 39, loc. cit. 46, 72 S. W. 1068, *Wolf v. Campbell*, 110 Mo. 114, 19 S. W. 622, and cases there cited, and *Gordon v. Burris*, 141 Mo. 602, 43 S. W. 642, and cases there cited, in that it lays down "a rule of law construing the Missouri Negotiable Instrument Act to mean that although the maker of a note, when sued by a person who claims to be the holder in due course, proves that the note had its inception in fraud, nevertheless the

burden is on the defendant to show that the alleged holder is not the holder in due course, and to permit the trial court in the first instance to peremptorily instruct the jury that the plaintiff is the holder in due course, and that the defendant has failed to prove to the jury that the alleged holder of the note took it with notice of its infirmities, when as a matter of fact, and under the decisions of this court, the rule of law is otherwise," and is so held by this court in said cases.

In the case presented by the return to this writ the plaintiff is a banking corporation of Bloomington, Ill., and the defendant a citizen of Warren county, Mo., where the suit was instituted. The subject of the spit is a promissory note for \$1,200 executed by said defendant on February 15, 1913, whereby he promised to pay to the order of the Pioneer Stock Powder Company, at the Citizens' Bank of Warrenton, the said sum, with interest at 7 per cent, six months after the date thereof. The petition alleged the execution of the note and its indorsement in blank by the payee and its delivery before maturity to the plaintiff for value, whereby the plaintiff became the holder of the note in due course, and default in its payment. The answer admitted the corporate capacity of plaintiff and the signing of the note, and denied all the other allegations of the petition. As special defenses it pleaded: (1) that the payee was an Illinois corporation, unlicensed to do business in Missouri; that the note was executed in the course of a business transaction in Missouri, and was therefore void; (2) that it was without consideration and fraudulently obtained; and that the plaintiff received the same with notice of these facts. This last defense was set out with great particularity, both as to form and substance. All the new matter was put at issue by replication.

At the trial the defense relating to the right of the payee of the note to do the business to which it pertained in this state was taken from the jury. The question of fraud and want of consideration, and notice thereof to plaintiff at the time he took the note, were submitted to the jury, and the issues found for the defendant, and judgment entered accordingly, from which an appeal was duly taken to the St. Louis Court of Appeals, from which this record comes. The Court of Appeals reversed the judgment of the Warren circuit court, and remanded the cause to that court, with direction to enter judgment for the plaintiff on grounds stated in the opinion, in which all the judges concurred, as follows:

"The question then recurs: Has defendant brought home to plaintiff a knowledge of such fact amounting to fraud in connection with the

procuring of these notes and of this contract? We have set out the testimony substantially as given on this matter by the defendant and his witnesses, and we are compelled to hold, on consideration of it, that while it probably presented evidence of fraud sufficient to take this issue of misrepresentation or fraud in connection with the procuring of the note and the contract, to the jury, if this was a case between the original parties to the note, it should not have been submitted to them on the evidence procured by defendant, as against this plaintiff.

"There is not a particle of evidence in the case to bring home to the bank knowledge of any of these matters, or of the terms of the contract between the defendant and the powder company. The very most that can be said about that is that defendant introduced evidence tending to prove that the bank, plaintiff here, knew that the powder company took these notes on account of sales of its products, but that is far from charging the plaintiff bank with knowledge of the terms of those contracts, or that there was any fraud, misrepresentation, or failure of consideration in connection with the note. Even if plaintiff bank may have had its suspicion as to the character of the powder company's mode of business, that is not sufficient to charge the bank with notice. *Link v. Jackson*, 164 Mo. App. 195, loc. cit. 202, 147 S. W. 1114. Furthermore, not only is the testimony on the part of plaintiff clear that the bank (plaintiff) acquired this note before its maturity, but the answer admits this, and clear that the bank took it as collateral security to notes it then held, the debt evidenced by which notes had not yet been paid and is in excess of this collateral.

"Failure of consideration is no defense to a note in the hands of a holder for value before maturity. See section 9999, Revised Statutes 1909, part of our Negotiable Instrument Law. Section 10022 of that law provides: 'A holder in due course is a holder who has taken the instrument under the following conditions: (1) That it is complete and regular upon its face; (2) that he became the holder of it before it was overdue, and without notice that it had been previously dishonored, if such was the fact; (3) that he took it in good faith and for value; (4) that at the time it was negotiated to him he had no notice of any infirmity in the instrument or defect in the title of the person negotiating it.'

"Section 10024 provides: 'Where the transferee receives notice of any infirmity in the instrument or defect in the title of the person negotiating the same before he has paid the full amount agreed to be paid therefor, he will be deemed a holder in due course only to the extent of the amount theretofore paid by him.'

"Section 10025 provides: 'The title of a person who negotiates an instrument is defective within the meaning of this chapter when he obtained the instrument, or any signature thereto, by fraud, duress or force and fear, or other unlawful means, or for an illegal consideration, or when he negotiates it in breach of faith, or under such circumstances as amount to a fraud.'

"Section 10026 provides: 'To constitute notice of an infirmity in the instrument or defect in the title of the person negotiating the same, the person to whom it is negotiated must have had actual knowledge of the infirmity or defect,

or knowledge of such facts that his action in taking the instrument amounted to bad faith.'

"These sections of our law are conclusive against the defense here attempted. As before said, there is not a particle of testimony in this case to show that the plaintiff bank had any knowledge of any infirmity or defect in this instrument, or of any such facts that its action in taking the instrument amounted to bad faith. There was no substantial evidence that the bank took these notes in bad faith, or to aid the powder company in defrauding defendant, as charged. At the very most, all that the defendant attempted to prove, that from the dealings of the bank with the powder company, and of the latter with defendant or its customers, and from the provision that the Powder Company was to pay the cost of collection on collaterals, the plaintiff bank should have been put on guard and should have suspected that there was something wrong with this note. That is not the law and cannot sustain this defense. As we have seen, mere suspicion is not knowledge. Very much the same state of affairs occurred, as far as this transaction is involved, in *McLean County Bank v. Brown* [App.] 187 S. W. 785, a case not to be officially reported.

"Our conclusion is that the judgment in this case should be reversed, and the cause remanded, with directions to the trial court to ascertain the amount due on the note, with interest, and, having done that, enter up judgment for the amount as found in favor of the plaintiff and against defendant, with costs; and it is so ordered."

*German-American Bank v. Smith*, 208 S. W. 878.

T. W. Hukriede and J. W. Delventhal, both of Warrenton, and Rosenberger & Dowell, of Montgomery City, for relator.

Emil Roehrig, of Warrenton, and Clarence A. Barnes, of St. Louis, for respondents.

BROWN, C. (after stating the facts as above). The record in *German-American Bank v. Smith* is before us on this writ, that we may ascertain whether the St. Louis Court of Appeals in its decision and judgment disregarded the authorities of the last previous rulings of this court upon a question of law in that case. One of the questions before it was whether or not the note sued on was obtained from the defendant maker by fraudulent representations and practices, and, if so, whether the plaintiff was the holder in due course under the provisions of the Negotiable Instrument Law of this state enacted in 1905 (R. S. 1909, c. 99, art. 1). The jury found upon both branches of this issue for defendant, and the trial court adjudged accordingly. Upon appeal to the St. Louis Court of Appeals the judgment of the Warren county circuit court, in which the cause was tried, was reversed, and the cause remanded to the trial court, with directions to enter judgment for plaintiff.

[1] The Court of Appeals, in its opinion, citing sections 9999, 10022, 10024, 10026, Revised Statutes of Missouri 1909, said:

"These sections of our law are conclusive against the defense here attempted." This opinion, from which we must ascertain the point decided, stands upon its interpretation of the law as contained in those sections alone. Whether that interpretation was right or wrong is of no concern here, unless it contravenes a previous decision of this court upon the same point, for we have no appellate jurisdiction over the judgment of that court, and in the exercise of superintending control by this writ can only see that it acts within its constitutional powers.

[2] The note sued on was executed February 5, 1913, some years after the enactment of the Negotiable Instrument Law, and was, of course, subject to its provisions, in respect to the rights of the parties thereto. The particular question now in dispute is whether the plaintiff in the suit was a holder in due course under the provisions of that law, and entitled as such to recover without showing that he stood in that relation to the instrument; that is to say, that he received it for value without notice of the infirmity resulting from the fraud in its procurement found by the jury. The relator insists that the issue should have been governed by the doctrine of this court as stated in *Hamilton v. Marks*, 63 Mo. 167, and *Keim v. Vette*, 167 Mo. 389, 67 S. W. 223, and cases cited in those opinions. The opinion in *Hamilton v. Marks*, supra, is distinguished for the thoroughness with which this court investigated the condition of the common law relating to this same question and the irreconcilable difference of the courts in England and America, and came to the conclusion, and so held, that the weight of reason was in favor of the doctrine that, where fraud of the payee of such a nature as to avoid the instrument in his hands was shown, the burden was upon the holder to prove his own character as an innocent purchaser for value. This doctrine was approved and stated by the court in *Keim v. Vette*, supra, in these words:

"But when it is shown to have been originally obtained by fraud it then devolves upon the holder to establish that he came to its possession for value and in good faith." 167 Mo. 399, 67 S. W. 225.

Had this question been before the Court of Appeals in this case, it is evident that its decision would have violated the principle involved in the two cases cited. The common-law doctrine was not involved in this case. The irreconcilable difference among the courts of common-law jurisdiction, so vividly described in *Hamilton v. Marks*, supra, called loudly for some measure of uniformity in the commercial world, and resulted, so far as this state is concerned, in the passage of the law construed by the St. Louis Court

of Appeals in the case now before us. The construction of this act in the respect here presented has never been determined by this court, and consequently the St. Louis Court of Appeals was untrammelled by any decision of ours in its disposition. That the statute has not received a uniform construction in the appellate courts of this state is shown by the exhaustive opinion of the Springfield Court of Appeals in *Downs v. Horton*, 209 S. W. 595.

For the reasons stated, we must quash the writ of certiorari in this case; and it is so ordered.

RAGLAND and SMALL, CC., concur.

PER CURIAM. The foregoing opinion of BROWN, C., is adopted as the opinion of the court.

GOODE, J., concurs.

BLAIR, P. J., and GRAVES and WOODSON, JJ., concur in the result.

#### BAKER v. GATES et al. (No. 20536.)

(Supreme Court of Missouri, Division No. 1.  
Dec. 1, 1919.)

#### 1. APPEAL AND ERROR ⇨1015(1)—REVIEW OF ORDER ALLOWING NEW TRIAL.

Where court directed verdict for defendants, an order allowing a new trial must be affirmed if there is any evidence to uphold a verdict for plaintiff, but, if there is none, the order should be set aside and the verdict reinstated.

#### 2. LANDLORD AND TENANT ⇨5(1)—CONTRACT GRANTING ESTATE FOR YEARS A LEASE.

An instrument granting to one an estate for years in premises, and entitling him to possession as against the owner during the term, the owner having no right to enter except to inspect work to be done on the land, consisting in removing stone and lowering the surface of the land, was a lease, and the relation established was that of lessor and lessee.

#### 3. LANDLORD AND TENANT ⇨170(1)—LANDLORD LIABLE FOR NUISANCE CREATED UNDER LEASE.

If the intended use of premises by lessee would of necessity create a nuisance, the owner must be held to have authorized the nuisance, and to be answerable for consequent damages; for no one may either use, or agree that some one else may use, his property so as to harm others.

#### 4. NUISANCE ⇨3(6)—QUARRY IN HEART OF CITY A NUISANCE.

A stone quarry in the heart of a city was a nuisance where the blasting disturbed persons who dwelt in the vicinity, and caused rocks and debris to fall on a boulevard.

**5. LANDLORD AND TENANT §170(4)—WHETHER LEASING FOR STONE QUARRY WAS NUISANCE FOR JURY.**

In an action against a landlord for personal injuries to one struck by a rock thrown by a blast through the air onto a boulevard from a quarry, operated by a lessee, whether the nuisance necessarily arose from the work so as to render the landlord liable *held* for the jury.

**6. LANDLORD AND TENANT §170(1)—LANDLORD NOT LIABLE FOR INJURIES TO EMPLOYEES OF RECEIVER ON LEASED PREMISES.**

Where landlord leased premises to be worked as a stone quarry, a matter necessarily a nuisance by reason of surrounding houses and streets, lessee having the right to permit third persons to quarry the stone, the landlord was not liable for injuries caused by reason of blasting stone by the receiver of one who had entered into a contract with the lessee to remove stone, the receiver not operating the quarry with the consent of the owner or the lessee, but under order of court.

**7. LANDLORD AND TENANT §170(1)—LANDLORD NOT LIABLE FOR INJURIES TO TRAVELER BY BLASTING ON LEASED PREMISES.**

Where landlord leased premises to be used as a stone quarry, necessarily constituting a nuisance by reason of surrounding houses and streets, the lessee having the right to contract with third persons for the removal of the stone, the landlord was not liable for injuries caused a traveler on the street by blasting done by a receiver of one who had contracted with the lessee, who was operating the quarry, without the consent of the owner or the lessee, but under order of court, although the lessee was employed by the receiver.

Appeal from Circuit Court, Jackson County; Thomas B. Buckner, Judge.

Action by Mrs. Stella Baker against Jemuel C. Gates and others. The named defendant dying during the pendency of the proceedings, his executors, Marvin H. Gates and another, filed an amended answer. Verdict was directed in favor of the executors. From an order sustaining plaintiff's motion for new trial, the executors appeal. Reversed and remanded, with directions.

J. R. Bell and Lathrop, Morrow, Fox & Moore, all of Kansas City, for appellants.

J. K. Cubbison, William G. Holt, and H. G. Pope, all of Kansas City, for respondent.

GOODE, J. This is an action for damages caused by a personal injury to plaintiff. At the conclusion of the evidence the court directed a verdict for the appellants Marvin H. Gates and B. T. Whipple, as executors of the last will of Jemuel C. Gates, deceased, but afterwards entered an order sustaining plaintiff's motion for new trial, without stating the reason for the order. The appeal was taken by said Marvin H. Gates and B. T. Whipple, as executors.

The case was begun against Jemuel C. Gates, Joseph M. Jones, receiver of the Spitcaufsky Construction Company, and John Spitcaufsky. Jemuel Gates died during the pendency of the proceedings, and an answer to an amended petition filed by plaintiff was put in by said executors at the January term, 1917. As between plaintiff and Joseph M. Jones, as said receiver, the case was settled December 29, 1914, for \$100, plaintiff signing a stipulation to dismiss as to the receiver, and to prosecute no further the cause against him. Jones was receiver of the Spitcaufsky Construction Company under an appointment made in a proceeding in bankruptcy.

Plaintiff was hurt between 8:30 and 9 o'clock on the morning of August 4, 1914, and while she was a passenger in an electric trolley car running southward on Southwest boulevard, a main thoroughfare, between Kansas City, Mo., and the city of Rosedale, Kan. As the car was passing a quarry some 450 feet from the boulevard, three charges of powder or dynamite were exploded in the quarry, hurling fragments of rock as far as the boulevard, some of it falling about the car, and one striking plaintiff's wrist. The weather was warm; the car windows were open, and plaintiff had rested her arm on the windowsill. There was evidence that on previous days in the year blasts had been discharged in the quarry violent enough to throw rocks, three to four inches in diameter, as was the one which struck plaintiff, and perhaps some larger, onto the boulevard and beyond it.

The quarry was in a piece of ground known as Deitz hill, an eminence a hundred feet or more high, and from 400 to 450 feet west of the boulevard and the street railway tracks thereon. The land where Deitz hill is belonged to Jemuel Gates, who demised it, February 12, 1913, by a written agreement, to John Spitcaufsky, for 15 years. The quarry is situated on the brow of the hill, facing eastwardly toward Southwest boulevard. Tracks of two or three steam railroads extend near the east foot of the hill, between it and the boulevard nearly on a level with the boulevard, but further from it than from the hill. One dollar is recited to have been paid and received as part of the consideration for the lease, but the instrument says the term was granted "principally for and in consideration of the premises, covenants, and agreements to pay, do, and perform those moneys, acts, and things which the lessee hereinafter promises, covenants, and agrees to pay and do." What Gates wanted was to have Deitz hill reduced to the level of the adjacent tracks of the railroad companies, and Spitcaufsky's undertaking to do this was the true consideration for the agreement. The contract contemplated that Spitcaufsky

might make contracts with "companies, corporations, or persons" to take out and crush rock on the premises; that such contracts should not impair or diminish the obligation of the lessee to perform his covenants; and there is a recital that it was understood "the personal qualifications of the lessee are largely the inducement of the lessor to enter into this lease." It was further provided that the lease was to be terminated "by the death or incapacity of the lessee," and that any person, company, or corporation at that time in the actual occupancy of the premises, and performing the contemplated work under contracts with the lessee, might continue operation upon giving the lessor satisfactory sureties, and in a specified amount, for the strict observance by such occupant of the terms of the agreement (paragraphs I, LV, and XII of lease). It was agreed that the lease should neither be assigned nor recorded, and the lessee was to use every effort and devote his entire time to the removal of all rock and material above the grade of the railroad tracks, "the very purpose and essence of this agreement being that such work shall be conducted with all dispatch." The lessor and his agents were to have access to the property for the purpose of inspecting the work as it proceeded, and Gates was accorded the option to terminate the lease for breach of any of the stipulations by Spitcaufsky by serving certain notices on him.

On December 8, 1913, Jemuel Gates served notice on John Spitcaufsky that, because of the latter's failure to comply with certain specified terms of the lease, Gates had elected to terminate it on January 15, 1914, unless prior to that date Spitcaufsky had complied with those terms. Another notice was served on Spitcaufsky, January 17, 1914, from which it appears he had written to Gates that he had complied as requested; but Gates reiterated his complaint of Spitcaufsky's defaults, and declared the lease at an end.

On July 21, 1914, two weeks before the accident in question, Jemuel Gates served a notice on Joseph M. Jones, as receiver of the Spitcaufsky Construction Company, demanding that Jones desist from trespassing upon the Deltz hill property and taking rock from the quarry; that he would be held accountable for past and future trespasses; further saying Spitcaufsky had violated the terms on which he had been given the right to take rock from the premises, and because of the violation Gates had canceled his right; that neither Spitcaufsky nor any one else had the right to permit Jones to enter upon or take rock from the premises.

Jemuel Gates filed an action against John Spitcaufsky to the March term, 1915, of the Jackson county circuit court, to quiet Gates' title to the premises, setting forth breaches of the terms of the lease as stated in the aforesaid notices, and that the lease had be-

come null and void; that Spitcaufsky had recognized the lease was at an end, but, notwithstanding those facts, was "claiming the right of possession of the above-described premises by virtue of the said lease, and has refused to cancel or surrender the said lease in writing, and thereby said lease, although terminated, in fact constitutes a cloud upon the title of this plaintiff to the property described in said lease, and that plaintiff is remediless at law," etc. Spitcaufsky denied by answer the alleged breaches. At the July term, 1917, when the action was in the names of Marvin H. Gates and B. Thompson Whipple, as executors of Jemuel Gates, a judgment was rendered that the lease had been terminated; that neither Spitcaufsky nor any one claiming by, through, or under him had any right, title, interest, or dominion over the leasehold premises, and the lease instrument was declared canceled and removed as a cloud upon the title of Jemuel Gates and his executors.

The amended petition on which the case at bar was tried alleges Gates leased the premises to Spitcaufsky to use as a stone quarry, and by agreements in the lease authorized and permitted Spitcaufsky to take rock and dirt from the hill; that Gates knew Spitcaufsky, in removing the dirt and stone and leveling the hill, would explode large blasts of nitroglycerine, dynamite, and other high explosives; knew the explosions would throw dirt, gravel, and rock to great distances, and would endanger the lives and property of persons in the vicinity, and of passengers on street cars on Southwest boulevard. It was alleged next that Joseph M. Jones was, at all times mentioned in the petition, the duly appointed, qualified, and acting receiver of the Spitcaufsky Construction Company; that said Jones, as such receiver, was on August 4, 1914, and for a long time prior thereto had been, in charge and control of the stone quarry and Construction Company; that Jemuel Gates, on August 4, 1914, and long prior thereto, knew said Jones, as such receiver, was carelessly and negligently using nitroglycerine, dynamite, powder, and other high explosives, and knew, or should have known, that said receiver, by his negligent methods of blasting, was throwing rock and dirt from the hill, and endangering the lives and property of adjacent property owners and the traveling public. This allegation also occurs:

"Plaintiff further states that John Spitcaufsky during all the times hereinafter mentioned was aiding, guiding, directing, and assisting said Joseph M. Jones, the receiver, in the operation of said stone quarry, and, as agent of said receiver, was carelessly and negligently aiding, guiding, and directing the operation of said stone quarry."

After the averment just quoted the petition alleges Jemuel O. Gates, as the owner of the premises, and John Spitcaufsky, and Joseph

M. Jones, as receiver, were, on August 4, 1914, in charge of and operating the premises as a rock quarry; that Gates, and Jones, as receiver, and Spitcaufsky were, on said date, operating and conducting a nuisance; that they knew, or should have known, said quarry was a nuisance, and knew it was a menace to the traveling public; on August 4, 1914, Gates, and Jones, as receiver, and Spitcaufsky knew, or should have known, street cars were constantly operated on Southwest boulevard past the stone quarry, with passengers in the cars continually in danger of rocks thrown by the blasts; that said defendants caused and permitted such blasts to be made, and as a natural result thereof plaintiff was struck by a rock, etc.

Regarding who was operating the quarry on and prior to August 4th, the receiver, Joseph M. Jones, testified he was receiver in bankruptcy of the Spitcaufsky Construction Company; he had never been given permission by either Jemuel Gates or his executors to go on the land; the blasting was done by men employed by him, and who were on his payroll as receiver of said construction company, and he paid them; he was conducting the operations as such receiver; had been ordered to take possession of all the property of the Construction Company, and went to Deitz hill to take possession of its property there; some of the men who had been at work there previously continued to work under him and some did not; John Spitcaufsky went to the hill occasionally, and discussed with Jones the work in a general way, but the foreman in charge for him as receiver was named Stubblefield; as receiver he (Jones) continued to use some of the tools and mules previously used by the construction company; he took charge of the affairs of that company about June 13, 1914, and did no work in the quarry after November, 1914.

[1-3] I. If there is any evidence to uphold a verdict for plaintiff, the order for a new trial must be affirmed; if there is none, it ought to be set aside and the verdict for appellants reinstated. *Ottomeyer v. Pritchett*, 178 Mo. 160, 165, 77 S. W. 62; *Fitzjohn v. Transit Co.*, 183 Mo. 74, 78, 81 S. W. 907. The position taken for plaintiff is that the contract between Jemuel Gates and John Spitcaufsky was entered into by the former for the purpose of binding Spitcaufsky to perform work on Deitz hill which would endanger persons in the vicinity and on the boulevard, even if done with due care; and this would lay Gates liable for any damage occurring in the course of the work, whether the contract created the relation of lessor and lessee between him and Spitcaufsky, or proprietor and independent contractor. The relation established was that of lessor and lessee; for the instrument granted to Spitcaufsky an estate for years in the premises, and entitled him to possession during the term against Gates,

who had no right to enter except to inspect the work and ascertain whether or not it was being performed according to agreement. 1 *Tiffany, L. & T.* § 15, p. 1627. If the intended use of the premises by Spitcaufsky would, of necessity, create a nuisance, Gates, as lessor, must be held to have authorized the nuisance, and to be answerable for consequent damages; for no one may either use, or agree that some one else may use, his property so as to harm others. This fundamental principle has been applied in cases where the facts were quite like those before us. In *Harris v. James*, 45 L. J. Q. B. (N. S.) 545, the action was against a landlord who had let a field to a tenant to operate a quarry on it, the necessary result of blasting in the quarry being to throw dirt and stone on plaintiff's land. That being true, the court held the landlord liable, although he would not have been if the injury had been caused by the tenant's lack of skill or care in blasting.

And so it was ruled where a house was let for the storage of powder and a damaging explosion occurred, it appearing the vicinity was so populous that a powder magazine must be a nuisance. *Prussack v. Hutton*, 30 App. Div. 66, 51 N. Y. Supp. 761.

And where an owner leased his premises for a kiln to dry lumber, a process which, however carefully managed, would endanger by fire the house of plaintiff, and his house, in fact, caught fire from the kiln, the owner was made to respond in damages. *Helwig v. Jordan*, 53 Ind. 21, 21 Am. Rep. 189.

Other apposite authorities might be cited, and among them *Gilliland v. Railroad*, 19 Mo. App. 411, where the rule on the subject was adopted as it is stated in a standard treatise:

"In order to charge the landlord the nuisance must necessarily result from the ordinary use of the premises by the tenant, or for the purpose for which they were let; and where the ill results flow from the improper or negligent use of the premises by the tenant, or, in other words, where the use of the premises may or may not become a nuisance, according as the tenant exercised reasonable care, or used the premises negligently, the tenant alone is chargeable for the damages arising therefrom." 2 *Wood, L. & T.* (2d Ed.) p. 1288.

[4, 5] The inference that the quarry on Deitz hill could not be worked without danger to persons and property as far away as Southwest boulevard is deducible from the facts in proof; and as there was testimony to show the danger was continuous, or at least occurred at intervals for a considerable period, the work was, in the strict sense of the word, a nuisance; for it disturbed persons who dwelt within range of the blasts in the quarry, and also persons on the boulevard in the exercise of the common right to travel there. *Pollock, Torts* (6th Ed.) 385; *Tiffany, L. & T.* § 102, p. 681. And it was a

jury matter whether a nuisance would necessarily arise from the work, as there were facts in evidence to prove the quarry could be worked without risk to the neighborhood; also that before the day of the accident no débris had been thrown as far as the boulevard. *Prussack v. Hutton*, 30 App. Div. 66, 51 N. Y. Supp. 761; *Fish v. Dodge*, 4 Denio, 311, 47 Am. Dec. 254. Therefore the question for decision here is whether there is evidence to prove John Spitcaufsky, or any one else for whose conduct the lessor, Gates, was responsible, was operating the quarry, and thereby maintaining the nuisance at the time plaintiff was hurt. It is asserted Spitcaufsky was working the quarry on that day, either by and for himself exclusively, or in conjunction with Jones, the receiver, and that because of Spitcaufsky's separate or joint charge of the work he caused plaintiff's hurt, and Gates, who authorized the work, is answerable too. Attentive study of every item of evidence claimed to warrant a finding that Spitcaufsky was wholly or partly in charge of operations when the accident happened have satisfied us there was no evidence tending to prove he was. The case made by the petition is that the receiver was in charge and control on that day and long prior thereto, and that Spitcaufsky was aiding, guiding, and directing the work as the receiver's agent, instead of in his individual capacity. Several witnesses testified to seeing John Spitcaufsky about the quarry on and prior to the day of the accident, giving orders and directing the work, but there is nothing in this inconsistent with the averment of the petition that Spitcaufsky was acting as Jones' agent, or contradictory of the testimony of the receiver that he was operating the quarry, and had been in charge since June 18th, nearly two months before the date of the accident. It is said the petition filed by the appellants as executors of the lessor to remove the cloud of the lease from the title shows Spitcaufsky was in possession of the hill, or in charge of the work on it, on August 4, 1914, and long after. We have quoted the only passage of that petition which refers to what Spitcaufsky was doing or claiming, and it has no tendency to prove Spitcaufsky was working the quarry when the accident occurred or later, but only that he claimed an interest and right of possession.

[8, 7] The receiver was not operating there with the consent of Jemuel Gates or the appellants, and so testified. Besides, a notice had been served on him July 8, 1914, by Jemuel Gates, that he was trespassing on the leased premises, and to desist from taking rock from them. It might be deduced from circumstances in proof, although there is no direct testimony to that effect, that Spitcaufsky Construction Company had been operating the quarry under a contract with John Spitcaufsky, the lessee, as provided in paragraphs 1 and 4 of the lease agreement, and that Jones, having been appointed receiver in bankruptcy of said company, took over the work. If Spitcaufsky had contracted with the Construction Company to take rock and dirt from the hill, a contract authorized by the lease agreement, the lessor would have been as responsible for an injury done while the Construction Company was in charge as for one caused by Spitcaufsky himself. But the relation of lessor and lessee did not exist between Gates and the receiver, and no fact appears to indicate that the receiver was working the quarry under authority from Gates as licensee. The lease agreement will not bear the interpretation that Gates was responsible for the torts of a possible receiver in bankruptcy of some person or company whom Spitcaufsky might employ. Whatever right, if any, Jones possessed to conduct the quarry, he got from the court which appointed him. This is by the way, for it is not contended for respondent that Gates was answerable for the receiver's torts, the argument being that there is evidence to support an inference that Spitcaufsky was doing the work. We hold there was none to show he was doing it, except as agent or employé of the receiver. Spitcaufsky might be liable as a joint tort-feasor for any injury done while thus acting, and that is the theory of the petition; but Gates, as lessor, would not be answerable for Spitcaufsky's acts while in the employ of a person who had no authority, direct or indirect, to work the quarry.

The judgment is reversed, and the cause remanded, with directions to set aside the order sustaining the motion for new trial, and to reinstate the verdict for appellants and render judgment thereon.

All concur.

**SENTNEY WHOLESALE GROCERY CO. v. THOMPSON. (No. 2536.)**

(Springfield Court of Appeals. Missouri. Dec. 6, 1919.)

**1. APPEAL AND ERROR §995—WEIGHT OF EVIDENCE NOT TO BE DETERMINED.**

It is not within the province of the Court of Appeals to pass on the weight of the evidence in a case of law.

**2. SALES §418(7)—DUTY TO MINIMIZE DAMAGES.**

A buyer injured by breach of a sales contract must exercise reasonable care and diligence to avoid loss or minimize the damages.

**3. SALES §418(2)—MEASURE OF DAMAGES ON FAILURE TO DELIVER.**

In a buyer's action against the seller for failure to furnish an article, the measure of damages is the difference between the contract price and the market value at the time of the breach.

**4. SALES §418(2)—NOTIFICATION OF SELLER'S INABILITY AS AFFECTING DAMAGES.**

Where a contract provided for the sale of tomatoes to be shipped when packed, there was no definite time set for performance, and the date on which the seller notified the buyer that he could not perform sets the date of the breach, and in estimating damages the market value of the tomatoes should be calculated as of that date.

**Error to Circuit Court, Howell County.**

Action by the Sentney Wholesale Grocery Company against F. M. Thompson. Judgment for plaintiff for nominal damages only, and plaintiff brings error. Affirmed.

J. L. Bess, of West Plains, for plaintiff in error.

W. N. Evans, of West Plains, for defendant in error.

**BRADLEY, J.** Plaintiff sued for damages for breach of contract. The issues were tried before the court without the intervention of a jury, resulting in a finding for plaintiff for nominal damages only, and plaintiff brings the cause here by writ of error.

We will refer to the parties as originally designated. On the 25th day of February, 1916, defendant entered into a contract of sale with plaintiff, a wholesale grocery company of Hutchinson, Kan., as follows:

"F. M. Thompson of Marshfield, Mo., hereby sells, and the Sentney Wholesale Grocery Company of Hutchinson, Kan., hereby purchases, the following Missouri tomatoes, pack of 1916: Twelve hundred (1,200) cases Standard No. 3 tomatoes at 85 cents per dozen, cash, less 1½ per cent., f. o. b. Marshfield, Mo., freight rate; shipment to be made when packed. Terms: Sight draft attached to bill of lading, payable promptly upon arrival and inspection of car at destination. The seller guarantees that the

above tomatoes will conform to all requirements of the National Pure Food Law (Act June 30th, 1906, c. 3915, 34 Stat. 768 [U. S. Comp. St. §§ 8717-8728]). Usual guaranty on swells and leaks, if any, to be held subject to the order of seller. Seller is not liable for delivery of goods in case of destruction by fire, or the elements of the seller's cannery or warehouse in which the goods may be stored, and not liable for delivery of more than 75 per cent. of this in case of inability to fill orders in full, owing to partial or complete destruction of the crops by hail, drought or any unavoidable accident or casualty."

Defendant failed to deliver the tomatoes as agreed, and hence this suit for damages. Defendant in his answer pleads that in the latter part of March or the first of April, after the execution of the contract, he notified plaintiff in writing that he could not furnish the tomatoes, because he had ceased to operate his canning factory at Marshfield. He also pleads that he again notified plaintiff about the 23d day of August, 1916, in answer to an inquiry by plaintiff, that he could not furnish the tomatoes. He also pleads that at the time he notified plaintiff of his inability to fill the contract plaintiff could have, by the use of ordinary diligence, bought such tomatoes elsewhere and at no increase in price.

[1] There is no controversy about the contract and its breach and the only question here is the right of plaintiff to recover more than nominal damages. The evidence on the part of the defendant tends to support the allegations: in his answer that he notified plaintiff the latter part of March or the first of April, and again in August, that he could not furnish the tomatoes, and that the price of tomatoes of the class sold had not increased from the date of the contract to the time when defendant claims to have notified plaintiff, and that such tomatoes could have been bought elsewhere at no increase in price. Plaintiff denied having received any notice from defendant until the 20th day of October, 1916, at which time the price of tomatoes of the class sold had greatly increased. Plaintiff proceeds on the theory that, not having had any notice of defendant's intention not to furnish the tomatoes, it is entitled to damages in a sum equal to the difference in the market price of the tomatoes at the time it received the notice and the contract price of the tomatoes. This would be true if the issue of fact as to when defendant received notice had been determined in favor of plaintiff, but that question, in the state of the record here, is no longer a subject of inquiry. Defendant testified that he notified plaintiff by letter, and plaintiff objected to this on the ground that the letter would be the best evidence, and this objection was overruled. But plaintiff makes no point on that ruling in his brief here. Neither did plaintiff make inquiry of consequences about



the alleged notice, but seemed satisfied in its denial of receipt of such notice at the time claimed by defendant. It is not our province to pass upon the weight of the evidence in a case at law. Plaintiff urges that the preponderance of the evidence was so overwhelmingly in its favor that the trial court committed manifest error in finding the issues of fact for defendant; but we cannot agree with plaintiff in this contention. There is substantial evidence in the record to support defendant's contention that he notified plaintiff in March or April that he could not fulfill the terms of his agreement, and that the price of the class of tomatoes sold had not increased in the market up to the time of such notice, and that plaintiff could have bought such tomatoes elsewhere if it had desired to do so.

[2] Plaintiff briefs its case here on the theory that, if defendant breached his contract, it is entitled to recover substantial damages regardless of the question of notice, or the price of tomatoes at the time of the breach, or the possibility of getting such tomatoes elsewhere. In the character of contract sued on here the law is well settled that it is the duty of one who is injured by the wrongful act of another to exercise reasonable care and diligence to avoid loss or to minimize the resulting damages. The general rule is well stated in 8 R. C. L. p. 442, as follows:

"It is a fundamental rule that one who is injured in his person or property by the wrongful or negligent acts of another, whether as the result of a tort or of a breach of contract, is bound to exercise reasonable care and diligence to avoid loss or to minimize the resulting damage, and that to the extent that his damages are the result of his active and unreasonable enhancement thereof, or are due to his failure to exercise such care and diligence, he cannot recover; or, as the rule is sometimes stated, he is bound to protect himself if he can do so with reasonable exertion or at trifling expense, and he can recover from the delinquent party only such damages as he could not, with reasonable effort, have avoided."

[3] In an action by the vendee against the vendor for the failure of the vendor to furnish an article which he agreed to furnish, the measure of damages is the difference between the price agreed to be paid and the market value at the time of the breach. *Rogers v. Union Iron & Foundry Company*, 167 Mo. App. 228, 150 S. W. 100; *Howard v. Haas*, 139 Mo. App. 591, 123 S. W. 1048. This seems to be the general rule; but, as pointed out in *Rogers v. Union Iron & Foundry Company*, supra, 167 Mo. App. loc. cit. 249, 150 S. W. 100, while the rule is that the market value is to be taken as of the time of the breach, yet that rule, like all other rules, has its exceptions, but in the instant case there is no foundation upon which

to predicate an exception to the general rule. [4] *Howard v. Haas*, supra, had its origin in a contract similar to the one in the case at bar. In that case the plaintiff sued in replevin to recover some tomatoes shipped, defendant under the contract. The issues there turned upon the question of damages. In that case it was held that as the contract fixed no special date for delivery the breach took place when the vendor notified vendee that he would not comply with its terms. That is the situation in the case at bar. There was no fixed time for delivery. It is merely stipulated that shipment was to be made when packed, with no definite time mentioned.

Plaintiff requested several declarations of law, which were refused. While error is not especially predicated on this refusal, we have examined these requested declarations, and find no ground for reversal in the action of the court in refusing them.

We find no errors in the record. The judgment below therefore should be affirmed; and it is so ordered.

STURGIS, P. J., and FARRINGTON, J., concur.

EDWARDS v. AMERICAN RY. EXPRESS CO. (No. 2588.)

(Springfield Court of Appeals. Missouri. Dec. 6, 1919.)

1. RAILROADS  $\S$  5½, New, vol. 6A Key-No. Series—PREFERENCE TO GOVERNMENTAL SHIPMENTS DURING FEDERAL CONTROL.

Where the government had taken over the operation of express companies together with railroads, it was the duty of an express company to give preference to governmental shipments, the carriers having been taken over as a war emergency, and shipper cannot complain of a delay caused by giving preference to governmental shipments.

2. CARRIERS  $\S$  104 — SUFFICIENCY OF EVIDENCE TO SHOW THAT DELAY OF EXPRESS SHIPMENT WAS DUE TO GIVING PREFERENCE TO GOVERNMENTAL SHIPMENTS.

In an action against an express company for delay in delivery of a shipment of eggs, evidence held insufficient to show that the delay was caused by giving preference to governmental shipments.

3. CARRIERS  $\S$  104 — SUFFICIENCY OF EVIDENCE TO SHOW THAT DELAY DID NOT DAMAGE SHIPPER, BUT THAT HE WAS INJURED BY NEGLIGENCE OF COMMISSION FIRM.

In an action against an express company for damages for delay in delivery of shipment of eggs which the shipper asserted resulted from a fall in market, evidence held not to conclusively show that the broker to whom the eggs were assigned by promptness could have obtain-

ed the same price as had the shipment been delivered seasonably and thus avoided the fall in market.

4. EVIDENCE  $\Leftrightarrow$ 43(3) — RAILROADS  $\Leftrightarrow$ 5½, New, vol. 6A Key-No. Series—JUDICIAL NOTICE; JURISDICTION OVER EXPRESS COMPANY UNDER GOVERNMENTAL CONTROL.

That defendant express company, sued for negligent delay, was, like the railroads, under governmental control, is not conclusive proof that defendant, and its predecessor, was made such a governmental agency as to oust the state court of jurisdiction to enter judgment; the court not being required to take judicial notice of the facts in other cases determining the status of the carrier.

Appeal from Circuit Court, Laclede County; L. B. Woodside, Judge.

Action by J. W. Edwards against the American Railway Express Company. From judgment for plaintiff, defendant appeals. Affirmed.

A. W. Curry, of Lebanon, and Branch P. Kerfoot, of New York City, for appellant.

Phil M. Donnelly, of Lebanon, for respondent.

STURGIS, P. J. This is a suit for damages caused by alleged negligent delay in transporting certain cases of eggs from Lebanon, Mo., to St. Louis, Mo., and there delivering same to the consignee. The case was tried by the court without a jury, resulting in a finding for the plaintiff. The plaintiff asked no declarations of law, and all those asked by defendant were given except a demurrer to the evidence and a peremptory instruction to find for the defendant on the ground that the United States was at war with Germany and her allies, and the defendant's predecessor, the Wells Fargo Express Company, whose business the defendant had taken over and assumed, was under the duty of giving precedence to shipments of the United States government.

[1, 2] Noting this last contention first, the court, at defendant's request, declared the law to be that the Wells Fargo Express Company, which made this shipment, was under the duty to give precedence to shipments of the United States government, and that, if in so doing it became impossible to deliver the shipment to the consignee at an earlier date than it did, then defendant is not liable. Such is the law as contended for by defendant, and the only question is whether the evidence conclusively shows that the delay was due to the carrier giving precedence to the government business. The evidence shows that the distance from Lebanon to St. Louis is 180 miles, and the running time of trains used by defendant and the Wells Fargo Express Company between such points is from five to six hours. According

to the plaintiff's evidence, these eggs were delivered to the Wells Fargo Company in the morning of February 26th, and all the evidence is that same were not delivered to the consignee at St. Louis till 9 o'clock on the morning of February 28th. Several trains carrying express run from Lebanon to St. Louis each day and each night. Granting, as defendant contends, that the eggs were not delivered to it till the evening of February 26th, yet there were three night trains carrying express to St. Louis, all arriving at St. Louis considerably before noon of the 27th. The defendant's local agent said that all the express on hand at the time was shipped on these night trains; nothing being left over. Clearly, then, the eggs in question reached St. Louis before noon of the 27th, and should have been delivered to the consignee at or shortly after noon of that day. No satisfactory reason was given why this was not done, and the evidence is far short of conclusively showing any such volume of government business as to excuse the delay in not delivering till the next day.

[3] The damage claimed is for a decline in the market price of eggs on February 28th, the day the eggs were delivered to the consignee, a commission firm, and the price on the 27th, when the eggs should have been delivered. The decline in price was clearly shown, but a member of the commission firm said that the lower price did not go into effect till 11 o'clock the morning of the 28th, two hours after the eggs were delivered. This point is only raised by the demurrer to the evidence, and we cannot say that the evidence conclusively shows negligence in the commission firm in not selling the eggs before the decline in price at 11 o'clock. All that is shown is that the commission firm sold the eggs at the market price on the day of the delivery, and, as there is no showing of negligence on the part of such consignee, we cannot conclusively find that it could and should have sold the eggs at a higher price.

[4] Defendant filed a motion asking the trial court to dismiss the case on the ground that:

"First, the express system and business formerly owned and operated by the Wells Fargo Express Company was and still is being operated by the United States government under the direction of the Secretary of the Treasury and Director General of Railroads, through the agency of the former officers, agents, and employees of the said express company, and that all the revenues derived from such operation belong to and are held by such officers and agents and employees subject to the order of the Secretary of the Treasury of the United States and the Director General of the Railroads; second, the court is without jurisdiction of the person or subject-matter of said purported cause of action and without jurisdiction to

hear and determine or render any judgment in the premises."

The only enlightenment given this court on this point in appellant's brief is that—

"The motion to dismiss should have been sustained, as plaintiff's own evidence conclusively shows that the American Express Company is a governmental agency, and that this suit is against the United States. Numerous cases involving this question are now in the appeal court, some having been decided, upholding this view; but on account of having been so recently decided the book and page cannot be cited."

We find no "conclusive proof" that the defendant, and its predecessor, was prior to this cause of action made such a governmental agency as to make this suit one against the United States. The only evidence on the point is "that the American Railway Express Company was, like the railroads at the present time, under governmental control and run by the government." The bit of evidence was put in at the trial and after the motion to dismiss was overruled. The court was not, we think, required to take judicial notice of the facts and itself search out the cases, if any, sustaining defendant's contentions. We are not at present advised that at the time of this shipment the Wells Fargo Express Company was so taken over and its business so dominated and conducted by the United States as to oust the courts of power and jurisdiction to hear complaints and enter judgments against such express company. The power and means of collecting this judgment by plaintiff is not before us.

The result is that the judgment is affirmed.

FARRINGTON and BRADLEY, JJ., concur.

# INTERSTATE COAL CO. v. GORDON et al. (No. 2508.)

(Springfield Court of Appeals. Missouri. Dec. 6, 1919.)

## 1. PARTNERSHIP ¶165—LIABILITY OF MEMBER OF FIRM.

If two brothers were in fact partners in a business at the time coal was purchased and delivered, one brother is liable to the seller as well as the other, regardless of whether the seller of the coal knew and relied on the actual partnership in extending credit or not.

## 2. PARTNERSHIP ¶37—RELIANCE ON HOLDING OUT.

Where plaintiff relies on a holding out as partner or firm by estoppel, he must prove knowledge of or reliance on such fact by himself in extending credit.

## 3. PARTNERSHIP ¶218(1)—RECOVERY WITHOUT PLEADING PARTNERSHIP BY ESTOPPEL.

In a suit alleging defendants to be partners and liable as such, plaintiff may prove and recover either on the theory of actual partnership or partnership by estoppel, or holding out as such, without specially pleading the estoppel.

## 4. TRIAL ¶252(4) — INSTRUCTIONS MUST BE SUPPORTED BY EVIDENCE.

In the absence of evidence warranting a finding of actual partnership between defendants, the issue should not have been embraced in the instructions.

## 5. PARTNERSHIP ¶218(3)—ACTUAL PARTNERSHIP A JURY QUESTION.

In an action to recover the price of coal from defendants as partners, evidence held to warrant submission to the jury of the question of actual partnership between defendants.

## 6. PARTNERSHIP ¶17—INTENTION OF PARTIES.

A partnership is largely a matter of the intention of the parties.

Appeal from Circuit Court, Newton County; Charles L. Henson, Judge.

Action by the Interstate Coal Company against J. D. Gordon and H. B. Gordon, resulting in verdict for H. B. Gordon. From an order granting new trial, defendant H. B. Gordon appeals. Affirmed.

Jno. J. Wolfe and John B. Cole, both of Joplin, for appellant.

H. S. Miller, of Joplin, for respondent.

STURGIS, P. J. The plaintiff sues to collect for coal sold and delivered to the alleged partnership firm of J. D. Gordon and H. B. Gordon. The whole controversy is with H. B. Gordon, who answered and denied under oath the alleged partnership. The defendant J. D. Gordon was in active charge of the retail coal and fuel business at Webb City, Mo., and the sole question is as to H. B. Gordon, who lived at Sheldon, Mo., being a partner in the business so as to be liable for this debt. The court submitted this issue to the jury under instructions given as to the law, and the jury found for defendant H. B. Gordon. Then the court granted a new trial for the specific reason that it had erred in giving instruction No. 3 at the request of said H. B. Gordon. This court is asked to reverse the order granting a new trial and to direct a judgment to be entered on the verdict.

[1, 2] The record shows that plaintiff sought to hold H. B. Gordon liable as a partner both on the theory that he and his brother, J. D. Gordon, were in fact partners in the retail fuel and feed business at Webb City, Mo., and on the theory that H. B. Gordon held himself out as a partner and per-

mitted his brother to do so, thereby obtaining credit for the coal in question. The court at plaintiff's instance gave instructions on both these theories, and then at defendant's instance gave instruction No. 3, which it later held to be error, as follows:

"The court instructs the jury that the issue of partnership in this case as against the defendant H. B. Gordon devolves upon the plaintiff to prove affirmatively by the preponderance or greater weight of the evidence that such partnership did exist as alleged by the plaintiff, and that in making out such proof it is not competent for the plaintiff in this case to prove such partnership by declarations made by the defendant J. D. Gordon in the absence of the defendant H. B. Gordon, and that, unless you shall find and believe from the evidence that the defendant H. B. Gordon was in fact a copartner in business with the defendant J. D. Gordon at the time or times when the coal in question was sold as sued for herein, and that the plaintiff then had knowledge of such copartnership and sold the coal in question, relying upon the same, or unless you shall further find and believe from the preponderance or greater weight of the evidence that the defendant H. B. Gordon did in fact, by his words and conduct relating to and touching the business of buying and selling coal, hay, feed, etc., in Webb City, Mo., as disclosed by the evidence, hold himself out to the public as a member of the firm of Gordon Bros. at such place for the purpose of inducing the plaintiff and the public generally to extend credit to the said firm, then your finding will be in favor of the defendant H. B. Gordon."

This instruction must be and is in fact conceded to be wrong. If the defendant H. B. Gordon and his brother were in fact partners in the business at the time this coal was purchased and delivered then H. B. Gordon is liable as well as his brother, regardless of whether the vendor of such coal knew of and relied on such actual partnership in extending credit or not. If H. B. Gordon was in fact a partner in the business, that fact alone makes him liable, and plaintiff did not have to prove, as the instruction requires, that plaintiff knew of and relied on such fact in making the sale. This is elementary in the law of partnerships. Where plaintiff relies on a "holding out" as partner or partnership by estoppel, then it is essential to prove knowledge of and reliance on such fact by the creditor, and the instruction improperly applied this to an actual partnership. *Hahlo v. Mayer*, 102 Mo. 93, 97, 13 S. W. 804, 15 S. W. 750, 22 Am. St. Rep. 753; *Rimel v. Hayes*, 83 Mo. 200.

[3] That plaintiff may, in a suit alleging defendants to be partners and liable as such, prove and recover on either the theory of actual partnership or partnership by estoppel,

or holding out as such, without especially pleading the estoppel, is well established. *Bank v. Lowder*, 141 Mo. App. 603, 125 S. W. 1180; *Ripley v. Evans*, 22 Mo. 157; *Campbell v. Hood*, 6 Mo. 211.

[4-6] Defendant claims, however, that this error in the instruction was harmless under the facts of this case and should not compel a new trial, for the reason that the case proceeds solely on the theory of a partnership by estoppel or holding out and there is no evidence of an actual partnership. This contention is not borne out by the pleadings or instructions, and is in fact contrary to the instruction in question. If there is no evidence warranting a finding of actual partnership, than that issue should not have been embraced in the instructions, as it was in the one at issue given at defendant's request. We think, however, that there was evidence warranting the submission of the question of actual partnership. At least two witnesses testified that defendant H. B. Gordon, in talking of this business and before the controversy arose, said that he and his brother were partners. Another witness said that defendant offered to sell him an interest in the business so as to give each a third. Defendant H. B. Gordon admits that he knew the sign "Gordon Bros." was maintained at the place of business for a long time. This evidence warranted a finding of actual partnership. *King v. Ham*, 4 Mo. 275; *Clark v. Huffaker*, 26 Mo. 264; 30 Cyc. 408. If, as it is held, a partnership is largely a matter of intention of the parties, then the assertion of H. B. Gordon at the time of and in connection with the business that he was a partner of his brother is the highest evidence of that relation and his intention to be bound as such. His later denial of such admissions and his assertion that no partnership ever existed between him and his brother may not have been believed by the jury. In that event the jury would have been warranted in finding from defendant's statements, admissions, and conduct with reference to the business that he and his brother were partners in fact in such business. 2 *Rowley*, *Modern Law of Partnership*, § 891; *Huyssen v. Lawson*, 90 Mo. App. 82, 85. Concluding, as we must, that this instruction was erroneous, the trial judge was in a better position than we are to judge of its prejudicial effect upon the jury, and we will not say that he was wrong in granting a new trial.

The order granting a new trial is therefore affirmed.

FARRINGTON and BRADLEY, JJ., concur.

MISSOURI STATE LIFE INS. CO. v. CALIFORNIA STATE BANK et al.  
(No. 13866.)

(Kansas City Court of Appeals. Missouri.  
Dec. 1, 1919.)

1. INSURANCE ¶586—INTEREST OF BENEFICIARY VESTED.

Where there is no provision in the policy that insured may change his beneficiary, the issue of the policy confers immediately a vested right upon and raises an irrevocable trust in favor of the party named as beneficiary, a right which no act of insured can impair without beneficiary's consent.

2. INSURANCE ¶587—CHANGE OF BENEFICIARY WITHOUT HIS CONSENT.

If the right to change the beneficiary is reserved in the policy, the insured may change beneficiary without the consent of the named beneficiary; the named beneficiary in such case having no vested right in the policy.

3. INSURANCE ¶205—ASSIGNMENT OR PLEDGE OF LIFE POLICY WITH CONSENT OF BENEFICIARY.

A life policy may be assigned or pledged by concurrent act of the insured and beneficiary as security for debt.

4. INSURANCE ¶205—INSURED CAN ASSIGN OR PLEDGE HIS INTEREST WITHOUT CONSENT OF BENEFICIARY.

The insured, without the beneficiary joining, him can assign or pledge the interest he has in life policy.

5. INSURANCE ¶222—PLEDGE OF INSURED'S BENEFICIAL INTEREST IN LIFE POLICY.

Where life policy gave insured the right to change beneficiary and assign policy, insured had the right to transfer all beneficial rights and interest of whatever character in policy to secure his debt, subject to the full rights of the beneficiary being restored upon fulfillment of the conditions of the pledge.

6. INSURANCE ¶587—CHANGE OF BENEFICIARY AFTER ASSIGNMENT OF INTEREST IN POLICY.

Insured, after having assigned all beneficial rights in life policy, could not designate a new beneficiary.

7. INSURANCE ¶593(2)—SUFFICIENCY OF EVIDENCE TO SHOW PLEDGE OF LIFE POLICY.

Facts held to show that life policy was pledged to bank as collateral by insured to be held by bank as collateral for insured's loans.

Appeal from Circuit Court, Moniteau County; J. G. Slate, Judge.

Bill of interpleader by the Missouri State Life Insurance Company against the California State Bank and Grace Kelsay. Judgment for interpleader Grace Kelsay, and interpleader California State Bank appeals. Reversed and remanded, with directions to enter judgment for California State Bank.

Embry & Embry, of California, Mo., for appellant.

S. C. Gill, of California, Mo., for respondent Grace Kelsay.

BLAND, J. On February 5, 1914, plaintiff issued a policy of life insurance in the sum of \$3,000 on the life of one Benjamin F. Kelsay in favor of his wife, Grace Kelsay, the beneficiary. The application for said policy was taken by plaintiff's local agent, Henry Herfurth, who was at the time cashier of the interpleader California State Bank. Herfurth paid the first premium and took Kelsay's note therefor, and Kelsay pledged the policy to Herfurth as security for the note. Herfurth placed this policy in a safe in said bank with some other policies left by persons with Herfurth for safe-keeping, but not in a place where the bank securities were stored. In August, 1915, Herfurth moved to Helena, Mont., and became president of a bank there. Upon his removal one F. C. Harra became cashier of the interpleader bank. Benj. F. Kelsay died May 6, 1918, and at the time of his death there had been paid upon the policy not more than two annual premiums. The policy lapsed on February 5, 1918, for nonpayment of the premiums then due, but by reason of the failure of the insured to take advantage of one of three options of settlement provided for in the policy in case premiums were not paid the insurance became automatically extended for two years and four months. The extended insurance expired on June 5, 1918. The policy contained a provision that the insured might change the beneficiary "provided the policy is not then assigned."

At the time of insured's death the bank held notes which, together with accrued interest, amounted to more than the face of the policy. These notes purported to be signed by B. F. Kelsay and Mrs. B. F. Kelsay, but Mrs. Kelsay denied having signed them. There is no question as to the genuineness of the signatures of B. F. Kelsay. This indebtedness seems to have been made several years previous to Kelsay's death, but was slightly less at that time than when Herfurth left and Harra became cashier of the bank. The notes held by the bank at Kelsay's death were renewal notes. Some time prior to Kelsay's death he pledged the policy to the bank as collateral for his indebtedness to it. There is no evidence that Grace Kelsay, the beneficiary, ever joined in or consented to the pledging of the policy to the bank. Upon the insured's death both the bank and Grace Kelsay claimed the proceeds of the policy, resulting in the insurance company filing a bill of interpleader in the circuit court of Moniteau county, Mo., setting forth the facts and praying that defendants be required to inter-

plead for the fund in its hand. The bank pleaded that the policy had been pledged or assigned to it to secure the insured's indebtedness to it and claimed the proceeds of the policy. Grace Kelsay claimed the proceeds by reason of having been named as beneficiary in the policy and denied that the policy had ever been assigned or pledged to the bank. The court found the issues for the interpleader, Grace Kelsay.

[1-4] Where there is no provision in the policy that the insured may change his beneficiary, the rule is "that the issue of the policy confers immediately a vested right upon, and raises an irrevocable trust in favor of, the party named as beneficiary, a right which no act of the insured can impair without the beneficiary's consent." *Blum v. N. Y. Ins. Co.*, 197 Mo. 513, 523, 95 S. W. 317, 319 (8 L. R. A. [N. S.] 923, 7 Ann. Cas. 1021); *Bank v. Hume*, 128 U. S. 195, 206; *Cornell v. Insurance Co.*, 179 Mo. App. 420, 429, 165 S. W. 858. However, if the right to change the beneficiary is reserved in the policy, the insured may make the change without the consent of the beneficiary. *Robinson v. Insurance Co.*, 168 Mo. App. 259, 153 S. W. 534; 25 Cyc. 892; *Cornell v. Insurance Co.*, supra. This is because the beneficiary in such a case would have no vested right in the policy. A policy of life insurance may be assigned or pledged by concurrent act of the insured and beneficiary as security for debt. *Insurance Co. v. Rosenheim*, 56 Mo. App. 27; *Charter Oak Life Ins. Co. v. Brant*, 47 Mo. 419, 4 Am. Rep. 328; 25 Cyc. 764. The insured, without the beneficiary joining him, can assign or pledge the interest he has in the policy. *Cornell v. Insurance Co.*, supra; 25 Cyc. 765.

[5] If the provision in the policy that the insured might assign it is not in itself authority for him to transfer all beneficial rights and interest of whatever character in it, regardless of the permission to change the beneficiary, then these provisions of the policy—that is, that the insured could change the beneficiary and assign the policy—conferred that right. The insured had the right to assign the policy and change the beneficiary, and, the interpleader Grace Kelsay having no vested right in the policy at the time of its assignment, it is apparent that the insured assigned all beneficial interests that could accrue under the policy to secure his debt (*Cornell v. Insurance Co.*, supra; *Ellis v. Kreutzinger*, 27 Mo. 311, 72 Am. Dec. 270; *Key v. Continental Ins. Co.*, 101 Mo. App. 344, 351, 74 S. W. 162), subject, of course, to the full rights of the beneficiary being restored upon the fulfillment of the conditions of the pledge.

[6] It is contended by the interpleader Grace Kelsay that the case of *Cornell v. Insurance Co.*, supra, is a case similar to this one and authority in her favor. Under that decision it is claimed that the money

is owing to her for the reason that she is the beneficiary mentioned in the policy, and that at that time neither the insured nor the bank, by virtue of being his assignee, had, nor had either of them ever acquired, the right of collecting any money from the insurance company by virtue of a provision in the policy relating to the surrender or cash value, etc. This case is to be distinguished from the *Cornell* Case for the reason that, by inference at least, it appears from the opinion in that case that the insured there had no right to change the beneficiary in the policy. In view of the fact that the policy had no cash value until the expiration of 20 years from its date, it was held that until the expiration of that time the pledgee of the policy would have no right to collect any money under it, and should the insured die within that time the beneficiary, having a vested right in the policy by reason of the fact that the beneficiary could not be changed, would have been entitled to the proceeds of the policy. The provision in the policy in the case at bar that the beneficiary could at any time be changed "provided the policy has not been assigned" was nothing more than a recognition on the part of the insurance company of the rights of an assignee of this particular policy worded as it was. Of course, the insured could not designate a new beneficiary after he had assigned all the beneficial rights in the policy.

It is urged that there is no evidence that the policy was pledged to the bank. The only direct evidence in the record as to this fact shows that it was, and to overcome this evidence the interpleader Grace Kelsay resorts to inferences that she claims are to be drawn from the evidence. The bank was at some disadvantage in proving the pledge of the policy, for the reason that all the testimony of persons who made the arrangement with deceased, or had any conversation with him in reference to the matter, was objected to and excluded by the court for the reason that the other party to the contract was dead. However, the bank introduced a witness who heard the deceased say to an officer of the bank, shortly before deceased's death, that deceased had the insurance policy with the bank as collateral for the loans the bank had made him. The policy was found by an officer of the bank in a place in the vault where the bank's securities and collateral for notes that people owed the bank were kept, tending to show that the policy had been pledged to the bank after Herfurth left. There was an indorsement on the policy, "Assigned to California State Bank as security." It was made by the cashier, but whether it was made before or after the deceased's death the cashier was not able to say.

It is true that Herfurth testified that the policy was given as security for the first premium, and that he placed the policy in the bank's vault where some other policies, which

people had left with him for safe-keeping, were kept, and not where the bank's securities were stored, nor was the policy placed with the bank securities during the time that he was with the bank. At the time Herfurth left the bank the deceased was indebted to the bank in large amounts, but at that time his indebtedness was secured by personal security and no collateral. The Kelsay notes that the bank held at the time Herfurth left were renewed at various times, and there is no reason why Kelsay should not have given the bank the policy as collateral security for his notes on condition that they be renewed. Herfurth testified that Kelsay owed him for this first premium at the time of Kelsay's death. Herfurth did not testify that he did not surrender the policy of insurance, which he held as collateral for his note, to the bank to be held as collateral for deceased's notes, and there is a strong inference that he must have done so for the reason that he had left the bank more than three years prior to the time his deposition was taken, had gone to a distant state, and had not taken the policy with him. In addition to this, he was making no effort to obtain possession of the policy, and did not assert any right under it, even though he knew that this suit had been filed, and that the interpleaders were contesting for the proceeds of the policy. There was no cross-examination of witness Herfurth. His deposition was taken, and from the deposition it would appear that for some reason Herfurth was never asked if he still held the policy as collateral for his note. Of course, he was not asked as to the reason why he was not in the possession of the collateral nor whether he had surrendered the same to the bank at its and Kelsay's request, to be used by it as collateral security for Kelsay's indebtedness.

[7] We think that all the evidence goes to show that the policy was pledged to the bank as collateral by Kelsay to be held by it as collateral for his loans, and that there is no substantial evidence it was not so pledged at the time of his death.

The judgment is reversed, and the cause remanded, with directions to the court to render judgment in favor of the interpleader California State Bank.

All concur.

# INGLE v. SOVEREIGN CAMP, WOODMEN OF THE WORLD. (No. 2506.)

(Springfield Court of Appeals. Missouri.  
Dec. 6, 1919.)

## 1. APPEAL AND ERROR ¶930(1)—REVIEW OF FACTS.

Where, the verdict was for plaintiff, the appellate court will consider the facts in the light most favorable to plaintiff.

## 2. INSURANCE ¶819(4) — EVIDENCE WARRANTING FINDING THAT INSURED DID NOT DIE FROM VIOLATING LAW.

In an action on a certificate issued by a fraternal insurer, evidence held to warrant finding that the member who was killed by the discharge of a shotgun, the barrel of which he was using to open a gate after he had broken off the stock in attempting to enter a neighbor's house in search of his wife, who had left him when he began to abuse her, did not meet his death as a result of his previous unlawful acts, but that the accident occurred after he had calmed down and was no longer committing any unlawful act.

## 3. INSURANCE ¶787—DEATH MUST BE PROXIMATE RESULT OF VIOLATION OF LAW TO AVOID CERTIFICATE.

In order to relieve a fraternal insurer under a provision that the certificate should be void if the member should meet his death as a direct result of drinking intoxicants or in consequence of a violation or attempted violation of the law, it must appear that the intoxication or law violation was the direct and proximate cause of the death; hence, where a member had ceased to exhibit a gun in an unlawful and angry threatening manner, the fact that he was killed by accidental discharge of the gun will not bar recovery.

## 4. INSURANCE ¶787 — GROSS NEGLIGENCE FROM DRINKING DOES NOT AVOID RECOVERY ON FRATERNAL CERTIFICATE.

That a member of a fraternal insurer was grossly negligent in using shotgun, and as a result it was discharged and killed him, will not preclude recovery under provision of the certificate declaring it should be void if the member should meet his death as the direct result of intoxication, even though the member's negligence might have been largely the result of drinking intoxicants.

## 5. APPEAL AND ERROR ¶882(12) — INVITED ERROR IN INSTRUCTION.

Where court gives an instruction too general in its terms, but also gives a requested instruction for defendant just as general, defendant cannot complain.

Appeal from Circuit Court, Division 1, Jasper County; Joseph D. Perkins, Judge.

Action by Katherine Ingle against the Sovereign Camp, Woodmen of the World. From a judgment for plaintiff, defendant appeals. Affirmed.

James P. Mead, of Joplin, for appellant.  
Walden & Andrews, of Joplin, and A. M. Baird, of Cartersville, for respondent.

STURGIS, P. J. It is conceded that defendant is a fraternal benefit society, and that its benefit certificate on the life of Emery Ingle in favor of plaintiff, his wife, was in full force and effect at the time of insured's death. The defendant refused to pay the policy, and its defense of this suit is based on the ground that the manner and

cause of the insured's death rendered the policy void under the clause following:

"If the member holding this certificate \* \* \* shall die \* \* \* from the direct result of drinking intoxicating liquors, \* \* \* or by his own hand or act, whether sane or insane, \* \* \* or in consequence of the violation or attempted violation of the laws of the state, \* \* \* this certificate shall be null and void."

The defendant alleged in its answer and undertook the burden of proving that the insured's death was the direct result of drinking intoxicating liquors and in consequence of the violation of the laws of the state. The plaintiff offered no evidence on this point, but rested her case on the facts elicited by the direct and cross-examination of defendant's witnesses. It appears, however, that defendant called most, if not all, the witnesses whose evidence would be valuable, using plaintiff's evidence given at the coroner's inquest as an admission against interest. These witnesses were friends and relatives of the deceased, but that only went to their credibility, which was in general, though not as to particulars, vouched for by defendant.

[1, 2] Since the jury found for plaintiff, we must take the facts supported by substantial evidence most favorable to her side of the case, which are in brief as follows: The insured came to his death by a gunshot wound fired from a shotgun in his own hands about midnight while he was in the act of opening or passing through a revolving gate at the house of one Riddle just across the street from his own home in the town of Duennweg, Jasper county, Mo. To what extent this was due to accident, to the insured's intoxication, and the unlawful possession and use of the gun is the question presented. The deceased went to Joplin in the evening in an automobile with some friends, including a brother-in-law, and while there was drinking—"took a few drinks," as his brother-in-law testified. He returned home about 11 o'clock at night, and at once began quarreling with and threatening his wife, accusing her of "following him." He seized his wife and choked her, but she escaped and went across the street to the home of Mr. Riddle where her brother-in-law was staying. The insured followed his wife in a few minutes, and with profane language ordered her to go home. She purported to obey, but instead went into a vacant lot, and later to another neighbor's house. The deceased had a shotgun with which he smashed in the door of Riddle's house, and in doing so broke the stock off the gun, retaining the loaded barrel. He then went home, and, not finding his wife, soon returned to the Riddle home, was yet bolsterous, and broke a window, and again left with the gun barrel going toward his home. In the meantime his little boy had gone into the street and was crying.

The brother-in-law, Verne Cunningham, went and picked up the child, the deceased came to him, and together they returned to the Riddle house, and at the gate, some 125 feet from the house, the gun barrel, being still in deceased's hands, was discharged, killing him almost instantly. His brother-in-law was the only one who did or could tell exactly what occurred at the time the gun was discharged. He testified:

"He [insured] had not just returned from Riddle's at the time of the shooting, but was outside the gate coming from towards his own house, not coming from Riddle's house. He was on the outside of the gate coming from his house. I judge it was about 10 minutes from the time he left Riddle's house until the shooting occurred. I did not exactly see the gun. It was dark. I know he had it in his hand. I saw the fire. The stock was not on the barrel at the time. All he had was the barrel. He fired it. He pushed it against the gate post. The gate turns around. The muzzle of the gun was towards him. He took the gun and pushed it on one of those things to turn the gate around, and as he did the gun went off. At the time there was no trouble at all. Everything was perfectly peaceful. He talked to me as though he was ashamed of himself. He said he had been a mean son of a bitch. That was after he left Riddle's house the last time. He wasn't quarreling with me. The child and I were the only persons there. He wasn't quarreling with the child. I had the child in my arms, and we were standing there. There was no ill feeling between him or any one around there at the time. \* \* \* It was some time after he left Riddle's house before the shooting occurred—about 10 minutes, anyhow. It was a brother older than my brother John that he drove off from the house with the gun. This took place some time before that. After he came back he went home and then back to Riddle's. If there had been any trouble, that was half an hour before the firing of the shot."

On this point Mr. Riddle testified:

"The deceased came to my house twice that evening. The second time he left my house, if there had been any trouble, it had quieted down and he went on peacefully. He walked peacefully down towards the gate; was standing at the gate talking to the boys. No trouble was brewing at that time. When the gun was fired I don't know how it happened. The stock of the gun was lying on my porch, and when he left my house all he had of the gun was the barrel of the gun. \* \* \* The gate is, I expect, 125 feet, maybe more, from my house. Was in a position so that if there had been any disturbance going on out there I would have heard it. There was nothing of the kind. The gate was of the kind that turns around as you go into it."

Mrs. A. F. Lewis testified:

"My home is right across the alley from Mrs. Ingle—about 50 feet away, I judge. I was sitting in my dining room window looking out at the time the shot was fired. I could see



Mr. Ingle out there where the shot took place. He was not engaged in any angry altercation or waving a gun or disturbing the peace in any way that I could see at that time. He was standing there talking very quiet for several minutes. I ran back into the bedroom. I couldn't see the gun. It was a shotgun. The scream first attracted my attention. I went and got up and didn't see anything. After a while I saw Mr. Ingle go across the road. I supposed it was his wife that screamed. It was a woman's voice. Emery [the insured] went then to his brother-in-law's, Mr. Riddle's. I do not know what he did there. After that I saw him come back across the road home. He went into the house. I can't say for certain how long he stayed in the house. I think it was about an hour from the time I heard the scream until the shot was fired. \* \* \* The shooting occurred right at the gate. I didn't hear what Mr. Ingle said. I heard him talking to Mr. Cunningham. Verne said, 'You ain't mad at me, are you, Emery?' and he said, 'No; I am not mad at you.' That was the only sentence they spoke. \* \* \* He came back across the road leisurely and quietly and stood there talking peacefully to some party at the gate for several minutes before the shot was fired."

There was evidence that the insured was when sober a peaceable man and kind to his family; and to hold that his outrageous conduct on this occasion was due to his drinking is the most charitable excuse suggested. The evidence, however, strongly tends to prove that his passions had largely subsided, and that he was in a calmer and repentant mood at the time he discharged the gun into his own body by attempting to push open the revolving gate therewith.

The defendant insists that the facts conclusively show that the deceased's death was the direct result of his intoxication and was in consequence of his violating the law. The defense pleaded is that insured while in an intoxicated condition did unlawfully and feloniously, while in the presence of various persons, exhibit in a rude, angry, and threatening manner a deadly weapon, and while so doing discharged same, inflicting his death wound. The jury evidently found the facts to be in accordance with plaintiff's instruction to the effect that, although deceased after drinking intoxicating liquors did exhibit a deadly weapon in an angry and threatening manner in the presence of various persons, yet, if he had abandoned such acts for a period of time prior to his death and was quiet and peaceable and did in a peaceable manner attempt to turn the gate with the shotgun, thereby accidentally discharging same and causing his death, then the defendant is liable.

[3] This instruction is supported by the evidence, and is, we think, in accordance with the law on this subject. It is not the law, as defendant argues and as his refused instructions declare, that mere proof that

one meets his death while violating the law or while intoxicated avoids a policy containing a clause such as is shown here. *Griffin v. Western Mut. Benev. Ass'n*, 20 Neb. 620, 81 N. W. 122, 57 Am. Rep. 848. The intoxication or law violation must be the direct or proximate cause of the death, and there must be a direct and necessary causal connection between the alleged cause and the result. *Accident Ins. Co. v. Bennett*, 90 Tenn. 256, 16 S. W. 723, 25 Am. St. Rep. 685; *Bloom v. Franklin Life Ins. Co.*, 97 Ind. 478, 49 Am. Rep. 469, 474. As said in *Supreme Lodge K. of P. v. Crenshaw*, 129 Ga. 195, 58 S. E. 623, 13 L. R. A. (N. S.) 258, 265, 121 Am. St. Rep. 216, 12 Ann. Cas. 307:

"Certificates issued by benefit societies usually contain a stipulation that the society shall not be liable in case of death of a member while engaged in, or in consequence of, an unlawful act. A contract having such a stipulation is not avoided by the mere fact that, at the time of the death of the member, he was violating the law, if the death occurred from some cause other than such violation. The rule seems to be that, in order to relieve the society, the violation of the law must be such as to proximately lead to the death of the insured by bringing him into danger of losing his life; that is, the act of the insured must be of such a character as to increase the risk of the insurer, and be entered into under such circumstances that the insured must have known that the act he was committing was of such character as to bring him into danger of losing his life."

The exact point ruled in that case is that, under a clause similar to this one, the killing of the insured by the husband who caught him in the act of committing adultery with his wife does not release the insurer. It is there stated that there are many instances in which it can be truly said that the death of the insured would not have occurred except for the commission of a crime, and yet such death is not the reasonable and natural consequence of the crime committed. This is a leading case, and the authorities cited in the opinion and in the editorial note thereto show that such is the law in most if not all jurisdictions. In *Bradley v. Mut. Ben. Ins. Co.*, 45 N. Y. 422, 6 Am. Rep. 115, the rule is stated thus:

"It seems to be clear that a relation must exist between the violation of law and the death, to make good the defense; that the death must have been caused by the violation of the law to exempt the company from liability. It cannot be the true meaning of the proviso that the policy is to be avoided by the mere fact that, at the time of the death, the assured was violating the law, if the death occurred from some cause other than such violation."

The case of *Supreme Lodge v. Beck*, 181 U. S. 49, 21 Sup. Ct. 532, 45 L. Ed. 741, is somewhat similar to this case, and it was

ruled that to discharge the insurer "the death must in some way come as a consequence of the violation or attempted violation of the criminal law, and the stipulation does not apply when it is simply contemporaneous and in no manner connected with the alleged violation or attempt to violate." In that case the insured had gone to a neighbor's house with a gun to induce by threats or force his wife to return home, and discharged the gun, killing himself, while coming out of an outbuilding into which he had gone after having attempted to enter the house where his wife was. The unlawful acts of the insured were held not to have been the cause of the death, since his going into and coming out of the outbuilding was not directly connected with or part of an attempt to carry out any criminal purpose.

It has been held in this state in *Harper v. Insurance Co.*, 19 Mo. 506, that, though one is a violator of the law in assaulting another, yet if after such assault he seeks to withdraw from the difficulty and avoid further trouble, but is followed and killed by his adversary, his death does not fall within the meaning of the policy clause similar to this one. Judge Scott uses this language:

"If the person whose life is insured uses offensive language to one whilst they are engaged in an unlawful game of chance, which language is concerning the game, and he is shot down for the provocation, it would not be maintained that he died in the known violation of the law of the land, within the meaning of the contract. So, if he is riding a race in a public highway, which is forbidden, and his horse falls and he is thrown, and his neck broken, he does not die in the known violation of the law of the land, within the meaning of the terms of the condition. So also in a quarrel, if he assaults another with his open hand, and is thereupon instantly shot down, he does not die in the known violation of a law, within the intent of the policy."

A similar ruling is made in *Brown v. Supreme Lodge*, 83 Mo. App. 633, where the death occurred in an ordinary fight in which the deceased was the aggressor. The court said such a case was not "within the contemplation of the contracting parties." *Railway Mail Ass'n v. Moseley*, 211 Fed. 1, 127 C. C. A. 427, is an instructive case citing and reviewing many authorities. The court held that a policy excluding death resulting from the insured's "vicious conduct" was not avoided where the insured assaulted a police officer and then fled, but was pursued by such officer and killed by him through a spirit of revenge, since the death was not the proximate cause of the insured's prior vicious conduct. *Supreme Lodge v. Brad-*

*ley*, 73 Ark. 274, 83 S. W. 1055, 67 L. R. A. 770, 108 Am. St. Rep. 38, 3 Ann. Cas. 872.

In the present case the attempt of the insured to open the gate by pushing it with the butt end of the loaded gun barrel was not itself a violation of the law and not directly connected with his previous unlawful conduct either toward his wife or in handling the gun.

[4, 5] There is less reason for holding that insured's death was the direct result of his drinking intoxicating liquors. The immediate cause of insured's death was his act of thrusting the gun against the gate to open it. That act might be justly characterized as grossly negligent, and his negligence was doubtless caused in whole or in part by his intoxication. Gross negligence, however, does not make such a policy void even in accident insurance. *Lovelace v. Travelers' Protective Ass'n*, 126 Mo. 104, 28 S. W. 877, 30 L. R. A. 209, 47 Am. St. Rep. 638; *Joyce on Insurance*, § 2845. And in seeking the cause of the negligent act, itself the primary cause of the death, we are seeking the cause of the cause, and thus going beyond the direct or proximate cause. 5 *Joyce on Insurance*, § 2832A. On this point the court instructed the jury that, although the insured was under the influence of intoxicating liquors at the time of his death, yet if such death was not the direct result of such intoxication to find for plaintiff, and on defendant's request that if at the time of his death the insured was under the influence of intoxicants and that his death was the direct result of the use of such intoxicants then to find for defendant whether said insured "intentionally or unintentionally caused his own death." These instructions state the law favorable enough for the defendant, and if they are too general in their terms, then the same fault is common to each. The court properly refused to instruct that, if the insured was intoxicated and was also flourishing or exhibiting a deadly weapon at the time he shot himself, then he was violating the law and to find for defendant. It is not the law, as we have seen, that the mere fact of insured's being intoxicated or engaged in violating the law or both at the time of his death works a forfeiture of benefits under the policy clause in question but there must be a casual connection between such act or acts and the ensuing death. The one must be the proximate and efficient cause of the other. Coincidence in point of time is not alone sufficient.

The result is that the judgment should be and is affirmed.

FARRINGTON and BRADLEY, JJ., concur.

## DIETZ v. NIX et al. (No. 15594.)

(St. Louis Court of Appeals. Missouri. Dec. 2, 1919. Rehearing Denied Dec. 18, 1919.)

1. CUSTOMS AND USAGES ⇨18—PLEADING OF CUSTOM NECESSARY.

In an action on the quantum meruit for the reasonable value of services in drilling an oil well, plaintiff, who relied on the custom of the locality for the owner to compensate the driller for the loss of any tools, must plead the custom; and, it not having been pleaded, evidence thereof is inadmissible to sustain plaintiff's claim for compensation for loss of tools.

2. EVIDENCE ⇨271(19)—SELF-SERVING DECLARATIONS INADMISSIBLE.

In an action for compensation for drilling an oil well, letters written by the driller to defendants, setting forth his claims, are self-serving declarations, which should not be admitted in evidence.

3. APPEAL AND ERROR ⇨884—REBUTTING EVIDENCE DOES NOT CURE ERROR IN ADMITTING EVIDENCE.

In an action for compensation for drilling an oil well, where the driller's letters, setting forth his position, were improperly admitted in evidence, the admission of letters written by one of the defendants, rebutting the claims of the driller made in such letters, does not cure the error and render it harmless.

4. APPEAL AND ERROR ⇨1050(1)—ERROR IN ADMITTING LETTERS WHICH WERE SELF-SERVING NOT CURED BY FAILURE TO OBJECT TO SIMILAR EVIDENCE.

In an action by an oil driller, where letters written by him setting forth his position were improperly received in evidence, the fact that defendants did not object to the admission of another letter, which did not cover everything contained in the earlier ones, did not cure and render harmless the error in admitting the first letter.

Appeal from St. Louis Circuit Court; Leo S. Rasseleur, Judge.

Action by J. F. Dietz against E. D. Nix and others. From a judgment for plaintiff, defendants appeal. Reversed and remanded.

Elliott W. Major and Joseph Barton, both of St. Louis, for appellants.

Virgile Rule and R. P. & C. B. Williams, all of St. Louis, for respondent.

ALLEN, J. The petition herein is in four counts. The first count alleges that plaintiff is a resident of the state of Oklahoma, that the defendants are residents of the city of St. Louis, and that prior to July 13, 1914, defendants were engaged in prospecting for oil in Oklahoma. It is then averred that on July 3, 1914, plaintiff and defendants entered into an express contract, whereby plaintiff agreed to drill a certain well for defendants in the county of Rogers, state of Oklahoma, to a depth sufficient to reach what is com-

monly known as the "shallow sand," or until notified by defendants to cease boring. It is alleged that defendants agreed to pay plaintiff \$1 per foot for such drilling; that plaintiff entered upon the performance of the contract, furnished the necessary labor and material therefor, and drilled said well to a depth of 868 feet, when he was notified by defendants to cease drilling, which instructions he obeyed. Averring full performance of the contract by plaintiff, and defendants' refusal to pay the amount due plaintiff thereunder, judgment is prayed for the sum of \$868, with interest and costs.

The second count is in quantum meruit to recover the reasonable value of plaintiff's services in drilling the well mentioned in the first count to a depth of 868 feet; judgment being prayed for \$868.

For a further cause of action, and a third count of the petition, plaintiff alleges that, on or about August 10, 1914, after he had drilled the said well to a depth of 868 feet, the defendants again employed plaintiff to resume the drilling thereof, and agreed to pay plaintiff therefor at the rate of \$20 per day, "and further agreed to pay plaintiff the reasonable value of any tools of plaintiff that might be lost, damaged, or destroyed while plaintiff was engaged in drilling said well." It is alleged that plaintiff entered upon the performance of this contract, furnished the necessary labor and tools therefor, and continued drilling the well for a period of 14 days; that "in the operation of drilling said well, in the usual course, and while in the exercise of ordinary care and caution," plaintiff lost certain tools, enumerated in the petition, alleged to have been of the reasonable value of \$312.15. And it is alleged that plaintiff faithfully performed the contract on his part, but that defendants refused to pay him the amount due thereon. Judgment is prayed on this count for \$592.15, with interest and costs.

The fourth count proceeds in quantum meruit for the reasonable value of the services rendered by plaintiff for the 14 days' work mentioned in the third count, and for the reasonable value of the tools alleged to have been lost while performing such work.

The answer to the first and second counts admits that during the summer of 1914 defendants entered into an oral contract with plaintiff, by which plaintiff agreed to drill for them a certain well in Rogers county, Okl. It is alleged, however, that by the terms of the contract plaintiff undertook and agreed to drill said well to a depth of 1,250 feet, with the right and option on the part of defendants to terminate the contract and the further drilling of the well at any time before that depth had been reached; that in the contract with plaintiff it was agreed and understood that plaintiff was to furnish all of

the necessary machinery, tools, etc., including water and fuel, necessary for the said work, if plaintiff would drill the well to the said depth of 1,250 feet at the price of \$1 per foot. And it is averred that plaintiff began drilling under the contract, and drilled the well to a depth of between 800 and 900 feet, the exact depth being unknown to defendants, but that plaintiff thereupon wrongfully, in violation of his contract, and against defendants' instructions, ceased drilling, and refused to drill further or to further carry out his contract unless he was paid by defendant a greater compensation than that agreed upon, or, as an alternative, unless defendants furnished him, at their expense, with water and fuel necessary for the work; that in order to induce plaintiff to carry out his contract with them, and on his express promise to resume drilling, defendants furnished him with the fuel and water necessary therefor; that thereafter plaintiff nevertheless wrongfully failed and refused to complete the drilling of said well, quit and abandoned the same, over defendants' protest, before the depth of 1,250 feet had been reached.

Further answering, defendants deny that plaintiff performed the terms and conditions of the contract on his part to be performed by him, deny that they are indebted to plaintiff on any account whatsoever, but aver that by reason of plaintiff's "said failures and defaults" they are discharged from any liability to him on account of the drilling of the well.

By way of counterclaim, the amounts alleged to have been paid out and expended by defendants in furnishing plaintiff with fuel and water are set out in the answer, totaling \$171.75, for which sum defendants pray judgment against plaintiff. The answers to the third and fourth counts are general denials.

The trial, before the court and a jury, resulted in a verdict for plaintiff on the first and third counts of the petition, for plaintiff on defendants' counterclaim, and for defendants on the second and fourth counts of the petition; the total amount of the verdict for plaintiff being \$1,617.30. Judgment followed accordingly, from which the defendants prosecute this appeal.

The evidence for plaintiff tends to establish the making of the original contract sued upon in the first count of the petition; i. e., tends to show that by that contract plaintiff was required to drill only through a certain sand, regarded as an oil-bearing sand in that region, and commonly known as the "shallow sand," at the rate of \$1 per foot; and that plaintiff reached this sand and drilled through it. Defendants' evidence, however, is to the effect that by this said oral contract plaintiff agreed to drill to a depth of 1,250 feet, unless requested by defendants to stop at a shallower depth, at the price of \$1 per foot. It is conceded that under the original

contract plaintiff was to furnish fuel and water for the drilling. After the well had been drilled to a depth of about 868 feet—i. e., through the "shallow sand"—plaintiff ceased drilling for a time. He testified that he reported to defendants' agent, De Ford, that he had drilled through the "shallow sand," and that De Ford told him to do nothing further until further directions were received from defendants; and that after some delay it was agreed between plaintiff and De Ford, the latter acting for defendants, that plaintiff would be paid for further drilling at the rate of \$20 per day, defendants to furnish the necessary fuel and water.

The testimony for defendants on the other hand tends to show that plaintiff, in violation of the contract which defendants assert that they made with him, refused to continue the drilling of the well after having reached a depth of about 868 feet, unless defendants would pay him a larger price per foot for the drilling, or would furnish fuel and water therefor. And it is undisputed that defendants did furnish fuel and water for the subsequent drilling.

After thus resuming drilling, plaintiff drilled for a period of 14 days, when he lost a "bit" in the well. In undertaking to recover this bit, plaintiff lost his boring tools, and was unable to recover them. Over defendants' objections, plaintiff was permitted to introduce testimony regarding a custom, said to prevail in the oil fields in that locality, to the effect that the producer, or owner of a well, becomes liable for the loss of the driller's tools where he contracted with the latter to do the drilling "by the day," without more. Plaintiff testified, in effect, that such custom obtained throughout the oil fields in the state of Oklahoma. And the testimony of plaintiff's witnesses tends to show the existence of such custom, at least, in the counties of Rogers and Tulsa, Okl. There is testimony for defendants, however, that no such custom existed.

[1] I. Error is assigned to the action of the court in admitting, over defendants' objections, testimony in regard to the supposed custom mentioned above. It is unnecessary to refer to the evidence in detail in order to determine whether it tends to show the existence of a custom such as could properly have been shown in evidence had it been pleaded. One ground of appellants' objection to the introduction of this testimony was that plaintiff had not pleaded the existence of such custom in his petition. As shown above, the second count of the petition, *inter alia*, charged that the defendants agreed to reimburse plaintiff for any tools which he might lose, while drilling at the rate of \$20 per day. Plaintiff adduced no evidence tending to show any express contract on defendants' part to so reimburse plaintiff, but sought to sustain this averment of the peti-

tion of proof of a custom touching the matter, with respect to which, it is claimed, defendants are presumed to have contracted; in other words that such custom entered into and became an integral part of the alleged oral contract between the parties.

Under the circumstances we think that the point made, that the evidence of the so-called custom was inadmissible, since the custom was not pleaded, is well taken. If any such custom existed, it was a local custom prevailing in the oil fields in that locality; and it was sought to show the existence thereof, not for the purpose of explaining the technical or special meaning of any word or term used in a contract, but to show what was the contract itself, upon the theory that the supposed custom entered into and became a part of the contract. And in order to show the parties to the contract contracted with reference to a custom of this character, so as to constitute the custom itself a part of the contract, the existence of the custom must be pleaded. See *Staroske v. Publishing Co.*, 235 Mo. 67, loc. cit. 75, 76, 138 S. W. 36; *Porterfield v. American Surety Co. of New York*, 210 S. W. 119; *Hayden v. Grillo's Adm'r*, 42 Mo. App. 1, loc. cit. 5, 6; *Sherwood v. Savings Bank*, 131 Iowa, 528, 109 N. W. 9; *Consolidated Coal Co. v. Jones & Adams Co.*, 120 Ill. App. 139, loc. cit. 146, 147; *Oriental Lumber Co. v. Blades Lumber Co.*, 103 Va. 730, loc. cit. 741, 50 S. E. 270; *Hendricks v. Middlebrooks Co.*, 118 Ga. 131, loc. cit. 137, 138, 44 S. E. 835; *Wallace v. Morgan et al.*, 23 Ind. 399. The existence of such custom vel non is essentially a question of fact, not of law, and should be both averred and proved like any other material fact in the case. See *Oriental Lbr. Co. v. Blades Lbr. Co.*, supra. Defendants were entitled to be advised that plaintiff relied upon such custom to make out, in part, the contract set up in the second count of the petition.

And though the question as to the existence of this so-called custom was not an issue in the case, instructions as to the third count of the petition submitted the question to the jury, thus broadening the issues made by the pleadings.

[2] II. Over defendants' objections plaintiff introduced in evidence two letters, written by plaintiff to defendant Nix in September, 1914, after work had been stopped on the well by reason of the loss of plaintiff's tools, and while plaintiff was undertaking to obtain from defendants the money claimed to be due him. These letters recited plaintiff's version of the transactions had by him with defendants, through De Ford, with assertions as to his having performed on his part, and as to his conduct and fairness in the premises. These letters were manifestly self-serving declarations, and ought to have been rejected on defendants' objections on this ground. *Hammond v. Beeson*, 112 Mo. 190, 20 S. W. 474; 16 Cyc. 1202 et seq.

[3] The aforesaid letters having been admitted in evidence over defendants' objections, defendants subsequently put in evidence letters written by defendant Nix to plaintiff in reply to letters from plaintiff. It is contended by plaintiff, respondent here, that thereby the error, if any, in admitting plaintiff's two letters was cured or rendered harmless. To this we do not accede. It is true that participation in error by inviting it waves the right to subsequently complain of such error. "But the reason of the rule ought not to permit its application to a case where the losing party, as here, does not invite the error, but yields under protest to the theory of the trial court, and thereafter tries, as best he may, to ameliorate his plight by administering an antidote to the poison already injected in the case, to see if, peradventure, he may not be able to render it innocuous." *Bailey v. Kansas City*, 189 Mo. 503, loc. cit. 513, 87 S. W. 1182, 1185. See, also, *McKee v. Rudd*, 222 Mo. 344, 121 S. W. 312, 133 Am. St. Rep. 529; *State v. Loving*, 184 Mo. App. 82, loc. cit. 85, 168 S. W. 339, and cases cited.

[4] In rebuttal plaintiff's counsel introduced in evidence a letter written by plaintiff to defendant Nix—Plaintiff's Exhibit C—to the introduction of which the record discloses no objection made by defendants. It is now contended that this letter "contains by repetition all of the matters complained of in the other two letters," and that its admission, without objection, cures or renders harmless the error in admitting plaintiff's other letters, for the reason, it is said, that one cannot complain of the admission of evidence over his objection, where evidence of the same tenor has been admitted without objection, citing *Laughlin v. Kansas City*, 275 Mo. 459 (Sup.) 205 S. W. 3, loc. cit. 8; *Masonic Mutual v. Lackland*, 97 Mo. 137, 10 S. W. 895, 10 Am. St. Rep. 298; *McPherson v. Andes*, 75 Mo. App. 204. It is unnecessary for us to say whether the doctrine sought to be invoked would find application to the exact situation here presented if Plaintiff's Exhibit C were of such character as to constitute a repetition of all the self-serving statements contained in the two letters erroneously admitted. While all three of the letters are of the same general character Plaintiff's Exhibit C does not cover everything contained in the other two letters in the nature of self-serving declarations. We think that the admission of the last-mentioned letters was highly prejudicial, and that the error was not cured or rendered harmless by reason of the fact that defendants' counsel omitted to object to the introduction of Plaintiff's Exhibit C.

The judgment should accordingly be reversed, and the cause remanded. It is so ordered.

REYNOLDS, P. J., and BECKER, J., concur.

**MEREDITH v. CLAYCOMB.** (No. 2565.)

(Springfield Court of Appeals. Missouri. Dec. 6, 1919.)

**1. NEGLIGENCE ⇨117—FACTS CONSTITUTING CONTRIBUTORY NEGLIGENCE MUST BE PLEADED.**

Where defendant relies on contributory negligence as a defense, the facts constituting such negligence must be pleaded.

**2. NEGLIGENCE ⇨136(26) — CONTRIBUTORY NEGLIGENCE JUSTIFYING DIRECTION OF VERDICT.**

When a plaintiff in making out his case clearly establishes that his injury was as much the result of his own negligence as that of the defendant, it is the duty of the court to declare as a matter of law that plaintiff cannot recover.

**3. MUNICIPAL CORPORATIONS ⇨706(7)—CONTRIBUTORY NEGLIGENCE AS QUESTION FOR JURY.**

Where plaintiff while riding a motorcycle was struck by defendant's automobile turning across the street in plaintiff's path to enter an alley, and it appeared that plaintiff carried no light, evidence merely tending to establish that he may have been guilty of contributory negligence *held* to make a question for the jury,

**4. MUNICIPAL CORPORATIONS ⇨706(8) — AUTOMOBILE COLLISION; EVIDENCE OF NEGLIGENCE RAISED QUESTION FOR JURY.**

Where plaintiff while riding a motorcycle was struck by defendant's automobile turning across the street to enter an alley, defendant having lights, but plaintiff having none, a demurrer to the evidence *held* properly denied.

**5. NEGLIGENCE ⇨118(4)—PROOF CONFINED TO SPECIFIC CHARGES OF NEGLIGENCE.**

Where a general charge of negligence is followed by a specific charge, the specific charge supersedes the general, and, if a plaintiff recovers at all, it must be upon the specific act or acts of negligence, and not upon the general.

**6. MUNICIPAL CORPORATIONS ⇨706(8)—SUFFICIENCY OF INSTRUCTIONS IN ACTION FOR INJURIES DUE TO AUTOMOBILE COLLISION.**

In action for personal injuries caused by a collision between plaintiff's motorcycle and defendant's automobile, wherein plaintiff alleged general and also specific acts of negligence, instructions leaving open to conjecture in what particular and when and where defendant failed to exercise the necessary high degree of care *held* prejudicial.

**7. MUNICIPAL CORPORATIONS ⇨706(8)—AUTOMOBILE ACCIDENT; INSTRUCTIONS DISREGARDING EVIDENCE.**

In an action for personal injuries in a collision between plaintiff's motorcycle and defendant's automobile wherein it appeared that plaintiff was struck while passing an alley which defendant was attempting to enter at high speed, an instruction denying recovery to plaintiff if he attempted to pass the alley after having seen defendant's machine make a turn *held* properly refused as disregarding plaintiff's proximity to the automobile.

Appeal from Circuit Court, Jasper County; D. E. Blair, Judge.

Action by Wayland Meredith against Stephen Claycomb. Judgment for plaintiff, and defendant appeals. Reversed and remanded.

Norman A. Cox and Hugh Dabbs, both of Joplin, for appellant.

Walden & Andrews, of Joplin, for respondent.

**BRADLEY, J.** Plaintiff sued to recover for personal injuries received in a collision with defendant's automobile in the city of Joplin on September 9, 1915. A jury trial resulted in a judgment in favor of plaintiff in the sum of \$4,000. The appeal was granted to the Supreme Court on the theory that the constitutionality of subdivision 9 of section 12, Laws 1911, p. 330, had been raised; but the Supreme Court, holding that the constitutionality of said section had not been timely raised, transferred the cause to this court. Meredith v. Claycomb, 212 S. W. 861. There are many assignments in appellant's brief, but we think the only ones which merit serious consideration are those relating to the demurrer to the evidence and alleged error in the instructions. The substance of the petition is stated in Meredith v. Claycomb, supra, and we deem it unnecessary to make an extended statement here.

Plaintiff alleges that at the time of the injury he was riding east on a motorcycle on Fifth street in the city of Joplin, and that defendant in an automobile was at the time traveling west on said street, and that it was the duty of defendant under the laws of the state to pass plaintiff on the right, but that this the defendant carelessly and negligently failed to do; that, as defendant approached an alley opening upon said street from the south, he suddenly turned without any warning or signal and drove his automobile towards this alley at the moment plaintiff was about to pass the same, resulting in the injuries complained of. The answer was a general denial, and what defendant denominates as a plea of contributory negligence. This plea is averred in the following language:

"Further answering, defendant states that, if plaintiff received the injuries complained of in his petition, the same were caused through no negligence on the part of defendant, but said injuries, if any, were caused by plaintiff's own negligence and want of care which directly contributed to cause said injuries."

The accident occurred on Fifth street in the city of Joplin between Connor avenue on the west and Jackson avenue on the east. Fifth street at the place of the accident is about 35 feet in width, and the alley about 18 feet in width which opens out upon the

street from the south. Defendant lived near by, and his garage was on this alley. The collision happened about 6:30 o'clock p. m., and possibly later. Defendant had his lights burning on his automobile, but plaintiff had no lights on his motorcycle. Defendant turned in to Fifth street from Jackson avenue on the east, and drove west on the north side of the street until within a few feet of opposite the alley, and then without any warning of any kind turned south towards the alley. Plaintiff approached the alley from the west on the south side of the street. Plaintiff passed around a large moving van or wagon, also traveling east, some 60 or 80 feet west of the alley, and saw defendant approaching. According to plaintiff's evidence, he was running his motorcycle about 10 or 15 miles per hour, and defendant was driving his automobile about twice as fast. The two men on the moving van who were witnesses corroborate plaintiff as to the rate of speed. These two witnesses also corroborate plaintiff as to how far he was from the alley when he passed around the wagon. If the relative rate of speed as given by plaintiff is to be adopted, then when plaintiff was 60 feet west of the alley defendant must have been farther east thereof. Plaintiff says that when he passed around the moving van he saw defendant approaching, but at that time defendant was on the north side of the street, and plaintiff was on the south side. Plaintiff says that, after making this observation, he then looked to his right along the alley and the houses near by to see that no one was coming from the alley or a house, and that, when he again looked to his left, defendant had turned his car to the south and was approaching the alley and was right upon him, within a few feet of him, and that he swerved his motorcycle to the right, thinking that he could avoid collision, but that he was too late, and the automobile crashed into his motorcycle, breaking both bones of his leg below the knee, and resulting in serious injuries. Speaking of the collision, plaintiff says:

"I saw him from the time he was at Fifth and Jackson to the alley, and he was still going west. There is a lot of children usually playing around the alley. There was no one there then, but I wanted to be certain there wouldn't be anybody run out of any of the buildings around there and I wouldn't injure them, and I turned to look that way and probably traveled 5 or 10 feet, and looked again to see where the automobile was, and he was about 8 feet, almost directly to my left, and I kind of swerved to the right and thought I would be able to get ahead of him before he run into me, but he was going at such a rapid rate of speed I didn't have a chance but to move a foot or 2 feet onward, too late to get out of his way, and his right-hand front spring got my leg, and after breaking my leg smashed on into the back cylinder of my machine. \* \* \* And I was thrown almost straight in front of the auto

about 10 feet, and he was going at such a rate of speed I thought possibly he might not be able to stop, and to get out of his line of motion I hopped further west. \* \* \* After I turned from the wagon going towards point of collision, I was paying attention to where he was going. I was probably 20 or 30 feet from the alley when I looked again, and the automobile was then within a few feet of the alley still going west. I next saw it when it was about 8 feet away from me."

Defendant testified that he ran on the north side of the street to within about 10 feet of the east side of the alley, and began to make the turn to go in to reach his garage; that when he went to make the turn he looked west on Fifth street to see if he could see any one coming in that direction, and that he saw nothing except a wagon, but did not distinguish what kind of wagon it was, but that it looked like a high wagon, but that he saw nothing else; that he looked until he got turned, and when he got turned he looked south to see that he did not strike anything going into the alley; and that the first thing that attracted his attention was that his wife sitting to his right screamed, and threw up her hands, and that he immediately threw out the clutch, and jerked on his emergency brake, and just as he did that something or other broke his east light.

"I hadn't seen anything at that time, something or other broke my east light. I stopped the machine instantly, and when the crash came I got out and found Mr. Meredith down in front of my machine. That is the first I knew there was anybody anywhere near except the men on the wagon."

Defendant evidently did not see plaintiff approaching, and this may have been, as he says, because plaintiff did not have on his lights. But if it was as light and no later than several of the witnesses testified, then the fact that plaintiff did not have on his lights would not excuse defendant's failure to see him.

There is a great deal of testimony as to the time this collision occurred. The question of time was important to defendant, because plaintiff admitted that he did not have his lights burning, but attempted to excuse himself on the ground that it was not yet dark enough to require lights, and was not 30 minutes after sundown. The evidence is conflicting as to whether the accident occurred at a time when plaintiff was required as a matter of law to have his lights on. Plaintiff places the time of the accident between 6 and a quarter of seven, while defendant says he arrived home on that afternoon at about a quarter or half past 7. Plaintiff testified that the sun set at 6:17 on the day of the accident, while a high school teacher in the city of Joplin, who had charge of the weather department at the high school for the year 1915, testified that on September

9th of that year in the latitude of Joplin the sun set "pretty close" to 6:30.

[1] Defendant did not plead the facts which he says constitute contributory negligence on the part of plaintiff. It is merely averred that, if plaintiff received the injuries complained of, the same were caused by no negligence on the part of defendant, but were caused by plaintiff's own negligence which directly contributed to his injuries. That this is not in compliance with the accepted rules of pleading an affirmative defense is apparent, and, if defendant expected to rely on contributory negligence as a defense, then the rules of good pleading require that the facts which go to constitute the alleged contributory negligence should have been pleaded. In *Harrington v. Dunham*, 273 Mo. loc. cit. 428, 202 S. W. 1066, in discussing the sufficiency of a plea of contributory negligence the plea is set out as follows:

"If the plaintiff received any injuries at the time mentioned in said petition, the same were caused by the plaintiff's own fault and negligence."

The Supreme Court held that this was not sufficient. In the case at bar, the issue of contributory negligence, whether properly pleaded or not, was submitted to the jury, and defendant had the advantage of that issue notwithstanding his defective pleading. Also, it might be noted that there was no effort on the part of plaintiff to require defendant to make his plea more definite and certain, and no objections on the ground of a defective plea was made to the evidence tending to show contributory negligence.

[2-4] It is true, as defendant urges, that, when a plaintiff in making out his case clearly establishes that the injury complained of was as much the result of his own negligence as that of the party of whose negligence he complains, it is then the duty of the court to declare as a matter of law that plaintiff cannot recover. *Collett v. Kuhlman*, 243 Mo. 585, 147 S. W. 965. But on the facts here we cannot say as a matter of law that any act on the part of plaintiff tending to show negligence directly contributed and was the proximate cause of his injury. All of the facts which would go to constitute contributory negligence on the part of plaintiff as appear in the record tend only to establish that he may have been guilty of some act of negligence directly contributing to his injuries, and in such circumstances the question is for the triers of the facts and not the court. There is some evidence by plaintiff tending to show that he recognized and knew who was in the approaching automobile, and knew that defendant's garage was on this alley. If plaintiff recognized defendant as the driver of the approaching car, and knew that defendant's garage was entered from this alley, this knowledge would certainly have considerable weight in the de-

termination of the question of plaintiff's negligence. We hold that as the evidence appears here, independent of defendant's defective plea of contributory negligence, the demurrer to the evidence was properly denied.

On behalf of plaintiff the court gave four instructions, three of which are challenged. Instruction 1 is as follows:

"If you find and believe from the greater weight of the evidence that the defendant on the 9th day of September, 1915, was driving west in an automobile on Fifth street, and that said street, between Jackson and Connor avenues, is a much-traveled public street, then it was his duty, under the law of the state of Missouri in operating his automobile upon said street, to exercise the highest degree of care that a very careful person would use under like or similar circumstances to prevent injury to persons traveling upon said street; and if you further find that at said time plaintiff was riding a motorcycle on said street and was approaching said alley from the west, and that defendant saw plaintiff approaching, or could have seen him by the exercise of ordinary care, and that as plaintiff approached defendant he drove his said motorcycle to the right and attempted to pass defendant on the right, and that at the same time the defendant carelessly and negligently turned to the left, and that before turning he carelessly and negligently failed to give any warning of his intention to turn toward the left, and carelessly and negligently ran his automobile upon and against plaintiff, and if you find that defendant at said time failed and neglected to operate said machine in a careful and prudent manner, and failed to exercise the highest degree of care that a very careful person would use under the same or similar circumstances, and as the result of such want of care, if any, on defendant's part, plaintiff received the injuries complained of, and if you further find at said time plaintiff was operating his said motorcycle with the highest degree of care that a very careful person would under the same or similar circumstances and was without fault or negligence on his part which contributed to or caused his said injury, then your verdict should be for the plaintiff."

Instruction 2 told the jury in substance that, even though it was after sunset, and that plaintiff did not have the lights on his motorcycle, yet if they found that there was sufficient light for the defendant by the exercise of ordinary care to have seen plaintiff's motorcycle, even though the same was without lights, and that defendant did see plaintiff approaching, or could have seen him, by the exercise of due care, in time to have avoided injuring plaintiff, and further find that the fact that plaintiff's motorcycle was without lights did not cause or directly contribute to cause the collision, then plaintiff's violation of the law with respect to lights, if any, would not preclude recovery.

Instruction 3 is as follows:

"The court instructs the jury that under the law it was the duty of both plaintiff and de-



defendant in operating or controlling their motor vehicles on said street to use the highest degree of care that a very careful person would use under like or similar circumstances to prevent injury to persons on or traveling over said street, and a failure to use such degree of care is negligence as the word is used in these instructions."

Instruction No. 1 so far as it deals with specific acts is predicated upon the alleged negligence of defendant in turning, without warning or signal, towards the alley, when he saw or by the exercise of proper care should have seen plaintiff who was at the same moment about to cross the mouth of the alley. Defendant contends that instruction No. 1 is erroneous, and that its giving constitutes reversible error. This instruction submits the issue as to whether the defendant carelessly and negligently turned into the alley, under the circumstances, without giving any signal or warning. After submitting this issue, it then proceeds:

"And if you find that defendant at said time failed and neglected to operate said machine in a careful and prudent manner and failed to exercise the highest degree of care that a very careful person would use under the same or similar circumstances, and as a result of such want of care, if any, on defendant's part, plaintiff received the injuries complained of," etc., then plaintiff could recover.

[5] The court eliminated the question of liability based upon excessive speed, and yet under this instruction, when considered in connection with instruction 3, defendant was convicted of negligence if the jury found he failed to exercise the highest degree of care while operating his car on Fifth street, without regard to place or time. If it were not for instruction No. 3, the phrase "at said time" in the latter part of instruction No. 1 might with reason be held to refer only to the time defendant turned to enter the alley. Instruction No. 3, at least in so far as it refers to defendant, states correctly an abstract proposition, as does the latter part of instruction No. 1; yet, when both are considered together, defendant could be convicted of negligence for driving at an excessive speed before he reached the alley as well as in turning under the circumstances without warning or signal. Plaintiff testified that he approached the alley at 10 or 15 miles per hour, and that defendant was going twice that rate. Under this evidence the jury might have concluded that defendant approached the alley at 30 miles an hour, and that if he had not been driving at such rate he would not have arrived at the alley until plaintiff had crossed this space, and there would have been no collision. Plaintiff in his petition charges specific and general negligence and submits both in his instructions. It is a well-established principle that, where a general charge of negligence is followed

by a specific charge, the specific charge supercedes the general, and that, if a plaintiff in such circumstances recovers at all, it must be upon the specific act or acts of negligence, and not upon the general. *Feary v. Metropolitan St. Ry. Co.*, 162 Mo. 75, 62 S. W. 452; *Lauff v. Carpet Company*, 186 Mo. App. loc. cit. 135, 171 S. W. 986; *McManamee v. Missouri Pacific Railway Company*, 135 Mo. 440, 87 S. W. 119; *Barnett v. Star Paper Mill Company*, 149 Mo. App. 498, 130 S. W. 1121; *Gibler v. Railroad Company*, 148 Mo. App. 475, 128 S. W. 791; *Waldhier v. Railroad Company*, 71 Mo. 514; *Clark v. General Motor Car Company*, 177 Mo. App. 623, 160 S. W. 576.

[8] The instruction should have confined the issues to those upon which plaintiff was entitled to recover. He alleged specific acts of negligence and also general acts, and, as we have said, he cannot recover except for the specific acts; yet under the instructions the jury were left to conjecture in what particular and when and where defendant had failed to exercise that high degree of care imposed by the law upon him. We think that instructions 1 and 3, when considered together, were prejudicial to defendant, and No. 1 should have confined the issues to the specific acts of negligence alleged. We find no fault with plaintiff's instruction No. 2.

Defendant requested a great many instructions, and one of these the court gave eleven as requested, modified and gave three others, and refused seven. Of those refused and modified, we deem it unnecessary to discuss but one. Instruction 14 requested by defendant was modified over his objection and exception. This instruction as requested is as follows:

"If you find from the evidence that plaintiff attempted to cross that part of the street adjoining the approach to the alley, and that plaintiff saw the lights on said machine turned toward the alley or saw said machine turned toward the alley, and he attempted to pass in front thereof, you will find the issues for defendant."

The court modified this instruction by adding the italicized words appearing herein below:

"If you find from the evidence that plaintiff attempted to cross that part of the street adjoining the approach to the alley in front of defendant's machine after defendant turned toward the alley, and that plaintiff saw the lights on said machine turned toward the alley or saw said machine turned toward the alley, and he attempted to pass in front thereof, *and that such act contributed to his injury*, you will find the issues for defendant."

[7] This instruction as requested was properly refused, because it denied recovery to plaintiff if he attempted to pass under the circumstances predicated without regard to his proximity to the automobile. If plaintiff saw the situation as predicated in the in-

struction as originally requested at a time and place when he might in the exercise of due care have stopped or slowed down and thus have avoided the collision, but, instead of doing so, he attempted to pass, then he could not recover. If this idea is properly embodied in the instruction, it should be given, and, if such facts were found to exist, then the jury should not be permitted to determine whether such contributed to the injury.

The issues in this case are and ought to be simple. If defendant was negligent, it was in failing to observe plaintiff's approach, and in failing to give any warning or signal, before he attempted to turn into the alley. If defendant desires to plead contributory negligence as a defense, he should set out the facts upon which he relies as constituting contributory negligence. There is enough evidence of negligence on the part of defendant as appears in this record to go to the jury, and likewise there is evidence tending to show contributory negligence on the part of plaintiff.

In view of our conclusion as to the instructions, the cause should be reversed and remanded, and it is so ordered.

STURGIS, P. J., and FARRINGTON, J.,  
concur.

#### MOBILE & O. R. CO. v. LACLEDE LUMBER CO. (No. 15608.)

(St. Louis Court of Appeals. Missouri. Argued and Submitted Nov. 10, 1919. Opinion Filed Dec. 2, 1919.)

#### 1. CARRIERS ⇐13(1)—DEVIATIONS FROM PUBLISHED RATES ILLEGAL.

It was unlawful for a carrier to charge or for a consignee to pay any less than the lawful rate published pursuant to Act June 29, 1906, § 2 (U. S. Comp. St. § 8569); neither rebates, concessions, or other deviations from such approved and published tariff rates being allowed, in view of Act Feb. 19, 1903 (U. S. Comp. St. §§ 8597-8599).

#### 2. CARRIERS ⇐13(1) — PERSONS CHARGED WITH KNOWLEDGE OF PUBLISHED RATES.

A consignee of an interstate shipment is charged with knowledge of the legal published tariff rates, and that rates fixed in a schedule of rates filed and published under acts of Congress are the only lawful rates; all persons being charged with knowledge of the law.

#### 3. CARRIERS ⇐194—CONSIGNEE PRIMA FACIE LIABLE FOR FREIGHT.

The consignee, and not the consignor, is prima facie liable for the payment of undercharges of freight.

#### 4. CARRIERS ⇐194—CONSIGNEE LIABLE FOR FREIGHT CHARGES.

There need not be an express promise on his part to pay freight charges or an implied promise arising from his acts in inducing delivery to him without payment of the charges to render a consignee liable for freight charges; the mere acceptance and removal of the goods by the consignee with knowledge that the carrier is giving up his lien for his charges being alone sufficient to create an obligation to pay such charges.

#### 5. CARRIERS ⇐194—CONSIGNEE LIABLE FOR CHARGES.

Where the consignor has agreed to deliver goods to the consignee f. o. b. at the place of destination, and the consignee has paid freight rates for the carriage of the same less than those fixed by law, the consignee is liable for the difference between the amount paid and the amount fixed by law, and it is immaterial that the consignor has become insolvent.

Appeal from St. Louis Circuit Court; Thomas C. Hennings, Judge.

Action by the Mobile & Ohio Railroad Company against the Laclede Lumber Company. Judgment for defendant, and plaintiff appeals. Reversed and remanded, with directions.

R. P. & C. B. Williams, of St. Louis, for appellant.

George W. Lubke and George W. Lubke, Jr., both of St. Louis, for respondent.

REYNOLDS, P. J. Plaintiff commenced its action against the defendant before a justice of the peace, filing this statement:

"Laclede Lumber Co., Dr., in Account with Mobile & Ohio Ry. Co.

"To undercharge on shipment of lumber contained in car No. 182,927, Southern, delivered to Laclede Lumber Co., on December 5, 1912, by Terminal Railroad Ass'n, on which there was a claim of freight charges (including demurrage of \$17).....\$ 98 44  
The proper amount to be collected being.....\$108 44

\$ 10 00"

From a judgment there against plaintiff an appeal was taken to the circuit court, where the cause was tried de novo by the court, a jury being waived, on the following stipulation, duly signed by counsel:

"That on the 5th day of November, 1912, the Brownlee Lumber Company of Utica, Mississippi, shipped a car of lumber to the Funk Lumber Company at Cairo, Illinois—Notify C. G. Gauss Lumber Company.

"Shipment arrived in Cairo November 8th, 1912, and said C. G. Gauss Lumber Company was duly notified and the shipment remained at that point until November 30th, 1912, during which time demurrage charges accrued. On the latter date the C. G. Gauss Lumber Company sold the car of lumber to the defendant f. o. b. St. Louis, and reconsigned the shipment from Cairo, Illinois, to the Laclede Lumber Company of St. Louis, by the Mobile & Ohio

Railroad Company. The latter railroad company delivered the car of lumber to the Terminal Railroad Association, which company made delivery to the Laclede Lumber Company on December 5th, 1912; and before delivery and as a condition precedent to delivery, the Terminal Railroad Association required the payment of and collected from said company \$98.44 on account of freight and demurrage charges against the car while the same remained on the track at Cairo, Illinois, before being reconsigned to St. Louis.

"The proper amount of freight and other charges which should have been collected was \$108.44, in accordance with the lawfully established tariff of freight and other charges duly filed with the Interstate Commerce Commission, and published by the plaintiff in accordance with the law and the rules of the Interstate Commerce Commission.

"By mistake of a clerk of the plaintiff, the bill for the freight and other charges was made out as \$98.44 instead of for \$108.44.

"Several months after the car had been delivered to the Laclede Lumber Company, the error in the freight bill was discovered by plaintiff and defendant was requested by plaintiff to pay the \$10.00 additional, being the \$10.00 sued for in this action; and defendant declined to pay the amount, contending that it was not liable for the same and that it had made payment in full to the C. G. Gauss Lumber Company for the car of lumber.

"At the time the error in the freight bill was discovered, the C. G. Gauss Lumber Company was in liquidation.

"The freight bill paid by the defendant is attached hereto as a part hereof."

This freight bill does not appear to have been in evidence and is not before us.

There was a judgment for defendant, from which plaintiff has duly appealed.

The errors assigned are to the ruling of the court in finding for defendant on the agreed statement, and in overruling plaintiff's motion for a new trial.

With the agreed statement of facts before us, and it was solely upon this that the case was heard and determined in the trial court, there can be no doubt but that plaintiff, appellant here, is entitled to recover the ten dollars for which it brought this action, that amount being so much less than the tariff charges as filed and set forth in the tariff on file by the Interstate Commerce Commission and duly published.

[1, 2] The amount of the lawful charges for the transportation of freight in interstate commerce is fixed by schedules of rates legally published pursuant to the act to Regulate Commerce (Act Feb. 4, 1887, c. 104, § 6, 24 Stat. 380) and the amendments thereto (Act June 29, 1906, c. 3591, 34 Stat. 586, § 2 [U. S. Comp. St. § 8569]); and it was unlawful for the plaintiff to charge, or for the consignee to pay, any less than the lawful rate; neither rebates, concessions or other deviations from the approved and published tariff rates being allowed. The rate fixed in the schedule of rates filed and published under the acts of

Congress is the only lawful rate. See Act Feb. 19, 1903, c. 708, 32 Stat. p. 847 (U. S. Comp. St. §§ 8597-8599). The consignee knew this, for it is charged with knowledge of the law.

"In every case of this character, in which there is no express contract by the consignee to pay the transportation charges, the question is whether or not the facts of the case raise the implication of such a contract. The law is well settled that such a contract is implied from the acceptance by a consignee or consignees of goods shipped under a bill of lading which contains the stipulation, the consignee or consignees paying freight, or any similar provision." (Citing cases.)

"The reason for this rule is that the consignee accepts the goods with knowledge that the carrier looks to him for payment of the transportation charges and waives his lien for them by delivery in reliance upon the consignee's implied promise, evidenced by his acceptance of the goods, that he will pay the charges. But this reason exists in all its force, in the absence of a bill of lading, wherever the consignee accepts the goods knowing that the carrier looks to him for payment, waives his lien, and delivers the goods in the faith that he will pay the charges. And as there is in such cases the same reason for the implication of a promise by the consignee to pay these charges as in cases where bills of lading exist, the same implication ought to and does arise." *Union Pacific R. Co. v. American Smelting & Refining Co.*, 202 Fed. 720, 723, 121 C. O. A. 182, loc. cit. 185.

So it has been held in our state, as see *Dunne & Grace v. Southwestern Ry. Co.*, 166 Mo. App. 372, 148 S. W. 997; *Mott Store Co. v. St. Louis & S. F. Ry. Co.*, 184 Mo. App. 50, 168 S. W. 822; *Yazoo & M. V. R. Co. v. Picher Lead Co.*, not yet officially reported, but see 190 S. W. 387; *Bush, Receiver, v. Keystone Driller Co.*, 199 Mo. App. 152, 199 S. W. 597; *Cicardi Bros. Fruit & Produce Co. v. Pennsylvania Co.*, not yet officially reported but see 213 S. W. 531.

[3] Learned counsel for respondent argue that the consignor and not the consignee is prima facie liable for the payment of under charges of freight because he has entered into a contract of shipment with the carrier. In support of this counsel cite *Central R. R. Co. of New Jersey v. MacCartney*, 68 N. J. Law, 165, 52 Atl. 575; *Baltimore & Ohio Southwestern Ry. Co. v. New Albany Box & Basket Co.*, 48 Ind. App. 647, 94 N. E. 906, 96 N. E. 28. It was said by Judge Sanborn, in *Union Pacific Railroad Co. v. American Smelting & Refining Co.*, supra, 202 Fed. 720, 121 C. O. A. loc. cit. 186, that the New Jersey decision is out of line and not in accord with the facts in judgment in the *Union Pacific Case*, supra, and so it may be said here. We do not think that the decision quoted from the Indiana Appellate Court sustains the contention of learned counsel for respondent; as we read and understand it, the reasoning of it is against him, although in that

case the action was against the consignor and not, as here, the consignee. But the same rule applies to both, as the cases we have cited hold.

[4] Those same learned counsel further argue that to make the consignee liable for the freight charges, there must be an express promise on his part to pay the same or an implied promise arising from his acts in inducing delivery to him without payment of the charges; that the mere acceptance and removal of the goods by the consignee, with knowledge that the carrier is giving up his lien for his charges, does not create an obligation to pay charges beyond the amount stated. Central Railroad Company of New Jersey v. MacCartney, supra, and Hutchinson on Carriers (3d Ed.) § 807, are cited in support of this. We do not understand that to be the law and it is thoroughly disposed of by the cases we have cited from our own courts and from the United States Circuit Court of Appeals.

[5] The third and final proposition made by learned counsel for respondent is that where the consignor has agreed to deliver goods to the consignee f. o. b. at the place of destination, and the consignee has paid freight rates for the carriage of the same less than those fixed by law, the consignee is not liable for the difference between the amount paid and the amount fixed by law. In other words, an estoppel is invoked. In support of this counsel cite Central of Georgia Ry. Co. v. Southern Ferro Concrete Co., 193 Ala. 108, 68 South. 981, Ann. Cas. 1916E, 376, and New York Central & H. R. R. Co. v. Butler (Sup.) 145 N. Y. Supp. 918. Whether those cases support the contention of counsel, it is not necessary to determine, for the Supreme Court of Alabama, in the subsequent case of Western Railway of Alabama v. Collins, not officially reported, but see 78 South. 833, held that where the agent of an interstate carrier, accepting goods under bill of lading requiring payment of freight by the owner or consignee, inadvertently charged a lower rate than that on file with the Interstate Commerce Commission, the carrier could recover the amount of the deficit from the consignee. In Pennsylvania R. R. Co. v. Titus, 216 N. Y. 17, 109 N. E. 857, L. R. A. 1916E, 1127, Ann. Cas. 1917C, 862, the Court of Appeals of New York held that the Interstate Commerce Act (Act Feb. 4, 1887, c. 104, 24 Stat. 379) makes "freight rates on railroads engaged in interstate commerce arbitrary, immutable by the agreement, mistake or artifice of the parties and not to be deviated from. Payment of part of the correct amount by the consignee does not fulfill or release performance of his contract."

There can be no estoppel against the carrier here, the acts of Congress negative any such claim. Bush, Receiver, v. Keystone Driller Co., supra, and cases there cited.

That the consignee has settled with the consignor on the lower rate and that the latter is insolvent, does not change the situation as between the former and the carrier.

It follows that the finding of the circuit court should have been for the plaintiff, appellant here, on the agreed statement of facts.

The judgment is reversed and the cause remanded with directions to the trial court to enter up judgment in favor of plaintiff on the agreed statement for the proper amount, ten dollars and costs.

ALLEN and BECKER, JJ., concur.

BURRESS v. RICHARDSON et al.  
(No. 2504.)

(Springfield Court of Appeals. Missouri. Dec. 6, 1919.)

1. MORTGAGES ⇐235 — LIEN WHERE TRUST NOTE WAS FRAUDULENTLY MADE IN DUPLICATE.

Where deed of trust is executed to secure only one note, but duplicate notes conforming to deed of trust are executed by landowner, the one first negotiated to an innocent purchaser carries with it the mortgage security and first lien on the land.

2. EQUITY ⇐72(1)—LACHES; INJURY CAUSED BY DELAY.

To be charged with laches a party must know, or have reason to know, that his delay is likely to cause, or is causing, harm to another.

3. EQUITY ⇐72(2)—LACHES; DELAY IN COLLECTING DUPLICATE NOTE.

Innocent purchaser of note secured by deed of trust who delayed collection beyond due date, interest being paid by maker, was not chargeable with laches because a duplicate note in the hands of a third person, of which he had no knowledge, was thereafter paid by the maker's grantee, who also had no knowledge of the existence of duplicate notes.

Appeal from Circuit Court, Division 1, Jasper County; Joseph D. Perkins, Judge.

Suit by L. C. Burress against C. D. Richardson and another. Judgment for plaintiff, and the defendant Richardson appeals. Reversed.

Jno. J. Wolfe and A. C. Burnett, both of Joplin, for appellant.

Pearson & Butts, of Joplin, and John L. McNatt, of Aurora, for respondent.

STURGIS, P. J. By this suit the plaintiff, as owner of certain land in Joplin, Mo., seeks

to enjoin the foreclosure of a deed of trust thereon given by a former owner. One of the defendants is the sheriff, acting as substituted trustee, and the other, Richardson, claims to own the secured note. The plaintiff claims to have paid off and fully discharged this deed of trust and the note secured thereby, and did in fact pay such amount to one O. H. Gentry, then claiming to own the secured note. The whole trouble arose from the fact that a former owner of this land executed two duplicate notes, both being originals, at the time he executed the deed of trust in question, so that either of such notes corresponds with the description of the secured note, and neither having any earmarks designating it as a duplicate. Both notes were sold by one A. B. Wilgus, who had the duplicate notes made for that purpose, he being the then real owner of the land, and the maker of the notes and the deed of trust being a mere dummy. Wilgus sold one of the notes to defendant Richardson, who is proceeding to enforce the deed of trust. Wilgus sold the other to O. H. Gentry. While Wilgus owned the land he paid interest on both notes, and when he sold the same subject to the incumbrance the landowner, plaintiff, continued to pay interest on the note held by Gentry until the same was due, and then paid same in full. Wilgus continued to pay the interest on the note purchased and held by defendant. Neither holder of the duplicate notes knew, until shortly before this suit was brought, that the other held a like note, and claimed same to be a lien on the land.

The trial court, after finding that both Gentry and defendant Richardson were each purchasers in good faith of their respective notes, each relying on his note as the one secured by the deed of trust, found the issue for plaintiff on the ground that—

"Neither of these notes are forgeries. Both of them are genuine notes, executed at the same time; but when the plaintiff, being owner of the land, paid off one of the notes, which was the note described in the deed of trust, he is entitled to have the deed of trust canceled and the lien thereof removed from his land."

The court then entered a decree, canceling the deed of trust and enjoining the defendant from enforcing the same. The defendant, Richardson, appeals.

[1] As we understand the court's ruling, the plaintiff landowner would, on paying either of these notes to the holder in good faith and without knowledge of the claim of the other holder, be entitled to have his land declared free of incumbrance as against the holder of the other note. Under this view of the law the fact of payment in good faith of either of said notes discharged the lien on said land regardless of which of said rival claimants in fact and in law held the prior lien. This we

think an erroneous view of the law. The means adopted by Wilgus of having the duplicate notes executed and secured by one deed of trust, ostensibly securing only one note, and then selling both to innocent purchasers, is not altogether a new device to defraud. The courts have several times been called upon to decide which of said innocent holders is entitled to priority of lien. The rule has been uniformly declared to be that, where the deed of trust is executed to secure only one note and identical duplicate notes are executed by the landowner conforming to the deed of trust, then the first note negotiated to an innocent purchaser carries with it the mortgage security and the first lien on the land. *Quinn v. McCallum*, 178 Mo. App. 241, 165 S. W. 1115; *Casner v. Schwartz*, 198 Mo. App. 236, 239, 201 S. W. 592; *Kirkpatrick v. Reed*, 204 S. W. 1135; *Yeomana v. Nackman*, 198 S. W. 180, 183; *Ricketts v. Finkleston*, 211 S. W. 391, 397; *Southern Com. Bank v. Slatery's Adm'r*, 166 Mo. 620, 66 S. W. 1066. This ruling is based on the rule of law that the sale and transfer of the secured note carries with it the mortgage security without any separate transfer, assignment, or delivery of the deed of trust as such. *Hagerman v. Sutton*, 91 Mo. 519, 531, 4 S. W. 73; *Logan v. Smith*, 62 Mo. 455; *German Am. Bank v. Carondelet Real Estate Co.*, 150 Mo. 570, 576, 51 S. W. 691. The evidence clearly shows that Wilgus first sold one of the identical notes for full value to defendant Richardson. Later he sold the other to Gentry. This is shown by Richardson's testimony, uncontradicted as to the date of his purchase, and the further fact that the original deed of trust was delivered to him with the note. When Wilgus sold the other note to Gentry he did not have such deed of trust, pretending that it was lost, and furnished Gentry a certified copy. The act of selling one of such notes to Richardson, the other not yet being negotiated, made such note the one secured by the deed of trust, carried such security with it, and vested the same in Richardson. Richardson's right to a first lien on the land to secure his note being vested in him, it is a mere truism to say that such right could not be divested or impaired without his consent or fault by any subsequent act of Wilgus in selling or of Gentry in buying the other duplicate note. Nor do we see how such lien could be defeated or impaired by the later act of the subsequent landowner paying money to Gentry, whose lien, if any, was subordinate to that of Richardson. *Pouder v. Colvin*, 170 Mo. App. 55, 58, 156 S. W. 483. Richardson was no party to that transaction, and did not even know of it. Gentry did not own or hold a first lien, if, indeed, he held any lien on this land, and the mere fact that the plaintiff, landowner, honestly believed he had a first lien and paid money to discharge same cannot be held to defeat Richardson's valid lien

in the absence of knowledge, consent, or fault on Richardson's part inducing such belief or action.

The only suggestion made as to any fault of Richardson is that he was guilty of laches in not collecting, or at least attempting to collect, his note promptly when due. It is claimed that his delay in this respect made it possible, if not necessary, for plaintiff innocently to pay the wrong note. The facts are that each of these duplicate notes was due August 26, 1917. Plaintiff paid the Gentry note December 9, 1917, after Gentry had offered to extend the note at the same rate of interest for any time that plaintiff desired. Wilgus had always kept the interest paid on defendant's note, and it is not shown that defendant knew of the transfer of the land to plaintiff. When this note became due defendant was not needing the money, and the interest was paid to August 26, 1917, the due date, and again on February 2, 1918. Thereafter the discovery of the fraudulent act of Wilgus was made, and this suit followed. Seeing that Richardson was innocent of any rival claim of Gentry or any one else, why should we hold him to be at fault for accepting interest and permitting his note to run after its due date. Such act is not out of the usual course of business. Had he known of Gentry's claim, a different proposition would arise, which we are not called upon to decide.

[2, 3] Laches always has some at least of the elements of estoppel. *Troll v. City of St. Louis*, 257 Mo. 626, 661, 168 S. W. 167. A party, to be guilty of laches, must know or have reason to believe that his delay is likely to cause, or is in fact causing, harm to another. One who is entirely innocent of any possible harm to another by reason of his delay in asserting or enforcing his rights cannot be guilty of laches. "Without knowledge there can be no estoppel" or laches. *Pouder v. Colvin*, 170 Mo. App. 55, 63, 156 S. W. 483, 486. We therefore decline to hold that defendant has lost his lien on this land merely because he indulged his debtor by not insisting on prompt payment of his debt when due, when he had no suspicion, or grounds for suspicion, that his delay would or could cause injury or loss to any one. We realize that plaintiff must suffer a hardship without fault on his part, but defendant is also without fault, and his lien on the land is prior to plaintiff's ownership. Plaintiff's recourse against Wilgus is said to be worthless, and whether he has recourse against Gentry or the person for whom Gentry acted in collecting the other note from plaintiff is not before us.

The judgment of the trial court is reversed.

FARRINGTON and BRADLEY, JJ., concur.

# AVERO v. WELLS. (No. 2535.)

(Springfield Court of Appeals. Missouri. Dec. 6, 1919.)

## 1. JUSTICES OF THE PEACE §90—NO STRICTNESS IN PLEADING REQUIRED.

In a proceeding in justice court, strictness and accuracy in pleading are not required.

## 2. FORCIBLE ENTRY AND DETAINER §24(3)—DESCRIPTION OF LAND SUFFICIENT.

In suit for forcible entry and detainer originating before a justice of the peace, complaint held sufficient in its description of the land as "nine acres more or less, of growing wheat, located near the center of the northwest quarter (¼) of the northwest quarter (¼), of section twenty (20), township twenty-six (26), range twenty-seven (27)" in a certain township and county.

Error to Circuit Court, Lawrence County; Charles L. Hanson, Judge.

Suit by Joseph Avero against D. W. Wells. To review judgment dismissing the cause, plaintiff brings error. Judgment reversed, and cause remanded.

See, also, 211 S. W. 712.

D. S. Mayhew, of Monett, for plaintiff in error.

D. H. Kemp, of Monett, and Barbour & McDavid, of Springfield, for defendant in error.

STURGIS, P. J. This is a suit for forcible entry and detainer originating before a justice of the peace in Lawrence county. When the case reached the circuit court on defendant's appeal and the trial commenced there, the defendant objected to the introduction of any evidence by plaintiff on the ground that "the complaint filed does not state facts sufficient to constitute a cause of action. There is no definite charge of where this land is and for that reason the defendant is unable to meet it. It is an indefinite and uncertain description of any land that is claimed to be forcibly withheld from the possession of this plaintiff." This objection was sustained by the trial court, and plaintiff was compelled to take an involuntary nonsuit, with leave to move to set same aside. His motion to set the nonsuit aside was overruled, and judgment was entered, dismissing plaintiff's case and awarding costs against him.

The case is here on a writ of error sued out by plaintiff and issued exactly one year after the rendition of judgment in the trial court. This writ of error is prosecuted, after that an appeal was dismissed and later a writ of error was dismissed in this court for failure to comply with the requirements of appellate procedure. See *Avero v. Wells*, 211 S. W. 712. The case has had the same

course of procedure as mentioned in *State ex rel. v. Silverstein*, 77 Mo. App. 304, 307, where it is held that a second writ of error may be sued out where the first one was dismissed for failure to comply with the rules of the court. See, also, *State ex rel. v. Finn*, 87 Mo. 310, 316.

Defendant has filed a motion to dismiss the present writ of error for failure to give the notice required by section 2071, R. S. 1909, but this motion is contrary to the fact, and is overruled. This leaves the sole question of the sufficiency of the complaint. The description of the land alleged to have been forcibly entered and detained and which the trial court held insufficient is as follows:

"Nine acres, more or less, of growing wheat, located near the center of the northwest quarter (¼) of the northwest quarter (¼), of section twenty (20), township twenty-six (26), range twenty-seven (27), in Pierce township, Lawrence county, Missouri."

[1, 2] Remembering that this is a proceeding in a justice court where strictness and accuracy in pleading is not required, and following the precedents in this respect, we are inclined to hold that this description is sufficient. In the early case of *Tipton v. Swayne*, 4 Mo. 98, the premises forcibly entered were described as "one house and one garden" belonging to plaintiff, and the court held that this description was "well enough," remarking that "a garden in the country can be supposed to have no metes and bounds but the fence which incloses it, because it is most commonly situated within the limits of the owner's tract of land." It will be noted that there was no allegation in the complaint as to the garden being fenced or its boundaries fixed in any manner, so that this fact must have appeared in the proof. In *State v. Vansickle*, 57 Mo. App. 611, a criminal case, the information charged defendant with forcibly entering "about eight acres of meadow land, being in the west half of the northeast fourth of the northeast quarter of section 15, township 61, range 13, Knox county, Mo." The court there said that the evidence showed that the boundary of this 8 acres was marked by a ravine, but nothing of that kind was shown by the information. In *Naylor v. Chinn*, 82 Mo. App. 160, the court held a description sufficient when "the proof shows that it could be accurately located by such description." See, also, *Ish v. Chilton*, 26 Mo. 256. The rule seems to be that "great strictness and accuracy has not been deemed essential" (*Naylor v. Chinn*, supra), and that the court, should, unless the description is so palpably indefinite as to be incurable, hear the evidence, and if in the light of the proof the location can be accurately fixed, then the proceeding should not be dismissed or the plaintiff precluded from re-

covering. The plaintiff says that the proof will show that the 9-acre tract of growing wheat was all the land planted in wheat on that 40-acre tract, and, if so, it is clearly located. We have noted the case of *Muckey v. Fetiz*, 162 Mo. App. 684, 145 S. W. 493, which was decided on another point, and what is said as to the insufficient description was not necessary to a decision. No case is there cited, and, while somewhat out of line, we are not disposed to construe that case as conflicting with the other cases cited or with this one. The judgment will therefore be reversed, and the cause remanded.

FARRINGTON and BRADLEY, JJ., concur.

McCULLOUGH v. W. H. POWELL LUMBER CO. (No. 2408.)

(Springfield Court of Appeals. Missouri.  
Dec. 6, 1919.)

1. NEGLIGENCE ⇨119(4)—PROOF OF SPECIFIC  
AVERMENTS ESSENTIAL.

Averments of specific negligent acts supersede a general averment of negligence, and plaintiff must recover, if at all, on the specific acts pleaded.

2. MASTER AND SERVANT ⇨204(12) — EVIDENCE INSUFFICIENT TO PROVE NEGLIGENCE ALLEGED.

Where the petition in an action for the death of a fireman, scalded by steam, alleged that the steam line from the boiler to the engine was defective, and so loosely connected as to come loose, proof that a pipe underneath the boiler leading to the pump and mud pipe became disconnected, and allowed the escape of steam, will not support recovery.

3. DEATH ⇨78—NATURE OF RECOVERY.

The amount recoverable under Rev. St. 1909, §§ 5426, 5427, for wrongful death, is compensatory damages.

4. DEATH ⇨31(3)—CAPACITY IN WHICH ADMINISTRATOR OF DECEDENT SUES.

An administrator, suing under Rev. St. 1909, §§ 5426, 5427, for the wrongful death of his intestate, sues merely as trustee for those who would be entitled to the proceeds of the judgment, and not on behalf of the estate.

5. DEATH ⇨18(3)—DEPENDENCY BASIS FOR RECOVERY; "NECESSARY INJURY."

In an action for wrongful death under Rev. St. 1909, §§ 5426, 5427, the question whether there was such dependency by those to whom the recovery would accrue under the laws of descent as to justify recovery, is not to be determined by strict legal dependency making deceased legally liable to furnish support, for the phrase "necessary injury" is broad enough to include any damages.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Necessary Injury.]

6. DEATH  $\Leftrightarrow$ 18(3) — PECUNIARY LOSS FROM DEATH OF ANOTHER.

The fact of pecuniary benefit does not require definite and exact proof in an action for death under Rev. St. 1909, §§ 5426, 5427; but whenever there is a reasonable probability of pecuniary benefits to one from the continuing life of another, however arising, the untimely extinguishment of that life raises a presumption of pecuniary injury.

7. PARENT AND CHILD  $\Leftrightarrow$ 4 — SUPPORT OF PARENT.

An unmarried adult is under no legal obligation to support his father, mother, brothers, and sisters, though such adult was still living in the family.

8. DEATH  $\Leftrightarrow$ 103(1) — SUFFICIENCY OF EVIDENCE TO GO TO JURY.

In an action under Rev. St. 1909, §§ 5426, 5427, for wrongful death of an unmarried adult, brought by an administrator for the benefit of the surviving father, mother, brothers, and sisters, evidence of the pecuniary loss held sufficient to carry the case to the jury.

9. DEATH  $\Leftrightarrow$ 64 — EVIDENCE OF LOSS.

In an action by an administrator under Rev. St. 1909, §§ 5426, 5427, for the benefit of the surviving father, mother, brothers, and sisters of deceased, an unmarried adult, evidence of deceased's indebtedness is inadmissible to show necessary injury, although evidence that a brother was surety on deceased's obligations is admissible to show the brother's loss.

10. DEATH  $\Leftrightarrow$ 84 — MEDICAL AND FUNERAL EXPENSES NOT RECOVERABLE.

In an action by an administrator, under Rev. St. 1909, §§ 5426, 5427, for wrongful death of his intestate, brought for the benefit of the father, mother, brothers, and sisters of deceased, evidence of the expenses for burial incurred by the beneficiary, as well as expenses incurred in attempting to relieve deceased of his injury, is inadmissible to show damages, for the beneficiaries were under no legal liability to incur such expenses.

Sturgis, P. J., dissenting.

Appeal from Circuit Court, Dent County; L. B. Woodside, Judge.

Action by C. W. McCullough, administrator of the estate of Charles Furnis McCullough, deceased, against the W. H. Powell Lumber Company, a corporation. From a judgment for plaintiff, defendant appeals. Reversed and remanded.

Frank H. Farris, of Rolla, and G. C. Dalton, of Salem, for appellant.

Wm. P. Elmer and John M. Stephens, both of Salem, for respondent.

BRADLEY, J. Plaintiff, as the administrator of Charles Furnis McCullough, deceased, sued to recover damages under sections 5426 and 5427, R. S. 1909, for the death of the deceased, alleged to have been caused by the negligence of the defendant. It is alleged in the petition that the deceased was

single and unmarried, and that he left surviving neither wife nor children, and was over the age of 21 years at the time of his death; that he left as his sole and only heirs and distributees, his father, mother, four brothers, and three sisters, naming them. It is further alleged that the deceased, at and for a long time prior to his death, contributed his earnings to the persons named for their necessary support and maintenance; that on the ——— day of January, 1918, and for some time prior thereto, the deceased was employed by the defendant company as fireman of its boiler in the operation of a planing mill in Salem, Mo., and that he was under the direction of its foreman.

The grounds of negligence charged in the petition are: (1) That it was the duty of the defendant to furnish the steam boiler and engine which deceased was firing in a reasonably safe condition, and to furnish the deceased reasonably safe tools and appliances with which to carry out and discharge his duties; and it is charged that the defendant wholly disregarding and neglecting its duties in this behalf did not furnish reasonably safe tools and appliances and did not furnish a boiler in a reasonably safe condition, but that on the contrary the said boiler was unsafe, and in a condition dangerous to human life for those engaged in firing and operating it, and that defendant knew of this condition or could have known such condition by the use of the required care. (2) That on the ——— day of January, 1918, the defendant's foreman directed deceased to fill said boiler with water and place a fire thereunder, and to run and operate the same, and that the deceased obeyed said instructions as directed, and was running, operating, and conducting said boiler, when said boiler because of its dangerous and defective condition, exploded, and inflicted upon deceased, internally and externally, serious burns, from which he died on the same day. (3) That the steam line from said boiler to the engine was old and defective, and was carelessly, negligently, and defectively connected to the boiler, and was so loosely connected that the pressure of the steam from the boiler blew the same off, allowing and permitting the steam and hot water to escape at and upon deceased, thus and thereby causing his injury and death.

It is further charged in the petition that the deceased was inexperienced in the work in which he was engaged, and that the defective condition of the boiler was unknown to him, and could not have been known to him by the exercise of reasonable and ordinary care; that the defect was concealed, and that deceased relied upon defendant exercising ordinary care in furnishing reasonably safe machinery and appliances with which to work, and a reasonably safe place in which to work.



To this petition defendant interposed a demurrer based upon eight specified grounds, but the demurrer is bottomed principally upon the proposition that plaintiff has no legal capacity to maintain this cause. The demurrer was overruled, and defendant answered by a general denial, and that plaintiff had no legal capacity to sue; also defendant pleaded assumption of risk and contributory negligence. The cause was tried before the court and a jury, resulting in a verdict in favor of plaintiff in the sum of \$5,000. Defendant, being unsuccessful in its motion for a new trial, prosecutes its appeal to this court.

The record discloses that deceased was a young man 24 years of age, but was still living at home with his mother and father, four brothers, and three sisters, some of which brothers and sisters were yet minors. The family, it seemed, lived in common, and whatever deceased made went to the maintenance of the whole family. The father and the boys farmed, made ties, and did whatever was at hand in the way of common labor, and the evidence is that the deceased was making about \$2 per day.

The boiler room in which was the boiler deceased was firing was 16x32 feet. The boiler was incased in brick walls. From underneath and to the rear of the boiler there extended down 18 inches a 3-inch pipe. To this pipe was attached an elbow, which connected with a pipe leading to the pump for pumping water into the boiler, and also connected with this 18-inch pipe was what is called the mud pipe, which extended out beyond the end of the boiler, and the evidence was that, when the pump was in operation, the platform upon which it rested shook considerably, so that the pipe connecting the pump with the elbow mentioned was also shaken considerably when the pump was in operation. The evidence shows that the boiler and connections had been installed about a year prior to the accident resulting in the death of the deceased, but that it had been operated only about 6 months of this time.

The evidence shows that the accident occurred about 6 o'clock p. m. on January 14, 1918, about quitting time, as the witnesses say. The injury to deceased was caused, as shown by the evidence, because the pipe leading from the elbow mentioned to the pump became disconnected at the elbow, and this permitted the steam and water in the boiler to escape into the boiler room. There is no direct evidence as to where in the boiler room the deceased was at the time the pipe became disconnected, but the evidence shows that the disconnection resulted in a sudden explosion, which partly lifted the roof of the boiler room, and blew some of the brick from the top of, and a hole in, the boiler room wall, and there is evidence that the brick wall around the boiler was partly demolished. The deceased was badly and fatally

scalded and burned about his face, in his mouth, in his throat, and over his entire body, and was unable to make any statement of consequence. Upon hearing the explosion, the men about the mill, including one of the brothers of deceased, went to the boiler room, and found deceased in the shavings room, a small room extending across the entire width of the boiler room, and in front of the boiler, and into which the shavings from the mill were blown and used for fuel. There was no mud and water in the shavings room, and it is apparent that deceased went from wherever he was at the time of the explosion to the shavings room in his effort to escape.

The evidence tends to show that the pipe that extended from the elbow to the pump, and which became disconnected, was screwed into the elbow only about 2 or 2½ rounds. The threads on this pipe where it entered the elbow were stripped, and remained in the elbow, and were found there when an examination was made after the injury. There is some evidence that this pipe was screwed into the elbow as far as the threads extended on the pipe; but, if this be true, then as appears from the record, there were only 2 or 3 rounds of threads cut on the pipe when the machinery was installed. This particular elbow was new at the time of the installation of this machinery. The threads extended into it some three-fourths of an inch, which would have permitted the pipe to have been inserted to that depth, had sufficient threads been cut on the pipe. The record also shows that the threads on this particular pipe were cut at the time of the installation of the machinery about a year previous to the accident; also it is shown by witnesses of experience that this pipe should have been inserted in the elbow at least three-fourths of an inch in order to have been reasonably safe, considering the size of the boiler and the amount of steam usually carried in operating the planing mill.

Defendant makes several assignments of error, in view of which three propositions are presented: (1) Can the plaintiff rely upon his allegation of general negligence when he has followed such general allegation by allegations of specific acts of negligence, and does the evidence support the specific act of negligence alleged? (2) Has plaintiff any legal capacity to maintain this cause of action; and, if so, may the recovery be for more than nominal damages? (3) Was error committed in the admission of evidence?

[1, 2] 1. It seems to be the established and accepted law of this state that where specific acts of negligence are charged in the petition, which contains also a general allegation of negligence that the specific negligent acts alleged are treated as superseding the general averment, and the plaintiff must recover, if at all, on the specific acts of neg-

ligence alleged. *Lauff v. Carpet Co.*, 186 Mo. App. loc. cit. 135, 171 S. W. 986; *McManamee v. Missouri Pacific Railway Co.*, 135 Mo. 440, 137 S. W. 119; *Barnett v. Star Paper Milling Co.*, 149 Mo. App. 498, 130 S. W. 1121; *Gibler v. Railroad Co.*, 148 Mo. App. 475, 128 S. W. 791; *Waldhler v. Railroad Co.*, 71 Mo. 514; *Clark v. General Motor Car Co.*, 177 Mo. App. 623, 160 S. W. 576; *O'Brien v. Western Steel Co.*, 100 Mo. 182, 13 S. W. 402, 18 Am. St. Rep. 536; *McCarty v. Hotel Co.*, 144 Mo. 397, 46 S. W. 172; *Chitty v. Railroad*, 148 Mo. 64, 49 S. W. 868. Plaintiff cannot, therefore, rely upon his general allegation of negligence. We do not think it necessary to cite any authorities, to support the proposition that plaintiff cannot rely upon the charge in the petition that the pipe leading from the boiler to the engine became disconnected, when the evidence shows conclusively that that was not the case. Plaintiff clearly charges one specific act of negligence, and has clearly proved another, and made no attempt to amend his petition, so as to make it conform to the evidence.

Plaintiff in his brief on this point says that calling a pipe a steam line, instead of a water line, is a difference in name only, and only shows the pleader's unfamiliarity with machinery. But such is not the case here. It has always been the law that, if the plaintiff recover at all, it must be on some act of negligence alleged in the petition, and we cannot see how an allegation that the steam pipe leading from the boiler to the engine became disconnected can be supported by proof that a pipe underneath the boiler leading to the pump and the mud pipe became disconnected. The negligence proved, had there been a supporting allegation in the petition, was amply sufficient to take the case to the jury. But, as we have observed, there is no allegation in the petition to support the negligence proved, when the general allegation is eliminated, which must be done when the pleader follows the general allegation with specific allegations.

[3, 4] 2. In the consideration of the second proposition, as to the plaintiff's right to maintain this cause and the matter of damages, it is necessary to consider sections 5426 and 5427 in connection with section 5425. Section 5426 has remained unchanged since its enactment in 1855, and section 5427 has been amended only to the extent of changing the amount which might be recovered, and the changes that have been made by reference in the class of persons who may sue as designated in section 5425. The amount recoverable under sections 5426 and 5427 has always been held to be compensatory damages. *Johnson v. Dixie Mining & Development Co.*, 171 Mo. App. 134, 156 S. W. 83; also same case (Sup.) 187 S. W. 1; *Troll v. Laclede Gaslight Co.*, 182 Mo. App. 600,

169 S. W. 337; *Kirk v. Wabash Railway Co.*, 265 Mo. 341, 177 S. W. 592.

In *Johnson v. Dixie Mining & Development Co.*, supra, the facts were similar to those in the case at bar, and the cause was brought under the same sections of the statute. A demurrer to the petition was interposed, and sustained, on the ground that the plaintiff had failed to allege the names of the beneficiaries for whom he sued other than the estate. In that case the deceased at the time of his death was over the age of 21 years, and left no wife or minor child or minor children, natural-born or adopted, and in that particular is on all fours with the case at bar. The contention of the plaintiff there was that the suit could be maintained by the administrator, without naming any of the beneficiaries to whom the proceeds of a judgment would be distributable under the statute. It will be noted that section 5427 provides that damages accruing under section 5426 are to be sued for and recovered by the same parties and in the same manner as provided in section 5425, and that in every such action the jury may give such damages, not exceeding the statutory amount, as they may deem fair and just with reference to the necessary injury resulting from such death to the surviving parties who may be entitled to sue. The gist of the holding in the *Johnson Case* is that an administrator, suing under sections 5426 and 5427, is merely suing as trustee for those who would be entitled to the proceeds of the judgment, and not on behalf of the estate as that term is generally used and understood. That case was certified by this court to the Supreme Court and was there affirmed. *Johnson v. Dixie Mining & Development Co.* (Sup.) 187 S. W. 1.

That the damages recoverable under sections 5426 and 5427 are compensatory is not controverted, and it necessarily follows, in order to recover under said sections, that there must be some one in being who is entitled to such compensatory damages; that is, there must be some one in the line designated in the statute of descent and distribution who is pecuniarily injured by the death of the deceased. If there is no such person or persons, then it is apparent that no cause of action can be maintained, because it would be idle to say that a cause of action could be maintained, and a judgment recovered, when there is no one to receive the judgment. Therefore the question of plaintiff's legal right to maintain this cause depends upon the fact of there being some one to whom the proceeds of a judgment could go in the event of recovery.

[5-8] Plaintiff alleges that the deceased for a long time prior to his death contributed his earnings to his mother, father, brothers, and sisters, and that such contribution was

necessary for their support and maintenance. The test, in view of the facts of the instant case, is: Were the persons named in the petition as the beneficiaries, so far as concerns the question of damages, pecuniarily injured by the death of the deceased, or would they have pecuniarily benefited by the continuing life of deceased? If these beneficiaries were pecuniarily injured by the death of the deceased, then plaintiff may maintain this cause of action; otherwise, he cannot. Recovery will not be sustained for the death of an adult, where there is no evidence that the beneficiary was receiving any pecuniary benefits from the deceased at the time of his death. Dependency, as used in cases falling under our damage act, means dependency in fact, and not necessarily a strict legal dependency, making the deceased legally liable to furnish support. 6 Thompson on Negligence, § 7049; Bowerman v. Lackawanna Mining Co., 98 Mo. App. 308, 71 S. W. 1062. The fact of pecuniary benefit does not require definite and exact proof; but wherever there exists a reasonable probability of pecuniary benefit to one from the continuing life of another, however arising, the untimely extinction of that life raises a presumption of pecuniary injury. 6 Thompson on Negligence, § 7050; McKay v. New England Dredging Co., 92 Me. 454, 43 Atl. 29; Baltimore Railroad Co. v. State, 63 Md. 135.

It is held in *Barth v. Railway Co.*, 142 Mo. loc. cit. 559, 44 S. W. 778, that the phrase "necessary injury" in our statute is broad enough to include any damages which may be estimated according to a pecuniary standard, whether present, prospective, or proximate. We realize that the facts in the case at bar, relative to damages that plaintiff may recover, render uncertain and somewhat vague the measure by which to determine the amount of such recovery. This is not like a case where a parent is suing for the death of a minor child, or husband for wife, or the wife for the husband, where it is always possible to have some definite standard by which damages may be estimated. The deceased was under no legal obligation to support his father, mother, brothers, and sisters, and therefore neither of them had any legal claim upon him for support, and his contribution to their support and maintenance was at the time of his death wholly voluntary. But the fact is, according to the record, that deceased had been contributing to their support, and was so doing at the time of his death, and, as held in *Bowerman v. Lackawanna*, supra, it is not necessary that there be a legal dependency, making the deceased liable to furnish support for the beneficiaries, in order to establish the pecuniary injury. In discussing the question of pecuniary injury or damages in a case under the damage act, *Ellison, J.*, for the Kansas City Court of Ap-

peals, in *Hickman v. Missouri Pacific Ry. Co.*, 22 Mo. App. loc. cit. 350, says:

"If a child, over the age of 21 years at the time he may be killed by negligence, is actually, at that time, engaged in the service of his parents as a member of the family, a different question would be presented. It was said in *North Pennsylvania Railway Co. v. Kirk*, 90 Pa. 15, that 'if there be reasonable expectation of pecuniary advantage from a person bearing the family relation, the destruction of such expectation by negligence occasioning the death of the party from whom it arose will sustain the action.' The son in that case was 28 years old, and was, at the time of his injury, engaged in the service of his father without compensation. Such question, however, is not presented in the present case."

We hold, therefore, under the facts here, that the question of damages is for the triers of the facts; that is, that there is enough evidence tending to show that the death of deceased was of sufficient pecuniary injury to the beneficiaries named in the petition to justify the submission of the question of damages to the jury. We think the observation made by Judge *Ellison* in *Hickman v. Railway Co.*, supra, as to the duty of the jury, applicable here, and we quote:

"While it is difficult to make clear just what the loss amounts to in such cases, yet it must be shown by evidence. Much, of course, from the nature of the action, must be left to the common sense and fairness of the jury, yet the jury should not act in an unrestrained or irresponsible manner. They must draw their inferences, from the evidence and law as presented, with fairness and reason."

[9] 3. The evidence discloses that the deceased owed some notes amounting to about \$1,000, and that one of the brothers named in the petition was on these notes. One of the notes was secured by a trust deed on the farm where the whole family lived; another note was for a span of horses, and secured by mortgage on the horses. Evidence of these obligations was admitted over the objections of the defendant. Presumably such evidence was admitted for the purpose of showing that this brother was especially pecuniarily injured, in that he might have to pay the whole obligation since his brother's death. But the extent of such pecuniary injury would depend on the value of the security, and the contingency of the condition and life of the team, and the rise or fall in the value of the real estate. If the evidence of these obligations was admitted on the theory that the estate was concerned as such, then it was incompetent, because as we have seen already the estate as such is not concerned. We hold that evidence of debts owed by the deceased was not competent. The estate as such is not concerned, and it would be a strained construction to say that "pecuniary injury," as used in the statute, covers that

class in the line of descent who may be peculiarly injured by debts of the deceased. The phrase "necessary injury," in section 5427, has reference to pecuniary loss resulting from the fact that the deceased was at the time of his death contributing something of a pecuniary value to the beneficiary or beneficiaries. If the administrator is suing as a trustee for those in the line of descent who have been peculiarly injured by the death of the deceased, then the fact that deceased may have owed debts is of no consequence.

[10] Defendant also challenges the competency of evidence as to medical and funeral expenses, and also for expenses incurred at a hotel, where deceased was taken in an effort to relieve him, and save him, if possible. It has been held a number of times in this state that such expenses are recoverable under the damage act, where there was a legal obligation to furnish such aid, and to incur such expenses. *Coleman v. Land & Lumber Co.*, 105 Mo. App. 254, 79 S. W. 981; *Hickman v. Railway*, supra. But we find no authority to support the contention that such expenses are elements of damage in the situation here. There was no legal obligation on the part of any of the beneficiaries named in plaintiff's petition to furnish medical aid, or to incur expenses for the funeral. In *Hickman v. Railway Company*, supra, it is said that the natural duty of the child to the parent has been from an early period in the history of the world an object of statutory solicitude, but that in the absence of legislation the distinction between the natural and the legal duty remains. Of course, the same observation is applicable when speaking of the duty of the parent to the child. We cannot breathe into a statute a spirit not reasonably within its terms. The observation is made in *Johnson v. Dixie Mining Co.*, supra, that:

"It would be competent for the Legislature to prescribe as a measure of damages, with reference to a suit by the administrator, the damage to the estate of the deceased; but that would be a new and different measure than that already prescribed by section 5427, prior to permitting an administrator to sue thereunder. This seems to have been done in other states. *Southern Pacific Co. v. Wilson* [10 Ariz. 162] 85 Pac. 401; *In re Meekin*, 64 N. Y. 145 [58 N. E. 50] 51 L. R. A. 235 [79 Am. St. Rep. 635]; *McCabe v. Light Co.* [27 R. I. 272] 61 Atl. 667. To do so by construction would be judicial legislation. The Legislature did not do so, and the measure of damages is left as it has always been. The mere authorization of an administrator to sue under this section does not work a change as to the measure of damages in such suits."

We hold that evidence of medical and other expenses incurred in treating deceased, and funeral expenses, are not proper elements of damage under the facts here.

Defendant makes complaint regarding the instructions given for plaintiff, and since the cause is to be retried we suggest that instructions 1 and 2, given for the plaintiff, be so connected as to constitute one instruction, with the latter part of instruction 1 as it now stands omitted, because it would appear from instruction No. 1, independent of any other instruction, that plaintiff could recover without any showing of negligence whatever. If the instructions are not united as one, then instruction No. 1 should be so worded as to require proof of the negligence alleged before authorizing recovery.

For the errors noted, the cause is reversed and remanded, and plaintiff may amend his petition to conform to the facts. *Coleman v. Land & Lumber Company*, supra.

FARRINGTON, J., concurs.  
STURGIS, P. J., dissents.

#### FRANCIS v. CITY OF WEST PLAINS. (No. 2561.)

(Springfield Court of Appeals, Missouri. Dec. 6, 1919.)

#### 1. MUNICIPAL CORPORATIONS ⇨821(13)— NEGLECT OF CITY IN FAILING TO PROVIDE SIDERAILS FOR SIDEWALK JURY QUESTION.

In action against city for injuries to pedestrian sustained in stepping off sidewalk into ditch, question of whether city was negligent in failing to construct guards or siderails to prevent pedestrians from stepping off walk into ditch held for jury.

#### 2. MUNICIPAL CORPORATIONS ⇨821(24)— NEGLECT OF PEDESTRIAN IN STEPPING OFF UNGUARDED SIDEWALK BRIDGING DITCH.

Pedestrian, who in walking toward his home on a dark night walked along a street which he knew had a sidewalk, with no handrails, bridging a ditch, was injured by stepping off sidewalk into ditch, was not contributory negligence, as a matter of law, where he had intended to avoid danger by walking in middle of street, but had, because of darkness, walked upon sidewalk, and where every other street leading toward his home would have exposed him to same danger; the question being for jury.

#### 3. MUNICIPAL CORPORATIONS ⇨821(23)— CONTRIBUTORY NEGLIGENCE IN USING SIDE- WALK KNOWN TO BE DANGEROUS.

A person has a right to use a sidewalk which he knows is dangerous if he in such knowledge uses it with care to himself, such use not being contributory negligence as a matter of law, unless defect is so glaringly dangerous that no prudent person would attempt to pass over it.

**4. MUNICIPAL CORPORATIONS — 822(2) — ERRONEOUS INSTRUCTION IN ACTION FOR INJURIES FROM DEFECTIVE SIDEWALK.**

In pedestrian's action against city for injuries from defective sidewalk, instruction that it was "the absolute and unqualified duty of defendant city to keep its sidewalks and streets in a reasonably safe condition" held erroneous, in making city an insurer, whereas it is only required to exercise reasonable and ordinary care.

**5. MUNICIPAL CORPORATIONS — 763(1) — DUTY OF CITY AS TO SIDEWALKS AND STREETS.**

A city is only required to exercise reasonable and ordinary care and diligence in making its streets and sidewalks reasonably safe for the public, and is not an insurer of safety of public in use thereof.

**6. DAMAGES — 144 — NECESSITY OF PLEADING DAMAGES FOR LOSS OF TIME AND EARNINGS.**

In personal injury action, damages for loss of time and loss of earnings cannot be recovered unless specially pleaded.

**7. NEGLIGENCE — 65 — TIME NOT ELEMENT OF CONTRIBUTORY NEGLIGENCE.**

Negligence of plaintiff, if one of the producing or efficient causes which helped to bring about the injury, will preclude recovery, regardless of when his negligent act was committed.

Appeal from Circuit Court, Howell County; E. P. Dorris, Judge.

Action by F. M. Francis against the City of West Plains. Judgment for plaintiff, and defendant appeals. Reversed and remanded.

O. L. Haydon, of West Plains, for appellant.

J. L. Van Wormer and Will H. D. Green, both of West Plains, for respondent.

**FARRINGTON, J.** The appellant is a city of the third class, and appeals from a judgment against it rendered for plaintiff after a trial to a jury based upon a petition alleging negligence on the part of the city in keeping a certain portion of its sidewalks and streets in an unsafe condition, on account of which the plaintiff fell and was injured, severely spraining one of his ankles.

Appellant raises numerous assignments of error, and in its brief charges: First, that a demurrer to the evidence should have been sustained; and, second, that certain instructions which were given on behalf of respondent contained reversible error, which instructions will be hereafter particularly noticed.

[1, 2] The appellant has failed to convince us that this case should have been withdrawn from the jury at the close of all the testimony, as we are of the opinion that the evidence which we will now relate makes out a case of negligence on the part of the city in failing to use reasonable care to keep its streets and sidewalks in a reason-

ably safe condition, and fails to show, as a matter of law, that the plaintiff was guilty of contributory negligence, such as to bar a recovery.

The facts are: The plaintiff, a man about 60 years of age, was a paper hanger by trade and lived in the southeast portion of the city of West Plains. He had purchased a store some few days prior to the night of his injury. On the night he was injured, about 10 o'clock, in company with his son, he started from his store to his home. The night was dark, and the street lights, owing to some trouble from a storm, were not lighted. He walked until he reached Grace street, a street running east and west, and proceeded down the south sidewalk of that street until he came to Locust street, a street intersecting Grace street and running north and south. Plaintiff lived about two blocks south on the east side of Locust street, about two blocks from the intersection. The evidence shows that at the intersection of Grace and Locust streets there is a cement culvert forming a part of the walkway, across the intersecting streets; that along the east side of Locust street, extending back for some distance, is a ditch or waterway, and to bridge over this waterway at the street intersection a cement walkway was bridged across this ditch, which at this point was from 2½ to 3 feet deep, and from 4 to 6 feet wide, there being no guards or side-rails to prevent one from stepping off the walk into this ditch. This walk had remained in this condition some four or five years. Prior to its construction there was a wooden bridge over this ditch at the same place, which bridge had railings.

There can be no question that the city in constructing this sidewalk, something like four feet wide, left the south side of the walk where it crosses the ditch unprotected, and that immediately south of the edge of the walk constructed was a ditch of the width and depth before described. The plaintiff and his son both knew of this condition, as they passed there every day going from home to town and back. The street lights were not on, and they both testified that in order to avoid the chance of falling into this ditch, in crossing the sidewalk over it, they concluded that it would be best to not go entirely across Locust street and then turn south on the regular sidewalk, for to go there would require that they pass over this unprotected part of the walk, but thought it would be best and safer for them to turn south down the middle of Locust street when they had proceeded east on Grace street to the center of Locust street. They both say that they thought they had reached the center of Locust street, and the plaintiff turned to go south, thinking that he was

in the middle of Locust street, when in fact he had gone too far east and was right on the part of the sidewalk that was over this unprotected ditch. When he stepped off to the south, he fell into this ditch and was injured. Their testimony is to the effect that it was so dark they could not discern exactly where they were, but were doing all they could to take the center of Locust street and proceed along it south to their home. It was also shown in evidence that the other streets leading from the store to the home were equally as dangerous and hazardous as the course which they undertook to go.

[3] This is not a case where it is admitted that the plaintiff knew of a defective condition and thoughtlessly and carelessly forgot it and walked into it, but, on the other hand, is one where the dangerous place was known to the plaintiff, and he was trying in the dark to avoid it. Neither does the evidence disclose such a condition as to make it so patently dangerous that no ordinarily prudent person would have attempted to go that way. A person has a right to use a sidewalk which he knows is dangerous, if he in such knowledge uses it with care to himself. It is not contributory negligence, as a matter of law, unless the defect is so glaringly dangerous that no prudent person would attempt to pass over it. *Loftis v. Kansas City*, 156 Mo. App. 633, 137 S. W. 993; *Graney v. City of St. Louis*, 141 Mo. 180, 42 S. W. 941.

We cannot hold that his action as disclosed in this record could be, as a matter of law, declared contributory negligence, and we are clearly of the opinion that the condition described by plaintiff's witnesses made it a case for a jury to pass on the defendant's acts concerning its duty to the plaintiff and the public as to this sidewalk. *Gallagher v. City of Tipton*, 152 Mo. App. 412, 133 S. W. 135; *Kuntsch v. New Haven*, 83 Mo. App. 174; *Walker v. City of Kansas*, 99 Mo. 647, 12 S. W. 894; *Gibbs v. City of Monett*, 163 Mo. App. 105, 145 S. W. 841. We therefore overrule the appellant's contention in this regard and hold that the case is a proper one to go to the jury.

A number of objections are made to the instructions given on behalf of respondent going to the assumption of facts and commenting upon evidence. In this connection, we will state that the instructions are subject to the criticism of appellant, but we do not hold that in this regard they would work a reversal of this judgment, and in this respect we will call attention to the fact that the instructions erroneously refer the jury to the pleadings. This has been held in a number of cases, useless here to cite, as bad practice. There are, however, two glaring errors, either of which would prevent the af-

firmance of this judgment. The first is contained in instruction No. 1, given on behalf of respondent, which instruction is as follows:

"The court instructs the jury that it is by law made the *absolute and unqualified* duty of defendant city to keep its sidewalks and streets in a reasonably safe condition for the use of pedestrians using the same for travel, and if you believe from the evidence that the defendant city permitted its sidewalks or streets at the place mentioned in plaintiff's petition to be in a dangerous condition for travel, and it so remained in a dangerous condition after it knew, or by the exercise of reasonable care and caution could have ascertained, the defective and dangerous condition of said sidewalk and street, and that plaintiff at the place mentioned in plaintiff's petition, on account of said defective and dangerous condition of said sidewalk and street if any, without fault or neglect on his part, was injured thereby, your verdict should be for the plaintiff, in any sum not exceeding \$2,000." (Italics ours.)

[4, 5] This instruction is clearly erroneous in the degree of care which is placed upon a city in the maintenance of its streets and sidewalks. It, by making it the absolute and unqualified duty of the defendant to keep its sidewalks in reasonably safe condition, makes the city an out and out insurer. The terms as used place a higher degree of care on the city than the highest degree of care. The rule has prevailed in this state for years that a city is only required to exercise reasonable and ordinary care and diligence in making its streets and sidewalks reasonably safe for the public. *Sprague v. City of St. Louis*, 251 Mo. loc. cit. 629, 158 S. W. 16; *Spalding v. Ziegler*, 173 Mo. App. 698, loc. cit. 704, 160 S. W. 14. It is held in *Howard v. New Madrid*, 148 Mo. App. 57, 127 S. W. 630, that a city is not bound at all hazards to keep its sidewalks in safe condition for travel, but is only bound to use ordinary care to keep them in a reasonably safe condition for travel by day and night. *Barnes v. City of St. Joseph*, 151 Mo. App. 523, 132 S. W. 318.

In the case of *Albritton v. Kansas City*, 192 Mo. App. 574, 188 S. W. 239, an instruction was condemned as containing reversible error in charging that "It is the duty of the city to keep its sidewalks in a reasonably safe condition for travel." It can be seen that the instruction in the case at bar goes much farther than the instruction quoted in the last case cited, for under the language given in the case at bar the city is made an absolute and unqualified insurer.

Respondent has cited the case of *Bond v. City of Sedalia*, 194 S. W. 740, in which the opinion contains the following language:

"Whether or not it was the custom for the property owner to fix defects such as the one in this case would make no difference, as a city under the law of this state was under the absolute and unqualified duty to keep its sidewalks reasonably safe for pedestrians."

Cases are cited also from Supreme and appellate courts of this state. On examination of that case and cases cited, it will be noted that the court was speaking of the general duty of the city concerning streets and sidewalks, and was not undertaking to fix the degree of care required in performing that duty. In those cases the city was attempting to escape liability on the ground that it was some one else's duty, or that some one else was responsible for the condition which caused the injury, and the language used by the court was proper when considered in the light of the question that was being decided. There was no such question whatever in the case at bar, as it was conceded that the city had constructed this sidewalk and permitted the condition which existed on the night of plaintiff's injury for a long period theretofore. The error contained in this instruction is grievous and must reverse the judgment.

[6] We also find an equally vicious condition in respondent's instruction No. 7. We will quote enough of it to point out the error:

"The court instructs the jury that, if you find the issues for the plaintiff, then in estimating his damages you may take into consideration all of the mental and physical pain and anguish suffered by him, and all the future mental and physical pain and anguish, if any, that will result to him on account of said injury, also his loss of time from his business, if any, together with the value of said time, since the date of his injury, if any. \* \* \*

It will be seen that this instruction permits a recovery for loss of time or loss of earnings from the date of the injury to the date of the trial. The petition contains no charge of any loss of time or loss of earnings. It has been repeatedly held that, in order to recover for loss of services or earnings from the date of the injury to the date of trial, there must be a special charge in the petition. As stated in the case of *Ferrier v. Schoenberg Merc. Co.*, 158 Mo. App. 533, 138 S. W. 893, the loss of past earnings is not a necessary consequence of personal injury negligently inflicted, and hence is not embraced within a general allegation of permanent injury, but must be specially pleaded and proved. The same question will be found discussed with like conclusion in the following cases: *Scholl v. Grayson*, 147 Mo. App. 652, 127 S. W. 415; *Rush v. Street Ry. Co.*, 157 Mo. App. loc.

cit. 512, 137 S. W. 1029; *Hitchings v. City of Maryville*, 134 Mo. App. 712, loc. cit. 716, 115 S. W. 473.

[7] Instruction No. 2, given at plaintiff's request, is misleading, in that it could be construed that, although plaintiff was negligent and contributed to his injury, yet, unless the negligence was not at or immediately before he fell, his negligence would not defeat a recovery. The time within which a negligent act may have been performed is not an element to be considered, the question being whether the act was one of the producing or efficient causes which helped to bring about the injury.

Instruction No. 4 on contributory negligence in effect tells the jury that if they believe the plaintiff was not guilty of contributory negligence then he should recover. It leaves out the necessary finding which the jury must make, that is, that the defendant was negligent.

The judgment will be reversed, and the cause remanded for trial in accordance with the views herein expressed.

STURGIS, P. J., and BRADLEY, J., concur.

# BUDDECKE v. GARRELS. (No. 15410.)

(St. Louis Court of Appeals. Missouri.  
Dec. 2, 1919.)

## 1. PROCESS $\S$ 155—MOTION TO QUASH RETURN LIES ONLY FOR DEFECTS ON FACE.

As a motion to quash a return will lie only when the return itself is insufficient, it was not a proper mode of objection to the jurisdiction of the circuit court of a city on the ground that neither plaintiff nor defendant was a resident of such city; such alleged fact not appearing on the face of the return on the summons.

## 2. ABATEMENT AND REVIVAL $\S$ 3—MODE OF OBJECTION TO JURISDICTION.

If facts on which the objection of lack of jurisdiction is based appear on the face of the petition, such objection should be made by demurrer; but if the objection is based upon facts de hors the petition and return, it should be raised by a plea to the jurisdiction.

## 3. APPEAL AND ERROR $\S$ 1037—ERROR AS TO PROCESS NOT AFFECTING RESULT HARMLESS.

Error in overruling motion to quash return after hearing evidence on issue of nonresidence was not prejudicial, where motion should have been denied because the proper remedy was plea to jurisdiction.

## 4. APPEAL AND ERROR $\S$ 285—WAIVER OF ERROR BY FAILING TO SAVE EXCEPTION ON MOTION FOR NEW TRIAL.

Objection to striking out plea to jurisdiction is waived by failing to make it ground of exception in motion for new trial, or rehearing,

notwithstanding term bills of exceptions were properly saved.

Appeal from St. Louis Circuit Court; Thomas C. Hennings, Judge.

Action for libel by William A. Buddecke against William L. Garrels. Judgment for plaintiff, and defendant appeals. Affirmed.

T. Percy Carr, of St. Louis, for appellant. W. B. & Ford W. Thompson, of St. Louis, for respondent.

BECKER, J. This case is an action for libel filed in the circuit court of the city of St. Louis, by William A. Buddecke, plaintiff, against William L. Garrels, defendant. The case was tried to a jury, resulting in a verdict in favor of plaintiff for \$500 actual damages, and from judgment rendered thereon defendant appeals.

Plaintiff in his petition alleges that he is a resident of the city of St. Louis. The defendant, who is a resident of St. Louis county, was "found" and served in the city of St. Louis. At the return term following the service upon the defendant, the defendant appeared specially, and moved to quash the sheriff's return, showing service in the city of St. Louis, and as a ground for the quashing of said return the defendant, in said motion to quash, alleged that neither the plaintiff nor the defendant was a resident of the city of St. Louis at the time the suit was brought. Upon the hearing of defendant's motion to quash, the plaintiff was a witness in his own behalf, and testified that he was in fact a resident of the city of St. Louis, and thereupon said motion was overruled, defendant excepting thereto and preserving his exceptions by the usual term bill, but not embodying this exception in his motion for a new trial filed after the case had been heard on its merits.

Defendant's motion to quash having been overruled, defendant was granted time to plead, and in due course filed an answer, setting up several defenses, the first of which was a plea to the jurisdiction of the court, based upon the same ground set up originally in defendant's motion to quash, namely, that the circuit court of the city of St. Louis had no jurisdiction because neither of the parties to the suit was a resident of said city, and specifically alleging, in such plea to the jurisdiction, that the plaintiff was a resident of Washington county. This original answer was subsequently withdrawn and an amended answer filed, in which the same plea to the jurisdiction was again set up as the first defense. Thereupon plaintiff moved to strike out such plea to the jurisdiction from said amended answer on two grounds: First, that the defendant, by filing his answer and amended answer, had entered his appearance, and was thereby precluded from pleading to

the jurisdiction; second, that the defendant had, prior to the filing of said answer and amended answer, set up the same matter in his motion to quash and dismiss the writ of summons, and that the court had, after hearing the evidence adduced on said motion to quash, adjudicated the question of the residence of plaintiff, and held it to be in the city of St. Louis, Mo.

The learned trial court sustained plaintiff's motion to strike out defendant's plea to the jurisdiction, the defendant saving his exception in a term bill filed in due course, but defendant failed to assign the action of the court in thus sustaining the plaintiff's motion to strike out the defendant's plea to the jurisdiction as a ground in his motion for new trial filed after the hearing of the case upon its merits.

The defendant next filed his second amended answer, omitting therein his plea to the jurisdiction stricken out by the ruling of the court as above noted.

Some time later the defendant filed a motion to withdraw his second amended answer and for leave to file a third amended answer in lieu thereof, and to reinstate therein his plea to the jurisdiction which the court had stricken out of his first amended answer, on the ground that the defendant had, since the filing of his second amended answer, discovered evidence unknown and unobtainable during the earlier stages of the case, which the defendant alleged would conclusively establish the fact that Mr. Buddecke's residence was in Washington county at the institution of the suit, and that the testimony to the contrary on the part of the plaintiff on the hearing of defendant's motion to quash, to the effect that he was a resident of the city of St. Louis at that time, was false. The motion further sets up that the defendant had never willingly waived his plea to the jurisdiction, or voluntarily submitted himself to the court's jurisdiction, but that the plaintiff had procured the court's action, namely, the overruling of the defendant's motion to quash, by falsely swearing that he was a resident of the city of St. Louis. This motion was duly verified, and defendant in addition filed supplementary affidavits thereto a few days after the filing thereof, which affidavits are intended to support the allegation of the said motion. The court, however, overruled defendant's motion, and refused leave to reinstate such plea to the jurisdiction. Defendant preserved his exception to this ruling of the court by filing his term bill of exceptions, but an examination of defendant's motion for new trial shows that defendant failed to embody this exception therein.

The defendant thereupon, in his endeavor to avail himself of his jurisdictional defense, applied to the Supreme Court of this state for a writ of prohibition, which writ, how-



ever, was denied. At the trial of the case the defendant again endeavored to raise the question of jurisdiction without success, and saved his exception to the adverse ruling of the court. But the action of the court in thus overruling this jurisdictional question raised by the defendant at the trial is not assigned as one of the grounds set out in the defendant's motion for new trial, filed at the conclusion of the case upon the merits.

We will not burden this opinion with a statement of the facts in the case, in that the several assignments of error, with the exception of the jurisdictional point, have each of them already been finally disposed of in the case of *Ritschy v. Garrels*, 195 Mo. App. 670, 187 S. W. 1120, a case in which said *Ritschy* sued this same defendant for libel because of the publishing of a certain pamphlet containing alleged libelous language (the same as in the instant case), the effect of the principal libelous charge or assignment being the same as in the case at bar, namely, that the defendant, Garrels, in said pamphlet charges plaintiff as having filed lying affidavits in a certain cause of action in the district court of San Miguel county, New Mexico. In other words, we are of the opinion, and so hold, that the *Ritschy* Case disposes of all the points sought to be raised in this present appeal, with the exception of the jurisdictional point, to which alone we shall address ourselves in this opinion.

[1, 2] It will be noted that the ground assigned by the defendant in his motion to quash the return of the sheriff was that neither the plaintiff nor the defendant was a resident of the city of St. Louis. This alleged fact did not appear on the face of the return on the summons, nor on the face of the petition; but was a fact (alleged) which did not appear either in the return or in the petition. A motion to quash a return will lie only when the return itself is insufficient. If the fact relied upon for the lack of jurisdiction appears on the face of the petition, it is a question of law which should be met by a demurrer, but if, as in the instant case, it is based upon facts de hors the petition and return, it should be made by a plea to the jurisdiction. *State ex rel. v. Grimm*, 239 Mo. 135, 143 S. W. 483; *Newcomb v. Railway Co.*, 182 Mo. loc. cit. 707, 81 S. W. 1069; *Thomasson v. Insurance Co.*, 217 Mo. loc. cit. 493, 116 S. W. 1092; cited with approval in *Hill v. Barton*, 194 Mo. App. loc. cit. 333, 188 S. W. 1105; *Warren v. Railway Conductors of America*, 199 Mo. App. loc. cit. 213, 201 S. W. 368; *Kepley v. Park Circuit & Realty Co.*, 200 S. W. loc. cit. 756.

[3] In light of what we have stated we are of the opinion that the learned trial court should have overruled the defendant's motion to quash, in that the reason set up therein as the ground on which the court had no juris-

diction is not the insufficiency of service of the writ in this case, but assigned grounds which if true could be taken advantage of only by a plea to the jurisdiction. The action of the trial court in hearing testimony on the question of the residence of plaintiff under the motion to quash was error, but not prejudicial, in that said motion should have been overruled for the reason assigned above.

The defendant, after his motion to quash had been overruled, filed his answer, and thereafter his amended answer, in each of which he set up his plea to the jurisdiction upon the same ground that he had alleged in his motion to quash. Thereupon the court sustained a motion of plaintiff to strike out said plea to the jurisdiction from the amended answer.

[4] While it is true that the defendant filed his term bill of exceptions in due course to the action of the court herein, yet he failed to embody the action of the court in sustaining the plaintiff's motion to strike out his plea to the jurisdiction from defendant's answer, as a ground of exception in his motion for a new trial, without which it is clear we may not review this matter of exception. It is hardly necessary to cite authorities upon the proposition that all adverse rulings made on motions during the progress of the case, prior to and leading up to the final judgment entered, are matters of exception, and the fact that term bill of exceptions have in each instance been properly presented and signed by the trial court, as appears from the bill of exceptions was duly done in this case, are not thereby preserved in case of an appeal in the case, unless such exceptions are embodied and duly presented to the trial court for review in a motion for new trial or rehearing, after the final judgment is entered. *Maplegreen Realty Co. v. Trust Co.*, 237 Mo. 350, 141 S. W. 621; *Bush Constr. Co. v. Withnell*, 190 Mo. App. 33, 175 S. W. 260. "It is well settled that all errors occurring during the progress of the trial and all matters of exception must be brought to the attention of the court in a motion for new trial; otherwise, they will be considered as waived." *State v. Brannan*, 206 Mo. 636, 105 S. W. 602. In light of this well-recognized rule it is clear under the record in this case that the defendant's exception to the action of the learned trial court herein has not been set out in the defendant's motion for new trial so as to be considered here.

It might be well to note, in light of the fact that the exception to the action of the trial court in sustaining plaintiff's motion to strike defendant's plea to the jurisdiction from his amended answer is not preserved so as to be reviewable here, that the defendant, after such adverse ruling on the part of the court, filed his second amended answer, omitting therefrom his plea to the jurisdiction, and

that it was only after the filing of this second amended answer that the defendant filed his motion for leave to file a third amended answer and to reinstate therein his plea to the jurisdiction. However, whether, under these facts, the defendant should be considered as having entered his general appearance and thereby waived his plea to the jurisdiction, we need not determine in light of what we have stated above. But see *Julian v. Kansas City Star Co.*, 209 Mo. 35, 107 S. W. 496; *Houston v. Pub. Co.*, 249 Mo. 832, 155 S. W. 1068; *McClung v. Pub. Co.*, not yet officially published, but to be found in 214 S. W. 193.

Each of the other points that have been made by the appellant in this case have been specifically passed upon adversely to appellant in the case of *Ritschy v. Garrels*, supra, and we refer those who may be interested in these several points to the opinion.

The judgment should be affirmed. It is so ordered.

REYNOLDS, P. J., and ALLEN, J., concur.

#### DETROIT AUTOMATIC SCALE CO. v. CLINTON. (No. 13167.)

(Kansas City Court of Appeals. Missouri. Dec. 1, 1919.)

##### 1. PRINCIPAL AND SURETY — 78—ADVANCES TO EMPLOYE COVERED BY HIS BOND FOR PERFORMANCE OF CONTRACT.

Where salesman's employment contract required salesman to furnish "a bond of indemnity for a prompt and faithful accounting to the company of all his indebtedness, including advances of money and any other loss or liability that may be sustained by the company by reason of having employed the salesman," and where bond securing salesman's performance of contract provided that surety should be liable for all moneys furnished by employer to salesman for any purposes connected with such salesman, salesman's contract held to permit advances of money.

##### 2. APPEAL AND ERROR — 994(3)—CREDIBILITY OF WITNESS WILL NOT BE REVIEWED.

The credibility of a witness is not within the province of the appellate court.

##### 3. PRINCIPAL AND SURETY — 6, 28—SURETYSHIP OR GUARANTY; SURETY BOND REQUIRES NO NOTICE OF ACCEPTANCE.

Bond making surety liable for all moneys furnished employé by employer for any purposes connected with employé held a mere surety bond, and not a contract of guaranty requiring notice of acceptance to guarantor.

Appeal from Circuit Court, Jackson County; Clarence A. Burney, Judge.  
"Not to be officially published."

Action by the Detroit Automatic Scale Company against George W. Clinton. Judgment for plaintiff, and defendant appeals. Affirmed.

W. B. Kelley, Olney Burrus, and William B. Bostian, all of Independence, for appellant.

A. C. Popham, of Kansas City, and J. G. Paxton and W. G. Rose, both of Independence, for respondent.

ELLISON, P. J. Defendant is surety on a bond for \$500 executed by him with the Detroit Automatic Scale Company as principal and this action is based on such bond. The judgment in the trial court was for the plaintiff in the full amount.

Plaintiff employed one Aulthouse as a salesman. The contract of employment is in writing and is of considerable length. The answer and the theory at the trial was that the bond was to secure the performance of this contract to the extent of \$500. There was evidence tending to show that the account against Aulthouse was correct. But defendant claims that there was no proof that the various items of the account came within the provisions of the contract, and therefore, while they might be correct as against Aulthouse, they were not shown to be such items as were secured by the bond.

The total balance due plaintiff from Aulthouse, as shown by the account, was \$1,621.12; while, as we have seen, the bond on which defendant stands as surety only secures up to the sum of \$500; so while plaintiff seems disposed to pass by many of the points of defense, it lays claim to enough of the items which are practically conceded by defendant to make up a total greater than the amount of the bond. Of these items some are for expressage, some for freight, some for cash payments retained by Aulthouse. Defendant says that these amount to "less than \$200." Plaintiff claims these sums amount to \$139.72. This sum would leave \$360.28 to be accounted for in making up the amount of the judgment rendered.

Confining ourselves between the beginning of the account and the 31st of July, 1912, we find that Aulthouse received \$1,371.15, including \$180 sent to Mrs. Aulthouse. Commissions due him as a credit amount to \$654.83, which subtracted from total he received leaves a balance against him of \$716.32. Thus we find against Aulthouse several hundred dollars more than the judgment against him.

[1, 2] It is claimed by defendant that advances of money were not permitted by Aulthouse's contract. This is not correct. The contract provides that Aulthouse should furnish "a bond of indemnity for a prompt and faithful accounting to the company of all

his indebtedness, including advances of money and any other loss or liability that may be sustained by the company by reason of having employed the salesman." And the bond provides that defendant shall be liable for all moneys which it (the plaintiff) may furnish him for any purposes connected with such salesman. And witness Garland, plaintiff's sales manager, testified, and he was not contradicted, that "all moneys which were turned over to Aulthouse by the company or which came into his possession, were under and by virtue of the terms of the contract." He testified that Aulthouse had admitted the correctness of the account. And, as we have already stated, the defendant's answer and theory at the trial was that the contract was the measure of defendant's liability on the bond. It is of no avail for defendant to now attempt to discredit this testimony. The witness' testimony was not objected to, and he was not cross-examined on the matter, and his credibility is not for this court. Besides it would be beyond all reason for us to question it, since it was not disputed by evidence in defendant's behalf, including that of Aulthouse himself.

It seems that \$180 of the account was for money sent by plaintiff to Mrs. Aulthouse, and that defendant offered an instruction which the court refused, that defendant was not liable for any money for that purpose. In view of the evidence showing the total amount owing to plaintiff under the contract was much more than the verdict rendered, no possible harm could have resulted to defendant by the refusal. It was doubtless refused for the very good reason that Aulthouse had credits for more than \$850 in commissions, and he could well have directed that \$180 be sent to his wife.

It is a part of defendant's defense urged here that changes were made in the written contract by verbal understanding between plaintiff and Aulthouse without defendant's consent. We have not discovered anywhere in the record where there were any changes made. The evidence shows the contrary. The idea of a change in the contract arises from an interpretation which defendant desires to put upon it.

A point is made that it was understood that another surety was to sign with defendant. This was duly submitted to the jury, and the verdict is against the claim that such understanding existed.

It is apparent from the record that the greater part of defendant's defense is made up from a misapprehension of the scope of the evidence in plaintiff's behalf. That evidence is abundant in showing a prima facie case. Some of it is very general in its terms, as it was uttered by the witnesses, but it covered the necessary points, and, as we have

already stated, there was no objection made, nor was there any elucidation sought by cross-examination.

We have examined the authorities cited by defendant, especially Crayon Co. v. Tomlinson, 145 Mo. App. 358, 130 S. W. 95, and Insurance Co. v. McDearmon, 133 Mo. App. 671, 114 S. W. 57, and find them not applicable to the facts in case before us.

[3] The instrument sued on is not a contract of guaranty requiring a notice of acceptance to the guarantor. It is a mere surety bond executed by defendant.

There was no error in the trial, and the judgment is affirmed.

All concur.

## JEGGLIN v. SOVEREIGN CAMP, WOODMEN OF THE WORLD. (No. 13045.)

(Kansas City Court of Appeals. Missouri.  
Dec. 1, 1919.)

### 1. INSURANCE $\S$ 755(1)—FRATERNAL BENEFIT INSURANCE; WAIVER.

Fraternal benefit association may itself with notice or knowledge of facts waive compliance with by-law requirements, notwithstanding Laws 1911, p. 292, § 22, and by-law provisions of association taking from subordinate organizations and officers thereof the power to create waiver.

### 2. INSURANCE $\S$ 695, 755(3)—WAIVER OF BY-LAW REQUIREMENTS BY FRATERNAL BENEFIT ASSOCIATION.

Where fraternal benefit association by-laws required member changing to hazardous occupation to "notify the clerk of the camp," notice of change of occupation to such clerk was notice to the association itself, and, where association with such notice failed to increase amount of dues and accepted payment of dues at old rate down to date of insured's death, it waived compliance with by-laws requiring payment of higher rate for the hazardous occupation and suspending member upon failure to so do.

### 3. INSURANCE $\S$ 755(3)—RETENTION OF PREMIUMS BY FRATERNAL BENEFIT ASSOCIATION.

Where fraternal benefit association, with full knowledge that insured had changed occupation requiring payment of increased dues at an increased rate, kept and retained premiums paid, for two years after change of occupation, at the old rate, without offering to return such premiums or depositing them in court, it will be estopped to deny that policy is valid, or to say that a forfeiture has not been waived.

Appeal from Circuit Court, Cooper County; Jack G. Slate, Judge.

Action by A. E. Jegglin against Sovereign Camp, Woodmen of the World. Judgment for plaintiff, and defendant appeals. Affirmed.

Roy D. Williams, of Boonville, for appellant.

Charles W. Journey and W. F. Johnson, both of Boonville, for respondent.

TRIMBLE, J. This is an action on a fraternal beneficiary certificate of insurance issued by the defendant on the 24th day of December, 1912, upon the life of Albert Jegglin, Jr., whose father, the plaintiff herein, is the beneficiary. Insured died on the 8th of June, 1917. Defendant refused to pay the insurance, and thereupon this suit was brought. A jury was waived, and the case was submitted to the court upon an agreed statement of facts and certain documentary evidence offered by the respective parties. The court, over defendant's demurrer to the evidence, found for plaintiff and rendered judgment accordingly. Defendant appealed.

At the time the policy was issued, insured lived in Missouri and was engaged in the occupation of a common laborer. Afterwards, he went to the state of Montana and there engaged in the business of mining. While in Montana, he continued to pay his dues through his brother, William Jegglin, to the clerk of the local camp in Missouri, of which the insured was a member. Said brother, in 1915, notified the said clerk that insured was employed as a miner in Montana, and in 1916 he again informed said clerk that insured was so employed. Insured, through his brother, continued to pay his dues at the rate required of a common laborer up to the date of his death, but no different or higher rate was paid by or for him, nor was any different or higher rate demanded.

Under the defendant's by-laws, mining was one of those occupations classed as hazardous; and it was provided that, if a member engaged in any such hazardous occupation, "he shall within 30 days notify the clerk of the camp of such changes of occupation, and while so engaged in such occupation shall pay on each assessment thirty cents for each one thousand dollars of his beneficiary certificate in addition to the regular rate"; failing to do this, such member would stand suspended and the certificate be null and void. As stated, deceased's brother attended to the payment of dues for him and notified the clerk of the local camp that insured was engaged in mining, but no additional dues for the increased hazard were paid or demanded. The defense is based upon insured's engagement in such hazardous occupation and his failure to pay the additional 30 cents required therefor. Plaintiff meets this defense by saying that defendant waived these matters.

Section 69 of the constitution and by-laws provides that—

"Sec. 69. No officers, employes or agents of the Sovereign Camp, or any camp, has the power, right or authority to waive any of

the conditions upon which beneficiary certificates are issued, or to change, vary or waive, any of the provisions of this constitution by these laws, nor shall any number of camps, with or without the knowledge of any Sovereign officer, have the effect of so changing, modifying or foregoing such laws or requirements. Each and every beneficiary certificate is issued only upon the conditions stated in and subject to the constitution and laws, then in force or thereafter enacted. The constitution and laws of Sovereign Camp, Woodmen of the World, now in force, or which may hereafter be enacted, by-laws of the camp now in force or which may be hereafter enacted, the application and certificate shall constitute a part of the beneficiary contract between this society and the member."

And in the Laws of 1911, § 22, p. 292, it is provided that—

"The constitution and laws of the society may provide that no subordinate body, nor any of its subordinate officers or members shall have the power(s) or authority to waive any of the provisions of the laws and constitution of the society, and the same shall be binding on the society and each and every member thereof and on all beneficiaries of members."

[1, 2] By virtue of the statute and the above-quoted by-law, the defendant insists that the local clerk had no power to waive the laws of the defendant. While it is true that the above provisions do take from the clerk and other officers of the local camp, and indeed from the local camp itself, the general power to create a waiver, yet the defendant itself with notice or knowledge of the facts may do so. *Thompson v. Modern Brotherhood of America*, 189 Mo. App. 15, 176 S. W. 506; *Hubbard v. Modern Brotherhood of America*, 193 S. W. 911. And it will be noticed that, in the case at bar, the by-laws provide that, if a member does change to a hazardous occupation, he shall "notify the clerk of the camp." In other words, the defendant says to the insured, "If you make such a change, the local clerk is the one whom you shall notify." Having thus specified the clerk as the one to whom notice shall be given, is not notice to him notice to the company? It seems to us that it is. Consequently, when insured, through his brother, notified the local clerk that he was engaged in mining, this was a notice to the defendant itself of such fact, since that was the method prescribed by the defendant for giving notice.

If notice to the clerk was, under this provision of the by-laws, notice to the defendant itself, then the latter is in the position of having accepted payment of all dues at the old rate down to the death of insured with notice that he was engaged in the hazardous occupation of mining. It had this notice, because notice to the clerk was the only means provided by the laws of said defendant whereby notice could be given.

This fact has a vital effect upon the question of waiver or no waiver, for the decision of such question depends upon the particular facts in each case. *Thompson v. Modern Brotherhood of America*, supra, 189 Mo. App. loc. cit. 17, 176 S. W. 506; *Modern Woodmen v. Breckenridge*, 12 Ann. Cas. 639 note.

[3] In addition to this, the proofs of death were made in July, 1917; suit was filed December 26, 1917; the defendant answered at the return term; and the case was not tried until May 27, 1918. Certainly, from the filing of defendant's answer down to the trial and rendition of judgment, the defendant was possessed of "full knowledge" of all the facts, and yet, with such knowledge, kept and retained the premiums paid for two years after such change of occupation, and made no offer to return them, nor did it deposit such premium in court for whosoever was entitled to them. Defendant is thus in the inconsistent position of insisting that the policy is null and void, while at the same time it is holding on to premiums to which it has no right whatever except upon the theory that the policy was valid and in force. It is therefore estopped to deny that the policy is valid, or to say that a forfeiture has not been waived. *Davis v. National Council, etc.*, 196 Mo. App. 485, 196 S. W. 97, 100; *Simmons v. Modern Woodmen of America*, 194 Mo. App. 29, 188 S. W. 932.

We are consequently of the opinion that the judgment should be affirmed, and it is so ordered.

All concur.

#### CHENAULT et al. v. YATES. (No. 18348.)

(Kansas City Court of Appeals. Missouri.  
Dec. 1, 1919.)

#### 1. CONSTITUTIONAL LAW §107—JUDGMENT §910(1)—VESTED RIGHTS IN STATUTE OF LIMITATIONS.

Judgment debtor whose judgment was rendered prior to enactment of Laws 1895, p. 221, changing period within which action on judgment is required to be brought from 20 to 10 years, had no vested right in the 20-year statute of limitations under Rev. St. 1889, § 6796; his only vested right being not to have his cause of action cut off until a reasonable time should expire after enactment of former statute.

#### 2. JUDGMENT §910(3) — LIMITATION AS AFFECTING JUDGMENT RENDERED IN ACTION ON JUDGMENT.

Where judgment was rendered before enactment of Laws 1895, p. 221 (Rev. St. 1909, § 1912), changing period of limitations for actions on judgment from 20 to 10 years, and where, in action on such judgment, another judgment was rendered subsequent to enactment of such statute, an action on subsequent judgment was barred

by failure to bring action within 10 years after rendition, notwithstanding Rev. St. 1909, § 1913, making such statute inapplicable to actions which had commenced and to cases where the right of action or of entry had accrued before the time statute took effect.

Appeal from Circuit Court, Ray County; Arch B. Davis, Judge.

"Not to be officially published."

Suit by Patti T. Chenault and another against William F. Yates, administrator of the estate of John P. Hewlett, deceased. Demurrer to plaintiffs' evidence sustained, and plaintiffs appeal. Affirmed.

Garner, Clark, Milligan & Garner, of Richmond, for appellants.

Lavelock & Kirkpatrick and Crowley & Jacobs, all of Richmond, for respondent.

BLAND, J. On February 19, 1890, one Peter Tribble obtained judgment against John P. Hewlett and another, in the circuit court of Ray county, for \$342.96 and costs, on a promissory note bearing 10 per cent. interest. At the May term, 1901, of said court, said Peter Tribble brought an action on said judgment against said John P. Hewlett, and judgment was rendered in favor of Tribble on May 24, 1901, in the sum of \$1,025.50, and costs. Tribble died intestate on November 29, 1915, and on April 9, 1918, this suit was brought by his heirs at law on these judgments, which had not been paid, against the estate of John P. Hewlett; the latter having died on March 21, 1918. The answer denied the indebtedness and pleaded the 10-year statute of limitations. Section 4297, R. S. 1899; section 1912, R. S. 1909. The court sustained a demurrer to plaintiffs' evidence, and they have appealed.

In support of their contention that their cause of action is not barred by the statute of limitations, plaintiffs contend that as the first judgment was rendered February 19, 1890, there was no presumption of payment, under the statute of limitations then in existence (section 6796, R. S. 1889), until the expiration of 20 years from that date; that in view of said statute and section 4298, R. S. 1899 (section 6797, R. S. 1889; section 1913, R. S. 1909), providing:

"The provisions of this chapter shall not apply to any actions commenced nor to any cases where the right of action or of entry shall have accrued before the time when this chapter takes effect, but the same shall remain subject to the laws then in force"

—the holder of the judgment at the time it was rendered in 1890 had "vested rights \* \* \* which decreed that their debt should not be presumed to be paid until the lapse of twenty years"; that the judgment rendered on May 24, 1901, amounted to a "judicial

ascertainment and finding that the debt was unpaid" and had the "effect of repelling a presumption of payment" that a written acknowledgment of the debt on the part of the defendant would have had, and that the statute (section 6796, R. S. 1889) then in force provided that the presumption of payment "may be repelled by proof of payment or written acknowledgment of indebtedness" made within the 20 years. From all this, plaintiffs conclude that the statute of limitations did not run until 20 years after the second judgment rendered on said 24th day of May, 1901.

[1] The Legislature of 1895 (Laws of 1895, p. 221) changed the time in which presumption of payment should be presumed from 20 to 10 years, but failed to provide a reasonable length of time for those who held judgments at the time of its enactment to bring suit upon them. For this reason, it was held by the Supreme Court that the statute of 1895 did not affect judgments rendered prior to that time, for to hold that it did would make it as to those judgments unconstitutional. This for the reason that to hold otherwise the statute might unduly cut short the time for the holder of such a judgment to sue, thereby depriving him of vested rights. *Cranor v. School District*, 151 Mo. 119, 52 S. W. 232; *Tice v. Fleming*, 173 Mo. 49, 72 S. W. 659, 98 Am. St. Rep. 479. It is apparent that plaintiffs' ancestor had no vested right in the 20-year statute of limitations. The only vested right he had was not to have his cause of action cut off until a reasonable time should expire after the enactment of the statute. *Investment Co. v. Curry*, 264 Mo. 483, 499, 175 S. W. 201; *Winkleman v. Levee District*, 171 Mo. App. 49, 153 S. W. 539; *Cranor v. School District*, supra.

In determining whether plaintiffs may now contend that their case is to be determined by the 20-year statute of limitations and not the 10-year statute, it is pertinent to inquire as to the effect the judgment of 1901 (the second one) had upon the judgment rendered in 1890 (the first). The 20-year statute of limitations was in force when the first judgment was rendered. As stated before, the suit filed at the May term, 1901, was a suit upon the former judgment. In *Cooksey v. K. C., St. Joseph, Council Bluffs R. Co.*, 74 Mo. 477, 480, the Supreme Court laid down the rule as to the effect of a judgment on the

cause of action upon which it is based, in the following language:

"The cause of action is said to merge in the judgment establishing it, upon the same principle that a simple contract merges into a specialty. Courts, in order to give a proper and just effect to a judgment, sometimes look behind, to see upon what it is founded, just as they would in construing a statute seek to ascertain the occasion and purpose of its enactment. The cause of action, though it may be examined to aid in interpreting the judgment, can never again become the basis of a suit between the same parties. It has lost its vitality; it has expended its force and effect. All its power to sustain rights and enforce liabilities has terminated in the judgment or decree. It is drowned in the judgment and must henceforth be regarded as *functus officio*."

[2] The same rule is laid down in *Freeman on Judgments* (4th Ed.) § 215; 2 *Black on Judgments* (2d Ed.) § 674. See, also, *Tourville v. Wabash Ry. Co.*, 148 Mo. 614, 623, 50 S. W. 300, 71 Am. St. Rep. 650. From these authorities there is no question but that the original judgment lost its existence, or, in other words, was swallowed up in the new judgment rendered in 1901. Plaintiffs' ancestor having no vested right in the 20-year statute of limitations any further than we have already indicated, and his original judgment rendered during the time that the 20-year statute of limitations was in force being out of existence, it is apparent the statute in force at the time of the rendition of the second judgment, to wit, section 4298, R. S. 1899, providing "that after the expiration of ten years from the original rendition" of every judgment "such judgment shall be conclusively presumed to be paid," governs this case, and the cause of action is barred.

It will not do for plaintiffs to compare the rendition of the second judgment to a written acknowledgment of the first one. There is no similarity between the two. The second judgment killed and swallowed up the first, while a written acknowledgment of a judgment before the 1889 statute of limitations ran against it, gave it new life, and continued the original cause of action for the statutory period. *Johnson v. Johnson*, 81 Mo. 331, 335, 336; *Berryman v. Becker*, 173 Mo. App. 346, 356, 158 S. W. 899.

The judgment is affirmed.

All concur.

THORNHILL v. MASUCCI et al.  
(No. 13282.)(Kansas City Court of Appeals. Missouri.  
Dec. 1, 1919.)1. PRINCIPAL AND AGENT ⇨105(6)—AGENT'S  
AUTHORITY TO COLLECT MONEY ON NOTE.

When a debtor, owing money on a promissory note, pays another as agent, it is his duty to see that the agent is in possession of the note, or, if not in possession, that the agent has authority to receive payment, or that the holder has represented or held him out as having such authority.

## 2. PRINCIPAL AND AGENT ⇨105(8)—AUTHORITY TO COLLECT INTEREST AS AUTHORIZING COLLECTION OF PRINCIPAL.

The mere fact that an agent collects, or is authorized to collect, interest does not show that he is authorized to collect principal.

## 3. APPEAL AND ERROR ⇨987(3)—REVIEW OF EVIDENCE IN EQUITY CASE.

In an equity case the Court of Appeals has the right to weigh the evidence and find the facts for itself.

## 4. PRINCIPAL AND AGENT ⇨137(1)—ESTOPPEL TO DENY AUTHORITY OF AGENT.

Principal whose habits and course of dealing have been such as to warrant presumption that agent was authorized to act in certain capacity will be conclusively presumed to have given agent authority to so act so far as may be necessary to protect the rights of third persons who have relied on such authority in good faith, and in the exercise of reasonable prudence, and will not be permitted to deny that agent had such authority.

## 5. BROKERS ⇨104—ESTOPPEL TO DENY AUTHORITY TO COLLECT PRINCIPAL OF NOTE.

Where real estate broker representing payee negotiated loan secured by a deed of trust on maker's real estate, and thereafter collected interest on note for payee, and granted an extension, which payee ratified, and where broker and payee had frequent business dealings with each other, payee frequently being in broker's office, payee will be estopped from denying, four years after payment of note and release of deed of trust upon margin of record obtained by production of forged note, where during such time he had made no effort to ascertain if note had been paid, or who was owing note and owning property, though he knew property had been sold, that broker had authority to collect principal.

Appeal from Circuit Court, Jackson County; William O. Thomas, Judge.

Action by Arthur Thornhill against Rugliere Masucci and others. Decree for defendants, and plaintiff appeals. Affirmed.

Stubenrauch & Hartz, of Kansas City, for appellant.

Cooper, Neel & Wright and Strother & Campbell, all of Kansas City, for respondents.

TRIMBLE, J. This is an action in equity by the holder of a promissory note, secured by deed of trust, to cancel a release made upon the margin of the record thereof, to obtain a decree that the note is an existing and unpaid obligation, and to quiet plaintiff's title thereto as against the claims and demands of the defendants, especially the defendants Masucci, who are claiming that said note has been paid in full. The decree of the chancellor was in favor of said defendants, and plaintiff has appealed.

On June 8, 1908, Frank J. O'Loughlin, a real estate broker in Kansas City, negotiated a loan of \$1,000 from plaintiff Thornhill to George E. McManus, secured by a deed of trust on the latter's real estate. He did not do this as McManus' agent, and the inference is plain that he did it for plaintiff. The note was made payable to O'Loughlin's brother, Charles J. O'Loughlin, was due three years after date, and bore 6 per cent. simple interest payable semiannually. The payee, however, immediately indorsed the note over to plaintiff, and the latter gave O'Loughlin a check to McManus for the amount of the loan. McManus did not know Thornhill, but about seven months after the loan was made O'Loughlin introduced Thornhill to McManus as the man who had lent the money. By its terms the note was payable at the Fidelity Trust Company, but McManus paid the interest twice a year regularly to Frank J. O'Loughlin up to December 20, 1910. Sometimes O'Loughlin would come after these payments, but more frequently McManus would pay them to O'Loughlin at the latter's office, though never, it seems, when Thornhill was there. O'Loughlin would turn the money over to plaintiff by giving his personal check therefor when the latter called. Plaintiff and O'Loughlin were "associated together," had frequent business dealings with each other, and the former was in the latter's office "lots of times."

In December, 1910, McManus sold the property to the defendants, the Masuccis, who are Italians, unable to speak or write English. They were to assume the deed of trust, and continued to pay the interest thereon as McManus had been doing. The interest due December 8, 1911, was not paid when due, and on December 20, 1911, O'Loughlin wrote to the Masuccis a letter calling their attention to the matter, and directing them to call at his office and pay it, which they did, and continued to do thereafter; and plaintiff continued to get from O'Loughlin these interest payments, as he had theretofore done.

On June 8, 1911, the note fell due, and the Masuccis applied to O'Loughlin for a three-years extension, which O'Loughlin granted, giving them a written agreement to that effect, dated June 8, 1911, and signed "A. Thornhill, by Frank J. O'Loughlin." Such

an extension, made with authority, had the effect of extending the note until June 8, 1914. Thornhill undoubtedly ratified the extension, for he indorsed on the note the fact of the extension, but the indorsement says the note is extended to December 8, 1913.

In June, 1913, the Masuccis paid \$300 on the principal of the note to O'Loughlin, and received from him a receipt to that effect, and signed F. J. O'Loughlin as agent for Thornhill. In December, 1913, they paid \$500, and obtained a similar receipt, and on June 8, 1914, the day the note fell due under the extension, they paid the remaining \$200, and all interest, in full of said note, and received a similar receipt, together with what purported to be the note itself. This note was in the exact words of the real note, even to the misspelling of the word "semi" therein. It was indorsed in blank, without recourse, by Charles J. O'Loughlin, the payee therein, and had the two credits of June 8 and December 8, 1913, on the principal. Frank J. O'Loughlin went with the Masuccis to the recorder's office, and there released the deed of trust as assignee. This note, together with the insurance papers and abstract, which O'Loughlin had always kept (and from whom Masucci got them when he bought the property), were all turned over to the Masuccis who went away thinking everything was all right and that their home was fully paid for; and they rested secure in that belief until in March, 1918, when they were served with summons in this suit by Thornhill, he claiming that the note had never been paid to him, and that the note by which the release was made was a forgery, which no doubt it was.

Plaintiff claims that he was always in possession of the true note, and that O'Loughlin never had possession thereof after plaintiff gave his check for its proceeds. There are, however, some peculiar circumstances connected with it which are not satisfactorily explained. The various interest payments up to and including June 8, 1912, appear credited upon the note by plaintiff on the dates thereof. Plaintiff was careful to make these credits upon obtaining the money on them, so much so that he placed his initials after each of said credits. But no credits appear on the note for the interest due December 8, 1912, June 8, 1913, December 8, 1913, or June 8, 1914. As the Masuccis paid \$300 in June, 1913, and \$500 in December, 1913, the interest on the note, at least in December, 1913, and June, 1914, would have been very much less than theretofore, and, had such lessened credits appeared on the note, they would have unquestionably revealed that plaintiff acquiesced in the payments made by the Masuccis on the principal. Skipping the four payments of interest due from December, 1912, to June, 1914, the note held by plaintiff has credits of interest claimed to have been paid regularly from December 8,

1914, to December 8, 1917, both inclusive. Plaintiff claims that these payments were made by O'Loughlin regularly as before, and he says he thought everything was all right until O'Loughlin, having become involved, absconded and left the city some time in the first half of the year 1918, upon learning which the plaintiff took his note to an agent and caused an examination to be made, with the result that it was discovered that the deed of trust had been released, and then this suit was brought March 5, 1918. Plaintiff at first testified explicitly that the reason he took the note to his agent and had an investigation made was because *the interest had not been paid*. If, as plaintiff claims, any interest was paid by O'Loughlin to him on December 8, 1917, it is remarkable that he should, *before* the next interest pay day, have the note investigated because "there was no interest paid." And it appears from plaintiff's own testimony, and that of his agent, that at the time he took the note to him for investigation there were certainly no credits of interest thereon *after* that of December 8, 1914, and it is likely that the one of December 8, 1914, was not on there either. They admit that the "last interest credits" were not on the note at the time it was brought to the agent for investigation, but were put on by the agent himself at one time, in order, as the agent says he told plaintiff, that the note should show "the exact condition of affairs." He put them on because plaintiff told him the interest was *all paid up*. Plaintiff admits he kept no memoranda as to when the interest was paid and only fixed the dates of the credits by the fact that those were the dates when the payments were due. It is true the evidence of plaintiff and his agent, later on, limits the credits, so put on at one time, to the "last six credits," and as there are seven credits appearing after the indorsement of the extension, the one of December 8, 1914, being the first of the seven, it might seem that this last-mentioned credit was put on by plaintiff. However, in all of the credits preceding the one of December 8, 1914, the plaintiff was careful to put his initials after each, but no initials appear after the one of that date. It appears just as the other six immediately following it, which it is admitted were not put on by plaintiff at all, but only by his agent, and that, too, after the note was more than four years overdue from the termination of the extension. Plaintiff knew McManus had sold the property, but says he made no effort to discover who was owing the note, nor who owned the property, nor anything whatever about it, although the evidence discloses that he and O'Loughlin were on intimate terms, and that Masucci and plaintiff were both down at the city market, where the former saw the latter, but did not know who he was.

From the foregoing it is not at all certain



that, and indeed it is doubtful if, any interest was ever paid plaintiff by O'Loughlin after December 8, 1914, and even if any was paid to him on that date, no amount is stated which would disclose whether the interest paid was the amount which would be due on the full note or only on the balance after the payment by the Masuccis. If no interest was paid to plaintiff after that date, then plaintiff carelessly let the matter run along for four years after the Masuccis had fully paid the note and had it released of record, during the greater portion of which time Frank O'Loughlin was in the city, and, presumably, could have been made to respond; and it was not until after the lapse of this great length of time, and after O'Loughlin had absconded, that plaintiff took any steps to ascertain the condition of his note, or what had been done by his agent, who concededly had complete charge of everything, and full authority to do anything and everything about it, except, so plaintiff says, he did not have possession of the note, and did not have authority to accept payments on the principal thereof. This last is the only thing plaintiff denies his agent had power to do, and on this denial he seeks to escape the loss caused by his unfaithful steward.

[1] It is no doubt the rule that, when a debtor owing money on a promissory note pays another as agent, it is his duty to see that the agent is in possession of the note, or, if not in possession, that the agent has authority to receive payment, or that the holder has represented or held him out as having such authority.

[2] It is also the rule that the mere fact that an agent collects, or is authorized to collect, interest does not show that he is authorized to collect principal. But these two principles are not determinative of the defendants' rights regardless of the surrounding facts and circumstances; nor do defendants admit, as plaintiff seems to think, that O'Loughlin did not have authority to receive the principal. On the contrary, they insist that the inferences are that he did; that plaintiff knew he had collected the same, else he would not have allowed the note to run for four years beyond the date of its maturity as extended, without making any inquiry of his intimate friend and business associate as to who owed the note or why it was not paid; that the inference to be drawn from the peculiar facts concerning the alleged payments of interest by O'Loughlin to plaintiff from and after its final maturity is that plaintiff knew it had been paid, and during those years was not looking to the payors of the note, but to O'Loughlin, if any one, for repayment; that, in any event, plaintiff saw fit to ratify every act O'Loughlin did that was in his favor, and negligently remained silent for four years before denying his right to collect the prin-

cipal; that, whether O'Loughlin did or did not in fact have authority to collect the principal, the facts and circumstances were such as were sufficient to lead a reasonable man to think he had such authority, and plaintiff knew, or in reason should have known, that they were such as to lead one to so think. In other words, that plaintiff is estopped to deny that his agent had such authority, all of which was duly pleaded.

[3] The decree of the chancellor does not disclose the theory on which it was founded nor the precise facts which the chancellor found which led to its rendition. It is true, as this is an equity case, we have the right to weigh the evidence and find the facts for ourselves; but owing to the peculiar circumstances and facts in the case, and the further fact that the chancellor had the witnesses before him, and is in a much better position to weigh their testimony and draw inferences therefrom than we are, we are not willing to disagree with his conclusions unless they appear to us to be wrong. The evidence as to whether O'Loughlin had authority to collect the note should be considered and weighed in the light of all the circumstances surrounding the parties and their business relationship to each other. *Miller v. Wilson*, 126 Mo. 48, loc. cit. 52, 28 S. W. 640.

[4] It is, however, not necessary for him to have had actual authority. Where a principal's—

"habits and course of dealing have been such as to reasonably warrant the presumption that such other was his agent, authorized to act in that capacity, whether in a single transaction, or in a series of transactions, his authority to such other person to act for him in that capacity will be conclusively presumed, so far as may be necessary to protect the rights of third persons who have relied thereon in good faith and in the exercise of reasonable prudence, and he will not be permitted to deny that such other was his agent, authorized to do the act he assumed to do, provided that such act is within the real or apparent scope of the presumed authority." *First National Bank, etc., v. Mutual Benefit, etc., Ins. Co.*, 145 Mo. 127, loc. cit. 188, 46 S. W. 615, 618.

"Indeed, whenever a principal has placed an agent in such a situation that a person of ordinary prudence, conversant with business usages, and the nature of the particular business, is justified in assuming that such agent is authorized to perform in behalf of his principal the particular act, and such particular act has been performed, the principal is estopped from denying the agent's authority to perform it." 21 B. O. L. § 84, p. 856.

[5] Nor can it be said that plaintiff ought not to be held on the principle of estoppel because he was wholly unaware of the situation. He knew enough to know, or enough to show that he should have known, that under the circumstances his debtor would

be reasonably led to think that his agent had full authority to act for him. At any rate, we cannot disagree with the chancellor and say plaintiff is entitled to the decree for which he prays.

The judgment is affirmed.

All concur.

**GODFREY et al. v. MARTHA INV. CO.**  
(No. 15598.)

(St. Louis Court of Appeals. Missouri.  
Dec. 2, 1919.)

**1. EVIDENCE — 450(7)—EXTRINSIC EVIDENCE INADMISSIBLE TO EXPLAIN UNAMBIGUOUS CONTRACT.**

In determining whether it was intention of parties to contract for a railroad "fill" that part or that all dirt placed in fill should be paid for at contract price, contract *held* not so lacking in definiteness, certainty, or clarity as to permit extrinsic evidence to clarify ambiguity.

**2. CONTRACTS — 159 — CONSTRUCTION OF WORD "PREMISES" IN BUILDING CONTRACT.**

In specifications of building contract, the word "premises" *held* to mean the lot on which building was erected, and not to include an adjoining lot on which plaintiff filled a railroad right of way under alleged separate contract.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Premises.]

Appeal from St. Louis Circuit Court;  
Rhodes E. Cave, Judge.

"Not to be officially published."

Action on contract by James A. Godfrey and Joseph G. Hercules, Jr., copartners, doing business as James A. Godfrey & Co., against the Martha Investment Company. Judgment for plaintiffs, and defendant appeals. Affirmed.

Robert C. Grier, of St. Louis, for appellant.

George C. Hitchcock, of St. Louis, for respondents.

BECKER, J. Defendant owned a certain lot of land on Union avenue near Natural Bridge road in the city of St. Louis, Mo., and was about to erect a factory building thereon. The railroad tracks of the St. Louis Merchants' Bridge Terminal Railway Company passed within about 500 feet to the south of the defendant's land. The defendant had obtained an easement for a right of way to build a railroad switch from said railroad tracks across the intervening lot up into the defendant's said property. The surface elevation over the right of way for the switch was lower than the level of the defendant's property and that of the tracks of the said railroad. Plaintiffs obtained the contract for erecting the factory building for

defendant, and a few days thereafter entered into a separate agreement with defendant to do certain grading and filling on the right of way of the switch, and it is for this latter work and labor that plaintiffs sued the defendant. The case was tried without the intervention of a jury, and resulted in judgment for plaintiffs in the sum of \$1,251.67. Defendant appeals.

Plaintiffs' petition is in two counts, the first of which is based upon a letter in words and figures as follows:

"St. Louis, Feb. 25, 1915.

"Jas. A. Godfrey & Co., Wainwright Building, City—Gentlemen: We hereby accept your verbal proposition to do the necessary filling for the railroad track, in addition to that covered by our original contract, at the rate of 20 cents per cubic yard, at our new factory site at Union avenue and Bircher avenue."

The petition alleges performance of the terms and conditions of the contract, and that there was graded and placed in the fill 5,636 cubic yards of material, whereby the defendant became indebted to plaintiffs in the sum of \$1,127.20, and that demand had been made and payment refused. The second count is for an item concerning which there is no dispute, and no further notice need be taken of it.

Defendant's answer admits the ownership of the land, and denies each and every other allegation in plaintiffs' petition contained.

It appears that plaintiffs had bid for the erection of the proposed factory building, but the bid itself is not in evidence. However, on February 8, 1915, there was a conference held between plaintiffs and defendant, or their agents, in which said bid of plaintiffs was discussed. During this conference the question of obtaining the necessary dirt to make the fill required for grading the railroad switch over defendant's property, as well as for the right of way over the adjoining property to make the necessary connection with the main railroad tracks, was considered. During the course of the conversation it developed that one-third of the necessary dirt for making the required fill for the switch would be available from the earth taken out of the necessary excavation for the factory building, and the question of getting the balance of the earth required or using some piling for the balance of the fill was discussed. After this conference, and on the same date thereof, the defendant company delivered to the plaintiffs a written conditional acceptance of "their bid of \$34,462 for completing our factory building on North Union avenue," which conditional acceptance contained, amongst other provisions, the following:

"Second. In the event that we wish to lower the level of the floor of the building one foot,

you are to charge us not to exceed \$462.60 for the additional grading."

"Third. All earth removed from the lot to be placed on the right of way of the proposed railroad track across the lot of ground to the south without additional charge to us."

"Fifth. A contract mutually satisfactory to be prepared by us subject to the approval of the parties making the loan."

Thereafter, without any additional negotiations, so far as the record discloses, the parties, on February 15, 1915, entered into a building contract "for the erection of a brick factory building," according to certain drawings and specifications made a part of said contract, "for the sum of \$34,924.50, which includes additional expenses of grading, etc., for the floor level to be one foot lower than the floor level shown on plans hereto attached."

In the specifications forming a part of this contract of February 15th it is provided:

"The lot is 333 feet 4 inches wide by about 515 feet, no inches deep, located on the east side of Union avenue, 333 feet 4 inches south of Bircher road."

It contains a further provision that—

"The present grade of the lot is partly above and partly below the proposed grade, and is to be graded as required, including the 20-foot strip north of the building, railroad track on rear, and 10-foot strip in front to gain access to viaduct in front of neighboring premises."

"After the foundations have been built and pointed, spaces around and outside of same, if any, are to be filled with clean clay, well watered and rammed, and the earth thrown up against the walls so as to shed the water. All surplus earth to remain on the premises, which are to be left in a neat and orderly condition."

Article 6 of the building contract itself provides:

"The contractor shall complete the several portions and the whole of the work comprehended in this agreement by and at the time or times hereinafter stated, to wit: Grading for the building site shall start when two-thirds of the filling for the railroad switch on the block of ground shall be completed by the owner, and said grading shall then be pushed by said contractor with diligence."

As near as we can make out from the record, after the signing of the building contract, the defendant "got to figuring, and we found out the piling would be expensive and we would be delayed getting the piling in, and we concluded to get the dirt necessary to complete the fill for the railroad switch." As the result of this defendant sought bids for this extra work, and on February 25, 1915, the defendant wrote to plaintiffs:

"We hereby accept your verbal proposition to do the necessary filling for the railroad track in addition to that covered by our original contract, at the rate of twenty cents per cubic yard, at our factory site at Union and Bircher avenues."

Defendant does not dispute the fact that 5,636 cubic yards of earth were placed by the plaintiffs in the fill to make the railroad switch on the property on which the defendant had a right of way, immediately adjoining the lot on which defendant's factory building was erected, and that of this amount 871.7 yards were obtained by the plaintiffs from the defendant's property elsewhere than out of the excavation for the factory building, and the defendant concedes that plaintiffs are entitled to be paid at the rate of 20 cents per cubic yard for said 871.7 cubic yards; but the defendant contends that as to the balance of the 5,636 cubic yards which came out of the excavation for the defendant's factory building, even though it was placed in the fill for the switch on the right of way (and not on the lot described in the contract as the lot which was owned by the defendant, and on which the factory was to be built), the plaintiffs should not recover, the defendant alleging that such filling was included in the original building contract of February 15, 1915. Plaintiffs' contention, on the other hand, is that they were to be paid 20 cents per cubic yard for all the earth that the plaintiffs put in the fill for the switch upon the right of way, which would include all of the earth excepting that which the plaintiffs actually left upon the said lot described in the building contract as the lot owned by the defendant and upon which the factory building was erected.

[1] We are thus confronted with the question as to whether or not the real intention of the parties with reference to what part or all of the dirt that was placed in the fill for the switch on the "right of way" was to be charged for at 20 cents per cubic yard can be gathered from the defendant's letter to plaintiffs of February 25, 1915 (in which they accept the plaintiffs' verbal proposition to do the necessary filling for the railroad track in addition to that covered by the building contract of February 15, 1915), supplemented by the original contract referred to therein. If we read the original contract together with this letter and apply to them the usual rules of construction, reading the words therein according to their plain and ordinary meaning (*Kas. City v. Public Service Commission*, 210 S. W. 381, and cases cited) and endeavoring to give meaning and intentment to all of the language thereof, we are constrained to conclude that the contract is not so lacking in definiteness, certainty, or clarity, as to bring it within that class of cases (*Laclede Co. v. Moss Tie Co.*, 185 Mo. 25, 84 S. W. 76; *Williams v. Railway Co.*, 153 Mo. loc. cit. 534, 54 S. W. 689; *Ellis v. Harrison*, 104 Mo. 270, 16 S. W. 198) which would permit of the introduction of extrinsic evidence to clarify any ambiguity therein.

[2] It is argued on behalf of the defendant that the word "premises," as used in the sentence contained in the specifications form-

ing a part of the contract of February 15, 1915, namely, "All surplus earth to remain on the premises, which are to be left in a neat and orderly condition," when taken into consideration with the whole contract, leaves the intention of the parties uncertain, indefinite, and ambiguous, and that the use of the word "premises" makes the intention of the parties subject to two interpretations, and that therefore extrinsic evidence, such as declarations of the parties made contemporaneous with the writings in evidence, as well as any surrounding facts and circumstances tending to explain the sense in which the word was used, was properly admissible. To this, however, we cannot agree.

The specifications which are a part of the building contract define the limits and location of the lot on which the factory building was to be constructed. This description does not include the defendant's right of way over the adjoining lot. In light of these facts we can but read the word "premises" as used in said contract and specifications as referring only to the lot described therein. Furthermore, our view is strengthened by the fact that the said building contract contains no provisions which relate to the making of the fill for the railroad switch.

As stated above, the cause was tried before the court without a jury, and during the course of the trial the court, at the suggestion of appellant's counsel, admitted, subject to objection to be passed upon by the court at the conclusion of the trial, the introduction of the original conditional acceptance of the defendant of plaintiffs' bid for the erection of the factory building as well as oral testimony offered by the defendant, on defendant's theory that the writings in question sued upon contained terms which were susceptible of more than one meaning, so that reasonable men might fairly and honestly differ in the construction thereof, and therefore extrinsic evidence, both written and parol, was admissible to resolve such ambiguity in order to arrive at the true intentions of the parties. The court at the time of admitting such extrinsic evidence, subject to plaintiffs' objection thereto, clearly stated its view, however, that the letter of February 25th, when taken together with the original contract referred to therein, namely of February 15th, did sufficiently express the intention of the parties, and therefore extrinsic evidence was not admissible.

The court gave declarations of law which, together with the memorandum opinion handed down by the learned trial judge, makes it evident that he excluded from his consideration any extrinsic evidence offered by the defendant, which action on the part of the court is complained of as prejudicial er-

ror to the defendant. It is clear from what we have stated above that in our judgment the action of the learned trial judge was correct.

As it has been well put in the memorandum opinion of the trial court:

Supposing "that the contract of February 25th had never been made at all, and that these plaintiffs, in carrying out the contract of February 15th, had done all the excavating and had left all the earth therefrom on the premises proper—that is, on the land owned by defendant—could these defendants then defend against an action for the full contract price on the ground that plaintiffs had failed to complete performance in that they had not placed the dirt from the excavation in the fill? Surely there can be little question but that it could not."

"Plaintiffs bid upon the work without including the placing of the dirt in the fill; the parties met and discussed the question of the moving of this dirt and placing it in the fill; defendant rejected the bid of plaintiffs, but offered to accept same if plaintiffs would agree to include the placing of the dirt in the fill at the contract price; and then with this matter of the moving and placing of the dirt particularly in mind and the subject of express discussion, the parties made a contract at the price of plaintiffs' original offer, which did not include moving the dirt and nowhere provided in the contract that the dirt shall be so moved, but, on the other hand, provided in the specifications that the dirt shall remain on the premises, which are accurately described at the outset of the specifications. \* \* \*

"To permit parol evidence, even if there were any which we do not find, to show that such was the agreement in fact, would open the door in practically every case where one person bids on work at a certain price and the owner accepts the bid on condition that additional work be included in the price, and thereafter the parties make a written contract at the original price and do not include such additional work, to oral evidence to show that the parties intended to include such additional work. If so, of what value whatever is a written contract?"

"In view of the foregoing we find that this work was not included by the parties in the contract of February 15th, and therefore was included in that of February 25th, and plaintiffs are therefore entitled to recover therefor in conformity with said contract of February 25th."

Reading defendant's letter of February 25th with the original contract of February 15th between the parties, we think no other conclusion can be reached except the one arrived at by the learned trial court.

It follows that the judgment should be affirmed.

It is so ordered.

REYNOLDS, P. J., and ALLEN, J., concur.

## MESSERLI v. BANTRUP. (No. 13368.)

(Kansas City Court of Appeals. Missouri.  
Dec. 1, 1919.)1. PLEADING  $\S$ 199—DEMURRER TO PETITION  
AT CLOSE OF EVIDENCE.

Imperfections in the petition do not entitle defendant, at the close of all the evidence, to a demurrer, unless the petition wholly fails to state any cause of action at all.

2. FRAUD  $\S$ 41—SUFFICIENCY OF PETITION IN  
ACTION FOR FRAUD.

In action to recover damages for fraud and deceit inducing plaintiff to enter into farm exchange contract with defendant, petition *held* to state cause of action.

3. DEEDS  $\S$ 94—MERGER OF CONTEMPORANE-  
OUS ORAL AGREEMENTS IN DEED INAPPLICABLE  
IN ACTION FOR FRAUD.

In action for fraud and deceit, inducing plaintiff to enter into farm exchange contract with defendant, where the suit was not on the contract itself nor upon defendant's deed, but on the fraudulent representations, the doctrine of merger of all prior and contemporaneous oral agreements in the deed has no application.

4. FRAUD  $\S$ 31—REMEDY BY ACTION UPON  
MISREPRESENTATIONS IN EXCHANGE OF LAND.

Plaintiff, who had been induced by defendant by fraud and deceit to enter into farm exchange contract, could sue for damages on misrepresentations, and was not required to sue on the deed nor rescind the contract.

5. FRAUD  $\S$ 20—MISREPRESENTATIONS AS TO  
NUMBER OF ACRES NOT AFFECTED BY FAILURE  
TO SURVEY.

The mere fact that plaintiff, who had been induced to enter into farm exchange contract by misrepresentations as to the number of acres in defendant's land, could have discovered the shortage had he demanded a survey, does not release defendant from liability for such misrepresentation, nor convict plaintiff of negligence, so as to make such negligence, and not the alleged fraud, the cause of plaintiff's loss.

6. FRAUD  $\S$ 9 — REPRESENTATIONS AS TO  
QUANTITY OF LAND ON SALE BY ACRE.

If vendor, in selling land, informs purchaser that he is selling land on the basis of its containing a certain number of acres, though he does not know if there are in fact the specified number of acres in the land, he would not be guilty of misrepresentations entitling purchaser to damages in the event of shortage.

7. FRAUD  $\S$ 64(3) — MISREPRESENTATIONS AS  
TO NUMBER OF ACRES JURY QUESTION.

In action for misrepresentations as to number of acres in defendant's land inducing plaintiff to enter into farm exchange contract with defendant, question of whether defendant represented land to contain specified number of acres, or told plaintiff that he was uncertain as to the number of acres, and had been told that there was a shortage, but was determined to make transaction on the basis of specified number of acres, *held* for jury.

8. TRIAL  $\S$ 143—PROVINCE OF JURY WHERE  
EVIDENCE IS CONFLICTING.

If verdict is deemed to be against the weight of the evidence, trial court may grant one new trial, but cannot originally pass on disputed issue, which was for jury.

9. FRAUD  $\S$ 36—DEFENSE IN ACTION FOR MIS-  
REPRESENTATIONS AS TO ACREAGE.

In action for misrepresentations as to quantity of land inducing plaintiff to enter into farm exchange contract with defendant, a contract subsequently entered into by the parties in settlement of a dispute, having no relation to the quantity of land, *held* no defense.

10. FRAUD  $\S$ 65(3)—INSTRUCTION IN ACTION  
FOR MISREPRESENTATIONS MISLEADING.

In action for misrepresentations as to quantity of land inducing plaintiff to enter into farm exchange contract with defendant, instruction that intent to deceive will be inferred if defendant made unqualified representations as to quantity of land knowing it to be untrue was misleading in not making it clear that representations, if unqualifiedly made, would have had same legal effect if not known to be true.

11. FRAUD  $\S$ 13(3)—STATEMENT AS TO MATE-  
RIAL FACT NOT KNOWN TO BE TRUE.

Actual or intentional falsehood need not always be uttered in order to sustain an action for fraud and deceit, since if one asserts a material fact as of his own knowledge, and not as a mere matter of opinion, knowing at the time that he has no such knowledge, and does this for the purpose of inducing another to act, and thereby induces the latter to act upon it to his injury and loss, such assertion is the same as if known to be untrue when made.

12. FRAUD  $\S$ 13(2)—MISREPRESENTATIONS AS  
TO QUANTITY OF LAND.

Vendor representing his land to consist of certain number of acres was guilty of misrepresentations if he knew of shortage, though he did not know the precise number of acres of shortage.

Appeal from Circuit Court, Moniteau County; J. G. Slate, Judge.

"Not to be officially published."

Action by Rudolph Messerli against John H. Bantrup. Judgment for plaintiff, and defendant appeals. Reversed and remanded.

S. C. Gill and J. B. Gallagher, both of California, Mo., for appellant.

Embry & Embry, of California, Mo., for respondent.

TRIMBLE, J. This is an action to recover damages for fraud and deceit. Plaintiff and defendant agreed to exchange farms, plaintiff giving his farm of 80 acres at the price of \$75 per acre for defendant's farm of 190 acres at the rate of \$60 per acre, and paying defendant the difference based on the above rates and acreage. The trade was consummated and the difference paid. Plaintiff's farm was in Moniteau county, and defend-

ant's was in Morgan county. The evidence in behalf of plaintiff clearly discloses that instead of there being 190 acres in defendant's farm there were only 162 and a fraction acres. No attempt was made to dispute the fact of this shortage. The case was submitted to the jury upon instructions given for the respective parties; but after the jury had deliberated upon the matter for several hours they were called into court, and asked if they had agreed upon a verdict, and upon ascertaining that they had not the court gave a peremptory instruction to find for plaintiff. In obedience to such instruction the jury returned a verdict for \$1,876.40. Defendant has appealed.

It is urged that the petition does not state facts sufficient to constitute a cause of action, and that defendant's demurrer at the close of the case should have been sustained.

[1] Imperfections in the petition, if there were any, do not entitle a defendant, at the close of all the evidence, to a demurrer, unless, indeed, the petition wholly fails to state any cause of action at all. Such was not the case.

[2] Taken as a whole, with all the matters necessarily implied therein, the petition certainly stated a good cause of action. It disclosed that during the prior negotiations leading up to and culminating in the trade defendant represented and stated that his farm contained 190 acres; that plaintiff did not know what it contained, but relied upon defendant's representations, and did not discover the truth until long after the trade had been made; that defendant knew his farm did not contain 190 acres, knew that his representations in that regard were untrue, and knowingly and fraudulently misrepresented the number of acres, and thereby obtained from plaintiff payment on the full 190 acres at \$60 per acre, made in full reliance on said fraudulent misrepresentations. The defendant's scienter is expressly stated, and the deceptive purpose of the fraudulent representations is plainly set forth, as well as the fact that plaintiff relied thereon, and was induced thereby to make the payment he did. *Hoffman v. Gill*, 102 Mo. App. 320, 324, 77 S. W. 146; *McGhee v. Bell*, 170 Mo. 121, 127, 70 S. W. 493, 59 L. R. A. 761; *Fall v. Hornbeck*, 132 Mo. App. 588, 112 S. W. 41; *Kenney v. James*, 50 Mo. 316.

[3] The suit is not on the contract itself nor upon defendant's deed. It is on the fraudulent representations, whereby plaintiff was induced to enter into the contract and pay money he did not in fact owe. Hence the doctrine of merger of all prior and contemporaneous oral agreements in the deed has no application here. *Leicher v. Keeney*, 98 Mo. App. 394, 72 S. W. 145; *Horne v. Hertel Co.*, 184 Mo. App. 725, 731, 171 S. W. 598; *Crim v. Crim*, 162 Mo. 544, 63 S. W. 489, 54 L.

R. A. 502, 85 Am. St. Rep. 521; *Hendricks v. Vivion*, 118 Mo. App. 417, 94 S. W. 318.

[4] Plaintiff did not have to sue on the deed nor rescind the contract. *Carr v. Swift*, 185 Mo. App. 86, 170 S. W. 914.

Plaintiff's farm was in one county, defendant's in another. Plaintiff saw it for the second time when he executed the contract. He did not go over all of it, but could see over it, as it was comparatively level land. The evidence in his behalf shows that he did not know the land was short, but relied upon what was stated to him in that regard. There was not such a disparity between the amount represented and the actual number of acres as to disclose the shortage to one looking over the land.

[5] The mere fact that the shortage could have been discovered had plaintiff demanded a survey does not release defendant of liability nor convict plaintiff of negligence so as to make it, and not the alleged fraud, the cause of plaintiff's loss. *Kelley v. Peebles*, 192 Mo. App. 435, 182 S. W. 809; *Judd v. Walker*, 114 Mo. App. 128, 143, 89 S. W. 558; *Id.*, 215 Mo. 312, 114 S. W. 979.

There is ample evidence in plaintiff's behalf tending to show that long before the trade was made, and while defendant owned the land, he well knew his land was short, and also evidence that he intended, whenever he went to sell it, to unload the shortage on "the other fellow."

There is no dispute over the fact that the farms were exchanged on the basis of the acreage and prices per acre hereinabove stated. But the evidence in defendant's behalf is to the effect that he did not know his land was short of 190 acres; that defendant told plaintiff the first time he came to look at the land that, as well as he knew, he had 190 acres; and that he said to plaintiff:

"Now, before we go any further, I have been told that this land, a part of it, has fractional forties. Now, I don't know whether it is long or short, but I bought it for one hundred and ninety acres, more or less, and that is the way I will have to deed it."

In view of this testimony, it seems to us that it cannot be said defendant conceded he had misrepresented the amount of his land. Nor does it conclusively appear that plaintiff was induced to make the trade by representations that the farm contained 190 acres.

[6] Neither does the admission that the farms were exchanged on the above-named basis entirely destroy the effect of the above-quoted testimony. For, in view of the claim that defendant made the above-quoted statement to plaintiff when they entered upon the negotiations, the respective valuation per acre placed on the two farms may have been not only a method of arriving at what the difference in money should be on a trade, but also a way of stating what the defendant was in-

sisting upon getting for his farm without regard to whether it contained 190 acres or not. To illustrate: A man in answer to a proposal to buy his lot says: "I will sell it on the basis of \$100 a front foot for 100 feet. I don't know whether there is 100 feet or not. I have been told there is not; but whether there is or not, I must sell it that way. You must pay me \$100 a foot for 100 feet, regardless of whether there is actually that many feet or not." If the other man agrees to buy the lot under such negotiations, it cannot be said he was fraudulently deceived as to the number of front feet in the lot. It seems to us that if the statement, which defendant's evidence tends to show was made to plaintiff, was in fact so made, then its meaning is the same as if he had used the language contained in our illustration. In other words, if such statement was made, then the basis of 190 acres, at \$60 per acre, was only another way of arriving at what defendant must have for his farm, without regard to whether it contained 190 acres or not. And plaintiff may have been willing to exchange farms and pay the amount of difference arrived at in that way even though the farm was short. Indeed, he never testified that he would not have traded had he known of the shortage. Although it may appear quite unlikely that he would have agreed to trade in case of so great a shortage, yet we cannot conclusively say he would not. Nor is it for us to say that plaintiff was induced to part with his money by reason of representations, relied upon and believed, that there were actually 190 acres in the tract he was getting.

[7] The question whether defendant made the statement he claims to have made plaintiff, and the construction to be placed thereon in the light of all the negotiations and transactions between the parties, are matters for the jury to pass on, and not for the trial court to decide in the first instance.

[8] The latter may, if the verdict is deemed to be against the weight of the evidence, grant one new trial, but cannot originally pass on the disputed issue. Hence, in our view, the court erred in giving the peremptory instruction to find for plaintiff. *Vincent v. Means*, 184 Mo. 327, 341, 62 S. W. 96; *Twohey v. Frulin*, 96 Mo. 104, 109, 8 S. W. 784; *Thomas v. Pacific Express Co.*, 30 Mo. App. 86.

The foregoing observations apply equally as well if the case be treated as one for money had and received, since if defendant told plaintiff what the former's evidence claims he did, then defendant did not obtain money from plaintiff which he is not entitled to keep. We think, however, that the petition as drawn shows that the pleader intended to state only a cause of action upon fraud and deceit, and not one for money had and received.

[9] Before the shortage in the land was discovered, or any question in regard thereto raised, the parties got into a dispute over some wood and the payment of taxes, which differences were settled by the defendant paying \$25 in full thereof. The written contract relating thereto had no reference to any differences except those already in existence, and had nothing whatever to do with the land, as shown by the evidence on both sides. Hence the contract constituted no defense.

[10] There are other objections raised to the instructions, but if there are any defects in them they will no doubt be avoided. In plaintiff's instruction No. 1 the facts required to be found were such that if defendant made the unqualified representations that he had 190 acres, knowing it to be untrue, then the intent to deceive will be legally inferred on the theory that one is presumed to intend the necessary consequences of his own acts. 12 R. C. L. 327, § 86; *Dulaney v. Rogers*, 64 Mo. 201, 204. But in that part of the instruction relating to whether defendant represented he had 190 acres without knowing whether he did or not we think the instruction should have been more explicit to avoid being misleading.

[11] It is true actual or intentional falsehood need not always be uttered in order to sustain an action for fraud and deceit. If one asserts a material fact as of his own knowledge, and not as a mere matter of opinion, knowing at the time he has no such knowledge, and does this for the purpose of inducing another to act, and thereby induces the latter to act upon it to his injury and loss, then such assertion is the same as if it were known to be untrue when made. *Hamlin v. Abell*, 120 Mo. 188, 200, 201, 25 S. W. 516; *Dulaney v. Rogers*, *supra*. We think an instruction attempting to state this principle should carefully include all those elements, and not attempt an abridged statement thereof, lest it be so misleading as to be understood as taking away the element of fraud altogether.

Defendant's instruction 2, as asked, was stronger than defendant was entitled to, and it was proper for the court to modify it. The instruction as modified would have been better, however, had it included the element of whether the shortage was apparent to ordinary inspection, and whether plaintiff would or would not have made the trade had he known the farm was short.

[12] To make the alleged representation knowingly untrue it was not necessary for the defendant to know the precise number of acres it was short of the 190; all he had to know in this regard was that it was short. And to make the instruction consistent with the one given for plaintiff, it should have also stated that the defendant need not have actually known the alleged representation was untrue if he made it as of his own knowledge,

knowing he did not know, and did it for the purpose of inducing plaintiff to act.

The judgment is reversed and the cause remanded for a new trial. All concur.

### MILTON v. HOLTZMAN. (No. 15605.)

(St. Louis Court of Appeals. Missouri. Dec. 2, 1919. Rehearing Denied Dec. 18, 1919.)

#### 1. LANDLORD AND TENANT §169(11)—QUESTION WHETHER TENANT INJURED ON PREMISES WAS CONTRIBUTORILY NEGLIGENT FOR JURY.

In an action by tenant of an apartment who stepped in a hole in the yard while she was hanging out her washing, question whether the tenant was guilty of contributory negligence held, under the evidence, for the jury.

#### 2. APPEAL AND ERROR §1067—TRIAL §210 (2)—INSTRUCTION ON CREDIBILITY OF EVIDENCE PROPERLY REFUSED.

The giving of an instruction on effect of witness knowingly swearing falsely rests largely in the discretion of a trial court, and a refusal to give such an instruction is not reversible error; for it is nothing more than an affirmative declaration of the power possessed by the jury in determining the credibility of witnesses.

#### 3. TRIAL §194(20)—INSTRUCTION NOT OBJECTIONABLE AS DIRECTION TO FIND FOR PLAINTIFF.

In an action by a tenant of an apartment who stepped into a hole in the yard and was injured, an instruction that, if under all the evidence in the case the verdict should be for plaintiff, the jury would assess her damage in such sum, etc., is not objectionable as an instruction to find for plaintiff if she stepped into the hole and was injured.

Appeal from St. Louis Circuit Court; Daniel D. Fisher, Judge.

"Not to be officially published."

Action by Frances Milton against Meyer Holtzman. From a judgment for plaintiff, defendant appeals. Affirmed.

William Baer and Thomas B. Harvey, both of St. Louis, for appellant.

Holland, Rutledge & Lashly, of St. Louis, for respondent.

ALLEN, J. This is an action for personal injuries alleged to have been sustained by plaintiff by reason of a negligent breach of defendant's duty as the owner of certain premises let in part to plaintiff's husband as tenant. The trial below resulted in a verdict and judgment for plaintiff in the sum of \$500, and the defendant appealed to this court.

At the time of plaintiff's alleged injury, to wit, February 21, 1916, the defendant owned

an apartment or tenement building in the city of St. Louis containing four "flats," and plaintiff's husband, with his family, including plaintiff, occupied one of these flats as defendant's tenant. In the rear of the building there was an inclosed yard used in common by all of defendant's tenants and their families occupying such flats. At the rear of the building there was a porch, with steps leading to the yard, and adjoining these steps, and at either end thereof, large planks were laid, extending parallel with the steps, forming a walk across the entire yard at this place. At the outer edge of this walk, opposite the steps and perhaps two or three feet therefrom, there was a hole in the ground which extended beneath the walk. Over this hole a small board about ten inches wide and three feet in length had been laid. On the day of her injury plaintiff was in this yard hanging her washing on a clothesline stretched across the yard. It appears that immediately prior to her injury she was upon the walk, near the steps mentioned, and that she placed her left foot upon the ground at the edge of the small plank which covered or partly covered the hole mentioned, when the earth at the edge of the hole gave way beneath her weight, causing her foot to enter the hole, by reason whereof she fell and sustained an injury to her foot and leg. Her testimony is that when she thus stepped into the hole one end of the small plank was forced downward into the hole, causing the other end thereof to rise and strike her in the face as she fell.

The evidence tends to show that a hole had existed at this place perhaps a year prior to the time of plaintiff's injury, but that it had been filled up; that the hole again appeared and had been in existence for some weeks prior to plaintiff's injury, this small board having been laid across it. Defendant testified that he knew of the existence of the hole after its reappearance; that his attention had been called to it by plaintiff two or three months prior to the injury, but that it was not as large as indicated by plaintiff's evidence. According to plaintiff's testimony she had lived at these premises about twenty months prior to her injury. She testified that she had never known of the existence of the hole; that she had seen the small plank mentioned, but did not know that it covered a hole. One witness for plaintiff testified that plaintiff had spoken to her concerning the hole as being dangerous. Plaintiff denied this, and denied that she had spoken to the defendant concerning the existence of the hole.

[1] I. It is argued that the trial court erred in refusing to give a peremptory instruction offered by defendant at the close of plaintiff's case. We are of the opinion, however, that the case was one for the jury. It



does not appear to be contended that no negligent breach of defendant's duty as landlord was shown; and indeed the evidence adduced leaves no room for such a contention. The argument in support of this assignment of error proceeds upon the theory that the evidence is such as to convict plaintiff of contributory negligence as a matter of law. But we regard it as entirely clear that the question whether plaintiff was guilty of contributory negligence was one to be referred to the jury. Even if plaintiff had knowledge of the existence of the hole (and she testified that she had none), it cannot be held that the danger was such as would deter a person of ordinary prudence from continuing to use that portion of the yard, or that plaintiff was guilty of negligence, as a conclusion of law, in failing to avoid the hole under the circumstances present.

[2] II. Defendant offered an instruction on the credibility of the witnesses and the weight to be given to their testimony, which, among other things, contained the following:

"In this connection you are further instructed that, if you believe that any witness has knowingly and willfully sworn falsely to any material fact, you are at liberty to reject all or any portion of such witness' testimony."

The court refused to give the instruction in this form, but gave it after striking therefrom the words quoted above. Appellant earnestly contends that thereby the trial court committed error prejudicial to appellant for which this judgment should be reversed.

It is said that there were very material conflicts in the evidence whereby respondent was impeached on matters material to the issues, and that not only was the giving of an instruction of this character warranted under the decisions in *Keeline v. Sealy*, 257 Mo. 498, 165 S. W. 1088, *Robert v. Rialto Building Co.*, 198 Mo. App. 125, and other cases there cited, 199 S. W. 428, but appellant was entitled, as a matter of right, to have the instruction given as offered, and its refusal was prejudicial—citing *State v. Mix*, 15 Mo. 154; *Gillett v. Wimer*, 23 Mo. 77; *State v. Dwire*, 25 Mo. 553; *Peckham v. Lindell Glass Co.*, 7 Mo. App. 563.

The authorities last cited above tend, indeed, to sustain appellant's position that it was error to refuse this instruction. As will be seen, however, they are early decisions of the Supreme Court, and later decisions of that court, and of this court as well, appear to reflect a contrary view.

In *State v. Hickam*, 95 Mo. 322, loc. cit. 332, 8 S. W. 252, 257 (6 Am. St. Rep. 54), it is said that the propriety of giving an instruction of this character "in any particular case must be left largely to the judgment and discretion of the trial court"—citing *White v. Maxcy*, 64 Mo. 552.

In *McCormick v. City of Monroe*, 64 Mo. App. 197, loc. cit. 202, it is said, by *Rombauer, P. J.*:

"The rule as finally established is that such an instruction, if carefully worded, may be given with propriety where the facts warrant it. \* \* \* The propriety of giving or refusing it, however, must be left mainly to the discretion of the trial court. *State v. Hickam*, 95 Mo. 322 [8 S. W. 252, 6 Am. St. Rep. 54]."

In *Beasley v. Jefferson Bank*, 114 Mo. App. 406, loc. cit. 409, 89 S. W. 1040, it is said, by *Goode, J.*:

"The giving of the common instruction that the jury is the sole judge of the credibility of witnesses and may disregard the testimony of any witness who has sworn falsely to a material fact is a point of practice intrusted to the discretion of the trial court, and not to be controlled on appeal except for manifest abuse"—citing *State v. Hickam* and *White v. Maxcy*, supra.

In *Robert v. Rialto Building Co.*, supra, we said that it is not error to give an instruction of this character—

"where there is a direct conflict in the testimony as to the material fact or material facts, which cannot reasonably be attributed to mistake, inadvertence, or lapse of memory; i. e., where there is contradictory evidence in the record of such a nature that the jury may with propriety find that a witness or witnesses willfully gave false testimony as to a matter or matters material to the issues."

In *Keeline v. Sealy*, supra, in an opinion by Commissioner Brown, an instruction of this character was said to be unwarranted under the facts of that case. But it is to be noted that a majority of the court did not concur in that portion of the opinion.

But, though it may not be error to give an instruction of this character in a particular case, it does not follow that it would be reversible error to refuse such an instruction. The trend of judicial authority in this state is to the effect that the propriety of giving an instruction of this character is a matter resting to a very great extent in the sound discretion of the trial court, and that the action of the trial court in the matter will not be disturbed unless there is a manifest abuse of such discretion to the prejudice of the appellant.

In a recent criminal case it was said by our Supreme Court:

"While there are cases in which the giving of instructions of this character is of doubtful propriety, this in our opinion is not one of them; the general rule, however, in regard thereto being that the giving of such an instruction in the absence of evident prejudice to the accused is to be left to the judgment and discretion of the trial court." *State v. Barnes*, 274 Mo. 625, loc. cit. 631, 204 S. W. 267, 269.

We are of the opinion that the refusal by the trial court to give this instruction did

not constitute reversible error. Such instruction is "nothing more than an affirmative declaration of the power possessed by the jury in determining the credibility of witnesses." *State v. Barnes*, supra, 274 Mo. loc. cit. 632, 204 S. W. 269. And it may well be presumed that a jury will not hesitate to exercise that power, if the circumstances warrant it, without being specifically told that they may do so.

[3] III. At the instance of plaintiff the court gave the following instruction, the only instruction given for plaintiff:

"The court instructs the jury that if under all the evidence in this case, and the other instructions, if any, given you, you find your verdict in favor of the plaintiff and against the defendant, you will assess her damages in such sum, if any, as you may believe and find from the evidence in this case will fairly compensate her for: First, any physical pain of body and anguish of mind, if any, which you may find from the evidence she has suffered as a direct result of her injuries; and, second, from any nervous shock, if any, which you may find from the evidence she has suffered, if any, as a direct result of her injuries."

It is urged that the giving of this instruction constituted reversible error for the reason that it constituted a direction to find for plaintiff if she was injured as a result of stepping into this hole, without regard to whether this occurred through the negligence of appellant.

It seems quite clear that this assignment of error is without merit. In support of its contention appellant relies upon the decisions of the Kansas City Court of Appeals in *Menhardt v. Midland Ice & Cold Storage Co.*, 163 Mo. App. 278, loc. cit. 281, 146 S. W. 845, and *Davis v. Metropolitan Street Ry. Co.*, 188 Mo. App. 128, loc. cit. 142, 176 S. W. 1067. In the *Menhardt* Case an instruction on the measure of damages—plaintiff's only instruction—told the jury, that if they found for plaintiff to allow him such reasonable amount as they might find and believe from the evidence "would fairly and justly compensate him for any injuries, if any, he sustained \* \* \* while in defendant's ice plant, *by reason of and as a direct result of*

*the traveling crane in evidence falling and striking him.*" It was the presence of the words which we have italicized which caused the court ultimately to condemn this instruction. On motion for a rehearing the court said:

"In our former opinion we overlooked the fact that the said instruction contained something more than a mere instruction directing the jury, if they found for the plaintiff, they would allow such a reasonable amount as they might believe from the evidence would compensate him for his injuries. It also included the following expression: 'By reason of and as a direct result of the traveling crane in evidence falling and striking him.' This was substantially a direction to the jury to find for the plaintiff if he was injured 'as a direct result of the traveling crane falling and striking him.'"

And in the *Davis* Case, supra, the instruction condemned was as follows:

"If you find for plaintiff, you shall assess his damages at such sum as you may find from the evidence will be a reasonable money compensation to the plaintiff for the injuries, if any you find, that plaintiff received as a direct result of being caught between defendant's cars."

This instruction was condemned upon the same ground as was that in the *Menhardt* Case.

In the case before us the instruction under consideration allowed the jury to award plaintiff such damages as would fairly compensate her for pain, if any, which they may find that she has suffered as a direct result of her injuries. The instruction is purely one on the measure of damages, and not subject to the criticism made of it. It does not contain language which might lead the jury to believe that they could find for plaintiff by reason of the fact that she fell into the hole, without regard to the question of defendant's negligence.

We perceive no reversible error in the record, and it follows that the judgment should be affirmed.

It is so ordered.

REYNOLDS, P. J., and BECKER, J., concur.

COLORCRAFT CO. v. AMERICAN PACK-  
ING CO. (No. 15598.)

(St. Louis Court of Appeals. Missouri. Argued and Submitted Nov. 7, 1919. Opinion Filed Dec. 2, 1919. Rehearing Denied Dec. 18, 1919.)

1. JUSTICES OF THE PEACE §180—NECESSITY OF SEPARATE FINDINGS OF LAW AND FACT APPLIES TO APPEALS FROM JUSTICE.

Rev. St. 1909, § 1972, requiring the court to state in writing the conclusions of fact found separately from the conclusions of law, where requested by a party, is mandatory in actions at law, and applies to an appeal from the justice of the peace, since section 7588 provides that trials upon such appeals shall be governed by the practice in the appellate court.

2. TRIAL §389—WAIVER OF FINDINGS OF FACT AND CONCLUSIONS OF LAW AFTER ADVERSE RULING ON REQUEST.

Where the court refused to make findings of fact and conclusions of law upon a party's request as required by Rev. St. 1909, § 1972, such party could ask to have his points of law presented without losing his rights under the statute.

3. TRIAL §393(1)—COMPLIANCE WITH STATUTE REQUIRING CONCLUSIONS OF LAW AND STATEMENT OF FACT.

Rulings of court at trial and the finding for defendant are not sufficient for the conclusions of law and the finding of fact required by Rev. St. 1909, § 1972.

4. PRINCIPAL AND AGENT §103(12)—AUTHORITY OF SALES AGENT TO CONTRACT AS TO TIME OF DELIVERY.

A sales agent is without power to contract for time of delivery, where the contract blank furnished him by his employer specifically provides that seller is to "ship as soon as possible," and that the order is not subject to countermand, and that any agreement not stated in the order will not be recognized, so that, in seller's action against buyer for refusal to accept goods, oral testimony was inadmissible to show understanding between seller's agent and buyer as to time of delivery.

5. SALES §81(3)—CONSTRUCTION OF PHRASE "SHIP AS SOON AS POSSIBLE."

The phrase, "ship as soon as possible," in a sale contract, means within a reasonable time under the circumstances of the case.

6. PRINCIPAL AND AGENT §178(4)—SALES AGENT'S KNOWLEDGE OF URGENT NEED OF GOODS CHARGEABLE TO PRINCIPLE.

Since whether goods sold were shipped "as soon as possible" must be determined from all facts and circumstances connected with the purchase, plaintiff's selling agent's knowledge of circumstances and the urgent demand for the goods is chargeable to plaintiff and should be considered.

7. PRINCIPAL AND AGENT §178(4)—KNOWLEDGE OF SALES AGENT AS TO BUYER'S URGENT NEED OF GOODS NOTICE TO SELLER.

Although a mere sales agent is without authority to alter the terms of a written contract, notice given to such agent while his agency exists, and referring to business within the scope of his authority, as to urgent need of goods ordered, is notice to his principal, and the buyer is not responsible for the agent's failure to communicate such information to his principal.

8. FRAUDS, STATUTE OF §109—SUFFICIENCY OF MEMORANDUM FOR SALE OF GOODS.

A memorandum sales agreement, setting out items and prices in usual trade abbreviations and easily understood, held sufficient to meet the requirements of the statute of frauds.

9. TRIAL §386(3)—DECLARATIONS OF LAW NOT COVERING WHOLE CASE PROPERLY REFUSED.

Requested declarations of law correct so far as they went, but not covering the whole case, were properly refused.

Appeal from St. Louis Circuit Court; Ernst A. Green, Judge.

"Not to be officially published."

Action by the Colorcraft Company against the American Packing Company. Judgment was rendered for the defendant in the justice court, and plaintiff appealed to the circuit court, where findings and judgment were entered in favor of defendant, and plaintiff appeals. Judgment of the circuit court reversed, and cause remanded.

Abbott & Edwards and Edwin C. Luedde, all of St. Louis, for appellant.

Henry H. Oberschelp, of St. Louis, for respondent.

REYNOLDS, P. J. This action was commenced by plaintiff filing a statement of account for the price of a lot of paint sold by plaintiff to defendant, an itemized account filed with the statement. From a judgment in favor of defendant, plaintiff appealed to the circuit court, where on a trial de novo before the court, a jury being waived, the finding and judgment were there entered in favor of defendant, from which it has duly appealed.

It appears that one Carson, located at St. Louis, Missouri, was the sales agent for defendant, the latter a corporation having its principal office at Cleveland, Ohio. Defendant was putting up a building in which to conduct its business, the erection in charge of one Hammann, he being the consulting engineer. On May 5th, 1916, the president or manager of the defendant company, one Honegger, called Hammann over to speak to Carson regarding some paint which was wanted in the finishing of the building, the

parties, that is Carson, Hammann and Honegger being in the premises. The building was so far completed as to be ready to be painted. It appeared that the painting job had been delayed beyond the time for starting operations in the building. This conversation took place between 8 and 9 o'clock on the morning of Friday, May 5th. Carson and Hammann got together and Hammann asked Carson if his company had the kind of paint defendant wanted in stock. Carson said they did not have it at St. Louis but they had it at Cleveland. Hammann asked him how long it would take to get it here, and Carson replied that if Hammann would give him the order that morning he would have the paint here in three days, which would be May 8th. Hammann said that he would give him one better; would give him until May 9th. The order for the paint was written up and signed by Carson for the plaintiff and by Hammann for the defendant. Hammann testified that in this connection he called Carson's attention to the fact that to hurry matters along, he wire in the order, if that would do any good, to which Carson assented, and that he (Hammann) made a notation not to ship over a certain road and to be sure and get the paint to St. Louis in three days. Hammann testified that he told Carson the painting contract had been let; that they had the painters engaged to come to work on the following Wednesday, which would be May 10th; that the company intended to do its own painting. Hammann further testified that Carson saw at the time the condition of the work on the building and machinery, and that everything was in readiness to do business just as quickly as they possibly could; that Carson was thoroughly familiar with this fact, as he had gone over the building, fully examined the walls and told him what kind of paint to put on; that he had given the order for the paint with the understanding that Carson would telegraph it to defendant at Cleveland, where it was in stock; that it would leave Cleveland that same afternoon (Friday) and reach St. Louis Monday or not later than Tuesday. "That," said witness, "was all understood before I made the order out;" that if that had not been understood, he would not have given Carson the order; had specifically told Carson that if he could have the paint here within three days, the order was his; that the paint did not arrive on May 9th; that the defendant company waited until the latter part of the following week and as the paint did not arrive defendant purchased it from a local concern at St. Louis and it was delivered two hours after the order was received. This testimony was all objected to by defendant as contradicting the written contract—objected to when it was given—and at its conclusion plaintiff moved to strike it out, excepting to the action of the court in overruling its objections and refusing to sustain the motion. On cross-examination

Hammann testified that Carson had left a carbon copy or duplicate of the contract with him; that he had signed it as representing the defendant. This carbon copy was introduced in evidence, the plaintiff having introduced the original.

Mr. Honegger, representing the defendant company, testified that he had been present and had overheard the conversation between Carson and Hammann and stated his recollection of it, which was practically as told by Hammann but with some more detail, Mr. Honegger testifying that he had said to Hammann, Carson being present:

"Now, Bill, we are ready to start the work. \* \* \* We want to start this work there; we must start by the 15th of May; absolutely start to clear our decks and make sausage, because we are all ready to do business, because we have the contract with the painters."

Whereupon Carson told Hammann that he had the stuff in stock; could give him immediate delivery on it and Hammann asked him what he meant by that. Carson figured it out and said: "Well, to-day is Friday and it will be here Monday." Hammann then said:

"I will give you an extra day's time, until Tuesday, but it must be here by that time otherwise I wont order."

Carson further said:

"I will go right down to the telegraph office and telegraph it so they will have it in before noon and ship it right out after dinner;" that they had the stock on hand at Cleveland but he did not carry it at St. Louis.

Plaintiff objected to all this testimony and moved to have it stricken out, excepting to the adverse ruling of the court. Honegger further testified that that was the only transaction they had had with plaintiff; that the defendant company waited for a week from the Tuesday or Wednesday following the giving of the order before ordering paint from any one else, and Mr. Carson then notified defendant that the paint had been lost in shipment, and that he (Honegger) verified this by telephone conversation with a railroad man. Carson, told of this, said he did not know when the paint would get to St. Louis; that it had been put in the wrong car, to which Hammann said, "We cannot wait any longer," and the same day defendant purchased the paint from another dealer; that on Friday, May 19th, 1916, the railroad company notified defendant that it had found the car containing the shipment of paint in East St. Louis, and on Saturday, May 20th, the railroad company notified defendant by mail of the arrival of the shipment at St. Louis. Defendant, however, did not take the paint from the warehouse, and Hammann testified that on May 17th, they had notified Carson that they would not take the paint but had ordered it from a local dealer, who had furnished it

in time for the painters to start working on the morning of May 18th. Witness Honegger further testified that he had seen Hammann sign the order and that Hammann had signed it for the company defendant by his direction.

We have stated the evidence somewhat out of order, putting in that of defendant before that of plaintiff.

In support of its case plaintiff introduced and read in evidence the order, which is as follows:

The Colorcraft Co., Cleveland, O.

Sale No. 140.

5/5/1916.

Name, American Pkg. Co.

P. O. Address, 3842 Garfield.

R. R. Town, St. Louis.

County, ——. State, Mo.

Terms, 60 days—2 per cent. 10 days.

This order is placed with the understanding that it is a positive order and not subject to change or countermand unless so specified hereon. Any agreement not stated on this order will not be recognized. Ship as soon as possible. Future date —.

1/2 Bbls.	Kuller Kraft		
	Flat #100 White	@	1.60
1	" Cement & Brick Ctg.		
	#10 Diamond White	"	1.55
1	" KonKote Enamel		
	#113 Gloss White	"	1.65
2/1	" K. K. Tub Enamel		
	#42 Vermillion	"	2.10
2/1	" K. K. Protection		
	#63 Heat Resisting		
	Black	"	1.25
	Less frt. & drg.		

May 8, 1916. [Rubber Stamp.]

Prices are f. o. b. cars or boat, Cleveland, Ohio.

Signature, W. Hammann, Purchaser.

W. W. Carson, Salesman.

The deposition of the general manager of plaintiff company at Cleveland was taken. He identified the original contract, which he testified had been received by plaintiff at Cleveland, May 8th, 1916; that the W. W. Carson, whose signature appeared above the word "Salesman," at the bottom of the order or contract, was the signature of Carson, who was plaintiff's traveling salesman; that the authority of this salesman during May, 1916, was merely to solicit orders from the trade and mail such orders to plaintiff at Cleveland, Ohio, for acceptance or rejection; that he had no authority to do anything else and had no authority to make contracts outside of such contracts or orders accepted by plaintiff in Cleveland, when solicited by plaintiff's salesman; that he had no authority to guarantee delivery of merchandise shipped by plaintiff; that plaintiff had done everything possible to expedite the movement of the goods ordered; that plaintiff received a telegram from Carson on the afternoon of Friday, May 5th, covering the order. Asked what he knew in regard to the order being preceded by a telegram from Carson, and whether he could say that his company had

received a telegram from Carson, and to state when it was received by him, the witness Carr answered:

"Yes, this order was preceded by a telegram from our salesman. We received the telegram in our office at 12:45 p. m., on Friday, May 6th, 1916.

"Q. State what, if any connection existed between the telegraphed order, just mentioned by you, and the contract which you have previously identified. A. The contract, which I have identified, is a confirmation of the telegram received.

"Q. State whether or not your company ever received any telegram from your salesman to the effect that this shipment be rushed. A. We did."

This witness further testified that plaintiff could not have shipped the goods ordered on May 5th, and as its factory only operated a half day on Saturday, May 6th, nothing could be done until the following Monday morning, May 8th; that during the spring season plaintiff's factory was rushed and this order was received during a particularly busy time and there were a great many rush orders in ahead of that sent by defendant, so that it was absolutely impossible for plaintiff to ship the material ordered by defendant before Wednesday, May 10th; that the goods were shipped as soon as plaintiff could physically do so; that he had received the original order some time during the day of May 8th, passed on the same for credit and after being satisfied in this respect, acknowledged the receipt of it to the American Packing Company at St. Louis, and asking if there was any correction that defendant should promptly advise plaintiff, otherwise plaintiff would bill and ship in full in accordance with the terms and prices in the order it had accepted; that it had prepared the goods for shipment as quickly as possible and delivered them in perfect order to the railway company in Cleveland, Ohio, some time during May 10th, 1916. Witness testified to the prices of the goods shipped and also identified the bill of lading covering the shipment, which was in evidence.

Plaintiff also offered in evidence the deposition of the treasurer of the company, who identified the contract as the one on which the goods had been shipped, and testified that Carson, the salesman who solicited the order and sent it in, had no authority to represent plaintiff except in soliciting orders from the trade. He further testified that plaintiff's company at the time the order was accepted in Cleveland knew of no understanding whereby the goods were to be delivered to defendant inside of ten days, nor had the plaintiff been party to any such arrangements; that the contract called for the goods to be shipped "as soon as possible," and that plaintiff had billed and shipped the material just as soon as it was physically possible to do so, and testified to the amount of the charge. It

was admitted that Hammann had testified at the trial before the justice that he had signed the order as the party in charge of defendant's work for which the goods shipped were desired.

At the close of plaintiff's testimony defendant interposed a demurrer, which was overruled.

The telegram or telegrams referred to as passing between Carson and plaintiff were not in evidence.

Plaintiff also introduced in evidence the notice from the railroad company to the defendant of the arrival of the goods, this dated 8 p. m., May 19th, 1916.

At the close of all the evidence in the case, plaintiff's counsel asked the court to make a finding of facts and conclusions of law. To this the court said he did not think they had a right to ask that on a case coming from a justice of the peace. Counsel for plaintiff said that he thought he could, if a jury was waived; to which the court said, that was only in an equity case; that if they had any declarations of law they wanted him to make he would pass on them. Counsel for plaintiff excepted to the ruling of the court denying a finding of facts and conclusions of law and asked the court to grant him a day or two to get up declarations of law. The court told counsel he was ready to pass on the case then if counsel wished; that he would find for the defendant then and counsel could hand in declarations of law and he would pass on them afterwards but that the finding would be for defendant. Afterwards counsel for plaintiff presented to the court a request for declarations of law which the court refused to make.

[1] We are obliged to reverse this case for the error of the learned trial court in refusing to make a finding of fact and declaration of law. Section 1972, Revised Statutes 1909, expressly provides:

"Upon the trial of the question of fact by the court, it shall not be necessary for the court to state its finding, except generally, unless one of the parties thereto request it with the view of excepting to the decision of the court upon the questions of law or equity arising in the case, in which case the court shall state in writing the conclusions of facts found separately from the conclusions of law."

It has been held that the failure to make a special finding in equity cases is not reversible error. *Miller et al. v. McCaleb et al.*, 208 Mo. 562, 106 S. W. 655. But that is not the rule in actions at law. We think this statute is mandatory (*Cochran et al. v. Thomas et al.*, 131 Mo. 258, 33 S. W. 6; *Kostuba v. Miller*, 137 Mo. 161, loc. cit. 173, 38 S. W. 946; *Backer v. Seaboard Fire & Marine Ins. Co.*, 174 Mo. App. 82, loc. cit. 85, 156 S. W. 829; *Fruin v. O'Malley*, 241 Mo. 250, 145 S. W. 437) and refusal to comply with it is reversible error. This is true whether the action is one at law originating in the circuit court or

coming there by appeal from a justice of the peace, for section 7588, Revised Statutes 1909, provides that the trial in the appellate court shall be governed by the practice in such court.

[2, 3] Learned counsel for respondent argue that the rulings of the court at the trial sufficiently show his view of the law and in finding for defendant is sufficient for the facts. Further, that having asked declarations of law, plaintiff is not entitled to a special finding of the law and of the facts. We do not think that either position is sound. The very object of the statute is to have a specific finding of the law as applicable to the facts found to be true. While it has been decided many times that a party is not entitled to a finding under the statute, and also to declarations of law, in the case at bar, by the action of the trial court in refusing to make a finding of facts and conclusions of law under the statute, which action was excepted to, plaintiff was driven to pursue the best course he could and ask to have his points of law presented.

[4] We do not think that the powers of a sales agent are of such character as to allow him to contract for the time of delivery when the very contract signed—a blank furnished him by his employer, and his only apparent authority in the matter—specifically provides that the seller is to "ship as soon as possible." The order also specifically provides that it is placed with the understanding, among other things, that it is not subject to change or countermand, and that any agreement not stated in the order will not be recognized. So we do not think that it was proper to admit testimony as to the understanding between this sales agent and the representative of the plaintiff as to the time of the delivery.

[5, 6] The phrase, "ship as soon as possible," has been often defined, generally being held to mean within a reasonable time under the circumstances of the case. The real issue in this case then is, were these articles shipped "as soon as possible"? It is true that the witnesses for the plaintiff testified that that was done, but that is their conclusion. Whether they were shipped as soon as possible is a question that should have been submitted to the jury for its determination. In considering the question as to whether the goods were shipped as soon as possible, all the facts and circumstances connected with the purchase are to be considered. The salesman for the plaintiff here was informed of the particular circumstances and the urgent demand for the goods. While a mere selling agent, his knowledge of those facts was the knowledge of the principal and the evidence as to those facts, not however as to the promise and agreement of the agent, was a proper matter of inquiry and of testimony.

[7] In *Robinson et al. v. Brooks et al.*, 40

Fed. 525, Judge Phillips, sitting in the circuit court of the Western District of Missouri, said (40 Fed. loc. cit. 527):

"Plaintiffs were advised of the importance to the purchasers of the greatest expedition in forwarding it. They must have known, as manufacturers engaged in the business of selling such machines for the harvest in Missouri, that the season for threshing begins here about the last days of June, or the first of July; in addition to which, the letter of June 30th, accompanying the order for the machine, urged immediate attention, as the threshing was ready. Knowing, as plaintiffs did, that such machines were bought for use in the beginning and flush of the threshing season, this fact indicated to them that time was of the very essence of the contract, and that the terms 'at once, or as soon as possible,' meant at the earliest moment of time practicable to meet the purchasers' object in making the order."

While not entirely applicable here on its facts, we think that the principle there announced is correct and although it is true that a mere sales agent has no authority to alter the terms of a contract, which were written, it is an accepted rule of decision that notice given to an agent while his agency exists and referring to business within the scope of his authority, is notice to the principal. This was the doctrine stated in *Hayward, Assignee, v. National Ins. Co.*, 52 Mo. 181, 14 Am. Rep. 400, and *Meier v. Blume*, 80 Mo. 179, loc. cit. 183 and following, and has been repeated in numerous subsequent decisions, the latest that we have found being *Cooper v. Newell*, 263 Mo. 190, loc. cit. 198, 172 S. W. 326. To state our exact holding here we say that all the testimony of the witnesses for defendant as to their instruction as to time given to the sales agent of plaintiff was improperly admitted, but the evidence of the knowledge of that agent of the condition of the work and its requirement was proper. The fact that the agent did not communicate this to his principal is something for which the defendant is not responsible. The fact that he had such knowledge, the fact that the order was telegraphed and that with that, or subsequently—it is not clear which—the sales agent telegraphed the plaintiff to rush the order, are circumstances for the consideration of the jury in determining whether the plaintiff had in fact shipped the goods as soon as possible, as it was required to do by the contract.

[8] It is urged by learned counsel for respondent that the memorandum here is not sufficient under the statute of frauds. We do not think that point tenable. The items and prices are in the usual trade abbreviations and easily understood. The memorandum is sufficient to meet the requirements of the statute.

[9] The declarations of law which the plaintiff asked and the court refused to give,

as far as they go, are correct, but they do not cover the whole case and do not submit the very important and essential question here involved, namely, Did the plaintiff ship the goods bought and ordered shipped "as soon as possible," with the knowledge it had of the urgency of the demand and the circumstances under which they were to be sent? That is a question of fact for the determination of a jury or of the court sitting as such.

The judgment of the circuit court is reversed and the cause remanded.

ALLEN, J., concurs.

BECKER, J., concurs in result.

### TEXAS COUNTY BANK v. WHITMAN. (No. 2458.)

(Springfield Court of Appeals. Missouri.  
Dec. 6, 1919.)

FRAUDS, STATUTE OF §18(3) — PROMISE TO  
PAY DEBT OF ANOTHER ON TRANSFER OF PROP-  
ERTY.

Statute of frauds (Rev. St. 1909, § 2783), prohibiting actions upon promises to pay the debt of another unless based upon a writing, etc., does not prevent plaintiff payee of a note from suing defendant, who had orally promised the maker of the note to pay it in consideration of certain property being transferred from the maker to defendant.

Appeal from Circuit Court, Texas County;  
R. A. Breuer, Judge.

Action by the Texas County Bank against Charles J. Whitman. Judgment for plaintiff, and defendant appeals. Affirmed.

Lamar, Lamar & Lamar, of Houston, for appellant.

Hiett & Scott, of Houston, for respondent.

BRADLEY, J. Plaintiff sued to recover the amount due on two promissory notes executed by one John Torevell, the father-in-law of defendant. One note was for \$100 dated March 14, 1917, due in 6 months, and the other note was dated June 9, 1917, for \$25, and was due in 90 days. The cause was tried before the court without the intervention of a jury, and a judgment was rendered for plaintiff for the amount due on the \$100 note, and for the defendant on the \$25 note, and defendant prosecutes this appeal.

Plaintiff in its petition set out that Torevell had executed and delivered the two notes to it, then charged that Torevell entered into an agreement with the defendant that he (Torevell) would deed certain lands

in Texas county to the defendant if he (the defendant) would pay Torevell's obligations to plaintiff bank, and that in pursuance of this agreement Torevell executed and delivered to the defendant his warranty deed conveying the land specified, and that the defendant promised plaintiff that he would pay said debts, but had failed to do so. The answer was a general denial.

The evidence by the cashier of plaintiff bank is that the defendant, for the consideration of Torevell conveying to him the land in Texas county, agreed to pay, among other obligations, the \$100 note; while defendant denied that he ever made such an agreement. The trier of the facts resolved this issue in favor of the plaintiff. The defendant relies here on the statute of frauds (section 2783, R. S. 1909), which provides that no action shall be brought to charge any person upon any special promise to answer for the debt, default, or miscarriage of another, unless the agreement upon which the action shall be brought, or some memorandum or note thereof, shall be in writing and signed by the party to be charged therewith, or some other person by him lawfully authorized. Plaintiff makes no contention that the alleged agreement on the part of the defendant to pay the note was in writing, but contends that it, as a creditor of Torevell, can take advantage of the agreement of defendant with Torevell to pay the debt of its debt-

or, Torevell, when such contract has for its consideration a transfer of property, and that in such circumstances the statute of frauds is no barrier to the maintenance of its suit. It is held in *Leckie v. Bennett et al.*, 160 Mo. App. loc. cit. 158, 141 S. W. 706, that a creditor may, without releasing the original debtor, take advantage of the agreement of a third person to pay the debt where the consideration for such agreement is the transfer of property, and that the creditor in such circumstances may maintain an action against such third person for the debt of his original debtor, though such agreement is not in writing. A number of cases are cited in *Leckie v. Bennett et al.*, supra, supporting plaintiff's contention. See, also, *Hill Bros. v. Bank of Seneca*, 100 Mo. App. loc. cit. 240, 78 S. W. 307.

We have examined the declarations of law asked by the defendant and refused, and find no error in such refusal. The controversy in this case, on the facts as appear here, depended upon the determination of the issue of the alleged agreement on the part of defendant to pay Torevell's note, and that issue was determined in favor of plaintiff.

The judgment below should be affirmed; and it is so ordered.

STURGIS, P. J., and FARRINGTON, J., concur.



## WHITE'S ADM'R v. KENTUCKY PUBLIC ELEVATOR CO.

(Court of Appeals of Kentucky. Nov. 28, 1910.)

## 1. NEGLIGENCE ⇐136(9) — QUESTION FOR JURY.

Negligence is a question for the jury if there is room for honest difference of opinion as to the effect of the facts or reasonable inferences to be drawn therefrom.

## 2. MASTER AND SERVANT ⇐286(39)—SUPERINTENDENT'S NEGLIGENCE QUESTION FOR JURY.

In an action against an elevator company for the death of a grain tank sweeper, whether defendant's superintendent was negligent in ordering deceased to clean the tank with the assurance that it was nearly empty *held*, under the evidence, for the jury.

## 3. MASTER AND SERVANT ⇐205(5)—ASSURANCE OF VICE PRINCIPAL AS TO SAFETY MAY BE RELIED ON.

A grain tank sweeper ordered to clean a tank with the assurance of his superintendent that it was so nearly empty as to be safe had the right to assume that the superintendent had inspected it and that it was reasonably safe.

## 4. MASTER AND SERVANT ⇐288(12)—ASSUMPTION OF RISK BY GRAIN TANK SWEEPER QUESTION FOR JURY.

Whether the danger from going into a dimly lighted and dusty grain tank with the assurance that it was nearly empty was apparent to an employee directed to clean it *held* a jury question.

## 5. MASTER AND SERVANT ⇐289(28) — CONTRIBUTORY NEGLIGENCE OF GRAIN TANK SWEEPER QUESTION FOR JURY.

Whether deceased was guilty of contributory negligence in releasing rope around his body after reaching the bottom of deep grain tank which he had been directed to clean *held* a question for the jury.

## 6. EVIDENCE ⇐20(1) — DIFFICULTY OF ASCENDING SLANTING SIDES OF GRAIN TANK MATTER OF COMMON KNOWLEDGE.

It is a matter of common knowledge that it would be very difficult, if not impossible, for any one to ascend the smooth, sloping sides of the hopper bottom of a grain tank and sweep the same with a rope tied about him, heavy enough to sustain his weight.

## 7. TRIAL ⇐141—MATTERS CLEARLY ESTABLISHED NEED NOT BE SUBMITTED.

Since the fact is clearly established that the condition of the ladder in grain tank which deceased had been directed to clean had nothing to do with his death, the court did not err in refusing to submit the case on account thereof.

## 8. MASTER AND SERVANT ⇐274(9) — EVIDENCE OF CUSTOM ADMISSIBLE ON QUESTION OF CONTRIBUTORY NEGLIGENCE.

Evidence that it was a custom of defendant's grain tank sweepers to take off the rope used for the purpose of getting up and down

was competent for the purpose of showing whether deceased, engulfed by grain, was negligent in removing the rope from his body after reaching the bottom of the tank.

## 9. NEGLIGENCE ⇐119(2)—CUSTOM NEED NOT BE PLEADED.

The rule requiring a custom to be pleaded before it may be shown in evidence has no application where the purpose is to prove the ordinary and usual way of doing a certain thing in order to determine whether it has been negligently done.

Appeal from Circuit Court, Jefferson County, Common Pleas Branch, Third Division.

Action by Pernie White's administrator against the Kentucky Public Elevator Company. At the conclusion of the evidence a verdict was directed for defendant, and the petition dismissed, and the administrator appeals. Reversed and remanded.

H. N. Lukins and Wallace A. McKay, both of Louisville, for appellant.

Humphrey, Crawford, Middleton & Humphrey, E. P. Humphrey, Robert Miller, and Louis Seelbach, Jr., all of Louisville, for appellee.

CHARKE, J. Pernie White, a colored boy 19 years of age, had been employed by the Kentucky Public Elevator Company for about 6 months as a "sweeper" when in June, 1910, he lost his life while attempting to sweep out one of his employer's large grain tanks. This is an action by his personal representatives to recover damages for his death, alleged to have resulted from negligence of the employer in failing to furnish him a reasonably safe place in which to work. At the conclusion of his evidence a verdict was directed for the defendant and his petition dismissed, and this appeal challenges the court's order directing a verdict for the defendant.

The tank in which decedent lost his life, known as No. 1, was one of a series constructed of concrete, circular in form, 21 feet in diameter and 85 feet deep. The bottom was not flat, but slanted to one side from all other directions at an angle of about 45 degrees so as to form a hopper with an opening on one side through which the grain could be discharged when desired by the force of gravity. This opening was smaller than a man's body, and the only means by which one could enter or leave the tank was an iron strap ladder attached to the side, leading from the top to near the bottom. The ladder in this tank had become detached at a point near its center and was not considered entirely safe at the time of the accident, and electric lights which had been used at one time for lighting the tanks when being cleaned were out of order. Decedent, before going into the tank, lighted a lantern and with an attached cord lowered it to the bottom of the tank.

The only other persons present at the time were Mr. Kelty, the superintendent of defendant company, and Jack White, the father of deceased, who was also an employé of the company. Mr. Kelty did not testify upon the trial, and the father of decedent describes what happened at the time as follows:

"Q. What did Mr. Kelty say? A. He took a bucket and run the bucket down in there; said: 'It is about out. Sweep it out right away.' I tied the rope on the boy there, and he said: 'Tie it on him good. Hold him over those ladders.' I said: 'Yes, sir.' I tied the rope on the boy; let the boy down; held him while he was going over the ladders; in case ladder might break I could hold his weight up. The boy went on down in the tank. After he got down in the tank he said to me: 'Papa!' I heard him holler, but you could not see anything, dark as anything with the dust. Q. What made the dust? A. That there was bad grain in there. Of course, they had been running it all day, I guess, throwing it out. Q. What do you mean by bad grain? A. It was rotten when it came in there. They pulled it at nights, dried it. It had been in there five or six months. It had been in there ever since cold weather. And he went on out—when the boy went, started down the tank, he went on out—and the boy said to me: 'Papa!' And I said: 'What is it?' He said: 'It seems to me as if there is grain sticking back in here; you better get that ladder and let it down to me so I can get back in there.' He said as if he knewed it was some back in there; he said 'It seems' there was some; he didn't say he knewed. Q. Could you see from the top down to where he was? A. No, sir; I could not see; the dust was so thick that I could not see. Q. Was there more dust than usual in the tank at that time? A. Yes; it was more dust than usual. Q. Could you see the glimmer of the light down there at that time, or was it perfectly dark? A. After the lamp got down to the bottom I could not see anything. I could just hear him talking, and he asked me for a ladder. Q. How far was the bottom of the ladder from the top of the bin that he went down on? A. It might have been about 8 or 10 feet, probably 12 feet, from where he slides off from the ladder to slide down to this hole. The ladder didn't go plumb down, the ladder that he had been going down on; it didn't go out of the hole; it stopped about 12 feet on the inside of the tank."

After reaching the bottom of the tank, decedent untied and removed the rope from about his body. When the father returned with the ladder the son had asked for, the boy did not answer, and, going down on the ladder attached to the tank, the father saw the lantern still burning and a quantity of grain in the hopper of the tank, but the boy was not in sight. This witness did not attempt to estimate the quantity of grain in the tank, except by saying that it took about an hour for it to run out of the spout over the boy's body.

William Whitney, who had charge of the spout or opening at the bottom of the tank,

testified that the grain had been running from this tank in a small stream all day on to a belt conveyor; that, hearing young White had disappeared, he opened the spout as wide as could be, and the boy's foot came out, but his body would not pass through; that the grain ran over the boy's body for 10, 20, or 30 minutes; he did not know how long; that he could not tell what quantity of grain came out thereafter, "but it might have been half a carload"; that he had not reported to any one that the tank was empty, and that the grain was still running out in a small stream, as it had been all day, when he was asked about Pernie and went to the spout and opened it; that the corn in this tank was moist and in bad condition when it came in, but that it was put through a drier and was in pretty fair condition when it was put in the tank; that as it was being taken out of the tank the corn was not in good condition and was dusty.

John Cole, who had been employed by the defendant for 15 years and frequently swept out the tanks, testified that the grain being taken out of tank No. 1 on the day Pernie lost his life was not in good condition. "It was some called it rotten grain; some say it was not bad, but it was not very good grain."

Jesse L. Weiser, a millwright by trade, who had had about 15 years' experience with elevators, in handling and storing grain in tanks and emptying tanks, stated that there are several means in use of determining how much grain is in a tank, the best and only accurate one by comparing the weights of the grain put in and taken out. Another way not so accurate is by sounding with a metal bucket or basket with a line marked in feet attached which will give the number of feet from the top of the tank to the grain bottom of the tank, and, knowing the number of bushels to the foot, the quantity of grain in the tank may be easily calculated. This latter method was the one used by Mr. Kelty, the superintendent, before directing decedent to sweep out this tank, and from which, on the evidence, he must have concluded the tank was about empty and ordered it cleaned by decedent.

Mr. Weiser testified that when grain is allowed to remain in such a tank as this for any considerable length of time, even if in good condition when stored, it is liable to, and frequently does, adhere in large cakes along the slanting sides of the hopper, and other witnesses testified that it is sometimes necessary to chop up such cakes before the grain will run out of the hopper.

[1] The court held this evidence insufficient to show negligence upon the part of the defendant, and this ruling of the court can be sustained only if it can be said that there was no room for honest difference of opinion as to the effect of the facts or reasonable inferences to be drawn therefrom. Morris v.

L. & N. R., 61 S. W. 41, 22 Ky. Law Rep. 1506; *Lamberg v. Central Consumers' Co.*, 184 Ky. 284, 211 S. W. 746.

That the tank was not empty or nearly so, as defendant's vice principal assured decedent, nor a reasonably safe place in which to work, is obvious; so the questions raised by the evidence were whether Mr. Kelty exercised reasonable care in ordering the tank cleaned when it was not safe to do so; whether the danger was so obvious decedent assumed the risk; whether he was guilty of contributory neglect; and what was the proximate cause of the accident.

[2, 3] The only basis for the claim that defendant exercised ordinary care in ordering deceased to clean the tank with the assurance it was about empty was the test made with the sounding bucket, but clearly this test was inaccurate, as testified by Mr. Welsler, and wholly undependable, or it was carelessly applied by Mr. Kelty, because the tank was not nearly empty, as he might easily have ascertained by comparing the weights or asking Mr. Whitney. It was his duty to have known the grain was still being withdrawn from the tank, and, knowing this, to have exercised reasonable care to ascertain it was so nearly empty as not to be dangerous before ordering it cleaned; and deceased, who was under no duty of inspection, had the right to assume he had done so, and that the place was reasonably safe. *Olive Hill Fire Brick Co. v. Stone*, 153 Ky. 360, 155 S. W. 733; *Louisa Coal Co. v. Hammond's Adm'r*, 160 Ky. 280, 169 S. W. 709; *Interstate Coal Co. v. Garrard*, 163 Ky. 235, 173 S. W. 767.

We do not see how it is possible to deny that from this evidence negligence might be reasonably inferred upon the part of the vice principal in ordering deceased to clean the tank with the assurance it was about empty.

Another reasonable inference from the testimony, it seems to us, is that this grain had become caked and adhered to the sides of the tank and hopper; for, if not so, Kelty certainly applied his test carelessly, if it is at all dependable. It is only on the assumption that it was caked and stuck on the sides of the tank, and that therefore in making the test the bucket missed this quantity of grain, that even good faith can be accorded Mr. Kelty. This condition is also indicated by the physical fact proven that decedent's foot was at the spout and his body completely covered by the grain.

There is no speculation necessary to ascertain the proximate cause of decedent's death, as argued by counsel for defendant; it was caused either by a large quantity of grain falling upon and suddenly engulfing him after he reached the bottom of the tank, or he stepped into and gradually sank below the grain which was at the bottom of the tank before he got there. The one explanation is

probable; the other hardly possible, it seems to us, considering the fact that he had disappeared and could not answer when his father returned with the ladder. But in either event the defendant would be liable if Kelty negligently ordered deceased into the tank when he knew or ought to have known the true conditions, unless the danger was so apparent deceased assumed the risks, or he was himself guilty of contributory negligence.

[4] Whether the danger was apparent to deceased in the dimly lighted and dusty tank was certainly a question for the jury.

[5] The fact relied upon by the trial court as proving contributory negligence as a matter of law is that deceased, after reaching the bottom of the tank, released the rope from around his body.

That the court was in error in this conclusion is, we think, quite apparent, although it is true that, had the decedent not released the rope from about his body, he more than likely would not have been killed, because he did not die until he had been removed from the tank after waiting for the grain to run out from over his body, and he could have been pulled out from under the grain much sooner and probably saved had the rope remained about his body. But, even so, the removal of the rope from about his body by the decedent would defeat a cause of action by his personal representative for his death only if its removal was negligence upon the part of the deceased, and not otherwise.

[6] The evidence for plaintiff shows, or at least tends to prove, that the only purpose of tying the rope about the body of the boy by the father, as ordered by Mr. Kelty, the superintendent, was to prevent an accident from the use of the defective ladder in reaching the bottom of the tank, and that it was not usual or customary or expedient to allow the rope to remain about his body after he had reached the bottom of the tank in safety, because it would have interfered materially with his ability to perform the very service he was sent into the tank to do. To sweep out the bottom of this tank decedent had to climb up the slanting sides of the hopper, which, as shown in the evidence, were made as smooth as possible to prevent grain from adhering thereto, and it is a matter of common knowledge that it would be quite difficult, if not impossible, for any one to ascend the smooth, sloping sides of the hopper and sweep same, with a rope tied about his body heavy enough to sustain his weight, and especially for a man such as deceased, who was six feet tall and weighed between 185 and 200 pounds.

We are therefore sure from the evidence that the question of whether or not the deceased was guilty of contributory negligence in removing the rope from about his body after he had safely reached the bottom of the tank was a question of fact for the jury,

and that the court erred in holding that same was as a matter of law contributory negligence. *Jonas v. South Covington & Cincinnati Street Railway Co.*, 162 Ky. 176, 172 S. W. 131, Ann. Cas. 1916E, 965.

[7] Since the fact is clearly established that the defective condition of the ladder had nothing to do with the death of decedent, the court did not err in refusing to submit the case to the jury on account thereof.

[8] Appellant also complains of the action of the trial court in the exclusion of certain evidence offered. Jack White was not permitted to testify, as shown by avowal he would have done, that it was the custom in the Kentucky Public Elevator Company at the time Pernie White was sent down to sweep this tank, and for some time prior thereto, for the sweepers to take off the rope after they got down into the bottom of the bin to enable them to do their work properly; that "they used the rope for the purpose of enabling them to go up and down off the ladder after it became out of repair and in bad condition, and would take off the rope as soon as they got down into the bin and began to sweep same. It was necessary to take off the rope in order that he might sweep the bin properly, and he could not do so with any comfort with the rope around him, and this custom had existed and continued for some years past at said elevator company." This evidence was clearly competent for the purpose of showing whether or not deceased was negligent in removing the rope after he reached the bottom of the tank, because the presence or absence of negligence necessarily depends on what ordinarily prudent persons under like circumstances would have done, and often this can be shown only by proving what is the ordinary or usual way of doing a thing. As said in 20 R. O. L. 30:

"The common experience of mankind is the criterion for determining what cautionary measures shall be taken to avoid injury to others. Every one may rightfully rely upon experience, and as a rule he is not to be charged with negligence in respect of acts which conform to a practice that has existed for years without resulting in any injury, \* \* \* and, subject to some qualifications, it is permissible to prove on issue of negligence the usage or practice of others in performing the same act."

[9] This was not an attempt to establish a custom as a binding obligation upon the parties and as forming a part of the contract between them, for the violation of which either party would be liable to the other, but was simply an effort to show what was the ordinary and usual way of performing the work decedent was trying to do in order to determine whether or not he was negligent in doing it the way he did. The rule requiring a custom to be pleaded before it may be shown

in evidence applies where there is an effort to incorporate into a contract a local custom as a binding stipulation between the parties, as was the case in *Mowbray & Robinson Co. v. Kelley*, 170 Ky. 271, 185 S. W. 1130, relied upon by defendant, but has no application where the purpose is, as here, to prove the ordinary and usual way commonly employed to do a certain thing in order to determine whether or not it has been negligently done.

We also think the court erred in excluding what the witness John Cole said with reference to the condition of the corn at the time of the accident, since in our opinion he sufficiently manifested his knowledge of its condition.

For the reasons indicated, the judgment is reversed, and cause remanded for another trial consistent herewith.

### HUSBANDS v. PADUCAH & I. R. CO.

(Court of Appeals of Kentucky. Dec. 19, 1919.)

#### 1. TRIAL $\S$ 309 — VIEW BY JURY AS EVIDENCE.

While the result of jurors' observations on a view is evidence which in making up their verdict they may consider in connection with the other evidence, they cannot arbitrarily disregard all the other evidence and base their verdict solely on the result of their observations.

#### 2. EMINENT DOMAIN $\S$ 300—SUFFICIENCY OF EVIDENCE OF DAMAGES TO PROPERTY BY EMBANKMENTS.

In an action for damages for injuries to property because of the construction of an embankment interfering with access to plaintiff's property wherein a view of the premises was taken and a verdict of \$1 was awarded, notwithstanding that there was evidence that plaintiff's property had been injured from 25 to 50 per cent. of its value, and not a single witness testified that the property was not injured, such verdict held flagrantly against the evidence.

#### 3. EMINENT DOMAIN $\S$ 298—ADMISSIBILITY OF EVIDENCE TO DIMINISH DAMAGES FOR OBSTRUCTION OF ACCESS.

In an action for damages to plaintiff's property because of construction of embankments interfering with access through certain streets, evidence that defendant had built a new street which afforded plaintiff a better means of travel than she had had prior to the obstruction held admissible on the question of damages.

Appeal from Circuit Court, McCracken County.

Action by Josephine Husbands against the Paducah & Illinois Railroad Company. Judgment for defendant, and plaintiff appeals. Reversed and remanded.

W. M. Husbands, John K. Hendricks, and William Marble, all of Paducah, for appellant.

Wheeler & Hughes, of Paducah, for appellee.

CLAY, C. This is the second appeal of this case. The opinion on the former appeal may be found in 176 Ky. 290, 195 S. W. 831, where the facts out of which the litigation grows are fully set forth.

It is sufficient for the purposes of this case to say that the railroad, at the points where it crosses Harrison, Madison, Monroe, Jefferson, and Broadway streets, was constructed on an embankment or fill that obstructed those streets but the company built underpasses at Broadway and Jefferson streets and midway between Madison and Harrison streets. The result was that the plaintiff, Mrs. Husbands, who had formerly had the use of five streets in going to and from her property in an eastern and western direction, was confined to the three underpasses, and in going to and from her property in a northern and southern direction it was necessary for her to make a detour between Jefferson and Broadway streets where she had formerly traveled Thirty-First street.

The suit was originally brought for the purpose of enjoining the railroad company from obstructing the streets. On appeal it was held that plaintiff was not entitled to the injunction, but was entitled to damages if her property was injured by the obstructions.

On the return of the case, a trial before a jury resulted in a verdict for plaintiff in the sum of only \$1. Plaintiff appeals.

Twelve witnesses testified in behalf of plaintiff. While they admitted that plaintiff could reach Paducah by a better street than she formerly had, all of them gave it as their opinion that the property of plaintiff, which was formerly worth from \$9,000 to \$12,000 was depreciated by the obstructions to the extent of from 25 per cent. to 50 per cent. of its value. While some of these witnesses were related to plaintiff and others had similar causes of action against the defendant, there were other witnesses who were not interested in any way in the result of the suit. The defendant offered no opinion evidence to the effect that the property was not injured, but rested its case on the view of the jury and the physical conditions as explained by the witnesses.

It is the contention of plaintiff that the verdict is flagrantly against the evidence. On the other hand, the defendant contends that the view by the jury, coupled with the evidence on the physical conditions, was sufficient to sustain the verdict, notwithstanding the fact that no witness testified that the property had not been injured by the obstruction.

[1] The courts are not in harmony as to the effect of a view by the jury. Some courts adopt the theory that a view is never evi-

dence, but that the purpose thereof is to enable the jury the better to understand, weigh, and apply the evidence, and not to make them silent witnesses in the case, burdened with testimony unknown to both parties, and in respect to which no opportunity for cross-examination or correction of error was afforded. *Close v. Samm*, 27 Iowa, 503; *Wright v. Carpenter*, 49 Cal. 607; *Shular v. State*, 105 Ind. 289, 4 N. E. 870, 55 Am. Rep. 211; *Chute v. State*, 19 Minn. 277 (Gil. 230). Other courts have adopted the rule that a view constitutes mute evidence and may in some instances be taken as determinative of the dispute to the exclusion of parol evidence. *Clarksville & H. Turnpike Co. v. Atkinson*, 1 Sneed (Tenn.) 426; *Smith v. Morse*, 148 Mass. 407, 19 N. E. 393. Still other courts hold that, while the result of the jurors' observations on a view is evidence which in making up their verdict they may consider in connection with the other evidence in the case, they cannot arbitrarily disregard all the other evidence and base their verdict solely on the result of their observations. *Chicago, etc., R. Co. v. Parsons*, 51 Kan. 408, 32 Pac. 1083; *Bigelow v. Draper*, 6 N. D. 152, 69 N. W. 570; *Topeka v. Martineau*, 42 Kan. 387, 22 Pac. 419, 5 L. R. A. 775; *Groundwater v. Washington*, 92 Wis. 53, 65 N. W. 871; *Washburn v. Milwaukee, etc., R. Co.*, 59 Wis. 364, 18 N. W. 328. After a careful consideration of the question, we conclude that the last-mentioned rule is the correct one, and should be applied unless the case is one that turns on the absence or presence of a physical fact which the jury may see for themselves, and no amount of oral testimony can affect, or the jury act pursuant to a statute giving them the power to view the premises and reach a conclusion from their own observations.

[2] Here, we have a case where not a single witness who testified on the subject stated that plaintiff's property was not injured by the obstructions. On the contrary, the witnesses gave it as their opinion that it had been injured from 25 per cent. to 50 per cent. of its value. Under these circumstances, it seems to us that the jury could not disregard this evidence and base their conclusion solely on the result of their own observations coupled with testimony as to the physical conditions, which testimony did not in any wise add to the result of the view. If the case were reversed, the effect of a contrary ruling could be more readily appreciated. Suppose that a dozen witnesses had stated that plaintiff's property was worth as much after the streets were obstructed as it was before; would the jury have been authorized, notwithstanding this evidence, to view the premises and conclude that plaintiff's property had been damaged to the extent of \$5,000? We think not, and

for the same reason we hold that the verdict in this case is flagrantly against the evidence.

[3] Plaintiff further contends that the court erred in permitting defendant to show that a new and better street had been constructed by the defendant. In support of this contention, we are cited to the case of *Stein v. C. & O. Ry. Co.*, 182 Ky. 322, 116 S. W. 733. In that case the street obstructed was appurtenant to plaintiff's lot, and her access to the front of the lot was entirely cut off. The court held that evidence to the effect that a street had been constructed which afforded plaintiff access to the rear of her lot instead of the front was not admissible. That principle cannot be applied to the facts of this case. Here, the alleged obstructions are not on the square where plaintiff's property is located, but are on other squares. She has not been deprived of the means of ingress and egress. There has been only an obstruction of her right. Hence evidence that defendant had built a new street which afforded plaintiff a better means of travel than she had prior to the obstruction was admissible on the question of damages.

Judgment reversed, and cause remanded for a new trial consistent with this opinion.

MOSS et al. v. CITY OF MAYFIELD et al.  
(Court of Appeals of Kentucky. Dec. 19, 1919.)

1. SCHOOLS AND SCHOOL DISTRICTS ⇨25—  
SEPARATE SCHOOLS FOR COLORED CHILDREN;  
DISTINCT MUNICIPALITIES.

Where the territory of a city is organized into two separate free graded public school districts, one for white and one for colored children, there are three separate and distinct municipalities, the white graded school district, the colored graded school district, and the city, which includes all people and property within its territory.

2. SCHOOLS AND SCHOOL DISTRICTS ⇨13—  
SEPARATE SCHOOLS IN FOURTH-CLASS CITIES  
FOR WHITES AND NEGROES.

Cities of the fourth class have the option, under Ky. St. § 3588, to maintain separate schools for white and colored children in one district, and under one board of education, instead of organizing two districts, one white and one colored, pursuant to section 3588A, or a graded school system may be maintained without co-operation of the city as provided for by sections 4464-4500b.

3. SCHOOLS AND SCHOOL DISTRICTS ⇨103(2)—  
ELECTION TO AUTHORIZE INDEBTEDNESS FOR  
BUILDINGS FOR COLORED SCHOOLS.

In view of Const. § 187, requiring separate schools for white and colored children, where the territory of a city was organized into two

separate free graded public school districts, one for white and one for colored children, and the proposition to incur indebtedness for school buildings for the colored school district, to be paid by taxation on the property of the colored people only, was submitted to the colored voters and adopted, there was no violation of section 157 on any ground that two-thirds of the voters of the municipality had not authorized the indebtedness, in that the whites had not voted.

4. SCHOOLS AND SCHOOL DISTRICTS ⇨90—  
LIMITATION ON INDEBTEDNESS OF COLORED  
DISTRICT.

Where the territory of a city was organized into two school districts, one white and one colored, the colored district, under Const. § 158, could incur an indebtedness for schools on vote of two-thirds of the colored voters not exceeding 2 per cent. of the value of the taxable property of colored citizens of the city and the proportion of corporate property that the number of colored children bore to the whole number of children of school age.

Appeal from Circuit Court, Graves County.

Suit by Frank Moss and others against the City of Mayfield and others. From judgment dismissing the petition, plaintiffs appeal. Reversed, with directions to enter judgment in conformity with the opinion.

Aubrey Hester, of Mayfield, for appellants.  
R. O. Hester, of Mayfield, for appellees.

CLARKE, J. Under ordinances passed by the board of council pursuant to section 3588a, there exists in the city of Mayfield two separate free graded public schools—one for the white children under the control of a board of education, and another for the colored children under the control of another board of education. Each school received from the state its pro rata of the school fund as provided by the Constitution and Statutes.

On September 10, 1908, the board of education for the white graded school represented to the board of council that it was necessary to raise \$75,000 to be used in the purchase and erection of school buildings in the city. The council, pursuant to the request of the board of education, enacted an ordinance submitting to the white voters of the city the question whether they would authorize an indebtedness of \$75,000 to be used in the purchase and erection of school buildings in the city to be paid by taxation upon the property of the white people subject to taxation.

The election was duly held, and more than two-thirds of the votes cast in the election, which was open only to white voters, were in favor of the proposition. The validity of this election as authority to issue bonds was contested in a suit by taxpayers upon the ground that two-thirds of the voters of the municipality had not authorized the proposed indebtedness, because the proposition was only

submitted to white voters, and not to all the voters of the municipality.

In that case—*Crosby et al. v. Mayfield*, 133 Ky. 215, 117 S. W. 316—this court held the election valid and not in contravention of section 157 of the Constitution, giving its reasons therefor as follows:

"The proposition is to incur an indebtedness to furnish the white school with proper school buildings. The question was submitted to all the white voters or to all the persons who have any interest in the question, or who will be liable in any manner for the tax. The meaning of the Constitution is that no liability shall be imposed without the assent of the voters; but it was not intended by the Constitution that the question should be submitted to persons who had no interest in it. The boundary of the city constitutes the white school district. This white school district is a municipality within the meaning of the section. The tax is levied upon the property of the white persons in this district, and these white persons are the voters in this municipality. In like manner a similar tax might be submitted to the colored voters for an improvement of the buildings of the colored school. Section 187 of the Constitution provides that separate schools for white and colored children shall be maintained. This provision of the Constitution requires the General Assembly to maintain separate schools for the white and colored children; and, if questions of taxation could not be submitted to the white people when they concern the white schools or to the colored people when they concern the colored schools, the growth of the school system in the state would seriously suffer, for each race is more directly interested in its own school than in the school of the other. Section 157 must be read in connection with section 187; and, when so read, it in no manner interferes with the power of the General Assembly to submit to either race questions of taxation affecting only its own school."

[1] The effect and meaning of the court's conclusion, while not stated in so many words, is necessarily that the white school district and colored school district, though covering the same territory, are separate and distinct taxing districts. The white graded school district includes only the property of white persons living within the district, and only white people are citizens thereof; and likewise the colored graded school district includes only colored citizens and their property located therein. In addition to these two separate graded school districts and covering exactly the same territory, is the city another separate and distinct municipality which includes all property and people therein.

There are thus three separate and distinct taxing districts covering exactly the same territory, but performing different governmental functions and entirely independent of each other, except that an indebtedness cannot be incurred or a tax levied by the board of education of either of the school districts

without the concurrence and assistance of the board of council of the city, which in calling elections and issuing bonds for the school districts acts for them, and not itself. The bonds it issues for the school district for either race are, by express provision of section 3588a, payable out of funds derived from taxes levied on the property and polls of the race whose school issues the bonds, and it is further provided that taxes derived from property or polls of the other race cannot be used for the purpose. It is only because of this provision which clearly makes the indebtedness of either school district its own, and not the city's indebtedness that saves an election participated in only by voters of one race from violating section 157 of the Constitution, because it is apparent two-thirds of a part only of the voters in a city could not vote an indebtedness upon the city.

[2] This peculiar situation seems to be fully authorized under the peculiar provisions of the charter of cities of the fourth class, and to have been regularly adopted by the city of Mayfield. Cities of this class have the option, however, under section 3588, to maintain separate schools for white and colored children in one district and under one board of education, or a graded school system may be maintained without co-operation of the city, as provided for under sections 4464 to 4500b of the General Statutes. *Thornton v. White*, 162 Ky. 796, 178 S. W. 167; *Miller v. Feather*, 176 Ky. 268, 195 S. W. 449; *Well-Roth & Co. v. City of Paris*, 176 Ky. 841, 197 S. W. 461; *Trustees of Graded Free Colored Common Schools of Mayfield v. Trustees of Graded Free White Common Schools of Mayfield*, 180 Ky. 574, 208 S. W. 520; same case on petition for rehearing, 181 Ky. 304, 204 S. W. 86; and *Id.*, 181 Ky. 810, 205 S. W. 904.

[3] Under authority of and following the course pursued in *Crosby v. City of Mayfield*, *supra*, the board of education of the free colored graded schools of Mayfield in April, 1919, represented to the board of council of the city that it was necessary to raise \$10,000 to be used in the purchase and erection of school buildings for the colored schools in the city. Council, pursuant to the request of the board of education, enacted an ordinance submitting to the colored voters of the city the question whether they would authorize an indebtedness of \$10,000 to be used in the purchase and erection of school buildings in the city and to be paid by taxation upon the property of the colored people subject to taxation. The election was duly held, and 308 votes were cast in favor of the bond issue, and only 12 against it. The result was certified to the council, and it was proceeding to issue the bonds when this suit was brought by one white man and one colored man to enjoin the bonds being issued. The circuit court dismissed the petition, and the plaintiffs have prosecuted this appeal, contending,

as was done in the case of Crosby v. Mayfield, supra, that the proceeding is in violation of section 157 of the Constitution, because the proposition was only submitted to the voters of one race, and not to all the voters of the municipality. The opinion of this court in Crosby v. Mayfield, supra, is conclusive upon the question, as we have already pointed out, because the question was submitted to all of the voters of the taxing district proposing to incur the indebtedness, viz. the colored school district, and assented to by more than two-thirds of the voters therein.

[4] 2. It is also contended that the issuance of \$10,000 worth of bonds to be paid by taxation upon the property of the colored people subject to taxation is in excess of the indebtedness which the free graded colored school district may incur under section 158 of the Constitution. That the indebtedness attempted is the indebtedness only of this school district, and not of the city or of the free graded white school district, is clear from what we have already said in this opinion in explanation of the opinion in Crosby v. Mayfield. The indebtedness that such a taxing district may incur, even when authorized by a two-thirds vote of the citizens thereof under section 158 of the Constitution, is 2 per cent. of the value of the taxable property therein, to be estimated by the assessment next before the last assessment previous to the incurring of the indebtedness. The taxable property in the free graded colored school district of Mayfield is, as we have seen, the property owned by colored citizens, and, in addition, as was determined in the case of Trustees of Graded Free Colored Common Schools of the City of Mayfield v. Trustees of Graded Free White Common Schools of the City of Mayfield, 180 Ky. 574, 203 S. W. 520, the proportion of corporate property in the city that the number of colored children bears to the whole number of children of school age in the city.

As shown by the pleadings, which by agreement are to be considered as an agreed statement of facts, the assessed taxable value at the assessment next before the last of property owned by the colored persons in the city was \$50,000, and of corporations \$1,000,000. There are 334 colored children and 1,244 white children of school age in the city, and the colored school district is therefore entitled to 334/1578 of the \$1,000,000 assessed by corporations, or about \$211,660. Adding this latter sum to the \$50,000 assessed by colored individuals makes the total taxable value of property in the colored school district approximately \$261,660.

As the proposed bond issue of \$10,000 is largely in excess of 2 per cent. of the taxable value of the property in the district, the chancellor erred in not enjoining so much thereof as exceeded the constitutional limit.

Wherefore the judgment is reversed, with directions to enter a judgment in conformity herewith.

### KNOX v. KNOX et al.

(Court of Appeals of Kentucky. Dec. 19, 1919.)

#### 1. WILLS $\Leftrightarrow$ 440—INTENT OF TESTATOR.

It is the duty of the courts to arrive at the intention of the testator, if possible, from the language employed.

#### 2. WILLS $\Leftrightarrow$ 629—VESTING OF ESTATE FAVORED.

When there are two or more periods fixed in the instrument for the happening of a contingency upon which an unlimited estate in land will devolve, that one will be selected which will vest the fee-simple title and give the devisee an absolute estate.

#### 3. WILLS $\Leftrightarrow$ 634(8)—CHILDREN TAKING VESTED INTERESTS ON DEATH OF MOTHER.

Where testator, who had devised his property to his wife for life, with remainder to his children, added a codicil directing that, in event of her remarriage, she should have a child's part, that the lands should be divided by commissioners, and that portions of any child not then 21 years of age should not be sold until that child became of age, "each child's part to come back to the other children if they should die without bodily heirs," held that, on the death of the widow, who did not remarry, those children who had reached their majority took their shares of the estate in fee, not subject to being divested by their death without bodily heirs.

Appeal from Circuit Court, Boyle County.

Action by Fannie Knox and others against J. R. Knox. From a judgment for plaintiffs, defendant appeals. Affirmed.

Chas. H. Rodes, of Danville, for appellant.  
Nelson D. Rodes, of Danville, and C. E. Rankin, of Harrodsburg, for appellees.

SAMPSON, J. In 1883 T. D. Knox died testate, the owner of two farms and some personal property situated in Boyle county. He left surviving him a widow and six children. By his will, made in 1867 he gave his property to his wife for life, with remainder to his children. In October, 1883, he made a codicil, among other things, saying:

"My property both real and personal be equally divided between my children and my wife to have a child's part in case she should marry, the lands to be divided by commissioners and the portions of any of the children, that one not twenty years old, not to be sold until they are of age, each child's part to come back to the other children if they should die without bodily heirs. This codicil to have no force nor effect during the life of my wife or while she remains my widow, but at her death or marriage to become of full force."



The widow died in 1918, never having remarried. The six children surviving are parties to this action, which was instituted by Fannie Knox, Emma D. Knox, and Virginia K. Kimble against James R. Knox, Mary K. Stephens, Wallace S. Knox, and Bettie D. Knox, to have a construction of the will of their father, T. D. Knox, and to compel James R. Knox to accept a deed of conveyance, and to pay the purchase price named therein, made by Fannie Knox, Emma D. Knox, and Virginia K. Kimble; the lands conveyed being the undivided interests of the three daughters named as plaintiffs in certain of the lands of T. D. Knox, which passed under the will. On May 24, 1918, only a few days after the death of their mother, the life tenant, the three daughters named entered into a written contract with their brother, James R. Knox, to convey to him all their interests in a 248-acre tract of land left by their father. A short time thereafter these plaintiffs prepared and tendered a proper deed to the defendant James R. Knox, conveying to him three-sixths undivided interest in fee simple in and to the 248-acre tract of land mentioned, but he declined to accept the deed for the reason that a brother Wallace S. Knox was claiming a contingent interest in the property on the ground that each child, including Wallace S. Knox, under the will took only a fee in an undivided interest in and to all the lands of their father, defeasible upon the death of such child at any time in the future without leaving a surviving child or heir of his body. This contention is based upon the language of the will, which reads, "Each child's part to come back to the other children if they should die without bodily heirs," but it does not take into consideration the balance of the codicil, which we quoted above.

[1-3] It is the duty of courts, in construing wills, to arrive at the intention of the testator, if possible, from the language employed, and this we think is easily done in the instant case. At the time the codicil was made the testator was a man only about 41 years of age, the father of six children, all of whom were less than 21 years of age. He had made a will in 1867, when he was only 27 years of age. At that time he had only two small children. He desired to make a suitable provision for his widow and also for his infant children. In case his wife remarried, she was to have a child's part, or one-seventh part, in the lands. With all the facts before him, and with this purpose in his mind, Knox in writing his codicil said, "my property both real and personal be equally divided between my children," and then, the contingency of his wife remarrying occurring to him, he added, "and my wife to have a child's part in case she should marry." Then he continued:

"The lands to be divided by commissioners and the portions of any of the children \* \* \* not to be sold until they [the children] are of age, each child's part to come back to the other children if they should die without bodily heirs."

We omitted one explanatory phrase, "that one not twenty years old," which was thrown in by the testator for the purpose of designating which child or children should not sell or have its or their share of the lands sold. Reading this part of the codicil in connection with the will, as Knox read and intended it to be read, he devised all his property, both real and personal, to his wife for life, with remainder to his six children in equal portions, the lands to be divided by commissioners after the death of his wife, if she did not remarry; but no child's part was to be sold until he became of age, and if he died during minority leaving no children his part should "come back to the other children."

It is a well-recognized rule that, when there are two or more periods fixed in an instrument for the happening of a contingency upon which an unlimited estate in land will devolve, that one will be selected which will first vest the fee-simple title and give the devisee or grantee an absolute estate. *Harvey v. Bell*, 118 Ky. 522, 81 S. W. 671; *Qrem v. Campbell*, 175 Ky. 210, 194 S. W. 118. Applying this rule to the language of the codicil, we must hold that the testator intended, and his language plainly means, that at the death of one of his children childless his part to "come back to the other children" if the death happened during the minority of the child dying, and not at any future time after he attained his majority, as contended by Wallace S. Knox. He insists that the children who are now much above the age of 21 years, cannot sell or convey their interests in the landed estate of their father, except subject to the contingent interest of the other children to take effect on the death of the child conveying without bodily heirs, because of the alleged limitation contained in the codicil, although there is no residuary estate. This contention is against the settled policy of law, which seeks to fix an absolute estate in land in the devisee or grantee at the earliest possible moment, rather than to defer it and continue the uncertainty for an indefinite time, as contended by Wallace S. Knox.

The provision in the testamentary paper that the portions of land allotted to the children in case of the death or remarriage of the widow "not to be sold until they [the children] are of age," only related to the minority of the children, and did not and was not intended to prevent the children from selling their lands after they or either of them arrived at the age of 21 years. The

rule is that, where a thing is granted or forbidden before or after a given time, the presumption is that the thing granted or forbidden may be done or performed at any time not within the prohibition; and, applying this rule, the children were empowered to sell and transfer their several interests at any time after they became of age, always subject to the right of the life tenant, up to the time of her death.

The testator gave his lands absolutely to his six children after the death of their mother, the life tenant. Before the bringing of this action she passed away. The plaintiffs, three of the devisees, were the absolute owners of the three-sixths undivided interests in the lands which they attempted to convey to James R. Knox at the time they contracted to convey the same, and had full power and authority to make such conveyance of their entire interest, subject to no defeasance whatever. The deed which they tendered was sufficient, as appears from the record, to have conveyed to James R. Knox the interest in the land which he contracted to take, and it was his duty to accept the deed and to pay the purchase money. This being true the trial court did not err in so adjudging.

The judgment is therefore affirmed.

#### VIRGINIA IRON, COAL & COKE CO. v. COMBS.

(Court of Appeals of Kentucky. Dec. 12, 1919.)

##### 1. ACKNOWLEDGMENT ¶5—DEEDS ¶82—VALIDITY OF SIGNED AND DELIVERED BUT UNACKNOWLEDGED DEED.

A deed, duly signed and delivered by the grantors, even though not acknowledged or properly recordable, is valid, not only as between the parties, but as to all those having notice of it.

##### 2. ESTOPPEL ¶30—VENDEE BOUND BY CONTENTS OF PRIOR DEEDS REFERRED TO IN OWN DEED.

A vendee is not only bound by the recitals of his own deed, but must take notice of the contents of prior deeds therein referred to, a vendee being in such privity with his vendor that recitals in a deed of record, constituting a link in a chain of title that will amount to an estoppel against his vendor, will be available as an estoppel against vendee.

##### 3. ESTOPPEL ¶30—RECITALS IN DEED REFERRING TO FORMER DEED.

Where deed by three grantors recited that it was "executed in lieu of a deed made to F. (one of the grantors) on August 16, 1885, and which deed was not properly certified and recorded," and where there was an improperly certified and recorded deed to F. by other two grantors upon the records, dated August 16, 1885, with almost identically the same descrip-

tion, grantee in first-mentioned deed was estopped from denying previous conveyance to F. and was chargeable with notice of F.'s subsequent mineral deed of record to third party.

##### 4. DEEDS ¶38(1)—SUFFICIENCY OF DESCRIPTION.

The test as to sufficiency of description in deed is whether the land can be located therefrom.

##### 5. MINES AND MINERALS ¶55(1)—SUFFICIENCY OF DESCRIPTION IN MINERAL DEED.

Mineral deed, describing land as grantor's land in specified county, on the waters of specified creek and fork, adjoining lands of named persons, and as being the 300 acres bought from named person, held to contain sufficient description; it being sufficient for identification of land.

##### 6. CHAMPERTY AND MAINTENANCE ¶7(2)—DEED NOT CHAMPERTOUS WHERE LAND NOT ADVERSELY HELD.

Father's mineral deed was not champertous as to son, to whom father and his grantors, who had conveyed land to father by improperly certified and recorded deed, subsequently jointly executed deed, where son lived on land with father, and there was nothing to justify conclusion that his possession was hostile to father.

##### 7. TRIAL ¶75—WAIVER OF OBJECTION TO SECONDARY EVIDENCE OF DEED.

Where there was no specific objection to testimony that a certain deed had been made, and where no request or demand was made for a certified copy of the deed, though witness offered to introduce certified copy, right to object to the evidence on the ground that the record was the best evidence was waived.

#### Appeal from Circuit Court, Perry County.

Suit by Jackson Combs against the Virginia Iron, Coal & Coke Company. Judgment for plaintiff, and defendant appeals. Reversed and remanded, with directions.

Wootton & Morgan, of Hazard, and D. D. Hull, Jr., and L. A. Nuckols, both of Roanoke, Va., for appellant.

Eversole & Turner and C. W. Napier, all of Hazard, for appellee.

CLAY, C. Jackson Combs brought this suit against the Virginia Iron, Coal & Coke Company to quiet his title to the minerals underlying a tract of land in Perry county. Defendant denied plaintiff's and pleaded title in itself. On final hearing plaintiff was granted the relief prayed for, and defendant appeals.

Prior to the year 1885, A. C. Combs, who was known as Austin Combs, owned a tract of land on Darb's fork of Lot's creek in Perry county, containing about 300 acres. On page 36, Deed Book F, in the Perry county clerk's office, appears a deed dated August 16th, purporting to have been executed by Austin Combs and Belle Combs, his wife, to Fielden Combs, the father of Jackson Combs. The consideration was \$200, \$115 of which

was in hand paid, and the remainder secured by note of even date. The deed appears between two deeds, which were recorded in the year 1885. On July 19, 1887, Fielden Combs and his wife, Arminta Combs, conveyed to T. P. Trigg, trustee, all of the coal, oils and gas, and other minerals underlying the land bought by Fielden from Austin Combs. Afterwards the Virginia Iron, Coal & Coke Company acquired the title of Trigg, trustee.

On August 12, 1901, Austin Combs and wife, Belle Combs, and Fielden Combs, "for a consideration of the sum of \$200 paid to first party by Fielden Combs on the 16th day of August, 1885, and shortly thereafter," executed a deed to Jackson Combs and Alonzo Combs, conveying the same tract of land which was conveyed to Fielden Combs by Austin Combs and wife. In the habendum clause is the following:

"This deed is executed in lieu of a deed made to Fielden Combs on August 16, 1885, and which deed was not properly certified and recorded."

[1] It is well settled that a deed duly signed and delivered by the grantors, even though not acknowledged or properly recordable, is valid, not only as between the parties, but as to all those having notice of it. *Ferrell v. Childress*, 172 Ky. 760, 189 S. W. 1149; *Bowling v. Bowling*, 172 Ky. 32, 188 S. W. 1070.

[2] It is likewise the law that a vendee is not only bound by the recitals of his own deed, but must take notice of the contents of prior deeds therein referred to, and that a vendee is in such privity with his vendor that recitals in a deed of record, constituting a link in a chain of title that will amount to an estoppel against his vendor, will be available as an estoppel against the vendee. *Mueller v. Eugeln*, 12 Bush, 441; *Krauth v. Hahn*, 139 Ky. 607, 65 S. W. 18, 23 Ky. Law Rep. 1261; *Devlin on Deeds*, vol. 2, § 718.

[3] Here, the deed under which Jackson Combs acquired title recited that it was executed in lieu of a deed made to Fielden Combs on August 16, 1885, which was not properly certified and recorded. There can be no doubt that the deed therein referred to is the deed of August 16th, which appears upon records of Perry county. The latter deed was made to Fielden Combs. It was made by the grantors, Austin Combs and wife. The same consideration is recited in each conveyance. The descriptions of the land conveyed are almost identical. Moreover, the deed of August 16, 1885, to Fielden Combs was not properly certified and recorded. Furthermore, the foregoing recital in the deed to Jackson Combs contains an express admission that the deed of August 16, 1885, had been made to Fielden Combs, and is sufficient, not only to estop the grantors, but grantees, from asserting the contrary. Un-

der these circumstances, Jackson Combs was charged with notice that Austin Combs and wife had made a prior deed conveying the land to Fielden Combs. Not only so, but the deed to Trigg, trustee, being of record, he was charged with notice of the fact that Fielden Combs his own grantor, had conveyed the minerals to Trigg, trustee, provided the description in the deed was sufficiently definite to pass title and the deed was not champertous.

[4 5] The authorities agree that great liberality is allowed in the matter of description, and that terms and phraseology of the description will be interpreted with the view of upholding the deed if this can reasonably be done. 8 R. C. L. § 126, p. 1071. In such cases, we apply the maxim, "Id certum est, quod reddi certum potest." The test in every case is whether the land can be located from the description. Bearing this rule in mind, let us examine the description, which is as follows:

"All the coals, metals, oils, gases, and mineral products lying, being upon and under out lands in the county of Perry, state of Kentucky, and described as follows, viz.: On the waters of Lot's creek and Carr's fork, adjoining the lands of Sam Napier and Clinton Combs, 212 acres being patented in my own name, etc., 300 bought from A. C. Combs, being 512 acres."

The tract in controversy is the 300 acres bought of A. C. Combs. The distinguishing features of the description are as follows: (1) "Our lands in Perry county"; (2) "on the waters of Lot's creek and Carr's fork"; (3) "adjoining the lands of Sam Napier and Clinton Combs"; (4) 300 bought from A. C. Combs. We find from the evidence that the land in controversy is in Perry county. It is located on Darb's fork, a tributary of Lot's creek. It adjoins the lands of Sam Napier. It was bought of A. C. Combs, and contains by actual survey 283.81 acres. It is therefore clear that the description contains all the elements necessary to identify the land, and is therefore sufficient.

[6] The claim that the deed from Fielden Combs to Trigg, trustee, conveying the minerals, was champertous cannot be sustained. Jackson Combs lived on the land with his father, who made the deed to Trigg, trustee, and there is nothing in the record to justify the conclusion that Jackson Combs' possession was then hostile to his father.

Since plaintiff purchased the land with notice that the title had theretofore been conveyed to Fielden Combs, and that Fielden Combs had conveyed the minerals to Trigg, trustee, it necessarily follows that plaintiff by virtue of the deed of August 12, 1901, from Austin Combs and wife and Fielden Combs, acquired title to the surface only.

[7] Another contention is that the defendant failed to show by competent evidence

that Trigg, trustee, had ever conveyed the minerals to defendant. While it is true that a certified copy of the deed from Trigg, trustee, to the defendant was not introduced, it appears that Jesse Morgan, a witness for defendant, testified that such a deed had been made. There was no specific objection to this evidence on the ground that the record was the best evidence. On the contrary, the witness offered to introduce a certified copy of the deed, if plaintiff's counsel desired, but no request or demand therefor was made. Under these circumstances, plaintiff waived his right to object to the evidence on the ground indicated, and cannot now insist that defendant did not show title by proper evidence.

It follows that plaintiff's petition should have been dismissed, and that defendant should have been granted the relief asked.

Judgment reversed, and cause remanded, with directions to enter judgment in conformity with this opinion.

#### CONSOLIDATION COAL CO. v. GRAYSON et al.

(Court of Appeals of Kentucky. Dec. 19, 1919.)

##### 1. DOWER ¶56(4) — HOMESTEAD ¶146— LEASE OF ALL OF HUSBAND'S LAND BY WID- OW BEFORE ASSIGNMENT OF DOWER.

Where a widow, in the absence of a previous assignment to her of dower or homestead, executes a lease on an entire tract and all of the land of which her husband was owner at the time of his death, such lease embraces no more than her dower interest.

##### 2. DOWER ¶57(4)—TO WHOM CONVEYANCE OR RELEASE CAN BE MADE.

A widow's dower before assignment can only be assigned, conveyed, or released by way of extinguishment to the owner of the fee or to a party in possession or in privity of the estate from which it accrues.

##### 3. DOWER ¶55—HOMESTEAD ¶143—WID- OW AS TENANT AT WILL OF HEIRS PRIOR TO ASSIGNMENT OF DOWER OR HOMESTEAD.

The only right of possession given the widow prior to the assignment of homestead or dower is that conferred by Ky. St. § 2138, declaring that she shall hold the mansion house, etc., until dower is assigned, and her possession is that of a tenant at will of the heirs.

Appeal from Circuit Court, Johnson County.

Action by the Consolidation Coal Company against Maggie Grayson and others. Judgment for defendants, and plaintiff appeals. Reversed and remanded.

E. C. O'Rear and J. B. Adamson, both of Frankfort, A. W. Young, of Morehead, and M. C. Kirk, of Paintsville, for appellant.

Wheeler & Wheeler and D. J. Wheeler, all of Paintsville, for appellees.

SETTLE, J. It appears from the record before us on this appeal that one John W. Grayson died in 1909, intestate, the owner and in possession of a 50-acre tract of land lying in Johnson county just without the corporate limits of Van Lear, a mining town owned by the appellant, Consolidation Coal Company, a corporation engaged in the mining and marketing of coal and other minerals. John W. Grayson was survived by his wife, Maggie Grayson, and three children, Kenton Grayson, Emma Phelps, wife of Ben Phelps, and Cora Sester, wife of Thomas Sester. At the death of the decedent the land in question was inherited by the three children named as his heirs at law, subject to the widow's right of dower or homestead therein. Prior to the death of John W. Grayson he sold, and by proper deed, in which his wife, Maggie, united, conveyed the coal and other minerals in and under the land mentioned to John C. Mayo, who thereafter by like deed, in which his wife united, conveyed the same coal and minerals to the appellant. Following its acquisition of the coal and mineral rights in the land appellant, by purchase and a joint deed from Emma Phelps, Cora Sester, and their husbands, acquired the respective undivided interests of the former of one-third each in the surface of the land as heirs at law of John W. Grayson, deceased, subject to the widows' right of dower therein. The deeds referred to were duly acknowledged and recorded.

After procuring these deeds the appellant brought this action in the court below to obtain of it a decree for the sale of the surface of the land; the petition describing the land, alleging its undivided joint ownership by appellant and Kenton Grayson, two-thirds by the former and one-third by the latter, subject to the right of dower or homestead of Maggie Grayson, widow of John W. Grayson, in the whole, neither of which had been assigned her. The petition contained the usual allegations respecting the necessity for sale of the land and as to its indivisibility, and asked that it be sold, and, after applying a sufficiency of the proceeds to pay the widow in money the ascertained value of her dower, that the remainder be divided between appellant and Kenton Grayson in the ratio of their respective interests. Kenton Grayson and Maggie Grayson were made defendants to the action, as were also the appellees, J. H. Matney and W. S. Boyd, regarding the latter of whom it was alleged that they were claiming to own some sort of interest in the land obtained by virtue of a lease attempted to be given them thereon by Maggie Grayson, the widow of John W. Grayson, which interest they were called on to disclose.

The answer of Matney and Boyd to the petition without controverting appellant's title to an undivided two-thirds interest in the land, denied its indivisibility and also the

right of appellant to obtain its sale or a division of the proceeds, and alleged that on November 7, 1910, Maggie Grayson, widow of John W. Grayson, executed and delivered to them (Matney and Boyd) a writing, whereby, for a consideration therein named, she leased to them for a term of 5 years from that date with the privilege to the lessees at the end of the 5 years of extending the lease 20 years longer, the entire 50-acre tract of land and put them in possession thereof, which possession they have since continuously held. This lease, it was further alleged, entitles appellees, to retain possession of the land as against appellant's deeds and claim of title for the full term to which its provisions extend it, although it is admitted by the answer that when the lease was made the lessor had not been assigned dower in the land, and has not since had it assigned her. All affirmative matter of the answer, except its averments regarding the execution and contents of the lease from Maggie Grayson to appellees, was controverted by appellant's reply; and all allegations of the answer setting forth the legal effect claimed for the lease were also controverted and the validity of the lease itself attacked by the reply.

It appears from a second amended petition and certain attached exhibits in the form of deeds found in the record that appellant after the filing of the answer of the appellees, Motney and Boyd, and the reply thereto, became the purchaser of, and was by deed conveyed, the undivided one-third interest of Kenton Grayson in the land in controversy, and also the dower interest of the widow, Maggie Grayson, therein. Consequently these conveyances, together with the previous one jointly made it by the two daughters of John W. Grayson and their husbands, passed to and vested in appellants the fee to the entire tract of 50 acres. The amended petition, disclosing this situation, renewed the attack on the lease given on the land by Maggie Grayson to the appellees, Matney and Boyd, alleged it to be invalid because of the want of power in the lessor to make it in the absence of a previous assignment to her of dower, and asked that it be set aside by the court, and appellees compelled to deliver to appellant the possession of the land.

We do not understand that the averments of the amended petition referred to as to appellant's title and the manner of its derivation are denied by the answer or any other responsive pleading filed by appellees. They rest their defense wholly on the alleged validity of the lease under which they claim the right to retain possession of the land.

On the submission of the case the circuit court upheld the validity of the lease from Maggie Grayson to appellees, and declared them entitled to retain the possession and use of the whole of the land thereunder for the full term thereof or during the lessor's life, if her death should occur before the expira-

tion of the lease. From the judgment entered to conform to this ruling, and awarding appellees their costs against appellant, the latter has appealed.

[1] Quite a lot of proof was taken in the case, but it will require little consideration, as much of it related to irrelevant matters or issues between appellant and one Spears, another lessee of the land, and between the latter and his lessors, all of which have been settled and Spears dismissed from the action.

The real question to be determined on the record as here presented is one of law, viz. whether a widow can convey or lease her unassigned dower to a stranger to the title. But before taking up the discussion of this question we will say that, where the widow, in the absence of a previous assignment to her of dower or homestead, executes a lease on an entire tract and all of the land of which her husband was owner at the time of his death, such lease, in any event, embraces no more than her dower interest; and a judgment awarding, as in this case, her lessees the possession and use of the entire tract of land for the term of the lease is therefore void. So for this reason, if no other were apparent from the record, the judgment of the circuit court would have to be reversed.

But, recurring to the question of primary importance, it should be said that, as the right to have dower assigned is a personal right, no estate can pass under a lease made of the land by the widow before it is assigned. To ascertain the law controlling this question we will first look to the text-books and next to some of the decisions of this and other courts of last resort that may be found in point. In *Scribner on Dower* (2d Ed.) 42, it is said:

"(33) As a right of dower, until it is legally and duly assigned, is a right vesting in action only, the general rule is that at law it cannot be aliened so as to enable the grantee to bring an action therefor in his own name. A widow may release her claim of dower to the tenant so as to bar herself, but she can invest no other person with a legal title thereto until it has been assigned.

"(34) This doctrine applies as well to a mortgage by the widow of her unassigned interest as to an ordinary deed of conveyance. And a lease by her falls within the operation of the same rule. Thus, where the widow of an intestate, before the appointment of an administrator, made a lease of his land, and the produce of the land was afterwards attached by creditors of the lessee, it was held that the attaching officer was liable to the heir in an action of trover for its value. The lease, said the court, was altogether void, and the tenant acquired no rights under it. So a covenant in an instrument purporting to be a lease, to pay the widow a sum of money annually as rent, in consideration of her forbearing to exercise her right of dower, is a mere personal covenant, and does not run with the land so as to bind the assignee of the covenantor. Nor can such a contract have the effect of a release, which must operate presently and ab-

solutely. And if it appear on the face of the instrument that the subject of it is a right only to have dower assigned, neither the lessee nor his assignee is estopped to deny the title of the widow to make a valid demise. \* \* \*

In Warvelle on Vendors (2d Ed.) vol. 1, § 32, it is said:

"Upon the death of the husband the inchoate right of the wife acquired by the marriage becomes absolute, yet she has no estate in the lands of her deceased husband until her dower has been admeasured and assigned; and her rights therein can only be released to the owner of the fee or to some one in privity with the title by his covenants of warranty. After assignment the widow acquires an estate of freehold in the land allotted in severalty, and her life estate therein possesses all the attributes of other estates for life, including the right of alienation."

In 14 Cyc. 960, we find this statement of the law:

"Prior to the assignment of her dower the widow has no vested freehold estate under the common law. She is not seized of any part of her deceased husband's land, but her right is for most purposes nothing more than a mere right of action."

The above statement of the law is supported by a citation of the case of *Shields v. Batts*, 5 J. J. Marsh. 12. In the opinion of which it is in part said:

"Before assignment of dower, the widow had no transferable legal interest. She could not have vested any right in a lessee, by contract of lease. *Tucker and Wife v. Vance*, 2 [A. K.] Marshall, 458. Of course, she could not maintain an action of ejectment for her dower before it had been assigned. It results that the right to dower could not, in this case, be transferred by sale under execution. Nor did the assignment by the county court, after the sale, help the invalidity of the sale. The assignment could not, by retroaction, make the sale valid, which, when made, was invalid. Nor had the county court any right to assign dower on the application of the persons claiming under the sale. Dower can be assigned \* \* \* only on the application of the widow or heirs, or some other person who holds a legal interest in the land."

To the same effect are the following additional authorities: *Blain v. Harrison*, 11 Ill. 384; *Carey v. Buntain*, 4 Bibb, 217; *Munsey v. Hanly*, 102 Me. 423, 67 Atl. 217, 13 L. R. A. (N. S.) 209.

[2] It is patent from the foregoing authorities that the widow's dower before assignment can only be assigned, conveyed, or released by way of extinguishment to the owner of the fee or to a party in possession or in privity of the estate from which it accrues. It follows, therefore, that the appellees took no estate in the land here involved under the lease executed to them by Maggie Grayson. On the other hand, as appellant is now the

owner of the title of the heirs at law of the decedent and remaindermen in the land, and also of the dower interest of the widow which by virtue of his being a privy of the estate he could legally acquire, though the dower had not been assigned, the judgment of the circuit court should therefore have awarded him the land.

We find nothing in our statutes relating to the rights of married women that contravenes the doctrine announced by the foregoing authorities. The only case found in this jurisdiction that seems to hold a contrary view is that of *Phillips v. Williams*, 130 Ky. 773, 113 S. W. 908, in which it was held that the grantee, in a deed from the widow conveying a house and lot owned by her husband at the time of his death, took the dower interest of the widow. It is evident, however, that the court's attention was not called to the question that is here involved. At any rate, the opinion is contrary to the decisions of this court in *Shields v. Batts* and *Carey v. Buntain*, supra, as well as the great weight of authority elsewhere on the subject, for which reason it should be and is overruled.

[3] The only right of possession given the widow in lands of her deceased husband prior to the assignment of homestead or dower is that conferred by section 2188, Ky. Stats., which declares that she "shall hold the mansion house, yard, garden, the stable and lot in which it stands, and an orchard, if there is one adjoining any of the premises aforesaid, without charge therefor, until dower is assigned her; and, as said in *Jordan v. Sheridan*, 149 Ky. 783, 149 S. W. 1028, such possession on her part is as tenant at will of the heirs until dower is assigned her.

For the reasons indicated the judgment is reversed, and cause remanded for the entering of such a judgment as will conform to the opinion.

## BURCHETT v. LESLIE.

(Court of Appeals of Kentucky. Dec. 19, 1919.)

### 1. ESTOPPEL — 63 — OWNER JOINING FENCE TO PARTITION FENCE MAY NOT URGE ILLEGALITY OF PARTITION FENCE.

In action under Ky. St. § 1786, to require adjoining owner who has joined his fence to that of plaintiff to effect an inclosure of his land, to contribute to cost of plaintiff's fence or detach his fence therefrom, adjoining owner is estopped from claiming that plaintiff's fence was not a lawful fence under section 1780, so that he was not liable for portion of cost.

### 2. FENCES — 19 — EVIDENCE OF SUFFICIENCY OF "LAWFUL FENCE."

That during ten-year period, stock succeeded in getting through fence onto premises of adjoining owner on one or two occasions is not indicative of a condition so defective and in-

secure that fence will not turn stock within Ky. St. § 1780, defining a "lawful fence" as one through which cattle cannot creep.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Lawful Fence.]

### 3. APPEAL AND ERROR ⇨524—TRANSFER OF BLUEPRINTS, DIAGRAMS, AND SKETCHES TO APPELLATE COURT.

In suits involving the right, title, and interest in real property, blueprints, diagrams, or sketches used in lower court should be transferred to Court of Appeals under Court of Appeals Rules, rule 22 (191 S. W. vii).

### 4. COSTS ⇨32(1)—PARTITION FENCE CONTROVERSY.

In action under Ky. St. § 1786, to compel adjoining owner who has joined his fence to that of plaintiff to pay his share of the cost of plaintiff's fence or detach his fence from that of plaintiff, plaintiff held entitled to costs under section 889, relating to costs to successful party in equity upon rendition of judgment requiring defendant to detach fence.

Appeal from Circuit Court, Pike County.

Suit by John M. Leslie against Floyd Burchett. From judgment for plaintiff defendant appeals, and from so much of judgment as requires plaintiff to pay costs plaintiff cross-appeals. Affirmed on original appeal and reversed on cross-appeal.

Cline & Steele, of Pikeville, for appellant.

Childers & Childers, of Pikeville, for appellee.

QUIN, J. A partition fence is the cause of this controversy. The parties are the owners of adjoining farms. About 30 years prior to the institution of this suit, appellee's father built a rail fence along the boundary of the two farms, and, while there is some dispute as to the location of this old fence, the decided weight of testimony shows that it was properly located.

About 10 years before the present petition was filed, appellee undertook to rebuild the fence and it was rebuilt along the line of the old fence. The fence is about 1¼ miles in length, about ½ mile of which is directly on the dividing line. It is probable the remaining three-fourths of a mile is slightly on the land of the appellee, though it follows the line of the old fence.

After the new fence had been erected, appellant undertook to inclose his land, and to complete the inclosure he made use of the fence built by appellee, by connecting his fence to the latter. When called upon to contribute one-half the cost of the division fence, appellant declined so to do, claiming that a portion of the fence was on his property. Thereupon appellee filed this suit to compel appellant to pay one-half the cost of the fence built by him, or else to require appel-

lant to detach his fence from that of appellee. Upon final submission the lower court entered a judgment ordering appellant to remove his fence where it joined the fence in question and adjudging each party to pay their own costs. From this judgment appellant has appealed, and appellee has prayed a cross-appeal from so much of the judgment as requires him to pay costs.

Three points are urged by appellant:

First. That the petition does not state a cause of action. With this contention we cannot agree, as we think the petition sufficient and the demurrer was properly overruled.

[1] Second. It is alleged the division fence is not a lawful fence under section 1780 of the Ky. Stats. The fence does not meet the requirements of said section, but appellant is in no position to complain of the character of construction. The fence had been built by appellee, and appellant had not been called upon to contribute any portion of the cost thereof until he sought to make use of it by attaching his fence.

[2] Appellee has raised successive crops of corn and other products on his land next the partition fence, and appellant has used his land as a pasture. That on one or two occasions stock has gotten beyond the fence and on appellee's premises is not indicative of a condition so defective and insecure that the fence will not turn stock. That appellant was able during all these years to show but a few sporadic instances of his stock getting through the fence, coupled with appellee's successful raising of crops year after year on his farm is a strong refutation of appellant's contention as to the faulty condition of the fence. Most of us know from experience that stock can sometimes break through a seemingly very substantial fence.

Appellant was not required to attach his fence to that of appellee, but having undertaken to do so, and thereby make use of it, he is estopped from asserting it does not comply with the statute. This is not a suit under section 1784 of the Ky. Stats., which provides when the parties may be required to build their portion of a partition fence, but comes more properly under section 1786, as to the apportionment of cost, and which provides that no one shall unite his outside boundary fences to the fences of any one else without paying the owner the fair value of one-half of the entire division fence. Appellant having undertaken to join his fence to that of appellee, and thereby use the latter to effect an inclosure of his property, he will not be allowed to so use the fence, and at the same time refuse to pay his portion thereof, simply because it is not a lawful fence. However, the lower court did not require him to pay any portion of the cost of the fence, but

only to detach his fence from it; hence he has not been injured in any wise.

In the third place, it is contended the new fence is not properly located and embraces some of the land of appellant. According to his witnesses, it varies from 4 to 15 feet from the line of the old fence, but on this question the weight of the evidence favors appellee. It seems manifest to us the new fence was built on the line of the older one, and the boundary thus marked by the two fences has been so recognized by the owners for some thirty odd years. Our statutes provide for the construction and maintenance of partition fences, and fix the rights and remedies of adjoining owners therein; but appellant, under the facts of this case, has no ground to complain of the judgment appealed from.

[3] Both in the testimony and appellant's proof reference is made to a map as showing the property in question. This map is not in the record. Unfortunately, this is not an uncommon occurrence. Too often in suits involving the right, title, or interest in and to real property, blueprints, diagrams, or sketches are used in the lower court but not brought here. The presence of such drawings or maps is a material aid to this court. If anything, the need is greater here than in the circuit court, where the judge and juries are usually acquainted with the land. Litigants and their counsel relying upon such exhibits, who suffer them to be omitted from the record, do so at their peril. They should be transmitted to this court; without them we are oftentimes seriously handicapped, as it is frequently impossible to understand the testimony of witnesses where the map to which reference is made is not before us. This is illustrated by the record in this case. For instance, in the deposition of appellant he is asked what the line from A to B in the sketch represents, and how the fence runs from B; whether there is a fence on the line from B to C; and about the fence that runs from E to D, as to the fence from B to E, and from B to the dotted line, all of which is meaningless to us.

It so happens in the present case that the conclusion we have reached renders resort to the map unnecessary, but it can readily be seen from the extract of the evidence above referred to how very unintelligible the testimony of witnesses must be in the absence of a map about which they have been interrogated. We are aware of the fact that in some courts it is the custom to draw a sketch on the floor of the courtroom, in others the use of a blackboard is employed, in which case, it being impossible to transmit the original, a drawing or rough sketch properly authenticated could at least be supplied and incorporated in the record. Many members of the bar have seemingly overlooked rule 22 of this court (191 S. W. vii), which reads:

"Maps or diagrams used at the trial of a case must be made a part of the record and brought to this court with the record. A failure to observe this rule will be visited with such penalty in each case as the court may deem proper."

[4] As to the question of costs: Ky. Stats. § 889, provides, in part, that in actions in equity the party succeeding on the merits, or otherwise, shall recover his costs, except against nominal defendants. The appellee being the successful party was entitled to his costs, and the court erred in not so decreeing.

Wherefore the judgment on the original appeal is affirmed, on the cross-appeal reversed. The costs in both the lower court and this court to be taxed against appellant.

### PINKSTON v. WATKINS.

(Court of Appeals of Kentucky. Dec. 19, 1919.)

#### 1. CONSTITUTIONAL LAW §15—CONSTRUING SECTIONS OF CONSTITUTION TOGETHER.

Different sections of the Constitution relating to the same subject, but making different provisions concerning it, should be read together and construed so as to reconcile the provisions.

#### 2. JUDGES §7—TERM OF POLICE JUDGE.

Under Const. §§ 160, 167, as to length of terms of police judges and when they shall be elected, the term of office is four years.

#### 3. JUDGES §7 — SHORTENING TERM PRESCRIBED BY CONSTITUTIONAL LAW.

The term of office of four years prescribed for police judges by Const. § 160, may not be shortened by the Legislature, as attempted in a particular instance by Ky. St. § 8490b, subsec. 5, part of the 1914 amendment of charters of cities of the third class.

#### 4. OFFICERS §49—SHORTENING TERM OF OFFICE.

Const. § 236, authorizing the Legislature to fix the time when one elected to office shall enter on its duties, where this has not been done by the Constitution, does not authorize the shortening of the term fixed by the Constitution.

#### 5. CONSTITUTIONAL LAW §12 — CONSTRUCTION OF PLAIN PROVISION.

Where a provision of the Constitution is so plainly expressed that all difficulty or ambiguity as to its meaning is removed, there is no occasion for resorting to assisting rules of construction or interpretation.

Original injunction suit by W. V. Pinkston against R. E. Watkins. Injunction granted.

W. P. Sandidge, of Owensboro, for plaintiff.

W. T. Ellis and L. P. Tanner, both of Owensboro, for defendant.



THOMAS, J. The city of Owensboro is one of the third class. By an act of the Legislature passed at its 1914 session charters of cities of that class were amended, which amendment is section 8480b, Carroll's 1915 Edition of the Kentucky Statutes. The purpose of the amendment was to provide a method by which cities of that class were authorized to adopt the commission form of government, and making provisions for the operation of that form of government should it be adopted. Pursuing the course therein pointed out, the city by vote of its citizens adopted the commission form of government provided for in the amendment at the regular election, 1916. At that time the plaintiff, W. V. Pinkston, was the duly elected, qualified, and acting police judge of the city, having been elected to that office in 1913 for a full term of four years. The time for the election of his successor, as well as the time for the election of a mayor of the city, was in 1917, the year following the adoption by the city of the commission form of government. At that election the plaintiff was re-elected to the office, and was in the discharge of the duties thereof at and prior to the general election in 1919. At the latter election the defendant, R. E. Watkins, was a candidate for the office, and, having received the highest number of votes, he was declared elected, and, having received his certificate of election and a commission from the Governor of the state, he was about to be sworn in and to take charge of the office and to undertake the performance of its duties, when plaintiff filed this suit seeking to enjoin defendant from undertaking to discharge the duties of the office and from molesting or disturbing plaintiff in the discharge of them, alleging in his petition that when he was elected in 1917 it was for a full term of four years, and that the election of his successor would not occur until 1921, that there was no vacancy in the office at the time defendant claims to have been elected thereto, and that his pretended election was null and void and conferred upon him no right to the office.

The decision of the question turns upon the constitutionality of a part of subsection 5 of the amendment referred to. That part of the subsection involved says:

"If the year in which such election under this act shall be held in any city be an even year, and the vote shall be in favor of the organization and government of the city under the provisions of this act, then at the regular city election in the next following odd year there shall be elected by the qualified voters of said city two commissioners and a mayor, if the term of the then mayor will expire with such odd year, or two commissioners and a police judge, if the term of the then police judge will expire with such odd year. If the terms of the then mayor and then police judge should both expire with such odd year, there shall be elected by the qualified voters of said city two commissioners and a mayor and a police judge, but the

term of office of such police judge, so elected at the same time as the mayor is elected, shall be for two years only. So that every two years as hereinafter provided there shall be elected two commissioners and a mayor, or two commissioners and a police judge, as the case may be."

The election referred to is the one by which the city adopted the commission form of government as provided for in the act. That election in this case having occurred in an even year (1916), and the term of plaintiff as police judge expiring the succeeding odd year (1917), according to the provisions of the act, he was elected the last time in 1917 for "two years only," and if the act in limiting the term for which plaintiff was last elected to two years is constitutional, his term expired in 1919, and he would no longer be entitled to the office, and, defendant having been elected thereto at the regular election in the latter year, he would have the right to be inducted into the office and perform its duties, in which case the judgment of the learned circuit judge who overruled the motion for the temporary injunction would have to be sustained, and this motion made before me to grant the injunction would have to be overruled.

Plaintiff bottoms his right to the injunctive relief which he seeks upon the provisions of sections 160 and 167 of the Constitution. Section 160, in so far as it relates to the question involved, is:

"The mayor or chief executive, police judges, members of legislative boards or councils of towns and cities shall be elected by the qualified voters thereof: Provided, the mayor or chief executive and police judges of the towns of the fourth, fifth and sixth classes may be appointed or elected as provided by law. The terms of office of mayors or chief executives and police judges shall be four years, and until their successors shall be qualified."

Section 167 is in this language:

"All city and town officers in this state shall be elected or appointed as provided in the charter of each respective town and city, until the general election in November, eighteen hundred and ninety-three, and until their successors shall be elected and qualified, at which time the terms of all such officers shall expire; and at that election, and thereafter as their terms of office may expire, all officers required to be elected in cities and towns by this Constitution, or by general laws enacted in conformity to its provision, shall be elected at the general elections in November, but only in the odd years, except members of municipal legislative boards, who may be elected either in the even or odd years, or part in the even and part in the odd years: Provided, that the terms of office of police judges, who were elected for four years at the August election, eighteen hundred and ninety, shall expire August thirty-first, eighteen hundred and ninety-four, and the terms of police judges elected in November, eighteen hundred and ninety-three, shall begin September first, eighteen hundred and ninety-four, and continue until the

November election, eighteen hundred and ninety-seven, and until their successors are elected and qualified."

It will be observed that section 160 prescribed that the terms of office of police judges of municipalities in this commonwealth "shall be four years, and until their successors shall be qualified," while section 167 prescribes that the first election for police judges under the new Constitution shall be held at the regular November election, 1893, at which time the terms of those elected prior thereto shall expire, except that police judges elected for four years in 1890 should hold their offices until August 31, 1894, when the one elected in November, 1893, should succeed to the office and hold it until the next regular election in 1897.

[1, 2] It has frequently been held by this court that in construing constitutional provisions different sections relating to same subjects, but making different provisions concerning them, should be read together and construed so as to reconcile the provisions found in all the sections relating to the same common subject or subjects. Applying this principle to the two sections under consideration, there is no difficulty in determining what was meant by their adoption. Section 160 prescribes only what shall be the length of the term of the office of police judges in this commonwealth, which is four years. Section 167 deals with the time when police judges shall be elected, and there is nothing found in it curtailing the length of term prescribed by section 160. After providing for the first election in November, 1893, that section provides for the election of police judges "thereafter as their terms of office may expire." When read together, the two sections mean that the terms of office of police judges will expire every four years after the first election provided for in section 167 in November, 1893. Following this construction of the two sections, there have been held regular elections for the office of police judge of the city of Owensboro in the years 1893, 1897, 1901, 1905, 1909, 1913, and 1917, and had the city not adopted the commission form of government provided for in the amendment *supra*, the next regular election of a police judge for the city would be in 1921, as is contended by plaintiff.

[3] So the question is: May the Legislature disregard the express directions found in the two sections of the Constitution referred to and create and an intervening term of the office of police judge for a shorter period than that expressly provided by the Constitution? There can be but one answer to the question, and it is in negative. Plaintiff was elected to his present office long after the enactment of charters for the cities of the third class following the adoption of our present Constitution, and is therefore filling the

office of police judge, which is referred to in section 160 of that instrument.

In the case of *City of Lexington v. Wilson*, 97 Ky. 707, 81 S. W. 471, 17 Ky. Law Rep. 435, this court held that those so elected to the municipal offices mentioned in that section were entitled to a full term of four years. Since there is nothing in section 167 of the Constitution in conflict with the provisions of section 160, the Legislature was without authority to limit the term to two years, as it attempted to do in subsection of the amendment quoted above. There is a wide difference between prescribing the time when one who is elected to office shall enter upon the discharge of its duties, and prescribing the time when an election may be held to fill the office and fixing the term of the incumbent.

[4] Section 236 of the Constitution, largely relied on by the learned circuit judge in denying the motion for the injunction, attempts only to confer authority upon the Legislature to fix the time when one elected to office shall enter upon the duties thereof, in the absence of any time fixed by the Constitution. The section does not refer to or in any manner purport to deal with the terms of any office, and under no rule of construction known to the law can it be construed to confer authority upon the Legislature to prescribe a shorter term for a particular office than the one prescribed for the same office by the Constitution. If that instrument had failed to provide the time when an elected officer should assume the duties of the office to which he was elected, then the Legislature, under the authority conferred by section 236, might fix that time, but it could not do that so as to affect in any manner the length of the term for which the officer was elected, as fixed in the Constitution.

[5] The question for solution on this hearing is equally as clear and free from difficulty as was the one construing the proviso to section 167 before this court in the case of *Tevis v. Rice*, 97 Ky. 528, 30 S. W. 1021, 17 Ky. Law Rep. 350, and we think the statement made by the court in the opinion there delivered that, "being so free from doubt as to its meaning, it is unnecessary to invoke the aid of any rules for the interpretation of the constitutional provisions and statutes," is strictly applicable here. Indeed, the terms "construction" and "interpretation" presuppose some obscurity or ambiguity in the instrument to be construed or interpreted. Where the instrument, be it a Constitution, a statute, or private writing, is so plainly expressed that all difficulty or ambiguity as to its meaning is removed, there is no occasion for the requisition of assisting rules of construction or interpretation.

We do not regard the cases relied on by

defendant as applying to the question involved. The principal one is Commonwealth ex rel. Elkin v. Moir, 199 Pa. 534, 49 Atl. 351, 53 L. R. A. 837, 85 Am. St. Rep. 801. In that case the legality of an act of the Legislature of Pennsylvania applying to cities of the second class in that state was involved. It was insisted that the act was void because it was impossible of execution; because it was discriminatory in the method it provided for filling certain municipal offices; because it provided that the Governor should in an interim appoint the chief executive of the city designated in the act as recorder; and because it vested in the Governor of the state the discretion of determining when it should become operative, and perhaps others. The alleged facts upon which the objections were founded were determined against the litigant who urged them. No question involving the interpretation of a constitutional provision was invol-

ed. On the contrary, the opinion expressly held that the Legislature had authority to enact the statute, since it did not conflict with any constitutional provision, although it might result in some injustice and be exceedingly difficult of execution. But throughout the opinion it is plainly manifest that, if the statute had been contrary to some provision of the Constitution, it would have been declared void.

Being thoroughly confident that so much of subsection 5 of section 3480b, above referred to, as attempts to limit plaintiff's term of office to which he was elected in 1917 to two years, is unconstitutional, it results that the motion for the injunction should be sustained, and the injunction prayed for granted; and it is so ordered.

CARROLL, C. J., and CLARKE and QUIN, JJ., heard and considered this motion with me, and concur in this opinion.

**MATTHAEI et al. v. CLARK**, District Judge,  
et al. (No. 3034.)

(Supreme Court of Texas. Nov. 19, 1919.)

**1. MANDAMUS  $\S$ 14(1) — DEMAND IN LOWER COURT NECESSARY BEFORE ACTION IN SUPREME COURT.**

Relators who sought no relief in trial court are not entitled to mandamus in Supreme Court to compel trial court to vacate its judgment, permit them to intervene, and grant certain other relief.

**2. MANDAMUS  $\S$ 4(1)—NOT USED AS SUBSTITUTE FOR APPEAL.**

Mandamus from Supreme Court to trial court cannot be used as substitute for appeal provided by law, by relator aggrieved by judgment or order.

**3. MANDAMUS  $\S$ 4(2) — REMEDY BY APPEAL WHERE INTERVENTION IS DISMISSED BY TRIAL COURT.**

Remedy of interveners being by appeal to Court of Civil Appeals from order dismissing intervention and refusing leave to amend, such order or judgment will not be reviewed by Supreme Court in original application for mandamus to control district court.

**4. MANDAMUS  $\S$ 26—NOT GRANTED FOR CONTROL OF JUDICIAL FUNCTIONS.**

It is not the function of mandamus from Supreme Court to control, in a purely anticipatory sense, the action of a district court or judge thereof in a matter within the jurisdiction of such court or judge.

**5. MANDAMUS  $\S$ 53—PETITION FOR VACATION OF JUDGMENT.**

Supreme Court will not by mandamus direct district court to vacate or set aside judgment, though on proper showing it might require such court to file, hear, and determine petition for such relief.

**6. MANDAMUS  $\S$ 26—DIRECTING RENDITION OF CERTAIN JUDGMENT.**

Supreme Court will not by mandamus direct district court to render a certain judgment, as to do so would be invasion of powers of district court and control of its discretion.

**7. MANDAMUS  $\S$ 72—TO COMPEL ACT IN DISCRETION OF PUBLIC OFFICERS.**

Supreme Court will not issue mandamus against any public officer except to enforce performance of a clear, legal duty not involving exercise of discretion conferred upon him by law.

**8. MANDAMUS  $\S$ 38 — DIRECTING APPOINTMENT OF RECEIVERS.**

Under Const. art. 5, § 3, and Rev. St. arts. 1526, 1528, authorizing issue of mandamus, Supreme Court in original mandamus will not direct appointment of receiver by trial court.

**9. MANDAMUS  $\S$ 37—DIRECTING ISSUANCE OF INJUNCTION.**

Under Const. art. 5, § 3, and Rev. St. arts. 1526, 1528, authorizing issue of mandamus, Su-

preme Court in original mandamus will not direct trial court to issue injunction.

**10. MANDAMUS  $\S$ 10—COMPELLING ACTION IN DISREGARD OF FINAL JUDGMENT.**

Under Const. art. 5, § 3, and Rev. St. arts. 1526, 1528, authorizing issue of mandamus, Supreme Court in original mandamus is without power to direct commissioner of insurance and banking to act in disregard of final judgment of district court having jurisdiction of subject-matter and of bonding company, especially where the acts of the commissioner in relation to bonding company would involve exercise of discretion.

Action for writs of mandamus by W. A. Matthaël and others against Erwin J. Clark, District Judge, and others. Writs refused.

E. G. Senter, of Dallas, for plaintiffs.

B. F. Looney, Atty. Gen., O. M. Cureton, Asst. Atty. Gen., for Austin.

H. M. Richey, W. E. Spell, and O. L. Stribling, all of Waco, Tom Henderson, of Cameron, and Denman, Franklin & McGown, of San Antonio, for defendants.

**HAWKINS, J.** This is an original action in this court for writs of mandamus to the judge of a district court and the commissioner of insurance and banking, respectively, whereby nine relators, as stockholders of Texas Fidelity & Bonding Company, a domestic corporation, seek to have this court control official actions of said officers in relation to certain litigation and certain legal and business affairs of said corporation, as hereinafter more specifically indicated. Especially do relators pray that the district judge be required to vacate and set aside, and that the commissioner be required to ignore and disregard, a certain judgment of the district court, from which no appeal was prosecuted.

Relators' petition to this court covers about 300 typewritten pages, and the "brief" thereof, covering some 19 additional pages, sets out eleven propositions of law. However, a comparatively short statement will indicate, sufficiently, the grounds upon which relators seek said extraordinary writs.

The following statement is based upon uncontroverted allegations of said petition:

On November 29, 1915, in district court of McLennan county, Seventy-Fourth judicial district, the Attorney General filed a suit, No. 877, in the name of the state of Texas, against said corporation, and therein, later, by amended petition, sought forfeiture of its charter and appointment of a receiver, praying alternatively for an injunction restraining said corporation from transacting business without first reducing the number of its directors to the minimum prescribed by law, and from exercising certain enumerated powers, and from performing acts of certain

specified kinds, etc. Answers in the name and behalf of the defendant corporation were filed, the original answer being filed at the instance of Gaffney, and his associates, all being stockholders, an amended original answer being filed at the instance of the corporation's president, McCullough.

On November 30, 1915, Harvey and five other stockholders filed, in the same district court, a suit, No. 883, against said corporation and Gaffney and 10 other stockholders, for an injunction, and for appointment of a receiver, etc. In that second suit the defendants filed an answer, and later the bonding company filed a motion to consolidate that suit with said suit No. 877 by the state, upon the grounds "that the parties are largely the same, that the relief sought by the two plaintiffs is largely the same, and that the evidence will be the same."

Said motion was not granted; but what, if any, technical disposition of that second suit, No. 883, has been made, has not been shown here.

Subsequently, on January 19, 1915, there was made and signed by attorneys, as for the parties to said suit by the state, No. 877, and presented to said district court therein, a written agreement for judgment in that cause, and thereupon that court rendered judgment in that cause, accordingly, setting out said agreement, in full, in said judgment. Said written agreement recited pendency of said two suits, giving the number of each and the names of the parties, plaintiffs and defendants, and that—

"All the parties to said suits are anxious to adjust the difficulties in the defendant's affairs and save its effects and assets for its creditors and stockholders from further litigation, loss, and expense."

Said agreement was signed in behalf of the state by the Attorney General and one of his assistants, and was signed by three firms of attorneys, and one other attorney individually, as "attorneys for defendant corporation and its majority and minority directors and stockholders thereof." Among those who so signed said agreement were the attorneys who signed the original petition of plaintiffs in said second suit, No. 883, and also the attorneys who signed the answer of the defendants in that second suit, and also the attorney who signed said motion to consolidate, and also the attorney who signed the answer of the defendant corporation in the state's suit, and also the attorney who signed the amended answer of that defendant in that cause, No. 877.

Said agreement covers eight typewritten pages and includes stipulations numbered from 1 to 15, inclusive. It provides, among other things, for forfeiture of said charter, the corporate existence to be continued three years after such forfeiture; that all assets

of the corporation be placed in the hands of two liquidating trustees, with extensive stated powers, one, Gaffney, being selected by majority directors, the other, Bebout, being selected by the minority directors, their compensation being fixed, each to give bond in a stated amount at cost of the corporation, the bonds to be filed with the commissioner of insurance and banking; that all salaries and all other expenses of administration be paid out of funds of the corporation upon its voucher checks signed by said trustees jointly; that said trustees prepare a full inventory and statement of all property and business affairs of the corporation, which shall be published, copies of which shall be filed in court and with the Attorney General and with said commissioner, one copy to be sent to each stockholder, and that said trustees shall make, quarterly, to the stockholders, a full report, which shall take substantially the same course; that succession of trustees, and deposit of corporate funds, and distribution of corporate assets, shall be as therein specifically stipulated; that said trustees shall act jointly, only, and that in event of disagreement they shall refer the matter to the First Assistant Attorney General, whose decision upon the point shall be final; that the district court shall retain jurisdiction of the suit, for such further orders as may be necessary to carry out and effectuate the purpose and intention of the agreement; and that "all court costs in this litigation and in both suits" hereinabove mentioned, and certain expenses of the Attorney General in the premises, shall be paid by said corporation. Said agreement further provided for payment, by said trustees, out of funds of the corporation, of fees as follows: To each of three designated firms of attorneys whose names are signed to said agreement, "for legal services rendered on behalf of said corporation and stockholders thereof in connection with the suits in this agreement hereinabove referred to," \$1,250, and to Gaffney, for all services and expense rendered and incurred by him for said corporation to that date, \$250, "it being agreed by the said parties after consultation with their respective clients that said fees and amounts are proper and reasonable, and as between them agreed upon."

Said judgment declares that said agreement, therein embodied, is "in all things, approved, and the parties are directed to carry out and effectuate the same," and expressly decrees that said charter be and thereby is forfeited, but that the existence of said corporation be extended three years from that date to permit settlement of its affairs; that all other relief sought by the state be denied; that all property and assets of the company be delivered at once to two therein designated liquidating trustees selected by the direc-

tors and named in said agreement and that they proceed to carry into effect the purposes of said agreement for judgment; that said corporation, its officers, agents, directors, and employes, be enjoined from interfering with the management and control of said trustees in the premises; and that costs be taxed as therein directed; and that the trial court retain jurisdiction of the subject-matter of that litigation, and full control of said decree, in order to effectuate its purpose.

Thereafter possession of all assets and control of all business affairs of said corporation were taken over, accordingly, by said trustees.

In November, 1916, 18 individuals, alleging that they were the only remaining qualified directors of said bonding company, filed in said suit by the state a petition for such amendment of said former judgment in that cause as should constitute Gaffney sole trustee thereunder, and increase his bond to \$50,000; an averment being that petitioners and the state had agreed thereon. Four individuals, as minority directors when said judgment was rendered, answered, submitting the matter to the court, alleging that they had ceased to be stockholders, tendering their resignations, and praying for an order of discharge from future duty and liability. Another individual, asserting that he still was a stockholder and director, also answered submitting the matter to the court. Bebout, one of said liquidating trustees, answered, submitting the matter to the judgment of the court, praying that, in the event said original decree be so amended as to constitute Gaffney sole trustee, the court enter an order discharging him (Bebout), and releasing him and his sureties from future liability on his bond.

On December 4, 1916, the district court entered an order amending said original decree, and appointing Gaffney sole liquidating trustee, fixing his bond at \$50,000, relieving Bebout, as joint trustee, upon the filing and approval of such bond, directing him then to turn over to Gaffney as sole trustee, and continuing, in full force and effect, otherwise, all provisions of said original decree and making them applicable to said sole trustee.

Relators charge, here, that the last preceding report of Gaffney, covering the period January 20, 1916, to February 1, 1917, filed in cause No 877, was artfully prepared to mislead and deceive the stockholders into the belief that the stock is worthless, and that it falsely represents the stock of the corporation to be worth approximately \$100,000 less than its liabilities, all in furtherance of a scheme of Gaffney and his associates to buy such stock at nominal prices; said report and a prior report of both trustees being set out in full. Relators aver that afterwards, on March 24, 1917, having obtained of the court permission so to do, eight

stockholders, only two of whom are relators here, claiming to own, and as agents and trustees of others to control, stock of said corporation aggregating 1,045 shares, filed in said suit by the state their plea of intervention, complaining of Gaffney, Sullivan, and Webster, and alleging that in July, 1915, when said corporation was prosperous, with large assets, those three individuals, in pursuance of a practice in which previously they had been successfully engaged, conspired and undertook to "bear" the stock of said bonding company and then to buy it at a large profit to themselves, and to force liquidation of said company, and subsequently did so; that its stockholders did not know of said purposes or plans, or that said agreed judgment was about to be entered in that cause, and were not consulted with respect to those proceedings, and took no part therein; that upon every opportunity a majority of the directors who had no interest in connection with Gaffney and were not connected with his said schemes voted against them; that said agreed judgment was, in effect, an attempted liquidation of the affairs of the corporation without authority of its stockholders or four-fifths of them, and was without lawful grounds therefor; and that Gaffney's appointment as a liquidating trustee had enabled him more easily to depreciate the value of the stock and to buy same at a discount, and that he had done so, pursuant to said plan and conspiracy.

Interveners further alleged that when said agreed judgment was entered no creditor held any unsatisfied claim against said corporation, and there then existed no lawful ground for forfeiture of its franchise, or for its dissolution, and said judgment was agreed to without authority of its stockholders, including interveners and those whom they represent, and that at date of filing of said plea of intervention said corporation owned assets of more than \$250,000 in excess of all liabilities; that its corporate rights and franchises are worth more than \$50,000; that a great majority of the stockholders who are not associated with Gaffney never consented to any of the proceedings in that suit, and now desire that said corporation be restored to control of its stockholders and be permitted to resume business.

Said plea of intervention further averred that through said schemes and manipulations Gaffney and his associates got control of a majority of the board of directors, and purchased the stock of others, whom they could not control, and others, becoming discouraged, acquiesced in said proceedings without getting authority of the stockholders so to do, and by reason of facts aforesaid interveners had no opportunity to present or make demand upon the directors to bring action against Gaffney and his associates or to take proper legal steps to protect said corpo-

ration and its stockholders, and its franchise and business, and that each and all of the board of directors voluntarily have abandoned their trust and ceased to represent or to pretend to represent said corporation, because whereof it is left without any agency to act for its protection except the stockholders themselves, in behalf of whom, and on behalf of said corporation, said plea of intervention was filed. Interveners averred that, by reason of the facts alleged by them, said bonding company had suffered damage in the sum of \$250,000. They prayed, among other things, that said cause be placed upon the trial docket of the court at the ensuing term, for trial; that Gaffney be immediately discharged as such trustee and be required to make a full accounting; that he be required to disclose, by sworn report, how much of the stock had been purchased by him or at his instance while he was trustee, etc.; that said agreed judgment, and particularly the portion of it forfeiting the franchise of said corporation, be set aside by the district court, and that said corporation be restored, by decree of that court, to all of its rights and privileges as of the time of the filing of said suit by the state; that said court order that a meeting of the stockholders be held in Waco, at a time and place to be fixed by the court, and that said order direct that the stockholders be authorized to take charge of the corporation and to exercise all rights of stockholders which, as provided by law, they are entitled to exercise at an annual meeting of stockholders.

Interveners prayed, also, that Gaffney, Sullivan, Webster, and their agents and associates, be perpetually enjoined from claiming to be stockholders, and from exercising any right as stockholders, and from assigning stock to any other person for the purpose of exercising rights of stockholders, and that interveners have judgment for the use and benefit of said bonding company, against said Gaffney, Sullivan, and Webster, and each of them, for said amount of actual damages and for a like amount as exemplary damages, and that said court decree that all stock purchased by them and their associates since Gaffney's appointment as liquidating trustee was purchased by them as trustees for said corporation, and for its use and benefit, and that payment therefor be made by credit upon said judgment for damages, or, in the alternative, out of assets of said corporation; and for general relief.

The state filed an answer to said plea of intervention, after which, in April, 1917, interveners, by supplemental plea, alleged, among other things, that the directors had abandoned their duties and turned over all assets of the corporation to Gaffney, and that he was pretending to exercise complete control thereof without authority of law

and contrary to law, and in violation of the rights of the stockholders, and as a result of the condition of its properties they were subject to waste and loss and were without adequate protection, and that no stockholders' meeting had been held since said agreed judgment was entered; and interveners prayed for a receiver, etc.

Separate answers to said plea of intervention were filed by Gaffney, and by the bonding company acting by and through its trustees who were its board of directors prior to said agreed judgment; and a plea of privilege to be sued in Bexar county was filed by Sullivan.

On April 6, 1917, said plea of intervention was heard by the district court, upon demurrers of the state and of the bonding company, respectively, whereupon that court entered an order sustaining said demurrers and dismissing said plea of intervention, reciting that interveners asked leave to amend, that said leave was refused, and that the interveners excepted and gave notice of appeal. But no appeal was prosecuted.

The nine relators of whom only two were named in said original plea of intervention or in said supplemental plea of intervention, set out, in their petition to this court, what they term a "first amended plea of intervention," which they aver they desired, but were not permitted, to file in the district court; also copies of reports of General Manager Maxwell for October and November, 1917, showing the volume of business of said corporation, etc., and his original supporting affidavit. Said proposed first amended plea of intervention covers much of the same ground covered by said original and supplemental pleas of intervention, with amplifications and additions. And in fourteen subsequent pages relators' petition to this court reiterates and amplifies many of the allegations hereinabove mentioned, and refers to and adopts all allegations made by the state in its suit, No. 877, and all allegations made by plaintiffs in said cause No. 883 relating to plans and motives of Gaffney and his associates concerning said bonding company and its stock, etc. They aver that the last meeting of the stockholders held or called was on August 3, 1915, whereat the stockholders voted down the proposal of Gaffney and his associates to throw the corporation into liquidation; that the stockholders never authorized or consented to and were not advised of the proceedings in said state suit in which said agreed judgment was entered; that said agreement was made without lawful authority, and was wholly unauthorized by any person lawfully empowered to consent thereto; that no one authorized so to do made or consented, on behalf of said corporation, to said agreement for judgment; that the stockholders never authorized, approved, or ratified the same; that ac-

tion was never had thereon by the board of directors of said corporation; that no officer of said corporation, acting in an official capacity, ever authorized same or agreed thereto; that said attorneys were without authority to act for, or to bind, or in any way obligate, said Texas Fidelity & Bonding Company with respect to the matters contained in said agreement, and particularly were they not authorized to consent to the forfeiture of the charter of said corporation; and that the names of three firms of attorneys who were not parties to the record in said cause were signed to said agreement; that they were attorneys for certain individuals in a separate and distinct lawsuit, to wit, said cause No. 833.

Relators also undertake, here, to show the attitude of the then commissioner of insurance and banking with reference to said corporation and to said Gaffney, and a declaration by the latter, in a letter to the stockholders, wherein he, Gaffney, declared:

"My associates and myself have employed counsel and intend to contest both cases, as we do not believe it will be to the best interests of stockholders to have the court appoint a receiver at the instance of either the state or the disappointed minority directors above named."

And in that connection relators aver that by said letter the stockholders were led to believe that he and his associates would resist said suit by the state; but that, instead of so doing, they made it the medium of accomplishing their said purpose concerning the corporation and its affairs, with the result that thereby they caused the corporation and its stockholders loss approximating \$375,000; and that, if the control of Gaffney and his associates is to be perpetuated, the stockholders probably will receive, at an indefinite future date, not exceeding \$2 per share.

Relators also aver that Gaffney is inexperienced and extravagant, and that stockholders have no substantial remedy against him, personally, for their said wrongs and losses; that the commissioner, acting in accordance with law, has refused and will refuse to permit Gaffney to pay out any dividends to stockholders until all obligation of its stockholders, including bond obligations, shall have been discharged; that many of said bonds run for long periods, and complete liquidation could not be had within less than 10 years; that there is no necessity for the existing expensive scheme of liquidation; and that Gaffney is unfit and incompetent to be such liquidating trustee.

Relators further aver that when said agreed judgment was entered said corporation was, and now is, solvent; that its charter was forfeited without legal right or authority so to do; that it was so delivered into possession of a stranger in violation of

applicable statutes; that it is now able and authorized to transact business, and has assets exceeding the amount required of it by law; that it had committed no offense for which it could have been put to death legally; that each allegation upon which the state asked forfeiture of said charter was subject to special demurrer; that the court was without authority, upon the pleadings and the facts shown and declared in open court, to condemn said corporation to death, and was without authority to take it out of the hands of its own directors and to enjoin them from exercising control over its affairs and to place its properties in the hands of said trustees and of said sole trustee; and that the president and several directors have refused and still refuse to act in said capacity.

Relators aver, also, that said corporation never had nor claimed more than 21 directors; that it never exceeded its lawful powers; that no proceeding by the Secretary of State, as provided in R. S. arts. 1142, 1143, looking to forfeiture of said charter for failure to pay in the full amount of stock subscription, was ever taken; that the stockholders did not know that all of it had not been paid in; and that, if said suit by the state had been duly tried, all of said facts would have been shown to the district court.

Relators pray this court for relief, as follows:

(1) That this court shall, herein, require the district judge to vacate and set aside said agreed judgment.

(2) That this court shall, herein, require of said commissioner: (a) That in all of his relations and dealings with said corporation, he shall wholly disregard said judgment; (b) that he shall call a meeting of the stockholders of said corporation at such time and place as he may designate; (c) that he shall make a complete investigation of the affairs of said corporation, and of the administration of the same since the entry of said agreed judgment, and shall submit a report, showing the results thereof, to said meeting of stockholders; (d) that at said meeting he shall direct and supervise the election of a board of directors for said corporation, and shall refuse to permit to be so elected any person who shall be found to have been associated with said Gaffney in a scheme to throw said corporation into liquidation, or in stock speculations growing out of or related to said scheme of Gaffney, or who shall have aided or abetted the same directly or indirectly; that if, upon investigation of the affairs of said corporation, the commissioner shall find that, safely, it cannot be reorganized and permitted to continue in business, the commissioner shall be required by this court (e) thereupon to institute a suit for a receivership and to wind up, according to law, the affairs of said corporation.



(3) Alternatively, that, if the aforesaid relief be denied, this court shall require of said district judge: (a) That he shall direct the clerk of his court to file, in said suit by the state, said proposed "first amended original petition of intervention" therein; and (b) that said district judge shall try same, and shall appoint a receiver for said corporation, and shall enjoin said Gaffney and all who may be associated or confederating with him from speculating in the stock of said corporation, and from circulating injurious reports concerning the same.

(4) General relief.

The effort of relators to obtain from this court, in an original action for mandamus, relief of such peculiar nature and such broad and far-reaching extent is, perhaps, unprecedented.

The controlling inquiry here is: Are the powers and authority of this court, in this action, so extensive as to authorize it to grant all or any of the relief for which the petition to this court prays? That inquiry must be answered negatively.

[1] Seven of the relators, Matthaei, Wilson, Frees, Peters, Everett, Lastinger, and Lumsford, appear not to have asked of the district court any relief whatever. None of them obtained leave to intervene in said suit in which said agreed judgment was rendered, or joined in said original plea of intervention, or in the supplemental plea of intervention therein, or otherwise submitted to or invoked the jurisdiction of that court. Said proposed "first amended plea of intervention" seems not to have been filed in or presented to that court or to the district judge. Obviously, therefore, those seven relators are not entitled, here, to such writs of mandamus.

[2] As to the other two relators, Spencer and Wheeler, who were interveners in said suit by the state, the merits or demerits of their stated contentions concerning said proceedings in the district court, including said order dismissing their intervention and refusing them leave to amend, are not, in any sense, determinable by this court in an original proceeding here. The action for mandamus was not designed, and we will not permit it to be used, as a substitute for the due and orderly appeal provided by our Constitution and laws for the benefit of any party who may consider himself aggrieved by an order or judgment of a trial court.

[3] By obtaining leave to intervene, and filing their original plea of intervention, in the suit wherein said agreed judgment had been rendered, said two relators became, in a sense, parties to that cause, and, as such, acquired, it may be assumed, a right at the proper time and in the manner provided by law to seek relief from said order dismissing their intervention and refusing them leave to amend; but such an appeal lies, under our statutes, to the proper Court of Civil Appeals,

and not to this court. Such an order or judgment of the district court will not be reviewed by this court in an original action, filed here, for the writ of mandamus. Accordingly, we now decline to direct said district court, or the judge thereof, to set aside or vacate said agreed judgment, or to order filed and to try out said proposed plea of intervention.

[4-6] Moreover, it is not the function of a writ of mandamus from this court to control, in a purely anticipatory sense, action of a district court, or of a judge thereof, in a matter potentially or even actually within the jurisdiction of such court or judge. Consequently, even if this case were considered and treated as one in which we were called upon, and felt impelled, in an original action of this character, to require the filing and hearing in the district court of a petition specifically in the nature and form of a bill of review to set aside or vacate a judgment or decree rendered at a former term of that court and clearly final in all respects, this court still would be without power or authority, herein, to determine or to direct, in advance, that such former judgment be set aside or vacated, or to direct the rendition or making by the district court, or the judge thereof, in such main cause, of an order or judgment of a particular character, appointing a receiver, granting an injunction, etc., to the effect here prayed for by relators. To do so would be to invade and usurp the province and powers and to control the discretion of the trial court or of the district judge.

Our state Constitution provides that, under such regulations as may be prescribed by law, this court may issue writs of mandamus and such other writs as may be necessary to enforce its jurisdiction, and declares that the Legislature may confer original jurisdiction on the Supreme Court to issue writs of mandamus in such cases as may be specified, except as against the Governor of the state. Article 5, § 3.

Our statutes confer upon this court power to issue writs of mandamus and all writs necessary to enforce its jurisdiction, and to issue writs of mandamus, "agreeable to the principles of law regulating such writs," against any district judge or officer of the state government, except the Governor. Article 1526.

[7] But, as applied to the facts of this case, those quoted words, as there used, imply that in accordance with immemorial custom and usage, and our settled practice, this court is not to issue such writ against any public officer except to enforce performance of a clear legal duty not involving exercise of discretion conferred upon him by law.

Another statute, article 1528, confers upon this court authority, by the writ of mandamus, "to compel a judge of the district

court to proceed to trial and judgment in a cause, agreeably to the principles and usages of law." It is well settled that, under its operation, the writ merely enforces due performance of a plain legal duty, without undertaking to control, in the slightest degree, the discretion of the trial court or judge. Such settled operation of article 1528 confirms the soundness of our above-stated conclusion concerning the restrictive effect of article 1526. A similar statute, article 1529, authorizing Courts of Civil Appeals to issue said writ, has been similarly construed.

[8.] It follows that, under the plainly written law, this court, in this original action here, is without authority peremptorily to direct the appointment of a receiver or the granting of an injunction as here prayed for by relators.

[10] As to the commissioner of insurance and banking, the relief which relators seek, here, as against him, must, likewise, be wholly denied. Said agreed judgment, upon its face, appears to have been rendered, and said modification thereof seems to have been made, by a court having jurisdiction over the subject-matter of the litigation and over said bonding company, in a suit by the state brought by the Attorney General, and from such judgment, and from such modification thereof, no appeal has been taken.

Under such circumstances, this court must treat said judgment of the district court, as so modified, as still operative and binding upon both the state and said defendant corporation. In that view of the matter, it is unreasonable to say that it is the clear legal duty of the commissioner of insurance and banking, an officer of the state government, to ignore and disregard said judgment in dealing with said corporation and its affairs. Indeed, for him to do so would be both absurd and revolutionary. Moreover, all and any of the above affirmative acts to which relators here seek to force the commissioner certainly would be out of harmony with, and some of them would be in practical contravention of, terms and provisions of said agreed judgment, which, as we have seen, the commissioner, under existing circumstances, is duty bound to respect.

Whether all or any of such affirmative acts would or would not be within the scope of the official duties of the commissioner, in the absence of such judgment of the district court, we need not now determine. Some of those acts necessarily, and obviously, would involve the exercise of discretion.

Manifestly, therefore, this court, in this action, is powerless to direct or control the official course or actions of the commissioner of insurance and banking in the premises.

Nothing herein is to be construed or understood as expressing or indicating any shade of opinion concerning any right, real or

claimed, of relators, or any of them, to relief in any action or proceeding other than an original action in this court.

The petition to this court being without merit, writs of mandamus will be refused.

SHUMAKER et al. v. BYRD. (No. 3201.)

(Supreme Court of Texas. Nov. 26, 1919.)

1. TRESPASS TO TRY TITLE ~~§~~32—PLEADING EVICTION OF PLAINTIFF.

In trespass to try title, allegations that defendants unlawfully withheld possession from plaintiff, that the property was occupied and used by defendants, and that plaintiff feared defendants would injure the property, held sufficiently to charge an eviction subsequent to the date of his possession of the premises, notwithstanding that the date upon which plaintiff had possession was erroneously stated.

2. TRIAL ~~§~~181—TIMELY OBJECTIONS TO PEREMPTORY "CHARGE."

Rev. St. 1911, art. 1971, as amended by Acts 1913, c. 59, providing that objections to the "charge" of the court shall be presented to the court before it is read to the jury, and that all objections not so made and presented shall be waived, is not applicable to a peremptory charge; the trial court having already decided that there is no issue to go to the jury.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Charge.]

Error to Court of Civil Appeals of Third Supreme Judicial District.

Trespass to try title by Moses Byrd against Nora Shumaker and others. A judgment for plaintiff on a directed verdict was affirmed by the Court of Civil Appeals (203 S. W. 461), and defendants bring error. Reversed and remanded.

H. C. Lindsey and Thomas M. Hamilton, both of Waco, for plaintiffs in error.

J. D. Willis, of Waco, for defendant in error.

HAWKINS, J. In this suit of trespass to try title the district court instructed the jury, peremptorily, in favor of the plaintiff, Byrd, defendant in error here, and upon the verdict rendered judgment against defendants, plaintiffs in error here. That judgment was affirmed by the Court of Civil Appeals. 203 S. W. 461.

That appellate court considered and overruled the contention there made by appellants, plaintiffs in error here, to the effect that said charge was erroneous, fundamentally, in that plaintiff's petition alleged that he was in possession of the premises subsequent to the alleged date of eviction. The gist of said decision upon that point was

that, when considered as a whole, plaintiff's petition was good as against a general demurrer, and sufficient to support said judgment of the trial court.

As briefly and correctly stated by the Court of Civil Appeals:

"The petition alleges that on or about the 23d day of December, A. D. 1915, the plaintiff was lawfully seized and possessed of the land and premises sued for, and then follows a description of the land, which includes reference to two deeds, one dated December 17, 1915, and the other dated December 18, 1915. The petition then alleges that on the day and year last aforesaid the defendants unlawfully entered upon the premises and ejected the plaintiff therefrom, 'and unlawfully withholds from him the possession thereof, to his damage in the sum of \$500; \* \* \* that your petitioner will further say to the court that said property is being occupied and used by the defendants in a manner reasonably calculated to injure it, damage and destroy the market value thereof, and he fears the defendant will make use of such possession to injure said property.'"

[1] The allegations that defendants unlawfully withhold possession from plaintiff, and that said property is being occupied and used by defendants, and that plaintiff fears that defendants will make use of such possession to injure said property, together charge, sufficiently, an eviction of plaintiff subsequent to the date of his alleged possession of said premises on or about the 23d day of December, 1915. If in the clause of the petition, "on the day and year last aforesaid," the word "first" were substituted for "last," the difficulty would vanish, and the evident meaning of the petition as a whole would be unquestionably clear. The petition should be so construed. In holding it sufficient to support said judgment the Court of Civil Appeals did not err.

However, that court did err in declining to consider the several assignments of error which complained of said peremptory charge to the jury, upon various grounds: As that it was on the weight of the evidence; that it failed to submit a controverted issue of fact; that it directed a verdict for damages; that it directed the amount of damages to be found; that it directed a finding for improvements, none being in issue; and that plaintiff failed to prove title from the sovereignty of the soil or from any common source. One contention of appellants was that an abstract of title by which, alone, appellee, as plaintiff, undertook to establish an essential link in his chain of title from a common source, is not admissible in evidence; wherefore, appellants contended, plaintiff having so failed to show title in himself, said peremptory charge in his favor constituted fundamental error apparent upon the face of the record.

In refusing to consider said assignments, the Court of Civil Appeals said:

"As appellants failed to present any objection to the charge before it was read to the jury, they must be held to have approved the same and waived the objections now urged"—citing *Ry. v. Bland* (Civ. App.) 181 S. W. 504, and *Ry. v. Dickey*, 108 Tex. 126, 187 S. W. 184.

The writ of error was granted by this court because that holding, construing article 1971, R. S., as amended by the Act of 1913, c. 59, was in conflict with certain decisions of other Courts of Civil Appeals upon that point.

[2] Subsequently, in two cases, this court construed that amended statute contrary to the indicated view of the Court of Civil Appeals in this case, and held, in substance, that the provisions thereof that objections to the charge of the court to the jury "shall in every instance be presented to the court before the charge is read to the jury, and all objections not so made and presented shall be considered as waived" are not applicable to a peremptory charge; the trial court having already decided that there is no issue to go to the jury. See *Walker v. Haley*, 214 S. W. 295, wherein this writer was disqualified, and *Decker v. Kirlicks*, 216 S. W. 385, not yet officially reported, wherein said former decision of this court thereon was cited and followed.

The judgment of the Court of Civil Appeals is reversed, and the cause is remanded to that court for consideration by it of said unconsidered assignments of error.

#### ADAMS v. STATE. (No. 5613.)

(Court of Criminal Appeals of Texas. Dec. 10, 1919.)

#### 1. CRIMINAL LAW §1171(8)—ARGUMENT OF DISTRICT ATTORNEY THAT DEFENDANT THREATENED PROSECUTING WITNESS WITH PISTOL NOT PREJUDICIAL.

Argument by the district attorney that defendant threatened the prosecuting witness with a pistol, having been withdrawn by the instructions of the court, cannot be deemed prejudicial, where the evidence was such as to at least raise an inference of the threat.

#### 2. CRIMINAL LAW §730(15)—STATEMENT BY DISTRICT ATTORNEY CURED BY WITHDRAWAL.

A statement by the district attorney that defendant was a burr-headed nigger held not prejudicial, the same having been withdrawn by the instructions of the court.

Appeal from District Court, Jasper County; W. T. Davis, Judge.

Sam Adams was convicted of hog theft, and he appeals. Affirmed.

G. E. Richardson, C. B. Neel, and Chas. C. Ingram, all of Jasper, for appellant.

Alvin M. Owsley, Asst. Atty. Gen., for the State.

DAVIDSON, P. J. Appellant was convicted of hog theft and given two years in the penitentiary.

The issues in the case were sharply contested. There seems to be no question that appellant killed the hogs that belonged to the alleged owner Scott. His contention was that he killed them at the instigation of his brother Carroll Adams, that Carroll sent him in the field to kill the hogs, and that he killed them under the impression that they were the property of his brother. The state's theory of the case was that appellant killed the hogs knowing to whom they belonged, and that when the owner of the hogs came upon him with them he claimed to have killed them for his brother, believing them to be the property of his brother; but he seems to have been also familiar with his brother's business, and sufficiently so to know to the contrary. The hogs were kept by appellant or his brother, or both, after being slaughtered; although they agreed to pay Scott for them, they failed so to do. The question of appellant's connection with taking the hogs was an issue as to his intent and purpose. The state's evidence was sufficient to show that the verdict of the jury was justified.

[1, 2] A bill of exceptions was reserved to the argument of prosecuting counsel. The bill recites that the district attorney said, "This defendant drew a gun on Tom Scott," the prosecuting witness, and he also in said argument pointed to the defendant and referred to him as a "burr-headed nigger." Exception was reserved to this, whereupon the court instructed the jury not to consider the remarks or action of the district attorney for any purpose whatever. It is contended that the evidence does not sustain the statement of the district attorney relative to the drawing of the gun, and the further remarks as to the defendant being a burr-headed negro, and that this was of such prejudicial nature that the injury could not be withdrawn by instructions of the court. While the evidence does not positively show that appellant drew his gun on prosecuting witness Scott, there is evidence that, just prior to the time Scott took the gun from appellant, appellant said he would blow out the heart of prosecuting witness. The prosecuting witness then got hold of the gun and took it from him. This was when prosecuting witness first came upon him in possession of the dead hogs. The fact that appellant drew the gun on prosecuting witness is not sustained by specific evidence, yet the circumstances are of such a nature that we do not believe the district attorney went sufficiently far away from the facts to

authorize a reversal, especially in view of the fact the whole matter was withdrawn from the consideration of the jury by instructions of the court. In regard to the fact that the district attorney called appellant a burr-headed negro, we express the hope that arguments of this character will not be indulged. Appellant is a negro. In view of the withdrawal of the matter from the jury by the court, we are of opinion this is not of sufficient importance to require a reversal. Some of the authorities may be cited in this connection: *Borders v. State*, 72 Tex. Cr. R. 135, 161 S. W. 483; *Byrd v. State*, 39 Tex. Cr. R. 609, 47 S. W. 721; *Frizzell v. State*, 30 Tex. App. 42, 16 S. W. 751.

Finding no error in the record as would require a reversal of the judgment, it is affirmed.

#### MINOR v. STATE. (No. 5565.)

(Court of Criminal Appeals of Texas. Dec. 10, 1919.)

##### 1. CRIMINAL LAW §649(1)—TRIAL COURT HAS DISCRETION IN GRANTING POSTPONEMENT.

The granting of a postponement is a matter resting largely in the discretion of the trial court.

##### 2. CRIMINAL LAW §649(1)—DENIAL OF POSTPONEMENT FOR ILLNESS OF DEFENDANT'S WIFE NOT ABUSE OF DISCRETION.

Where defendant answered ready, and after the introduction of testimony asked for a postponement on the ground that his wife was ill with typhoid-malarial fever, but it appeared that she had been sick for two weeks before beginning of trial, which did not occupy more than 2½ hours, *held*, that the trial court's denial of postponement was not an abuse of discretion.

Appeal from Bexar County Court; Nelson Lytle, Judge.

O. M. Minor was convicted of unlawfully carrying a pistol, and he appeals. Affirmed.

Alvin M. Owsley, Asst. Atty. Gen., for the State.

LATTIMORE, J. Appellant was convicted in the county court of Bexar county for criminal cases, of unlawfully carrying a pistol, and given 30 days in the county jail.

There is no statement of facts in the record. The complaint and information, and the charge of the court, are in conformity with the law, and the only error presented by bills of exception is, substantially, that, after the trial had begun, appellant asked the court below to postpone or continue the case, because of the illness of his wife, which the court refused to do. As this appears in the

record, it shows that the case went to trial upon announcement of ready by both parties, and that the entire trial, including the return of the verdict by the jury, did not occupy more than 2½ hours; that, after certain witnesses had testified, appellant asked for an hour and a half in which to prepare a motion for postponement, or continuance; that the court asked for a statement of the proposed ground of such application, in order that he might determine whether or not to grant the time asked for in which to prepare said application. Appellant at first refused to make such statement, but later stated to the court that his wife was ill with typhoid-malarial fever. Upon further inquiry, it was ascertained that she had been sick with this disease for two weeks before the beginning of the trial; and, upon further questions and answers, the court overruled the request for time, and also the application for postponement, stating, when he did so, that he would permit appellant to prepare and file his application at his leisure, and would consider the same as overruled.

It further appears that, after this action of the court, appellant remained at the trial until its conclusion; he being on bond at the time.

[1, 2] We see no reversible error in the court's action. It was not alleged or claimed that the wife was a witness in the case, nor was appellant compelled, nor did he choose, to absent himself from the courtroom, or the trial, by reason of the court's refusal to grant such postponement; nor does he appear to have been deprived of any right by the court's action. The matter complained of was largely within the discretion of the trial court, and unless such discretion should appear to have been abused, to the injury of the appellant, we would not undertake to revise the court's action.

The judgment of the trial court will be affirmed.

#### WEBB v. STATE. (No. 5517.)

(Court of Criminal Appeals of Texas. Dec. 3, 1919.)

#### 1. INDICTMENT AND INFORMATION $\S$ 140(2)—MISTAKE OF PROSECUTING WITNESS IN SWEARING TO COMPLAINT AS GROUND FOR QUASHING.

That prosecuting witness testified after start of trial that he would not have sworn to complaint charging accused with "habitual" carnal intercourse, if he had known that complaint so charged, is not sufficient to quash complaint, where prosecuting attorney stated that he read over the entire complaint to prosecuting witness before he signed.

#### 2. INDICTMENT AND INFORMATION $\S$ 140(2)—BURDEN OF PROOF ON MOTION TO QUASH COMPLAINT ON GROUND OF FRAUD IN OBTAINING.

Where a complaint was read over to prosecuting witness before he swore to it, the burden of proof is on accused, on motion to quash because prosecuting witness would not have signed complaint had he known what it contained, to show fraud.

#### 3. CRIMINAL LAW $\S$ 406(4)—ADMISSIONS BY ACCUSED BEFORE GRAND JURY AS COMPETENT EVIDENCE.

Incriminating statements of accused voluntarily appearing before grand jury and making the statements after having been duly warned in terms of law are admissible against him.

#### 4. CRIMINAL LAW $\S$ 402(1)—TESTIMONY OF GRAND JUROR AS TO ADMISSION BY ACCUSED AS SECONDARY EVIDENCE.

Court was within its discretion in overruling objection that testimony of grand juror as to incriminating statements of accused was not the best evidence, where two witnesses swore that statement of accused was not reduced to writing and another witness thought it was but was not certain.

#### 5. LEWDNESS $\S$ 10—SUFFICIENCY OF EVIDENCE.

In a prosecution of a married man for habitual carnal intercourse with a female not his wife, evidence held to sustain a conviction.

Appeal from San Patricio County Court; J. C. Houts, Judge.

Floyd Webb was convicted of adultery, and he appeals. Affirmed.

M. O. Nelson, of Sinton, for appellant.

Alvin M. Owsley, Asst. Atty. Gen., for the State.

LATTIMORE, J. Appellant was convicted of adultery in the county court of San Patricio county, the charge against him being that he had habitual carnal intercourse with one Anna Harris; he then and there having a living wife, and she having a living husband, etc. His punishment was fixed at a fine of \$300.

[1] Appellant made a motion to quash the complaint in this case, after the trial had begun, and the prosecuting witness who filed the complaint had taken the stand and testified that he did not swear to the complaint, and that he would not have made it if he had known that it charged appellant with "habitual" carnal intercourse.

[2] The county attorney, in order to meet this statement, stated that he read the entire complaint over to said witness, who signed and swore to the same. There was no error in the action of the trial court in overruling this motion to quash. The cases cited properly hold that a complaint is not valid unless there is affixed to the same a proper jurat, but these cases present no authority for the

contention here made. We do not believe that a complaint can be so attacked, in the absence of some claim of fraud, and the burden to establish same would be upon appellant.

[3] It is urged that error was committed in allowing the state to introduce the testimony of three members of the grand jury, who testified to incriminating statements made by appellant before that body while investigating this charge. It is made to appear that, while such investigation was under way, appellant appeared before the grand jury and made a statement; after having been duly warned in terms of law. His statement thus made was introduced as evidence against him by the state, and is the matter complained of. There was no error in this action. *Wisdom v. State*, 42 Tex. Cr. R. 579, 61 S. W. 926; *Addison v. State*, 211 S. W. 225. The *Brown Case*, 42 Tex. Cr. R. 176, 58 S. W. 133, and *Gutgesel Case*, 43 S. W. 1016, cited by appellant, were overruled in the *Addison Case*, *supra*.

[4] Objection was also made to the testimony of said grand jurors, reproducing the statements made by appellant before the grand jury; the ground of such objection being that the statement of appellant was reduced to writing and that the writing was the best evidence. The state was not offering the contents of a written instrument, but the reproduction of a verbal statement made by appellant. The appellant made the objection thereto. That an objection is well founded in fact must be shown by the party who presents same. Two witnesses swore that the statement was not reduced to writing, and one said he was pretty sure it was written out, but he was not certain of it. The trial court was entirely within its discretion in admitting the said evidence in this state of the record.

The bill presents the objection to the testimony of all three of said witnesses in one bill. When the evidence sought to be reproduced was given orally in the first instance, the same rule would not apply as where it was *prima facie* an attempt to reproduce the contents of a written instrument.

[5] Appellant further contends that the verdict was without evidence to support it. We cannot agree with this proposition. When on the stand as a witness, appellant admitted to having intercourse with the female in question three times—all of which times, he said, were in his car. He admitted having been out with her many other times and places, both in and out of San Patricio county, and on one occasion spending the night with her by the roadside, at which time, however, he says he did not have carnal knowledge of her. He also stated on cross-examination that he did not know how

many times he had carnal intercourse with her. The husband of the woman testified that he caught the parties in bed together on one occasion. The witness McNutt stated that his recollection of the statement of appellant before the grand jury was that he had had intercourse with the woman several times at his home. Many suspicious circumstances were testified to by the husband, and the father-in-law of the alleged paramour of appellant. This court has held that one proven act of intercourse, sufficiently accompanied by other facts, would sustain a conviction of adultery under the habitual clause of the statute. *Mabry v. State*, 54 Tex. Cr. R. 449, 114 S. W. 379.

Finding no error in the record, the judgment of the trial court is affirmed.

### JACKSON v. STATE. (No. 5600.)

(Court of Criminal Appeals of Texas. Dec. 3, 1919.)

#### 1. LARCENY $\S$ 55—EVIDENCE SUFFICIENT TO WARRANT CONVICTION.

In prosecution for theft of a hog, evidence held sufficient to sustain conviction.

#### 2. CRIMINAL LAW $\S$ 1091(5)—EXCLUSION OF QUESTION DOES NOT SHOW ERROR WHERE WITNESS WOULD HAVE GIVEN ADVERSE ANSWER.

A bill of exceptions complaining of the exclusion of the question asked by defendant does not show harmful error where the bill stated that, had the witness been permitted to testify, the answer would have been in the negative, and hence not in favor of defendant.

#### 3. CRIMINAL LAW $\S$ 1091(5, 10)—BILL OF EXCEPTIONS TO EXCLUSION OF EVIDENCE INSUFFICIENT.

A bill of exceptions complaining of the refusal of the court in prosecution for theft of hogs to permit witness to answer a question framed to show that the witness to whom defendant sold hogs failed to deliver them to claimant because of the uncertain description given of them by claimant is insufficient where it does not disclose what objection was made by the state or point out the materiality or relevancy of the inquiry.

#### 4. CRIMINAL LAW $\S$ 1170(4)—SUSTAINING OF OBJECTION TO QUESTION HARMLESS WHERE THE EVIDENCE WAS ELSEWHERE ADMITTED.

In prosecution for theft of a hog, the sustaining of an objection to question asked purchaser from defendant as to whether he refused to surrender the hogs to claimant because of uncertainty of claimant's description cannot be considered as disclosing error where the purchaser elsewhere testified he did not delay the surrendering of the hogs because of any uncertainty or insufficiency of description.

Appeal from District Court, Anderson County; John S. Prince, Judge.

Ishmael Jackson was convicted of the theft of one hog, and he appeals. Affirmed.

Seagler & Pickett, of Palestine, for appellant.

Alvin M. Owsley, Asst. Atty. Gen., for the State.

MORROW, J. [1] The conviction was for the theft of one hog. The appellant sold three hogs to the witness McMahan, and they were turned into a pasture in which there were about 75 other hogs. The owner named in the indictment, Jones, came to the premises of McMahan claiming that his hogs had been stolen, and was directed by the wife of McMahan to go into the pasture and see if he could find his hogs. Jones returned, identifying as his the three hogs which had been purchased from appellant. These hogs were in Jones' mark, and appellant claimed to have used the same mark. After identifying the hogs, Jones brought other parties whose statements touching the identity of the property convinced McMahan that they belonged to Jones, and they were delivered to him. The appellant claimed that the hogs belonged to him; that he had had them in a pen for some months. One of them had a sore place upon it, which he claimed had been torn by a dog when the hogs were put in the pen. Other testimony was given to the effect that the torn place was fresh at the time the hogs were delivered to McMahan. There was evidence that the appellant had offered to pay McMahan \$100 to have the prosecution abandoned, and there were other circumstances tending to contradict appellant in his claim of ownership. Without detailing all of the evidence, we express the opinion that it is sufficient to support the verdict of the jury.

[2] Two bills of exceptions appear, one complaining of the refusal of the court to permit the witness McMahan to answer the following question:

"Is it not a fact that in May, 1918, when the state's witness, Billie Jones, who claimed the alleged stolen hogs, inquired of you if you knew the whereabouts of said hogs, that he, Billie Jones, was not then able to give any description of the hogs other than their earmarks, which was under slope in each ear?"

It is stated in the bill that the witness would not have testified that at said time Billie Jones was unable to give any description of the hogs other than their marks. It is manifest that the bill discloses no harmful error.

[3, 4] The other bill complains of the refusal of the court to permit the witness McMahan to answer a question framed to show that he failed to deliver the hogs at once to Jones because of the uncertain and contradictory description given of them by Jones in various conversations with the wit-

ness. The bill does not disclose the objection that was made by the state and sustained by the court, nor does it point out the materiality and relevancy of the inquiry, and in this respect is defective. *Luttrell v. State*, 14 Tex. App. 152; *Counts v. State*, 19 Tex. App. 452; *Goforth v. State*, 22 Tex. App. 408, 3 S. W. 332. The inference may be drawn that the purpose of the inquiry was to indicate to the jury that Jones had made statements touching the identity of the hogs contradictory to that given by him upon the trial. It is possible that the trial judge regarded the inquiry not adapted to that purpose in that it is not asked what statements Jones made, but rather asks for the conclusion of the witness relating to whether the statements he did make were contradictory or otherwise. We have examined the statement of facts touching this matter, and it appears that the witness McMahan said that he had but one conversation with Jones about the hogs, and that in that conversation Jones did not describe them; that he did delay delivering them to him until they were identified by Mr. Kennedy as belonging to Jones. He said further that the delay was not because of any contradiction in Jones' description. The state of the record was not such as to disclose that there was error committed by the learned trial judge in the matter complained of.

The judgment is affirmed.

#### PETTY v. STATE. (No. 5588.)

(Court of Criminal Appeals of Texas. Dec. 3, 1919.)

#### 1. HOMICIDE $\Leftrightarrow$ 119—WHEN KILLING IN SELF-DEFENSE JUSTIFIABLE.

Under Pen. Code 1911, art. 1105, homicide is permissible in repelling an assault where death or serious bodily injury is to be apprehended, but where an assault is of such character that no serious injury is to be apprehended, one assaulted must, under article 1107, resort to other reasonable means at hand of preventing injury before he can be justified in taking the life of his antagonist.

#### 2. HOMICIDE $\Leftrightarrow$ 300(7) — INSTRUCTION ON SELF-DEFENSE INCORRECT UNDER EVIDENCE.

A charge that homicide is justifiable in protection of the person against any unlawful and violent attack, but in such case all other means must be resorted to for the prevention of the injury, *held* erroneous; the evidence showing that from defendant's standpoint the attack upon him was one calculated to kill or seriously injure him, in which case defendant was not required to resort to any other means than force.

3. HOMICIDE  $\Leftrightarrow$ 300(7)—LIMITATION OF SELF-DEFENSE BY INSTRUCTION ON PROVOKING DIFFICULTY NOT JUSTIFIED BY EVIDENCE.

The act of defendant, who with others was working on a public road, in lying down on a pallet which deceased claimed as his bed and refusing upon request to surrender it, was not unlawful, and where it did not appear to have been intended or reasonably calculated to provoke assault by deceased, an instruction on provoking the difficulty was not appropriate.

Appeal from District Court, Smith County; J. R. Warren, Judge.

McKinley Petty was convicted of murder, and he appeals. Reversed and remanded.

Calhoun & Gentry, of Tyler, for appellant. Alvin M. Owsley, Asst. Atty. Gen., for the State.

MORROW, J. The conviction was for murder, and punishment fixed at confinement in the penitentiary for a period of ten years.

The deceased and the appellant were negro youths and friends. They were employes of Meadows in working upon a public road. Meadows maintained a tent in which the men working for him slept upon pallets that were made on the ground. The deceased had been working for Meadows for some time. He and the witness Holmes slept together upon a pallet made of a wagon sheet. The appellant was employed on the day upon which the homicide took place. It was contemplated that the appellant should sleep in the tent, but that he should make his own arrangements about finding some place in the tent to occupy. Before retiring a conversation took place in which the appellant, answering an inquiry, said he was going to sleep in the tent, and the deceased remarked there was no place for him. Subsequently the appellant entered the tent and lay down upon the pallet which had been occupied by the deceased and Holmes. Later the deceased entered and insisted that the appellant surrender the bed. A colloquy took place, which the testimony does not indicate amounted to a quarrel. It was concluded, however, by the deceased remarking, "You wait until I come back; I'll bet you get up," at the same time going rapidly out of the tent; and on his immediate return the appellant struck him one blow with a pocketknife, causing his death. There is but little conflict in the evidence relating to what transpired, except that the state's witnesses claim that the deceased had two sticks, while the appellant and his witnesses mentioned but one. There is no evidence of previous ill will, except that a witness testified that during the evening, while a crap game was progressing, the deceased, who was not in the game, made some remark to which the appellant respond-

ed, telling the deceased to mind his own business, or words to that effect.

The witness Holmes, who was lying on the bed with the appellant, said that he got the impression that the controversy was friendly until the deceased got mad and ran out of the tent, saying, "I'll bet you get up when I get back," and returned with a stick about the size and length of his arm; that as he entered the tent with the stick drawn back the appellant met him and struck him.

The appellant testified that he thought the controversy over the bed friendly; that he intended to move over and give the deceased the place in which he had been sleeping; that he did not know the deceased was mad until he saw him coming back with a stick; that he, the appellant, then got his knife out of his overalls, which he was using for a pillow; and that the deceased at that time was entering the tent and struck the appellant with the stick, the blow being warded off by the arm. His testimony was that he was frightened when he saw that the deceased was mad and approaching with a stick; that he then thought deceased was about to kill him, and struck for the purpose of preventing it; that he did not intend to kill the deceased.

[1,2] The court submitted the law of murder, manslaughter, and self-defense. In connection with the latter the court embodied in his charge the following:

"Homicide is justifiable in the protection of the person against any unlawful and violent attack, but in such case all other means must be resorted to for the prevention of the injury."

We regard appellant's complaint of this phase of the charge a just one. From appellant's standpoint, the attack upon him was one calculated to kill or seriously injure him. The danger was imminent and immediate. We discern nothing in the evidence relating to it indicating that appellant was called upon to resort to any means other than force sufficient to repel the attack and avoid the injury to himself. The law of self-defense is governed by statute in this state, and occasions arise in which the assault is of a character indicating that no serious injury is intended, and in resisting such an assault one must resort to other reasonable means at hand of preventing the injury before he can be justified in taking the life of his antagonist. See article 1107, Penal Code; *Best v. State*, 58 Tex. Cr. R. 327, 125 S. W. 909; *Terrell v. State*, 53 Tex. Cr. R. 604, 111 S. W. 152. Generally speaking, when the assault is of a character which, viewed from the standpoint of the person assailed, is likely to produce death or serious bodily injury, article 1105 of the Penal Code, which makes the infliction of death justifiable in preventing murder and other offenses named, controls. *Kendall v. State*, 8 Tex.



App. 582; Ainsworth v. State, 8 Tex. App. 537; Hill v. State, 10 Tex. App. 625.

[3] The court limited appellant's right of self-defense. The evidence does not impress us as of a character making a charge upon provoking the difficulty appropriate. The act of the appellant in lying down upon the pallet and refusing upon request to surrender it was not unlawful; and though it may have been inconsiderate, it does not appear to have been intended by him to bring about an assault by the deceased that harm might be done him; nor reasonably calculated to provoke the deceased to attempt to injure him. Young v. State, 53 Tex. Cr. R. 417, 110 S. W. 445, 126 Am. St. Rep. 792; Roberson v. State, 203 S. W. 349; Ruling Case Law, vol. 18, p. 833, § 137; Franklin v. State, 34 Tex. Cr. R. 286, 30 S. W. 231.

While no complaint is made of the failure to charge on the law of aggravated assault arising under article 1149 of the Penal Code, and the evidence suggesting that the homicide may have taken place in a sudden passion and death inflicted with an instrument which was not per se a deadly weapon (Hill v. State, 11 Tex. App. 470, and other cases cited in Branch's Annotated Penal Code, § 2103), we deem it proper, in view of another trial, to mention this phase of the case.

For the errors pointed out, the judgment is reversed, and the cause remanded.

#### WASHINGTON v. STATE. (No. 5587.)

(Court of Criminal Appeals of Texas. Dec. 8, 1919.)

#### 1. CRIMINAL LAW §1099(5)—CONSIDERATION OF STATEMENT OF FACTS NOT FILED IN TIME.

A statement of facts filed more than 90 days after adjournment of the term at which conviction was had, contrary to Code Cr. Proc. art. 845, cannot be considered.

#### 2. CRIMINAL LAW §1106(2)—WHAT CONSTITUTES FILING OF TRANSCRIPT "AT ONCE."

A transcript, filed nearly 150 days after adjournment of trial court, is in plain violation of the duty enjoined on the district clerk by statute, requiring that transcripts be made out "at once" after adjournment, and forwarded to Court of Criminal Appeals.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, At Once.]

#### 3. CRIMINAL LAW §1097(4)—ADMISSIBILITY OF CONFESSION NOT CONSIDERED IN ABSENCE OF STATEMENT OF FACTS.

Without a statement of facts appellate court cannot determine whether confession was obtained by force.

#### 4. CRIMINAL LAW §537—FORCED CONFESSION ADMISSIBLE IF THEREBY FRUITS OF CRIME ARE DISCOVERED.

In a prosecution for burglary of a private residence, a confession obtained by force is admissible if in connection therewith defendant made statements which led to the finding of the stolen property, the fruits of the crime.

Appeal from District Court, Houston County; John S. Prince, Judge.

Tobe Washington was convicted of burglary of a private residence, and he appeals. Affirmed.

Alvin M. Owsley, Asst. Atty. Gen., for the State.

LATTIMORE, J. Appellant was convicted in the district court of Houston county of the offense of burglary of a private residence, and given a sentence of five years in the penitentiary.

[1] We cannot consider the statement of facts filed in this case, because the same was filed in the office of the district clerk more than 90 days after the adjournment of the term at which appellant was convicted. See article 845, C. C. P. It appears from the record that said term of court adjourned on April 23, 1919, and the statement of facts was not filed until August 1, 1919.

[2] We also call attention to the fact that the transcript herein was not filed in this court until September 17, 1919, or nearly 150 days after the adjournment of the trial court. This is in plain violation of the duty enjoined upon the district clerk by our statute, which requires that transcripts be made out at once after adjournment, and forwarded to this court. Attention was called to this character of dereliction in Francis v. State, 70 Tex. Cr. R. 243, 156 S. W. 1167, and in Northcutt v. State, 70 Tex. Cr. R. 577, 158 S. W. 1004.

We trust that the time will come when the district clerks of this state will more carefully observe the requirements of our laws in this respect.

[3, 4] There are three bills of exceptions in the record, but there is no statement therein as to when any of them were filed with the district clerk. They complain in various ways that the admission of the alleged confession was obtained by force. Without any statement of facts, we are unable to say whether this is error. If, in connection with such confession, statements were made by appellant which led to the finding of the stolen property, the fruits of the crime, etc., such confession would be admissible notwithstanding.

The indictment and the charge of the court seem to follow the law; and, no error appearing, the judgment of the trial court is affirmed.

**SAUNDERS et al. v. STATE. (No. 5604.)**

(Court of Criminal Appeals of Texas. Dec. 3, 1919.)

**1. JUDGMENT  $\S$ 17(1)—JUDGMENT ON BAIL BOND AGAINST SURETIES NOT SERVED.**

Where there are more parties than one on a bail bond and sureties have not all been served, a judgment cannot be rendered against them even by default, unless judgment dismisses as to parties not served, and renders judgment against those served.

**2. BAIL  $\S$ 93—JUDGMENT MUST DECREE SURETIES JOINTLY AND SEVERALLY LIABLE.**

A judgment against sureties on bail bond must follow the statute and decree sureties jointly and severally liable, and it is not enough to render judgment only specifically against each surety for the amount stipulated in the bond.

**3. BAIL  $\S$ 58—RECITAL IN BOND AS TO OFFENSE.**

A bail bond, reciting that principal stood charged "with offense of selling liquors in violation of the local option law," is not sufficient.

Appeal from District Court, Cooke County; C. R. Pearman, Judge.

Scire facias on bail bond by the State against Owen Saunders and others. Judgment for plaintiff, and defendants appeal. Reversed, and cause remanded.

See, also, 217 S. W. 949.

J. T. Adams, of Gainesville, for appellants.  
Alvin M. Owsley, Asst. Atty. Gen., for the State.

**DAVIDSON, P. J.** [1] This is a scire facias case. The record discloses that the principal gave bond, which was forfeited. None of the sureties were served by citation to answer the forfeiture except one, but judgment final was taken against all of the sureties. The authorities sustain the proposition, contended for by appellants, that where there are more parties than one on the bond, and the sureties have not all been served, a judgment cannot be rendered against them, even by default. Some disposition must be made in the judgment of those not served. This is done by a dismissal of those not served if a judgment is desired to be taken against those who were served. A final judgment, under such circumstances, cannot be rendered, and especially as against those who are not served.

[2] It is contended also that the judgment is fatally defective in its recitals, in that it made the bond final for the \$500 stipulated in the bond against each party. We are of opinion the judgment does not comply with the law. The sureties are jointly and severally liable, but the judgment must so decree. It is not sufficient that it renders a

judgment only specifically against each surety for the amount stipulated in the bond. All of the sureties are as well jointly liable for the amount. They are also severally liable but the judgment must follow the terms of the statute. This is a statutory bond.

[3] It is also contended that the bail bond was not sufficient. The recitation of the offense in the bail bond was that the principal stood charged "with the offense of selling liquor in violation of the local option law." This is not sufficient. There are quite a number of adjudicated cases holding that such is not a sufficient recitation of the offense for violation of the local option law. See *Stephens v. State*, 50 Tex. Cr. R. 531, 98 S. W. 859, 99 S. W. 1122; *Cravey v. State*, 26 Tex. App. 84, 9 S. W. 62; *Anderson v. State*, 201 S. W. 994. It is necessary that the scire facias shall state the offense with which the principal is charged, and, unless this is done, final judgment cannot be correctly rendered upon the bond.

For the reasons indicated, the judgment will be reversed, and the cause remanded.

**GIPSON v. STATE. (No. 5546.)**

(Court of Criminal Appeals of Texas. Dec. 10, 1919.)

**CRIMINAL LAW  $\S$ 273—EVIDENCE ADMISSIBLE TO DETERMINE PENALTY AFTER PLEA OF GUILTY.**

A plea of guilty under the Texas practice admits all the criminating facts alleged, and evidence is admitted only to enable the jury to determine the penalty.

Appeal from District Court, Smith County, J. R. Warren, Judge.

Enoch Gipson was convicted of manufacturing intoxicating liquors, and he appeals. Affirmed.

Alvin M. Owsley, Asst. Atty. Gen., for the State.

**LATTIMORE, J.** Appellant pleaded guilty in the district court of Smith county of the offense of manufacturing intoxicating liquor, and was given a penalty of one year in the penitentiary. A motion for a new trial was filed, upon the grounds that the liquor was not shown to be intoxicating, and that it was not shown that the same was not made for sacramental purposes.

A plea of guilty, under our practice, admits all the criminating facts alleged, and evidence is admitted only for the purpose of enabling the jury to determine the penalty. However, the evidence in the statement of facts in this case shows that the liquor was intoxicating.

The charge of the court and the indictment appear to be in accordance with the law, and, finding no error, the judgment of the lower court is affirmed.

### HUNTER v. STATE. (No. 5562.)

(Court of Criminal Appeals of Texas. Dec. 10, 1919.)

#### 1. CRIMINAL LAW §981(2)—INQUIRY AS TO INSANITY AFTER TRIAL.

If it be claimed that defendant's mind is of such a character as to render him legally insane, the matter can be inquired into after as well as before trial for a criminal offense, and, on adjudication of the question in a lunacy proceeding, defendant can be sent to an institution for the insane, and not to the penitentiary.

#### 2. CRIMINAL LAW §1064(1)—MOTION FOR NEW TRIAL NOT CALLING FOR CONSIDERATION.

The Court of Criminal Appeals cannot consider a motion for new trial, not signed or sworn to, nor stating its facts in such a way as to make their truth a question to be considered, either by the trial court or the Court of Criminal Appeals.

Appeal from District Court, Smith County; J. R. Warren, Judge.

June Hunter was convicted of violation of the local option law, and he appeals. Affirmed.

Alvin M. Owsley, Asst. Atty. Gen., for the State.

LATTIMORE, J. Appellant was convicted in the district court of Smith county for the violation of the local option law, and given a penalty of five years in the penitentiary. There is no statement of facts, and no exceptions appear in the record, either to the evidence or to the charge of the court; but appellant raises one question in his motion for a new trial which we will notice.

[1] Appellant was tried on April 28, 1919, and his amended motion for a new trial was filed on May 7, 1919, appended to which motion were four affidavits of parties, substantially stating that appellant was of weak mind and easily influenced, and one of said affidavits raises the question of whether or not appellant had sufficient intelligence to know the difference between right and wrong. If it be claimed that appellant's mind is of such character as to render him legally insane, such matter could be inquired into after, as well as before trial, and, upon an adjudication of such question in a lunacy proceeding, appellant could be sent to an institution for the insane, and not to the penitentiary. We make this observation, stating, however, that the matter is not presented in

the record in such way as to show any error in the action of the trial court in overruling the motion for a new trial.

[2] There are other facts stated in the motion for a new trial which we cannot consider. Said motion was not signed or sworn to, nor the facts therein stated in such a way as would make their truth a question to be considered, either by the trial court or this court. No reason or excuse is shown why there is no statement of facts in the record.

The indictment and charge of the court are sufficient and, no error appearing, the judgment of the trial court is affirmed.

### McCORMICK v. STATE. (No. 5512.)

(Court of Criminal Appeals of Texas. Dec. 10, 1919.)

#### 1. CRIMINAL LAW §878(2)—GENERAL VERDICT PROPERLY APPLIED TO COUNT CHARGING THEFT.

Where indictment was in two counts, one charging theft, and the other receiving and concealing the property, and a general verdict of guilty was returned, the trial court properly applied the verdict to the count charging theft, and rendered judgment accordingly.

#### 2. CRIMINAL LAW §780(2)—EVIDENCE JUSTIFIED INSTRUCTION ON ACCOMPLICE'S TESTIMONY.

In a prosecution for theft, held that, defendant was entitled to have given an instruction submitting the issue of whether state's witness was an accomplice.

#### 3. CRIMINAL LAW §814(2)—ISSUE RAISED BY EVIDENCE SHOULD BE SUBMITTED.

Where there is any evidence raising an issue, it becomes the duty of the trial court to submit the issue.

#### 4. CRIMINAL LAW §743—TRUTH OF DEFENDANT'S TESTIMONY FOR JURY.

Whether the evidence of the accused be true or false is a question for the jury under proper instructions.

#### 5. CRIMINAL LAW §780(2)—JUSTIFICATION FOR REFUSAL OF REQUEST TO SUBMIT ISSUE.

That defendant in his alleged confession, which was introduced by the state, contradicted his testimony as a witness on the trial, could only affect his credibility as a witness, or his guilt, and in no wise justified ignoring the right of the jury to pass on the question of accomplice's testimony, by refusing requested instruction relating thereto.

#### 6. CRIMINAL LAW §829(1)—REFUSAL OF INSTRUCTION COVERED BY MAIN CHARGE.

There was no error in refusing special requested charges, where point raised was covered by the main charge.

7. CRIMINAL LAW 982—REQUEST FOR SUSPENDED SENTENCE PUT REPUTATION IN ISSUE.

Defendant, being prosecuted for theft, by asking for a suspended sentence, put his reputation in issue, and there was no error in allowing the state to prove that he had been convicted for playing poker.

Appeal from Criminal District Court, Tarrant County; George E. Hosey, Judge.

Tench McCormick was convicted of theft, and appeals. Reversed and remanded.

Mays & Mays, of Ft. Worth, for appellant.

Jesse M. Brown, Criminal Dist. Atty., of Ft. Worth, W. E. Myres, Asst. Criminal Dist. Atty., of Cleburne, O. M. Cureton, Atty. Gen., and John Maxwell, Asst. Atty. Gen., for the State.

LATTIMORE, J. [1] The indictment against appellant contains two counts, one charging appellant with theft, and the other with receiving and concealing the same property alleged to have been stolen in the first count. A general verdict of guilty was returned by the jury, and the trial court applied said verdict to the count charging theft, and rendered judgment accordingly. This was correct, and such action has often been upheld by this court.

[2] Appellant asked a special charge, in due form and manner submitting to the jury the question as to whether or not the state's witness Harwell was an accomplice; said charge being refused, and such action of the court assigned as error. We think this contention must be upheld. Appellant testified in his own behalf, denying the theft of the alleged stolen property, or any guilty connection with the taking of the same, and further testified that on the night the property was taken he was at home; that he got his first information relative to the whereabouts of the alleged stolen property from the witness Harwell, said information being received by him the night before he was arrested. He states that Harwell—

"came over and called me out, and told me that he was going to Dallas early the next morning, \* \* \* and said something about wanting some casings brought down to the gin the next morning; told me he wanted me to help him put some casings on his car. \* \* \* The next time I saw this fellow Bud Harwell, after he came to my house that night, was the next morning just before daylight. He did not come into the house; he came to the porch and called me out, and he came to the little room. There is a little room or hall on the porch, and I was in there. I did not have my pants on. He told me there that he had some stuff down there, and he wanted me to bring it to the gin; that he wanted to go to Dallas. I did not have any idea it was stolen stuff at that time. He said he would give me 50 cents for bringing it down there. I took the stuff to the

gin. He was there when I got there. He was in his car. I delivered the stuff to him. He gave me a check after I delivered the stuff to him. \* \* \* I turned this stuff over to him when he gave me this check, and went back to the house."

On cross-examination, in answer to the state's question, "Who turned over the automobile tires and tubes to you?" appellant answered:

"Fred Harwell told me about where I would find them. He told me that I would find them over about an old well right at the garage. I found them right there at the well. Part of them was stuck down in the well. He told me that morning where I would find them, on the morning he came to my house, the morning that Le Gett arrested me; and he wanted me to go and get them, and deliver them at the gin for him."

[3, 4] The state's contention, supported by their proof, was that Harwell was acting for and in behalf of the owner, and with the officers, and aiding to recover the alleged stolen property, and find out and catch the thief. Their contention is abundantly upheld by the evidence, and may be true; but that is a question for the decision of the jury, and not the trial court. When there is any evidence raising an issue, it becomes the duty of the trial court to submit the same to the jury, and in this case it is beyond question that, if appellant's testimony be true, the witness Harwell would certainly be an accomplice. Whether the evidence of appellant be true or false, under our practice it is a question for the jury, under proper instructions. The state contends that the evidence does not raise the question of accomplice testimony, and cites the case of *Dever v. State*, 37 Tex. Cr. R. 396, 30 S. W. 1071, the case of *Steele v. State*, 19 Tex. App. 425, and the case of *Bush v. State*, 68 Tex. Cr. R. 299, 151 S. W. 556. As we understand those cases, they hold directly contrary to the state's contention.

[5] It is entirely immaterial to a decision of this question that appellant, in his alleged confession, which was introduced by the state, contradicted his testimony as a witness on the trial. This could only affect his credibility as a witness or his guilt, and in no wise justified ignoring the right of the jury to pass on the question of accomplice testimony. The substance of the requested charge on that theory should have been given.

[6] The court below did not err in refusing the other special charge requested; the point there raised being covered by the main charge.

[7] No error was committed by allowing the state to prove that appellant had been convicted for playing poker. He asked for a suspended sentence, and thereby put in is-

sue his general reputation, as affecting which evidence of convictions for offenses not involving moral turpitude is admissible. *Williams v. State*, 74 Tex. Cr. R. 289, 187 S. W. 300.

For the error indicated, the judgment of the trial court is reversed, and the cause remanded.

# JUHAN v. STATE. (No. 4544.)

(Court of Criminal Appeals of Texas. June 5, 1918. On Motion for Rehearing, Oct. 22, 1919.)

## 1. CONSTITUTIONAL LAW §81—SCOPE OF POLICE POWER.

While the courts do not undertake to catalogue the subjects on which police power may operate, such power, which is not arbitrary, is commensurate with the duty to provide for the people in their health, safety, comfort, and convenience, as consistently as may be with private property rights.

## 2. CONSTITUTIONAL LAW §81—REGULATION OF BUSINESS UNDER POLICE POWER.

The state under its police power has the right to regulate the conduct of business to protect the public health, morals, and welfare, observing constitutional limitations, reasonable classification, and terms of control.

## 3. LICENSES §11(1)—OCCUPATIONS LIABLE.

Callings that cannot be regulated except by license tax are those which cannot in their operation be dangerous to the public, but all others may be restricted.

## 4. INTEREST §27—REGULATION OF LOANING MONEY.

The taking of interest, or as it was then called usury, was looked upon in early times with great disfavor, and actually prohibited, not only by the old English law, but by the Mosaic law of the Jews, and to this day the calling of lending money at interest is subject to regulation.

## 5. INTEREST §3—INHERENT RIGHTS TO LEND MONEY AT INTEREST.

The right to lend money at interest is a creature of statute, and not an inherent right.

On Motion for Rehearing.

## 6. CONSTITUTIONAL LAW §296(1) — PAWN-BROKERS AND MONEY LENDERS §2—DENIAL OF DUE PROCESS OF LAW.

Acts 34th Leg. 1915, c. 28 (Vernon's Ann. Civ. St. Supp. 1918, arts. 6171a-6171d), defining loan brokers, providing regulations therefor, and punishment for violation thereof, which requires every private citizen engaged in such business not only to give a bond, but to file a written irrevocable power of attorney, naming the county judge of the county as his duly authorized agent, for the purpose of accepting service and consenting that service of any civil process upon such judge shall be valid, is unconstitutional, the unreasonable and dis-

criminatory provisions as to service, coupled with the further provision that judgments against persons engaged in the loan business shall be collectible out of the required bond, denying persons engaged in such business of their property and privileges without due process of law.

Appeal from Collin County Court; R. L. Moulden, Judge.

O. O. Juhan was convicted of violating Acts of 34 Leg. 1915, c. 28, defining loan brokers, and providing regulations therefor, and punishment for violation thereof, and he appeals. Reversed, and proceedings ordered dismissed.

Charles F. Greenwood and John W. Pope, both of Dallas, for appellant.

Sam Neathery, Co. Atty., of McKinney, and E. B. Hendricks, Asst. Atty. Gen., for the State.

MORROW, J. The prosecution is for violation of the act of the 34th Legislature, chapter 28 (Vernon's Ann. Civ. St. Supp. 1918, arts. 6171a-6171d), defining "Loan Brokers," and providing regulations therefor and punishment for violations thereof.

A loan broker is defined in the act as follows:

"A 'loan broker' is a person, firm or corporation who pursues the business of lending money upon interest and taking as security for the payment of such loan and interest an assignment of wages, or an assignment of wages with power of attorney to collect the same or other order for unpaid chattel mortgage or bill of sale upon household or kitchen furniture." Section 1 (article 6171a).

Other provisions, making conditions precedent to the engagement in the business, require a bond of \$5,000, prescribing its terms; that a book registering the transactions shall be kept open to inspection; the filing of power of attorney, making the county judge the agent upon whom service of process may be had; penalizing the continuance of the pursuit of the business when in default of the payment of the judgment rendered on the bond; requiring that in securities pledged by a married man the wife shall join; fixing an annual tax; declaring compromises for usury void; and prescribing a penalty.

The appeal is maintained on the proposition that appellant, in lending money at the legal rate on chattel mortgage security, was exercising an inalienable right, and that the act abridging it is void for want of power in the legislative department of the government, and its terms unreasonable.

[1] He urges various reasons for his contentions. These cannot, within the limits of an opinion, be followed in detail. All of them are referable to the scope and limits of the police power of the state. This power

has been the subject of much comment by text-writers and judges, so much that it would be futile to attempt its review. No more satisfactory statement of it has been found than that made by Justice Williams of the Supreme Court of this state in the opinion in *H. & T. O. Ry. Co. v. Dallas*, 98 Tex. 415, 84 S. W. 653, 70 L. R. A. 850, from which we quote as follows:

"The power is not an arbitrary one, but has its limitations. It is commensurate with, but does not exceed, the duty to provide for the real needs of the people in their health, safety, comfort, and convenience, as consistently as may be with private property rights. As those needs are extensive, various, and indefinite, the power to deal with them is likewise broad, indefinite, and impracticable of precise definition or limitation."

Courts have not undertaken to catalogue the subjects upon which the police power may operate, nor to define in precise terms the measures that may be lawfully taken, but are guided by previous decisions, and pass upon particular cases as they arise, and determine whether they fall within or without the proper limits. See *Hudson v. McCarter*, 209 U. S. 349, 28 Sup. Ct. 529, 52 L. Ed. 828, 14 Ann. Cas. 560; *Chicago R. R. v. State*, 47 Neb. 549, 66 N. W. 624, 41 L. R. A. 481, 53 Am. St. Rep. 557; *State v. Harrington*, 68 Vt. 622, 35 Atl. 515, 34 L. R. A. 100; *Ives v. South Buffalo Ry. Co.*, 201 N. Y. 271, 94 N. E. 431, 34 L. R. A. (N. S.) 162, Ann. Cas. 1912B, 156; *Stone v. Mississippi*, 101 U. S. 814, 25 L. Ed. 1079; *Dunn v. Commonwealth*, 105 Ky. 834, 49 S. W. 813, 43 L. R. A. 701, 88 Am. St. Rep. 344; *Aubrey's Case*, 36 Wash. 308, 78 Pac. 900, 104 Am. St. Rep. 952, 1 Ann. Cas. 927; *People v. Budd*, 117 N. Y. 1, 22 N. E. 670, 682, 5 L. R. A. 559, 15 Am. St. Rep. 460. It follows that the decisions of courts passing upon laws similar to those before it in a given case become important subjects of investigation.

[2-4] It cannot be questioned that the state, under its police power, has the right to regulate the conduct of business to protect the public health, morals, and welfare, observing constitutional limitations, reasonable classification, and terms of control. This is recognized in constructions of both the federal and state Constitutions. *Tiedeman on Lim. Police Power*, § 102; *Mugler v. Kansas*, 123 U. S. 623, 8 Sup. Ct. 273, 31 L. Ed. 205; *Murphy v. People of Cal.*, 225 U. S. 623, 32 Sup. Ct. 697, 56 L. Ed. 1229, 41 L. R. A. (N. S.) 153; *St. Louis v. Fischer*, 167 Mo. 654, 67 S. W. 872, 64 L. R. A. 679, 99 Am. St. Rep. 614; *Id.*, 194 U. S. 361, 24 Sup. Ct. 673, 48 L. Ed. 1018; and other cases listed in *Ruling Case Law*, vol. 6, p. 198.

Callings that cannot be regulated except by license tax are those which cannot in their operation be dangerous to the public. *Tiedeman on Lim. Police Power*, p. 273; *Ex*

*parte Dickey*, 144 Cal. 234, 77 Pac. 924, 66 L. R. A. 928, 103 Am. St. Rep. 82, 1 Ann. Cas. 428. All others may be restricted. *Tiedeman on Lim. Police Power*, § 102; *Ex parte Drexel*, 147 Cal. 763, 82 Pac. 429, 2 L. R. A. (N. S.) 588, 3 Ann. Cas. 878; *Stone v. Mississippi*, 101 U. S. 814, 25 L. Ed. 1079, notes 15 and 16, and other cases listed in 6 *Ruling Case Law*, p. 218, note 16. And those essentially harmful may be prohibited. *Commonwealth v. Vrooman*, 164 Pa. 306, 30 Atl. 217, 25 L. R. A. 250, 44 Am. St. Rep. 603; *Ruling Case Law*, vol. 6, p. 194, note 6 and cases cited.

The calling of lending money at interest is subject to regulation. From 22 Cyc. 1471, we quote the following:

"The taking of interest, or, as it was then called, 'usury,' was looked upon in early times with great disfavor, and actually prohibited, not only by the Mosaic law among the Jews, but also under severe penalties by the old English laws. The church uttered its anathema, and the state leveled its forfeitures, against the taking of any interest, great or small. But, notwithstanding the denunciations and punishments to which it was subjected, it could not be suppressed, and it was finally, in 1545, sanctioned in England by 37 Henry VIII, c. 9."

[5] The right to lend money at interest is a creature of statute, not an inherent right, and in our Constitution there is a limitation of the right prohibiting contracts for interest exceeding 10 per cent. per annum. Many restrictions and regulations with reference to lending money and touching the security that may be taken therefor will be found in the banking laws of the United States and the several states. Laws identical in purpose and similar in detail to that involved in this appeal have been passed by more than 30 of the states of the Union and in the District of Columbia. So far as we have examined the authorities they have except in the case of *Massie v. Cessna*, 239 Ill. 352, 88 N. E. 152, 28 L. R. A. (N. S.) 1108, 130 Am. St. Rep. 234, been sustained. *People v. Stokes*, 281 Ill. 159, 118 N. E. 87; *Mutual Loan Co. v. Martell*, 200 Mass. 482, 86 N. E. 916, 43 L. R. A. (N. S.) 746, 128 Am. St. Rep. 446; *Knoxville v. Harbison*, 183 U. S. 13, 22 Sup. Ct. 1, 46 L. Ed. 55; *Hancock v. Yaden*, 121 Ind. 366, 23 N. E. 253, 6 L. R. A. 576, 16 Am. St. Rep. 396; *State v. Peel*, 36 W. Va. 802, 15 S. E. 1000, 17 L. R. A. 385; *State v. Wear*, 79 Or. 367, 154 Pac. 905, 155 Pac. 364; *Commonwealth v. Grossman*, 248 Pa. 11, 83 Atl. 781; *In re Stephan*, 170 Cal. 48, 148 Pac. 196, Ann. Cas. 1916E, 617; *Heath & Milligan Mfg. Co. v. Worst*, 207 U. S. 338, 28 Sup. Ct. 114, 52 L. Ed. 236; *Telephone Co. v. Los Angeles*, 211 U. S. 265, 29 Sup. Ct. 50, 53 L. Ed. 176; *Edwards v. State*, 62 Fla. 40, 56 South. 401; *King v. State*, 136 Ga. 706, 71 S. E. 1093; *State v. Sherman*, 18 Wyo. 169,

106 Pac. 299, 27 L. R. A. (N. S.) 898, Ann. Cas. 1912C, 819; *Wessell v. Timberlake*, 95 Ohio, 21, 116 N. E. 43, Ann. Cas. 1918B, 402; *Commonwealth v. Puder*, 261 Pa. 129, 104 Atl. 505, Supreme Court of Pennsylvania, decided April, 1918.

In the case of *People v. Stokes*, 281 Ill. 159, 118 N. E. 87, that of *Massie v. Cessna*, 239 Ill. 352, 88 N. E. 152, 28 L. R. A. (N. S.) 1108, 130 Am. St. Rep. 234, is distinguished; and in *Mutual Loan Co. v. Martell*, supra, the Supreme Court of Massachusetts and the Supreme Court of the United States (222 U. S. 231, 32 Sup. Ct. 74, 56 L. Ed. 178, Ann. Cas. 1913B, 529) refused to follow it.

The states having similar laws are as follows: California, Colorado, Connecticut, Delaware, District of Columbia, Florida, Georgia, Illinois, Indiana, Iowa, Kentucky, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Nebraska, New Hampshire, New Jersey, New York, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, Tennessee, Texas, Utah, Virginia, Wisconsin, and Wyoming. The major portion of them require a bond as a condition precedent for the pursuit of the business, and other regulations varying in terms, but not different in substance, from those in our statute. The law on the subject enacted by Congress for the District of Columbia varies from ours in no essential particular, and contains the criticised requirement that an agent upon whom service of process may be made shall be appointed, requires a bond in the sum of \$5,000, and is more restrictive than the Texas statute, in that it requires the bond shall be made by a surety company. U. S. Statutes at Large, vol. 37, part 1, p. 657, c. 26. In amount of bond and other provisions this statute is not unlike that in many of the other states. The classification of occupations for the purpose of police regulation, based upon the character of security taken for loans, is declared legal in *Griffith v. Conn.*, 218 U. S. 563, 31 Sup. Ct. 132, 54 L. Ed. 1151, and the principle recognized in the decisions construing our Constitution, art. 8, § 2. See *Fahey v. State*, 27 Tex. App. 146, 11 S. W. 108, 11 Am. St. Rep. 182; *Texas v. Stephens*, 100 Tex. 628, 103 S. W. 481; *Cradock v. Express Co.*, 58 Tex. Civ. App. 551, 125 S. W. 60; *Fahey v. State*, 27 Tex. App. 160.

The case of *Owens v. State*, 53 Tex. Cr. R. 105, 112 S. W. 1075, 126 Am. St. Rep. 772, is relied on by appellant as sustaining his contention throughout. The decision condemned the statute concerning the pursuit of the business of procuring and purchasing assignments of wages. Its terms were a manifest discrimination in excepting from its operation persons of the same class as others who were affected by its restrictions. We think it was also correctly determined there-

in that the statute was an unauthorized and unreasonable exercise of the police power. By fixing the license tax at \$5,000 annually, to be collected by the state, and \$2,500 additional by the county, it manifestly prohibited the pursuit of the business at which it was directed. The right to license and regulate an occupation which may under such restrictions be conducted in a manner not harmful to the public does not include the right to prohibit its pursuit. *Tiedeman on Lim. Police Power*, § 102; *Freund on Police Power*, §§ 492, 494, 498; *Hirshfeld v. City of Dallas*, 29 Tex. App. 242, 15 S. W. 124; 8 Cyc. 886; *Carrigan v. Lycoming Fire Ins. Co.*, 53 Vt. 418, 38 Am. Rep. 689; *Milliken v. Weatherford*, 54 Tex. 388, 38 Am. Rep. 629; *Commonwealth v. Atlantic Coast Ry.*, 106 Va. 61, 55 S. E. 572, 7 L. R. A. (N. S.) 1086, 117 Am. St. Rep. 983, 9 Ann. Cas. 1124; *State v. Phelps*, 144 Wis. 1, 128 N. W. 1041, 35 L. R. A. (N. S.) 353. The restrictions upon the wage-earner and the purchaser were unreasonable in that they put a prohibitive tax upon the purchaser, and made one subject to the tax who took as many as three assignments of wages. The distinction between that case and this one is obvious. Here the license tax is \$150 a year. The obligation in the bond is contingent, and not absolute. It creates no liability against one who pursues the occupation in accordance with the law. It regulates, but does not prohibit, the business. A bond, in substance such as that required by this statute, was required by the state of Michigan as a condition precedent to engaging in the business of pawnbroker. A pawnbroker's occupation is lending money upon personal property pledged. That of a loan broker, under our statute, is lending money upon personal property mortgaged and upon wages assigned. The principles applicable in the control of pawnbrokers by similar statutes are obviously applicable to those in the instant case. The Supreme Court of Michigan, in a pawnbroker's case, held the bond, which was for \$5,000—very like that in our statute—valid, and the law not obnoxious to the various constitutional provisions urged. See *Grand Rapids v. Braudy*, 105 Mich. 670, 64 N. W. 29, 32 L. R. A. 116, 55 Am. St. Rep. 472, and note. Our statutes regulate pawnbrokers in a manner quite similar to the statute here in question. See Title 103 *Vernon's Sayles' Civil Statutes*. The validity of these regulations has been recognized by this court in *Heitzelman v. State*, 26 S. W. 729. Other cases upon the subject will be found in 30 Cyc. 1165; *Solomon v. Denver*, 12 Colo. App. 179, 55 Pac. 199; *Butt v. Paltrovich*, 30 Mont. 18, 75 Pac. 521, 104 Am. St. Rep. 698; *Elsner v. Hawkins*, 113 Va. 47, 73 S. E. 479, Ann. Cas. 1913D, 1278, and note.

The pawnbrokers' statute embraces prac-

tically the same elements that are the basis of complaint against the loan brokers' statute, and render the right to regulate and furnish an example of an approved method therefor. In street traffic regulations in this and other states the requirement of a bond of indemnity against violations has been held not unreasonable. See *Ex parte Cardnell*, 170 Cal. 519, 150 Pac. 348, L. R. A. 1915F, 850; *Memphis v. State*, 133 Tenn. 83, 179 S. W. 631, L. R. A. 1916B, 1151, Ann. Cas. 1917C, 1056; *Willis v. Ft. Smith*, 121 Ark. 606, 182 S. W. 275; *La Blanc v. New Orleans*, 138 La. 243, 70 South. 212; *Dickey v. Davis*, 76 W. Va. 576, 85 S. E. 781, L. R. A. 1915F, 841; *Greene v. City of San Antonio*, 178 S. W. 6; *Ex parte Parr*, 200 S. W. 404; and other Texas cases there listed.

A provision permitting revocation of licenses has often been held not unreasonable. *Abend v. Terre Haute & Indianapolis R. R. Co.*, 111 Ill. 203, 53 Am. Rep. 620; *Renegar v. United States*, 172 Fed. 646, 97 C. C. A. 172, 26 L. R. A. (N. S.) 686, 19 Ann. Cas. 1117; *Lane v. Chappell*, 159 S. W. 905; *Fischer v. St. Louis*, 194 U. S. 361, 24 Sup. Ct. 678, 48 L. Ed. 1018; *Davis v. Mass.*, 167 U. S. 43, 17 Sup. Ct. 731, 42 L. Ed. 31; *Kissinger v. Hay*, 52 Tex. Civ. App. 295, 113 S. W. 1008.

The United States Supreme Court has held that, as a condition precedent for a license to do business, a foreign corporation may be required to designate an agent within the state upon whom process may be served, and that such requirement may be applied to an individual stockholder who is a nonresident. *Wilson v. Seligman*, 144 U. S. 41, 12 Sup. Ct. 541, 36 L. Ed. 338. It would seem a fair analogy that the state, having authority to prescribe regulations as a condition precedent to the pursuit of a given avocation, would have the right to include as a part of the regulation the requirement that an agent upon whom process might be served be designated as a condition precedent to the issuance of the license.

Concerning the police power of the state and the relation of the courts to its exercise, we take the following quotation from the opinion of the Supreme Court of the United States in *Mugler v. Kansas City*, 123, U. S. 623, 8 Sup. Ct. 273, 31 L. Ed. 210:

"It does not at all follow that every statute enacted ostensibly for the promotion of these ends is to be accepted as a legitimate exertion of the police powers of the state. There are, of necessity, limits beyond which legislation cannot rightfully go. While every possible presumption is to be indulged in favor of the validity of a statute (*Sinking Fund Cases*, 99 U. S. 718, 25 L. Ed. 501), the courts must obey the Constitution rather than the law-making department of government, and must, upon their own responsibility, determine whether, in any particular case, these limits have been passed. 'To what purpose,' it was said

in *Marbury v. Madison*, 5 U. S. (1 Cranch) 137, 176, 2 L. Ed. 60, 70, 'are powers limited, and to what purpose is that limitation committed to writing, if these limits may, at any time, be passed by those intended to be restrained? The distinction between a government with limited and unlimited powers is abolished, if those limits do not confine the persons on whom they are imposed, and if acts prohibited and acts allowed are of equal obligation.' The courts are not bound by mere forms, nor are they to be misled by mere pretenses. They are at liberty—indeed, are under a solemn duty—to look at the substance of things, whenever they enter upon the inquiry whether the Legislature has transcended the limits of its authority. If, therefore, a statute purporting to have been enacted to protect the public health, the public morals, or the public safety has no real or substantial relation to those objects, or is a palpable invasion of rights secured by the fundamental law, it is the duty of the courts to so adjudge, and thereby give effect to the Constitution. \* \* \*

"No one may rightfully do that which the lawmaking power, upon reasonable grounds, declares to be prejudicial to the general welfare.

"This conclusion is unavoidable, unless the Fourteenth Amendment of the Constitution takes from the states of the Union those powers of police that were reserved at the time the original Constitution was adopted. But this court has declared, upon full consideration, in *Barbier v. Connolly*, 113 U. S. 81 [5 Sup. Ct. 857], 28 L. Ed. 924, that the Fourteenth Amendment had no such effect. After observing, among other things, that that amendment forbade the arbitrary deprivation of life or liberty, and the arbitrary spoliation of property, and secured equal protection to all under like circumstances, in respect as well to their personal and civil rights as to their acquisition and enjoyment of property, the court said: 'But neither the amendment—broad and comprehensive as it is—nor any other amendment was designed to interfere with the power of the state, sometimes termed its police power, to prescribe regulations to promote the health, peace, morals, education, and good order of the people, and to legislate so as to increase the industries of the state, develop its resources, and add to its wealth and prosperity.'"

Numerous cases applying the principles herein announced to particular statutes will be found in *Ruling Case Law*, vol. 6, p. 240, note 20, p. 241, notes 1, 2, and 3; page 243, note 13. Having no precise limits defined in advance, the unrestrained exercise of the police power would endanger constitutional government. It being an essential and useful attribute of government, the courts can no more arbitrarily deny its proper exercise than they can tolerate its arbitrary application.

The statutes regulating loan brokers are founded on the idea that there exists a real basis for the classification adopted, and that in the conduct of the business of lending money on mortgages on household effects and



assignment of wages there are abuses, both on the part of the lender and the borrower, which require restrictions in the public interest.

Giving scope to the presumption in favor of the validity of laws, having regard for the numerous instances in which the law-making power of the state and nation have found it expedient to enact laws with the same object as that under consideration, observing that the courts in numerous instances have upheld these laws as a legitimate and proper exercise of the police power of the state, we regard ourselves unauthorized to declare that the Legislature of this state was inhibited by the state or federal Constitution from embracing the subject within its police regulations, or that the conditions existing did not furnish occasion therefor, or that the provisions of the act are unreasonable.

The fact that the record discloses that the appellant has not been able to make the bond required cannot, in view of the finding of the trial court against him, nor in view of the general application of similar laws throughout the country, as pointed out above, be taken as conclusive that the requirement is unreasonable. Similar bonds have been held reasonable requirements; statutes demanding them have been enforced for years. The object of the demand is primarily to furnish assurance that the individual who seeks the license is of a type that will conduct the business permitted in a legal manner, and, secondarily, to furnish indemnity to those injured by his failure to do so. This court upheld the same statute in the case of *Ex parte Hutsell*, 78 Tex. Cr. R. 589, 182 S. W. 458. The opinion was not unanimous, though there was no dissenting opinion written. There has been development of the subject since that time, and in view of the dissent of the Presiding Judge, for whose opinion the writer has great respect, the subject has been gone into with as great detail as practicable, with the result that our conclusion is that the law is not shown invalid, and that the judgment entered should be affirmed.

DAVIDSON, P. J. That the Legislature may regulate "loan brokers" is not questioned. But I cannot concur in sustaining this act of that body. I may later write.

#### On Motion for Rehearing.

LATTIMORE, J. [8] The original opinion in this case is devoted mainly to a discussion and decision of the question as to whether the business of appellant is such as is properly within the regulatory control of the state in the exercise of its police power. We have no doubt that the business of the appellant is one whose regulation is within the police power of the state, and that reasonable re-

striction thereof may be provided by the Legislature; but under our Constitution such restriction may not be such as to make it impossible to conduct a legitimate business, or to arbitrarily deprive a citizen engaged in such business of his right to that equal protection under our laws which is guaranteed by our bill of rights, nor take from him his right to the due course and process of law, which is also guaranteed him by our Constitution.

Giving particular attention to the language and requirements of chapter 28, Acts of the Regular Session of the 34th Legislature, which contains the law on this subject, we concede that the requirement of a bond as a prerequisite to engaging in business as a loan broker is proper, provided the amount and conditions of such bond be not improper. Nor would it be unreasonable for such a law to require an artificial person, such as a corporation, to appoint an agent or attorney in fact upon whom service of legal process may be had, though we are unaware of any law in this state making such provision in the case of a domestic corporation, in case of any other corporation than that described in this act. In our opinion, however, to single out the loan broker, and to define him as one who lends money upon personal securities, who takes assignments of wages, and chattel mortgages upon household goods, and to then require him to give a bond for \$5,000, made renewable every year, and conditioned that he will faithfully comply with each and every requirement of the law governing such business, and pay any judgment which may be obtained against him, as is provided in sections 2 and 3 of the act under consideration (articles 6171b, 6171c), and then to further write in section 7 of said act (article 6171g), as a part of "the law governing such business," that such private citizen shall file with the county clerk of each county where he does business a written, irrevocable power of attorney, naming the county judge of such county as his duly authorized agent and attorney in fact, for the purpose of accepting service for him or it, or being served with citation in any suit brought against him or it, in any court of this state, "and consenting that the service of any civil process upon such county judge as his or its attorney for such purpose, in any suit or proceeding, shall be taken and held to be valid, waiving all claim and right to object to such service or to any error by reason of such service," is to attempt to place such obligation in said bond as to make it unreasonable and discriminatory. No citizen of this state can be compelled to relinquish or waive his right to his day in court as a condition to engaging in any lawful business. Nor will a law requiring a bond seeking to impose such condition be upheld by us. We are not surprised that the bonding companies and solvent citizens, as is disclosed by

this record, refused to make for appellant the bond required by this act. Under its conditions, and the terms of this law, the county judge might accept service, or be served with citation, in a suit against appellant in the most remote county in the state, and in a lawsuit wholly foreign to the loan brokerage business, and in such case, even without knowledge on the part of appellant of said suit or service, or accepted service, a judgment might be rendered against him and his bondsmen for any amount; and, even though the service be defective, erroneous, and illegal, appellant and his sureties would be powerless, for by the express provisions of the law such written appointment of the county judge as his attorney in fact must contain appellant's consent to such service, and his waiver of any right to object to any error therein. Notwithstanding the fact that, as to the ordinary citizen, erroneous and defective service renders the judgment either void or voidable, as the case may appear, for some reason effort is here made to take from the man engaged in the business of loan broker such right, and he is thus penalized and denied the right of equal protection of the law, and deprived of his property and privileges without due course of law. There is no provision in this law requiring the county judge to notify, or in any other way acquaint, the loan broker with the fact that he has accepted service or been served with citation in any suit against him, which fact may result from the consideration that it would do the loan broker no good, inasmuch as he could not take any steps to release himself by reason of any defect in the citation. It might be very questionable, if necessary to a decision of this case, as to whether the county judge could in any event be compelled to act as such agent or attorney in fact, or put himself to any trouble by reason thereof, or take any action with regard thereto. Such function is nowhere prescribed in our Constitution and laws as a part of the duty of the county judge. This, however, is aside from the decision of the questions involved.

Not only do the conditions of the law above mentioned appear unreasonable and discriminatory, but it is further provided in section 9 of said act that any judgment obtained against a loan broker under the articles of this act, or under the laws of Texas, shall be collectable out of the bond provided for.

It thus appears that the bond and sureties would not only be held for the acts of appellant while actually engaged in the line of his business as a loan broker, but also for any other sum for which he might be liable under the laws of this state.

It does not appear to us to be necessary to discuss this act any further. There is grave doubt in our minds as to whether or not the individual citizen of this state, who is given

the right under reasonable and wise provisions of law to be served with citation, and thereby have knowledge brought home to him of a pending suit in this state, can be compelled, if he engage in a particular line of business, to relinquish that right of personal service. We know of no law or authority in this state holding that he may be.

We are not permitted to concern ourselves with the question as to whether the loan broker is necessary and useful in a community, to meet the wants of those who lack ability to measure up to the financial standing required by the bankers, nor as to whether the loan shark is an evil that should be effectively banished from our midst. Evils must be met and abolished, or minimized, according to the wisdom of our Legislature, but within the limits fixed by our Constitution.

Believing that those provisions of this law which fix the conditions of the bond, and require a waiver of the loan broker's right to object to defective service, and permit the payment of other judgments out of the bond, deny a citizen equal protection, and seek to deprive him of his property and privileges without due course of law, we hold said act in violation of our Constitution. The case of *Ex parte Hutsell*, 78 Tex. Cr. R. 589, 182 S. W. 458, holding this law constitutional, is hereby overruled.

The motion for rehearing is granted, and the cause is reversed, and ordered dismissed.

#### FREEMAN v. STATE. (No. 5478.)

(Court of Criminal Appeals of Texas. Dec. 8, 1919.)

#### 1. BURGLARY $\S$ 26, 28(2)—PROOF OF THEFT UNDER INDICTMENT FOR ATTEMPT TO COMMIT BURGLARY.

Under an indictment charging an attempt to enter a private residence with intent to commit the crime of theft, both allegation and proof of intent as to theft is necessary.

#### 2. BURGLARY $\S$ 41(10)—EVIDENCE SHOWING WANT OF CONSENT.

Evidence that owner of residence, who died previous to trial of indictment charging attempt to enter private residence with intent to commit theft, was notified by his sister that a man was on the porch trying to pry off a screen from window opposite her room, and that he called the police, is sufficient to show his want of consent.

#### 3. BURGLARY $\S$ 41(10)—EVIDENCE SHOWING ATTEMPT TO ENTER RESIDENCE WITH INTENT TO COMMIT THEFT.

Evidence that accused climbed the porch of a private residence, and while attempting to pry off the screen on a window the occupant of the room opposite screamed and accused ran away, is not sufficient to convict under indictment.

ment charging, under Pen. Code 1911, art. 1305, an attempt to enter a private residence with intent to commit theft.

Appeal from District Court, Galveston County; H. C. Hughes, Judge.

George Freeman was convicted of attempt to commit burglary, and he appeals. Reversed, and cause remanded.

Marsene Johnson, Elmo Johnson, Roy Johnson, and Marsene Johnson, Jr., all of Galveston, for appellant.

O. H. Theobald, Co. Atty., and F. Spencer Stubbs, Asst. Co. Atty., both of Galveston, and Alvin M. Owsley, Asst. Atty. Gen., for the State.

MORROW, J. [1] The appellant was convicted of the offense of attempting to commit burglary. The indictment charges that the attempt was made to enter the private residence of W. Rowley with the intent to commit the crime of theft. These averments were necessary, and proof of them essential. *Moore v. State*, 37 S. W. 747; *Fonvill v. State*, 62 S. W. 573; *Encyclopedia, Law and Procedure*, vol. 6, p. 216, subd. E, note 77.

[2] Appellant's connection with the offense was denied by him; and from the state's evidence it appeared that in a private residence belonging to W. Rowley and his two sisters, and used by them as a place of residence, appellant climbed up on the porch at nighttime, and was in the act of trying to open the window screen, which was right opposite the bed of one of the ladies occupying the room, when one of the women screamed, and the appellant jumped off of the porch and ran. The brother, W. Rowley, was notified, and he called the police, who arrested appellant later. W. Rowley was dead at the time of the trial, but we regard the circumstances proved as sufficient to show his want of consent. *Franklin v. State*, 53 Tex. Cr. R. 547, 110 S. W. 909; *Jackson v. State*, 49 Tex. Cr. R. 215, 91 S. W. 788.

[3] The crime burglary of a private residence is in all cases to commit a felony or the crime of theft. Penal Code, art. 1305. In the instant case, there is no proof of the specific intent which actuated appellant in attempting to enter the house. The facts proved were sufficient to support the conclusion that he was endeavoring to enter for an unlawful purpose; but whether it was to commit the crime of theft, of some felony not charged in the indictment, there is a complete absence of evidence. The appellant's place of business was in the vicinity, and he had had occasion to pass the premises and opportunity in that way to know something of the habits of the inmates. If it had been charged in the indictment that the attempt was made with the intent to commit the offense of rape, the evidence would have been quite as cogent, probably more cogent,

to establish that intent than the intent to steal. The intent with which the attempt to enter was made cannot be presumed without sufficient facts to support it. *Sedgwick v. State*, 57 Tex. Cr. R. 420, 128 S. W. 702; *Mitchell v. State*, 33 Tex. Cr. R. 575, 28 S. W. 475. In the case of *Moore v. State*, 37 S. W. 747, the indictment charged the attempt to commit burglary in two counts; one with the intent to commit rape, the other with the intent to steal. From the remarks of the court in deciding the case, we quote the following:

"There certainly is no evidence in this case to indicate, even if we could concede, an attempt on his part to break and enter said building, as to the purpose he had in view when he did the same. As to this purpose, in order to sustain the conviction there should be no reasonable doubt as to whether he intended one or the other of the intents charged. The evidence should establish one or the other of such intents, beyond a reasonable doubt."

Believing the evidence insufficient to sustain the conviction, the judgment is reversed, and the cause remanded.

#### BELL v. STATE. (No. 5545.)

(Court of Criminal Appeals of Texas. Dec. 10, 1919.)

#### CRIMINAL LAW §—273—EVIDENCE ADMISSIBLE TO DETERMINE PENALTY AFTER PLEA OF GUILTY.

A plea of guilty under the Texas practice admits all the criminating facts alleged, and evidence is admitted only to enable the jury to determine the penalty.

Appeal from District Court, Smith County; J. R. Warren, Judge.

Gus Bell was convicted of manufacturing intoxicating liquors, and he appeals. Affirmed.

Alvin M. Owsley, Asst. Atty. Gen., for the State.

LATTIMORE, J. Appellant pleaded guilty in the district court of Smith county of the offense of manufacturing intoxicating liquor, and was given a penalty of one year in the penitentiary. A motion for a new trial was filed, upon the grounds that the liquor was not shown to be intoxicating, and that it was not shown that the same was not made for sacramental purposes.

A plea of guilty, under our practice, admits all the criminating facts alleged, and evidence is admitted only for the purpose of enabling the jury to determine the penalty. However, the evidence in the statement of facts in this case, shows that the

liquor was intoxicating. The charge of the court and the indictment appear to be in accordance with the law, and, finding no error, the judgment of the lower court is affirmed.

### HORNBUCKLE v. STATE. (No. 5463.)

(Court of Criminal Appeals of Texas. Dec. 8, 1919.)

#### 1. BURGLARY $\S$ 4—KITCHEN CONNECTED BY A PLANK PART OF "PRIVATE RESIDENCE."

Under Pen. Code 1911, art. 1314, defining private residence as any building or room occupied and actually used by any person or persons as a place of residence, a kitchen about 16 feet from bedrooms which were used by the family and connected therewith by plank walk, used both as a kitchen and dining room, must be deemed a part of a private residence.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Private Residence.]

#### 2. CRIMINAL LAW $\S$ 507(2), 780(2)—DENIAL OF CHARGE ON ACCOMPLICE TESTIMONY EBONEOUS.

In a prosecution for nighttime burglary of a private residence, where it was contended that defendant stole therefrom a can of lard, a witness whose testimony showed that on the night of the burglary he learned of defendant's possession of the lard, and after hearing of the burglary he received and hid it, is an accomplice witness, and defendant's request for charge on accomplice testimony was improperly denied.

Appeal from Criminal District Court, Bowie County; P. A. Turner, Judge.

Jim Hornbuckle was convicted of nighttime burglary of a private residence, and he appeals. Reversed and remanded.

Mahaffey, Keeney & Dalby, of Texarkana, for appellant.

C. M. Cureton, Atty. Gen., and E. A. Berry and W. J. Townsend, Asst. Atty. Gen., for the State.

MORROW, J. The conviction is for nighttime burglary of a private residence. The evidence establishes the breaking of the house and the theft therefrom of a can of lard. It was the state's theory that while Forsythe and his wife, the owners of the property, were attending church in the neighborhood, which church the appellant was also attending, he left the church during the services, opened the house, and got the can of lard, bringing it to a point near the arbor of the church, and subsequently the same night took it to his home, which was in the neighborhood. This theory was supported by the testimony of two witnesses, who gave testimony in the nature of a confession.

They were attacked upon the ground that they were animated by a desire to injure the appellant, because he had caused them to be charged by indictment with burning his barn.

There was proof that a five-gallon can, together with a cloth, was taken out of the dam on appellant's premises; and these the testimony of Forsythe and wife tended to identify as the can which contained the lard stolen and the cloth which covered it.

Cooper, a witness for the state, testified that at the time the burglary took place he was living at appellant's house and working for him, that on the night the burglary took place he went with the appellant to church, remained with him throughout, and that together they went to appellant's house and spent the night. The witness said that he was engaged in constructing a dam for the appellant, and that after the burglary—he having no knowledge of appellant's connection with it—appellant brought to him a five-gallon lard can, which the witness, at appellant's request, put into the dam and covered with dirt. It was shown that prior to giving his testimony this witness had denied any knowledge or connection with hiding the can.

Appellant testified, denying the theft, the confessions, and any connection with hiding the property or delivering it to Cooper.

[1] The term "private residence" is declared by the statute to mean "any building or room occupied and actually used \* \* \* by any person or persons as a place of residence." Penal Code, art. 1314. The dwelling of Forsythe consisted of two sleeping rooms with a hall between and a room used as a kitchen and dining room to which was attached a shedroom used as a pantry. The kitchen was about 16 feet distant from the bedrooms, and the two were joined by a plank walk. Forsythe and his family lived in this abode. They did not sleep in the kitchen, from which the lard was taken, but kept their supplies in that and the adjoining shedroom, and used the kitchen for cooking the meals and for dining purposes. In our opinion, the whole constituted the private residence within the meaning of the statute, and was used by the owner named in the indictment as a place of residence. With the contrary view urged by appellant we are unable to agree. See *Holland v. State*, 45 Tex. Cr. R. 172, 74 S. W. 763; *Johnson v. State*, 52 Tex. Cr. R. 201, 107 S. W. 52; *Mays v. State*, 50 Tex. Cr. R. 391, 97 S. W. 703; *Cyc. Law & Procedure*, vol. 34, p. 1647.

[2] The appellant sought to have the question as to whether Cooper was an accomplice witness requiring corroboration submitted to the jury, and complains of the refusal of the court to do so. Under the evidence,

Cooper's connection with the crime was such as to make it incumbent upon the court to instruct the jury on the law of accomplice testimony. If the appellant, as the state contends, carried the lard can home from the church on the occasion mentioned, and Cooper was with him on that particular occasion, as he testified, the conclusion that he knew of the possession of the can of lard by the appellant cannot be escaped. Cooper admits he knew of the burglary before he received and hid the can. It has often been held that one receiving or concealing stolen property with knowledge of its theft is classified as an accomplice witness. *Johnson v. State*, 58 Tex. Cr. R. 245, 125 S. W. 16; *Branch's Annotated Penal Code*, p. 367. See, also, *Simmons v. State*, 50 Tex. Cr. R. 528, 97 S. W. 1052; *Wyatt v. State*, 55 Tex. Cr. R. 74, 114 S. W. 812; *Kelley v. State*, 34 Tex. Cr. R. 414, 31 S. W. 174.

The testimony of Cooper, if believed by the jury, was hurtful to the appellant, and he was entitled to have the jury instructed in appropriate terms that, if they believed Cooper was an accomplice, his testimony uncorroborated could not form the basis of conviction.

The judgment is reversed, and the cause remanded.

#### WILLIAMS v. STATE. (No. 5547.)

(Court of Criminal Appeals of Texas. Dec. 10, 1919.)

#### CRIMINAL LAW §273—EVIDENCE TO FIX PENALTY AFTER PLEA OF GUILTY.

A plea of guilty admits all the criminalizing facts alleged, and evidence is admitted only for the purpose of enabling the jury to determine the penalty.

Appeal from District Court, Smith County; J. R. Warren, Judge.

Andy Williams was convicted of manufacturing intoxicating liquor, and he appeals. Affirmed.

Alvin M. Owsley, Asst. Atty. Gen., for the State.

LATTIMORE, J. Appellant pleaded guilty, in the district court of Smith county, of the offense of manufacturing intoxicating liquor, and was given a penalty of one year in the penitentiary.

A motion for a new trial was filed upon the grounds that the liquor was not shown to be intoxicating, and that it was not shown that the same was not made for sacramental purposes.

A plea of guilty, under our practice, admits all the criminalizing facts alleged, and evidence is admitted only for the purpose of

enabling the jury to determine the penalty. However, the evidence in the statement of facts in this case shows that the liquor was intoxicating. The charge of the court and the indictment appear to be in accordance with the law, and, finding no error, the judgment of the lower court is affirmed.

#### WILSON v. STATE. (No. 5597.)

(Court of Criminal Appeals of Texas. Dec. 8, 1919.)

#### 1. WEAPONS §6—EVIDENCE INSUFFICIENT TO SHOW UNLAWFUL CARRYING OF PISTOL.

One who borrows a pistol and carries it home by the most practicable route does not violate the law prohibiting unlawful carrying of a pistol.

#### 2. WEAPONS §17(6)—DENIAL OF INSTRUCTION AS TO INSUFFICIENCY OF EVIDENCE TO CONVICT IF UNLAWFULLY CARRYING PISTOL, ERRONEOUS.

Refusal to instruct as to acquittal if accused, charged with unlawfully carrying a pistol, borrowed pistol and was carrying it home by the most practicable route and came upon his brother engaged in trouble, and after the difficulty turned back to his brother's store to ascertain whether his brother was injured, and there left the pistol for a day or two, was error.

Appeal from Angelina County Court; E. B. Robb, Judge.

Weed Wilson was convicted of unlawfully carrying a pistol, and he appeals. Reversed and remanded.

Mantooth & Collins, of Lufkin, and J. J. Collins, of Huntington, for appellant.

Alvin M. Owsley, Asst. Atty. Gen. for the State.

DAVIDSON, P. J. Appellant was convicted of unlawfully carrying a pistol, his punishment being assessed at a fine of \$100.

Under the state's evidence, appellant was seen with the pistol on a street in Huntington. He fired two shots at a party who was fighting with his brother. Appellant admitted having the pistol and firing the shots at the time and place indicated. His contention was that he had borrowed the pistol to carry to his home shortly before this occurrence, and had left it at the store of his brother in Huntington, and that at the time he had the pistol he was en route home with it, and that he came upon the scene where his brother and his antagonist were engaged in trouble, and that he fired the shots indicated; that he did not know whether the man he shot at had seriously hurt his brother or not, so he turned and

went back to his brother's store to ascertain that fact, and left the pistol at the store for a day or two, when he secured and took it home.

[1, 2] The court charged the jury, in substance, that if appellant had borrowed the pistol, and was carrying it home by the most practicable route from his brother's store, the jury would acquit. Appellant's contention was that the court should have instructed the jury that if in carrying the pistol home from the store he came upon his brother in the difficulty as indicated, and turned back to the store after the difficulty to ascertain whether his brother was injured or not by the man who was attacking him, and then left the pistol at the store, still he would not be a violator of the law. Proper exception was reserved to the charge for failing so to instruct the jury, and special requested instructions asked, which were also refused and exception reserved. We are of opinion the court should have instructed the jury as requested, and committed error in not doing so. If appellant had started home with the pistol and was en route home the most practicable way or line of travel, he would not be guilty, and the court so instructed the jury; but if his attention was arrested by the trouble, and after cessation of the trouble he turned back to his brother's store to ascertain, as he stated he did, the condition of his brother, and then left the pistol, we are of opinion that the jury ought not to have convicted him. This was an important question in the case, because the jury may have thought and reached the conclusion that, having gone the distance he did to where his brother and opponent were having trouble with the pistol and fired it, and then returned to the store, he went to the store and secured the pistol for the purpose of going to and engaging in the difficulty between his brother and his opponent, and that if appellant did that he would have violated the pistol law. But if he started home and came upon the trouble between his brother and his opponent unexpectedly and fired the pistol and returned to the store, he should not be convicted.

We are of opinion the court erred in not so charging the jury, and for this reason the judgment is reversed, and the cause remanded.

#### QUINNEY v. STATE. (No. 5595.)

(Court of Criminal Appeals of Texas. Dec. 3, 1919.)

#### 1. CRIMINAL LAW §1099(11)—STATEMENT OF FACTS MUST BE APPROVED BY JUDGE TRYING CASE.

Under the statute, the judge trying the case must approve the statement of facts,

though he has ceased to hold office, and approval by his successor is insufficient.

#### 2. CRIMINAL LAW §1091(8)—BILL OF EXCEPTIONS NOT SUFFICIENT WHERE CONTAINING GROUND OF OBJECTION BUT NOT FACTS.

Where bill of exceptions shows objections to argument of counsel as commenting on failure of accused to testify, but does not show as a fact that accused did not testify, it is insufficient, as grounds of objections are not statements of facts.

#### 3. CRIMINAL LAW §1144(1/2)—PRESUMPTIONS ON APPEAL AS TO CORRECTNESS OF RULING.

Court on appeal must indulge the presumption that the rulings of the trial court are correct.

#### 4. CRIMINAL LAW §1091(11), 1092(14)—CERTIFICATE OF TRUTH OF FACTS.

The mere statement of the grounds of objections in a bill of exceptions is not a certificate of the judge that the facts stated are true, and defendant must incorporate sufficient evidence in the bill, to verify the truth of the objections.

Appeal from District Court, Matagorda County; Saml. J. Styles, Judge.

John Quinney was convicted of manslaughter, and he appeals. Affirmed.

Linn & Austin and W. S. Holman, all of Bay City, for appellant.

Alvin M. Owsley, Asst. Atty. Gen., for the State.

DAVIDSON, P. J. Appellant was convicted of manslaughter and allotted two years in the penitentiary.

[1] There are two grounds urged why the statement of facts cannot be considered: First, said statement of facts was filed more than 90 days after the adjournment of court. Court adjourned on the 17th of July, and the statement of facts was filed the 27th of October, which shows to have been more than 90 days subsequent to adjournment of the term. This, under the authorities, would preclude the consideration of the evidence. Second, the case was tried by Judge Saml. J. Styles, and the bills of exception are approved by Judge Styles. The statement of facts was approved by Judge Munson. The record goes to show the statement of facts was not presented to Judge Styles, and there is no reason shown why it was not so done. By the terms of the statute and under the decisions construing it, it is necessary that the judge who tried the case should approve the statement of facts, and the fact that he was no longer the incumbent does not justify the approval of the statement of facts by his successor. This question has been frequently decided. See *Kaufman v. State*, 72 Tex. Cr. R. 455, 163 S. W. 74; *Richardson v. State*, 71 Tex. Cr. R. 111, 158 S. W. 517; *Morgan v. State*, 78 Tex. Cr. R. 223, 180 S. W. 610;

Porter v. State, 72 Tex. Cr. R. 71, 160 S. W. 1194; Allen v. State, 72 Tex. Cr. R. 277, 162 S. W. 868; McGee v. State, 78 Tex. Cr. R. 636, 182 S. W. 309; Sorrell v. State, 79 Tex. Cr. R. at page 452, 186 S. W. 336; Blake v. State, 81 Tex. Cr. R. 88, 193 S. W. 1064. The statement of facts will therefore not be considered.

There are a number of bills of exception reserved to various matters that occurred during the trial. Some of them are indefinite and do not sufficiently state the environments and matters occurring in connection with the bills and place them in such attitude they may be revised by the court.

[2] There are two bills, however, which are considered. The trial judge says the matters should have been reserved in one exception instead of two, but whether we consider them as one or two would be immaterial. Without stating the bill as reserved by appellant, the qualification of the trial judge to bill No. 5 is as follows:

"The special district attorney in his closing argument did not refer to the fact that the defendant failed to take the stand as a witness in his own behalf. The following is substantially all the said district attorney stated in connection with the matter referred to in said bill: 'Judge Linn and Judge Holamn know who killed Buck Wiley. Judge Linn told the jury that Ed Chapman killed Buck Wiley. Gentlemen of the jury, I would have some respect for defendant's case if they had come clean and told the plain truth about it like a man. I had a case in Wilson county not long ago where a client of mine killed a man who killed his son, and he went upon the stand and told the jury he killed the man because the man killed his boy. He told the truth like a man, and I have some respect for him. I know another man, an old man, who killed a man because the man had killed his boy. He took the stand and told the jury like a man, saying: "I am an old man and have not much time to live, but I killed that man because he killed my boy." I have some respect for that kind of man.'"

The court further states that defendant's counsel spoke in an undertone to the court, and the court understood that counsel objected to such statement of the district attorney and desired a bill of exceptions; but counsel did not request the court, either verbally or in writing, to stop counsel for the state or require him to desist from further statement of that kind, and did not request the court by special charge to withdraw said remarks from the jury. "Except as herein qualified and explained, the foregoing bill is allowed and ordered filed to become a part of a record in this case."

Bill No. 6, as reserved by appellant's counsel, thus states the matter:

"If the young man had come here and told me that he was in a rage and killed Buck Wiley because he had killed his father, I would have respected him as a brave man and forgiven him,

for that is just what I would have done; but he did not do it."

Various objections were urged to this. The court thus qualifies this bill:

"The remarks referred to in the bill are made at the time and just following the remarks referred to in bill No. 5, and the exceptions were taken to all the remarks made, both the remarks made in bill No. 5 and remarks made in this bill, No. 6, at the same time and in the same manner as indicated in the qualifications to bill No. 5, and there was but one exception and not two."

[3] It is urged that these bills are not sufficient in definiteness and certainty to require their consideration for the purpose of showing that appellant failed to testify as a witness. It will be observed that the court qualifying the bill states that the remarks of the district attorney did not refer or allude to the fact that defendant did not testify. The recitation in the bill itself of the speech made by the special prosecutor shows that the defendant did not come to court and tell him, the officer, that he was enraged when he killed Buck Wiley because he killed his father, and if he had done so he would have respected him as a brave man and forgiven him, " \* \* \* but he did not do it." Under this statement of the special district attorney, the defendant could have testified in the case, but failed to state that he killed the deceased because the deceased had killed his father. Under the showing the defendant may have testified, and the bill does not exclude the idea that he may have testified, but it does carry the statement that he did not state that he had killed the deceased because the deceased had killed his father. The recitation in the bill to the effect that the accused objected because it was failure on his part to testify is not the statement of a fact but the ground of objection. This is not a sufficient statement to verify the fact that he did not testify. Therefore we are of opinion that the bill is not sufficiently full and explicit in its statements to show and verify the fact that the defendant failed to testify as a witness. This court must indulge the presumption that the rulings of the trial court were correct. The bill must show to the contrary. See Branch's Crim. Law, p. 25; Edgar v. State, 59 Tex. Cr. R. 252, 127 S. W. 1053; Moore v. State, 7 Tex. App. 20.

[4] It is also laid down by a great number of authorities that the mere statement of the grounds of objection in a bill is not a certificate of the judge that the facts stated are true. It merely shows that such an objection was made. It is incumbent upon the defendant to incorporate sufficient of the evidence in the bill to verify the truth of the objections. Branch's Crim. Law, pp. 25, 26, where a great number of authorities are collated. This bill does not verify the fact that ap-

pellant failed to testify, and the judge certifies that the district attorney did not refer to the fact that he did not testify, and does not certify that the defendant did not testify. This bill, to have been sufficient, should have stated as a fact, and not as a ground of objection, that appellant did not testify as a witness. Under these authorities, we are of opinion that the bill is not sufficiently explicit in regard to this matter to require this court to revise. Under this view of the case and under the record as presented, we are of opinion there is no error sufficiently shown to require a reversal.

The judgment will be affirmed.

### MINCE v. STATE. (No. 5519.)

(Court of Criminal Appeals of Texas. Dec. 8, 1919.)

**JURY**  $\S$ 29(3)—**JURY MAY BE WAIVED ON TRIAL OF ALLEGED DELINQUENT CHILD.**

A charge against one of being a delinquent child is not a felony, and jury can be waived.

Appeal from District Court, Hale County; R. C. Joiner, Judge.

Malcolm Mince was found guilty of being a delinquent child and ordered confined in the State Industrial School, and he appeals. Affirmed.

M. J. Baird and Geo. L. Mayfield, both of Plainview, for appellant.

Alvin M. Owsley, Asst. Atty. Gen., for the State.

**LATTIMORE, J.** Appellant appeals from a conviction in the district court of Hale county, sitting as a juvenile court and rendering a judgment finding appellant guilty of being a delinquent child, and ordering him confined in the State Industrial School for Boys, at Gatesville. The judgment recites that a jury was waived and appellant found guilty of being a delinquent child.

A motion for a new trial was made and overruled, and the case, as brought here, presents but one point, to wit, that the complaint filed against appellant shows him to be guilty of a felony, and that in a felony case a jury cannot be waived. Under our statutes, a charge against one of being a delinquent child is not a felony, and a jury can be waived. This identical question was before this court in the companion case of Allen Lee v. State, 215 S. W. 856, decided at a former day of this term adversely to the contention of appellant.

No error appearing in the record, the judgment of the trial court is affirmed.

### JONES v. STATE. (No. 5502.)

(Court of Criminal Appeals of Texas. Dec. 10, 1919.)

**1. CRIMINAL LAW**  $\S$ 795(1)—**ACCUSED ENTITLED TO INSTRUCTIONS AS TO CIRCUMSTANCES REDUCING OFFENSE TO LOWER GRADE.**

In criminal prosecutions, where there are any circumstances that would mitigate or reduce the offense to a lower grade than that of which accused was convicted, he is entitled to the benefit of such circumstances under appropriate instructions from the court as to the law applicable thereto.

**2. CRIMINAL LAW**  $\S$ 770(2)—**ISSUES FAVORABLE TO ACCUSED SHOULD BE SUBMITTED TO JURY.**

In a criminal prosecution wherever the evidence presents an issue or theory favorable to the accused, the trial court should fairly and freely submit such issue for the consideration of the jury under appropriate instructions.

**3. CRIMINAL LAW**  $\S$ 561(1)—**DEFENDANT TO HAVE BENEFIT OF REASONABLE DOUBT.**

In a criminal prosecution, where there is a doubt as to the testimony, the defendant is entitled to the benefit thereof.

**4. HOMICIDE**  $\S$ 309(4)—**INSTRUCTIONS NECESSARY UNDER THE EVIDENCE AS TO MANSLAUGHTER.**

In a prosecution for murder, it was error to refuse an instruction with reference to the law of manslaughter, where it appeared that decedent was defendant's landlord and that the killing occurred after decedent had attempted to collect rent from defendant for a parcel of ground which he was entitled to hold rent free.

**5. CRIMINAL LAW**  $\S$ 786(2)—**QUESTION WHETHER ADMISSIONS OF ACCUSED WERE MADE WHILE UNDER ARREST WAS FOR JURY.**

In a prosecution for murder, it was not error to submit to the jury question whether certain admissions by defendant when brought from jail to execute his appearance bond, were made while he was under arrest, the jury to disregard such statements if they should find that he was under arrest, but to consider them if he was not then under arrest; the question being a close one as to the facts.

Appeal from District Court, Freestone County; A. M. Blackmon, Judge.

Mack Jones was convicted of murder, and he appeals. Reversed and remanded.

Boyd & Bell, of Teague, for appellant.

Alvin M. Owsley, Asst. Atty. Gen., for the State.

**DAVIDSON, P. J.** Appellant was convicted of murder and allotted five years in the penitentiary.

The facts are quite voluminous, and only a brief statement will be made in order to review one question, to wit, the failure of



the court to charge the jury with reference to manslaughter.

The deceased, Dan Compton, it seems had rented land under the control of Marvin Watson. This was subrented or let to appellant. There was a small spot of ground which appellant claims he was to have rent free, for the purpose of planting a truck patch, potatoes, watermelons, and such things. Deceased later had a discussion with defendant in which he demanded that this little spot of ground should be planted in corn. Appellant claimed it was too late to plant corn and that it would do no good, but in accordance with the wishes of deceased he did plant it in corn, and there was nothing raised from it; but later the deceased demanded of appellant that he pay rent for the land. Appellant demurred, but deceased insisted. Appellant finally stated, and perhaps an agreement was had to that effect, that they would leave it to the justice of the peace and Mr. Marvin Watson as to whether rent on that small tract of land should be paid. Deceased demanded that appellant should not gather his corn crop from the rented premises unless the rent on this small tract was first paid. On going to the justice of the peace and Mr. Watson, they informed him to proceed with gathering his crop, and Watson said if he wanted rent from it he could get it from produce in other parts of the field. Appellant went home and began gathering his crop. He took his gun with him to the field, but, fearing deceased would come, concluded he would go home and leave his assistant to do the gathering of the crop. There was testimony introduced showing that deceased had threatened the life of appellant if he did not pay the rent or gathered his crop without doing so. On the morning of the difficulty, appellant had gone to the field and carried his gun. After remaining for a short time, he concluded deceased would come to the field as he had been doing, and he would leave to prevent meeting deceased and having trouble with him. It is in evidence deceased went armed with a Winchester rifle. He seems to have carried it with him wherever he went. In leaving the field and upon reaching a fence, just outside of which was a road, the deceased made his appearance. Upon seeing appellant, he raised his gun to his shoulder, and his horse turned, and appellant fired and immediately ran away to prevent deceased from shooting him. He testifies also that deceased fired. It seems to have been a fact that there were two shots fired. There is a great deal of testimony pro and con as to whether the gun of deceased was fired. The contention, therefore, of the state would be, if deceased did not fire, appellant fired twice. Appellant evidently ran away in quite a hurry, for he lost his hat in leaving the scene of the trouble. Deceased's body was found

about 100 or 150 yards from the place where the shooting occurred. Deceased had no authority to demand of appellant that he pay the landlord, Watson, rent on this small tract. The justice of the peace, Kazey, and the landlord, Watson, had given appellant instructions about the rent, and he was told by both to gather his crop.

[1, 2] The court failed to charge on the law of manslaughter; exception was reserved, and the matter is presented for revision. We are of opinion that in this matter the court was in error. The authorities seem to be harmonious in regard to this proposition: Where there are any circumstances that would mitigate or reduce the offense to a lower grade than that of which appellant was convicted, he is entitled to the benefit of such circumstances under appropriate instructions from the court as to the law as thereto applicable. *Hudson v. State*, 40 Tex. 12; *Williams v. State*, 7 Tex. App. at page 398; *McLaughlin v. State*, 10 Tex. App. 340; *Neyland v. State*, 13 Tex. App. 536; *Moore v. State*, 15 Tex. App. 1; *Rutherford v. State*, 15 Tex. App. 236; *Williams v. State*, 15 Tex. App. 617; *Wilson v. State*, 80 Tex. Cr. R. 442, 190 S. W. 155. Wherever the evidence presents an issue favorable to the accused, the trial court should not disregard it, but should fairly and freely submit such issue for the consideration of the jury under appropriate instructions. Such omissions by the trial court cannot be treated by this court as immaterial. *Moore v. State*, 15 Tex. App. 1; *Williams v. State*, 15 Tex. App. 617. If it reasonably appeared to defendant that he was in danger of serious bodily harm, injury, or death at the hands of deceased, falling short of self-defense, and he was thereby aroused to such terror or resentment by such appearances as to render his mind incapable of cool reflection, he would be entitled to a charge on manslaughter. See the same authorities. In *McLaughlin v. State*, supra, this language was used:

"If in a murder case there be evidence which, however inconclusively, tends to prove facts from which the jury may deduce a finding of manslaughter, it is incumbent on the trial court to give the law of manslaughter in charge to the jury; and it should be given affirmatively, directly, and pertinently to the theory of the case indicated by such evidence." *Neyland v. State*, 13 Tex. App. at page 550.

This quotation is also made from the *McLaughlin Case*, supra, as quoted in *Rutherford v. State*, 15 Tex. App. at page 248:

"Every theory presented by evidence in the case demands of the court a charge thereon, whether strongly or weakly supported by the testimony. If there be evidence tending to support it, the law must be directly and pertinently applied thereto. The jury, and the jury alone, must pass upon the strength of the evidence which tends to support the theory. Nor

can the evidence be so full and complete in favor of one theory as to preclude evidence, or excuse the court in refusing or failing to charge the law relative to another theory."

[3, 4] From these authorities the proposition may be deduced, as well as from the statutes and the general trend of our jurisprudence, that all theories favorable to defendant must be submitted to the jury under appropriate instructions. Where there is a doubt as to the testimony, its cogency and effect, or its probable bearing upon the minds of the jury in their decision of the case, it redounds to the benefit of the accused. In other words, a doubt of the facts brings always an appropriate instruction to cover that doubt. A doubt of the facts, and their cogency and effect and bearing, brings into play a doubt of the law, and whenever there is a doubt upon these propositions the defendant is entitled to the benefit of that doubt, and they must be resolved favorably to his side of the case. This is in accord and in harmony with the presumption of innocence with which the law clothes the accused, and this to the exclusion of reasonable doubt. We are therefore of opinion that the court should have given an instruction with reference to the law of manslaughter under the facts adduced in this record.

The refusal of the court to grant a continuance is not necessary to be discussed, as it may not arise upon another trial, and if it should it may come under very different circumstances from those presented by this record.

[5] We have examined with some degree of interest the ruling of the court with reference to the admission of statements made by the defendant at the time he was brought from jail and executed his appearance bond. The matter is left in doubt as to whether he was under arrest or not; that is, whether he had been discharged from custody after the execution of his bond. The evidence is pro and con and sharply contested. The court submitted this to the jury for their determination, substantially that if they should find he was under arrest they should disregard his statements; if not under arrest, then they should consider the statements along with the remainder of the testimony. Without discussing the matter, we are of opinion, as this is presented, perhaps the court was justified in submitting the issue. It is a very close question, and one about which the mind of the writer is somewhat uncertain. His statement as given by the county attorney is to the effect that he had gone to the place where the shooting occurred something like over one-half hour before the killing occurred. The defendant's contention was that the county attorney asked him how long he had been in the field,

and not at the place of the homicide, before the killing occurred, and to this he stated about one-half hour, or such matter. This testimony might have a material bearing upon the case, but it was a question for the jury's decision, and perhaps under the testimony the court was not in error in submitting this question.

For the refusal of the court to charge upon manslaughter this judgment will be reversed. We would say, however, that we are of opinion the continuance also should have been granted.

The judgment is reversed, and the cause remanded.

#### POTTER v. STATE. (No. 5564.)

(Court of Criminal Appeals of Texas. Dec. 10, 1919.)

##### 1. LIBEL AND SLANDER $\S$ 141—CORPORATION NOT SUBJECT TO CRIMINAL LIBEL.

A corporation as such cannot be criminally libeled.

##### 2. LIBEL AND SLANDER $\S$ 152(2)—INSUFFICIENCY OF INDICTMENT NOT SHOWING BY INNUENDO LIBEL DIRECTED AGAINST PROSECUTOR.

An indictment, which set out a newspaper article that charged fire was of incendiary origin, held insufficient to charge offense of criminally libeling the person named in the indictment as the one against whom it was directed, notwithstanding Vernon's Ann. Code Cr. Proc. 1916, art. 472; there being no innuendo showing the applicability of the article to the one claimed to be libeled or that the diatribe in the article against Jews was directed against him.

##### 3. JURY $\S$ 126—CHALLENGE FOR PREJUDICE IMPROPERLY DENIED.

Where an alleged criminal libel contained a diatribe against Jews and it appeared that four or five members of the jury panel were of the Jewish race or connected with them and would have admitted that they would be prejudiced against one criticizing the Jews as a race, defendant was entitled to bring out such matter on voir dire examination, and his challenge against such persons for cause should be sustained.

Appeal from Bexar County Court; Nelson Lytle, Judge.

F. N. Potter was convicted of criminal libel, and he appeals. Reversed, and prosecution ordered dismissed.

Alvin M. Owsley, Asst. Atty. Gen., for the State.

LATTIMORE, J. Appellant was convicted of criminal libel in the county court for criminal cases of Bexar county, Tex., and his

punishment fixed at seven months' confinement in the county jail.

The indictment in the case is as follows:

"In the Name and by the Authority of the State of Texas:

"The grand jurors for the county of Bexar, and state of Texas, duly organized as such at the October term, A. D. 1917, of the district court of the Thirty-Seventh judicial district of Texas, in and for said county, upon their oaths in said court, present that on or about the 21st day of July A. D. 1917, in the county of Bexar and state of Texas, F. N. Potter, with intent to injure J. D. Oppenheimer, did unlawfully, wickedly and maliciously publish, sell and circulate a malicious statement in printing and writing of and concerning one J. D. Oppenheimer and affecting the reputation of the said J. D. Oppenheimer to the tenor following, to wit:

**"Very Successful Fire.**

"Any one would think that the weather of late was hot enough naturally without trying to make it more so by artificial means but it never gets too hot for a nest of Jews when they can figure out a profit from the ruins of destroyed property.

"This is the case of the big Oppenheimer fire of last Saturday in San Antonio when, after much patience, perseverance and considerable coal oil and 24 hour old rot gut whisky they finally succeeded in their hellish design to destroy the 4-story brick fire trap on Commerce street in which they did several kinds of business on a wholesale plan but the firemen confined their unholy efforts to their own property.

"Insurance to the tune of \$300,000, principally on a liquor stock that had been sold down pretty close recently, furnished the motive for the crime but from the freely expressed opinion of some prominent citizens of the Alamo City while the fire was trying to eat its way into the big building of the San Antonio Drug Company, they will have a hard time to make the collection. Had the Drug Company been caught in this trap, explosions would have occurred and all buildings and business in the wholesale district more or less damaged.

"About the only way to keep a Jew from burning his property is to refuse him insurance and in this case we seriously doubt if the Oppenheimer Bank & Booze Company, Limited, succeeds in collecting the nicely estimated profit from their self-destroyed property. They ought not.

"Note.—We have looked up the libel law governing above cases and find the following universal opinion which is still in effect: "That country newspapers are entitled to accuse Jews of incendiarism even though it be shown conclusively, that no insurance was being carried at the time of said fire, because it has been proved that goods has been sold at a rattling good profit after having gone through the first degree of a grand fire even when no insurance had been taken out and the stock was a total loss." (Opinion by Judge Chesty, Chief Justice of Corrupt Law, page 19c; paragraph \$9.93; reheated, digested (Kang, court), and marked down to below cost in every department."

"The said F. N. Potter meaning by the aforesaid written and printed and published and circulated statement to charge that the said J. D. Oppenheimer to whom the same refers to and meaning thereby to convey the idea that the said J. D. Oppenheimer had been guilty of the penal offense of Arson against the peace and dignity of the state.

"Geo. C. Eichlitz,

"Foreman of the Grand Jury."

Upon the back of this indictment appear the names of J. D. Oppenheimer, Henry Oppenheimer, Louisa Oppenheimer, Adalarde Oppenheimer, and others, as witnesses.

[1, 2] The appellant moved to quash the indictment, because the same charged no offense against the laws of this state, specifying objections thereto. We think the motion well founded. It will be seen by an examination of the allegations of said indictment that J. D. Oppenheimer is nowhere referred to by name in the alleged libelous publication, nor is the language therein used susceptible of the construction that J. D. Oppenheimer, rather than some of the other Oppenheimers, is referred to or meant by the expressions contained in said publication, in the absence of some explanatory or innuendo averments in the indictment. It is not even alleged in the indictment that the said J. D. Oppenheimer was a Jew, or that he was in any way connected with any business in San Antonio, or that on or about the Saturday before said publication any fire occurred in any house owned or controlled by said J. D. Oppenheimer, or said Oppenheimer and others. We are aware of the fact that section 13 of what is called the "common sense" indictment act of 1881, and which is now article 472 of Vernon's C. C. P., says in general terms that it is not necessary to set forth any intrinsic facts for the purpose of showing the application to the libeled party of the defamatory matter upon which the indictment is founded, and that it is sufficient to allege generally that the same was published against him or concerning him; but an inspection of the various cases of libel which have been before our courts will reveal that without exception, as far as we are informed, where the alleged libelous matter is not such as to make its references and meaning clear and unmistakable, resort has been had to explanation and innuendo. McKie v. State, 37 Tex. Cr. R. 544, 40 S. W. 305; Nordhaus v. State, 40 S. W. 804; Byrd v. State, 38 Tex. Cr. R. 630, 44 S. W. 521; Squires v. State, 39 Tex. Cr. R. 97, 45 S. W. 147, 73 Am. St. Rep. 904.

The name "Oppenheimer" occurs twice in the alleged libelous matter set out in the indictment in the instant case; once referring to "the big Oppenheimer fire of last Saturday," and once speaking of the "Oppenheimer Bank & Booze Company." Reference to the statement of facts shows that the alleged injured party's name does not

occur in the name of the firm of which he testified he was a member. The style of said firm was D. & A. Oppenheimer. In the same building with D. & A. Oppenheimer was the Oppenheimer Cigar Company, and also another firm, styled J. Oppenheimer & Co., and the fire occurred in the store of J. Oppenheimer & Co. By referring to our statutes (Branch's Penal Code, art. 1170), we see that a corporation as such cannot be criminally libeled. These latter statements are made to show the reason in this case for the requirement that there be explanatory or innuendo averments in the indictment, in order that the vague, indefinite, and impersonal statements in the publication referred to may be first pleaded as referring to J. D. Oppenheimer, as a predicate for proof of that fact.

[3] In view of another possible indictment and trial, we notice another matter complained of by bill of exception. The alleged libelous publication was a severe attack and criticism of Jews generally. On the trial it appeared that there were four or five members of the jury panel who belonged to that race, or were connected with them, and who would have admitted that if they were taken on the jury, and it should develop on the trial that appellant had printed an article severely criticizing the Jews as a race, they would be prejudiced against such person. Appellant desired to ask these jurors questions disclosing said fact, and to read to them as a part of such question, the alleged libelous matter, for the purpose of challenging said jurors for cause. The court declined to permit said questions and to sustain challenges for cause of said jurors, for the reason that all of said jurors would state and did state that they could lay aside any prejudice created by such defamatory article and try the case according to law and evidence. In our opinion such jurors were disqualified, and the questions should have been permitted, and challenge for cause should have been sustained, if made. Prejudice is not to be confounded with opinion. The latter may be hastily formed, and if a juror on his voir dire says he has an opinion, but it is of such character that he can lay it aside and be governed by the law and the evidence, he may be held qualified; but prejudice rests upon a different foundation, and, if existent in a given case, renders its possessor incompetent. This is true in every case, though in many instances the jurors may answer without thought that they have prejudice, when upon investigation it may be made to appear that they mean an opinion; but once it be admitted that prejudice exists against this particular accused, or any other individual similarly accused, a challenge for cause, if made, should be sustained.

For the reasons above stated, the prosecution is reversed, and ordered dismissed.

# RICHARDS v. STATE. (No. 5581.)

(Court of Criminal Appeals of Texas. Dec. 10, 1919.)

## 1. HOMICIDE $\S$ 300(7)—INSTRUCTION OF PROVOKING DIFFICULTY NOT JUSTIFIED BY EVIDENCE.

In a prosecution resulting in conviction of manslaughter, instruction qualifying defendant's right of self-defense by a charge on provoking the difficulty *held* not justified by evidence.

## 2. CRIMINAL LAW $\S$ 556—STATE BOUND BY PROOF OF STATEMENTS OF ACCUSED.

Where the state through its own witnesses introduced defendant's declarations showing that defendant had killed deceased, and detailing in a manner in substantial harmony with defendant's own testimony the incidents and causes of the homicide, by the introduction of such statements the state became bound to the truth of all of them not disproved by evidence before the jury.

## 3. HOMICIDE $\S$ 112(5)—INTENT ESSENTIAL TO LEGAL PROVOCATION OF DIFFICULTY.

An intent to provoke deceased to attack accused in order to produce occasion to kill deceased is an essential element in the law of provoking the difficulty, but the mere existence of such intent, in the absence of some word or action reasonably calculated to effect the end intended, is insufficient.

## 4. HOMICIDE $\S$ 112(2)—CARRYING ARMS AND SEEKING INTERVIEW DOES NOT FORFEIT RIGHT OF DEFENSE.

Defendant did not forfeit his right of self-defense by the mere act of arming himself and seeking an interview with deceased to bring about a peaceful adjustment of their difficulties.

Appeal from District Court, Eastland County; Joe Burkett, Judge.

W. R. Richards was convicted of manslaughter, and he appeals. Reversed, and cause remanded.

S. W. Bishop, of Gorman, J. A. Moore, of Desdemona, and J. R. Stubblefield, of Eastland, for appellant.

Alvin M. Owsley, Asst. Atty. Gen., for the State.

MORROW, J. The appellant upon an indictment for murder was convicted of manslaughter.

The appellant and deceased, Gillette, appear to have been farmers and neighbors. The appellant purchased the deceased's farm from him, and, owing to oil developments in the community, the deceased was dissatisfied with the transaction, and in conversation with appellant and others expressed his dissatisfaction, and claimed that appellant had misled him. There is much evidence indicating that deceased assumed a hostile attitude toward the appellant, made specific threats

to kill him which were communicated to appellant, and some of which were made in his presence. On one occasion some days before the homicide, according to the testimony of appellant and his son, the appellant, while he was on the farm which he had rented from the deceased, was violently abused by the deceased, who held a pistol in his hand, and at the same time assured appellant that if he ever made a track upon the land again he would be killed. A similar occurrence according to appellant's testimony took place upon the day of the homicide, at which time the deceased with a pistol in his hand undertook to intercept the appellant, and he escaped the encounter only by fast driving. He said that the matter had reached a stage where he determined that some efforts at settlement were imperative, and that he determined to make an effort to have an interview with the deceased and to propose to compromise their differences by allowing the deceased to have a part of the royalty attached to the land by reason of the oil developments; that with this end in view he started to find the deceased, arming himself, however, with a pistol and a gun, as he claimed, for the purpose of self-protection in the event he was attacked by the deceased. While on this mission the meeting took place in which the deceased was killed and the appellant severely wounded.

There were no eyewitnesses other than the appellant. They were discovered when one of the state's witnesses, attracted by the shouts of the appellant, went into the pasture belonging to a Mr. Hudson, and there found in a clump of trees and bushes some 50 yards from the road the appellant and deceased lying upon the ground 2 or 3 feet apart, the deceased dead, and the appellant severely wounded in a number of places. On the ground near them were two shotguns and two pistols. The appellant said to this witness, "I am shot all to pieces, and he is dead."

A few minutes before he was killed deceased left the home of Mr. Hudson. Mrs. Hudson testified for the state that she heard a gun fire soon after deceased left, and she looked out and saw Gillette, deceased, going under or through the fence, that she saw him running and heard more shots fired, and that while running and immediately after he had got through the fence she saw him fire a pistol or a gun. The deceased at the time was going in the direction of the place where his body was found.

The state proved statements of appellant to the effect that he had made a fair deal with deceased for his land, and that deceased's subsequent dissatisfaction was without just cause; that prior to the homicide the deceased had on several occasions threatened to kill him, and on some of them had tried to do so; when these witnesses reached the parties the appellant said, "He is dead, and I

am as good as dead;" that prior to the meeting the deceased had made a gun play, and appellant, believing he was about to be killed, had escaped by outrunning the deceased, and that he realized thereafter there would be a killing unless there was a compromise, and that he returned for the purpose of trying to talk and compromise, and that before the shooting, he tried to attract the deceased by hollering and opening a discussion; that the deceased advanced upon him without answering, while the appellant retreated; that as the deceased got through the fence he drew his gun, and the appellant, seeing that he was in the act of shooting, fired, both of them firing at the same time; that deceased was then making towards him; that they continued to shoot at each other, the deceased advancing, and the appellant, having received a broken leg, remained stationary; that when deceased got to appellant they had a struggle over a gun, appellant's pistol being empty, and they both fell upon the ground; that the appellant then thought the shooting was over, and that they were both shot to death; that after lying on the ground awhile he looked up to see if deceased was dead, when he saw him getting up on his elbows and trying to get on the appellant, and appellant reached for his gun and shot again, killing him.

The appellant testified in substance in accord with his statement as detailed by the state's witness, going into considerable detail with reference to the business transaction and the various attacks, threats, and assaults upon him by the deceased. His conversation with the justice of the peace, which was verified by the latter, suggesting that the deceased be put under a peace bond, was also detailed by him. He said that after starting to go and talk with the deceased he concluded he would go back and attempt to have the officers disarm the deceased, and as he turned back a rabbit jumped up in front of the dog that was with him, and he heard a sound and a gun fire, and looking up saw the deceased, but was unable to tell whether he was going up the road or approaching, but that when he reached the fence deceased got over the fence or through it, had a pistol in his hand, and was looking right at the appellant, at which time appellant picked up his guns, which he did in order that deceased might stop. The deceased did stop, and then ran toward the appellant and was in the act of shooting when the appellant also fired. Appellant claimed that he waved his hand and tried to stop the shooting, but, seeing that deceased intended to continue it, the appellant raised his shotgun, when deceased fired again, breaking the appellant's leg. He then described numerous shots fired by each of them as the deceased advanced, circling appellant, both availing themselves of the protection afforded by the trees; that a cartridge

hung in his gun, and he dropped over on his side and elbow to keep the blood from running down his throat; that he got his Winchester to working, and deceased reloaded, and both parties continued the shooting. Appellant claimed that he was dazed by the wounds. He described a hand-to-hand struggle, which culminated in both he and the deceased falling to the ground from exhaustion, as he supposed; that his idea was that both of them were going to die; that after remaining in this position awhile appellant raised his head to talk to deceased, and he saw the deceased was in the act of reaching for a pistol which was lying between his legs, when the appellant reached for his gun and shot the deceased again, killing him dead.

[1] The state advanced the theory that appellant armed himself and hid among the trees and brush in the pasture for the purpose of waylaying the deceased. So far as this issue is supported by the evidence, it comes from the facts which have been substantially stated. The appellant insists that the facts do not justify the court in qualifying his right of self-defense by a charge of provoking the difficulty. We think this charge was not authorized.

[2] The appellant's theory and testimony are to the effect that he realized from the threats and attempt upon his life made by the deceased that a difficulty was inevitable unless a compromise was made, that he sought the deceased with the view of effecting a settlement, and that he armed himself to protect his life in the event the interview which he was attempting culminated in an assault by the deceased, and that in the exchange of shots described by him the deceased was the aggressor, and that the aggression was not brought about by the appellant, but was a manifestation of deceased's predetermination to kill appellant, as indicated by his previous threats and attempts against the appellant's life. This theory, arising from the appellant's testimony, is accentuated by the fact that the state through its own witnesses introduced the declarations of the appellant showing that the appellant had killed the deceased, and detailing in a manner in substantial harmony with his own testimony the incidents and causes of the homicide. By the introduction of these statements the state became bound by the truth of all of them that were not disproved by the evidence before the jury. *Pratt v. State*, 59 Tex. Cr. R. 635, 129 S. W. 364; *Bailey v. State*, 65 Tex. Cr. R. 1, 144 S. W. 996; *Sharp v. State*, 81 Tex. Cr. R. 256, 197 S. W. 209; *Davis v. State*, 209 S. W. 749.

[3] If the state's theory that the appellant was lying in wait be accepted as true, we are unable to discern the evidence upon which the jury would predicate a finding that in so do-

ing his intent was to provoke the deceased to attack him in order to produce the occasion to kill the deceased. Such intent is an essential element in the law of provoking the difficulty (*Winters v. State*, 37 Tex. Cr. R. 582, 40 S. W. 303; *Young v. State*, 53 Tex. Cr. R. 417, 110 S. W. 445, 126 Am. St. Rep. 792), and the existence of such intent, in the absence of some word or act reasonably calculated to effect the end intended, is insufficient (*Cheatham v. State*, 57 Tex. Cr. R. 442, 125 S. W. 565; *Rasberry v. State*, 208 S. W. 169; *Branch's Annotated Texas Penal Code*, p. 1099).

[4] The appellant would not forfeit the right of self-defense by the mere act of arming himself and seeking an interview with the deceased for the purpose of bringing about a peaceful adjustment of their difficulties. *Shannon v. State*, 35 Tex. Cr. R. 2, 28 S. W. 687, 60 Am. St. Rep. 17.

There are other questions involved, but none of them are such as are likely to arise upon another trial.

For the error pointed out, the judgment is reversed, and the cause remanded.

MORRIS et al. v. MOORE et al. (No. 7717.)

(Court of Civil Appeals of Texas. Galveston.  
Nov. 5, 1919. Rehearing Denied  
Dec. 4, 1919.)

#### 1. ADVERSE POSSESSION §104—PRESUMPTION OF GRANT.

In action to recover land formerly owned by plaintiffs' ancestor wherein defendants claimed their predecessor had purchased land from ancestor prior to act of Fourth Congress of Republic of Texas requiring sale of land to be evidenced by written instrument, evidence of continuous possession under claim of right by defendants and predecessors for more than 70 years, and of no claim being asserted thereto during such time by plaintiffs or ancestor, together with other facts and circumstances, held to raise presumption that such sale had been made.

#### 2. ADVERSE POSSESSION §95—PRESUMPTION OF PAYMENT OF TAXES.

One who was in possession of land under claim of ownership and under deed duly recorded, and rendered it for taxation during 10-year period, will be presumed, in absence of a contrary showing, to have paid taxes when due; he being dead and the tax records destroyed.

#### 3. ADVERSE POSSESSION §85(3), 95—SUFFICIENCY OF EVIDENCE TO ESTABLISH FIVE-YEAR STATUTE OF LIMITATIONS.

In action to recover land in which defendants set up the five-year statute of limitations in bar of plaintiffs' right to recover, evidence held to support finding that defendants' predecessor occupied land under a recorded deed and paid taxes thereon for more than five years.

Appeal from District Court, Brazoria County; Sam'l J. Styles, Judge.

Suit by Mrs. Mila Morris and others against E. R. Moore, T. L. Smith, and others. Judgment for named defendants, and plaintiffs appeal. Affirmed.

Munson & Williams, of Angleton, E. R. Townes, of Houston, and Oliver J. Todd, of Beaumont, for appellants.

Stevens & Stevens, of Houston, Elmer P. Stockwell, of Angleton, and H. O. Schulz, of Rosenberg, for appellees.

LANE, J. This suit was filed in the district court of Brazoria county, Tex., by Mrs. Mila Morris, Mrs. Polly Carleton, Mrs. Pattie Rector and her husband, E. L. Rector, and Allen Townes, as heirs of R. J. Townes, deceased, on the 18th day of May, 1917, against E. R. Moore, T. L. Smith, and others, to recover a strip of land 200 varas in width and 5,000 varas in length, a part of the A. Darst league in Brazoria county, and being the same awarded to A. Darst, Jr., in the partition of the estate of his father, the original grantee.

The petition was in the usual and ordinary form of petitions in suits of trespass to try title.

By order entered prior to final trial, the suit was disposed of as to all the parties defendant except E. R. Moore and T. L. Smith, and the cause proceeded to trial between the plaintiffs and these two defendants only.

The defendants Moore and Smith each filed an answer. Each disclaimed as to any portion of the land sued for by plaintiffs except those parts thereof claimed by them and described in their respective answers. They also denied generally, pleaded not guilty, and also pleaded the three, five and ten years' statute of limitations in bar of the plaintiffs' right to recover in their suit.

Plaintiffs Mrs. Morris, Mrs. Carleton, and Mrs. Rector, by supplemental petition, each alleged that they were minors at the date of the death of their mother and father, under whom they claim as heirs, who died on the 24th day of August, 1863, and 3d day of October, 1865, respectively, as well as coverture in avoidance of defendants' pleas of limitation. Plaintiff Allen Townes also pleaded his minority in avoidance of such pleas of defendants.

The cause was tried before the court without a jury, and judgment was rendered for defendants.

It is shown that the A. Darst league, of which the land in controversy was a part, was granted to Abraham Darst on the 6th day of May, 1831; that the south one-half of the Darst league was partitioned among the original heirs of A. Darst, by running strips, parallel to its south line, of 200 varas in width and extending from east to west

across the league a distance of 5,000 varas; and that these strips were numbered from 1 to 9, inclusive, beginning at the south side of the league, and in the partition of the league strip No. 2, which was the second from the south side, was awarded to A. Darst, Jr.

The plaintiffs claimed the land under a probate sale by the administrator of A. Darst, Jr., to R. J. Townes, who was their father and ancestor in title, and as evidence of said title introduced the following:

A filed paper in the succession of the estate of Abraham Darst, Jr., asking for letters of administration, cause No. 130, on file in the clerk's office of Brazoria county, Tex., filed by R. J. Townes for petitioner on December 27, 1837, addressed to the honorable court of Brazoria county, reading as follows:

"The petition of Samuel Damon respectfully represents that Abraham Darst departed this life in said county some short time since, intestate, leaving no relatives in the ascending or descending line, and possessed of a small estate. That his succession has not yet been opened and is indebted to petitioner. He therefore prays that the succession be opened and that letters be granted to him according to law."

An order of the probate court of Brazoria county, dated December 27, 1837, reading as follows:

"Samuel Damon having this day filed a petition praying for letters of administration in the estate of Abraham Darst, deceased, notice is hereby given with citation to all persons interested to appear at a special term of the court of probate to be held at the court house in Brazoria on the second Monday of January next ensuing, and show court why said letters should not issue as is customary and according to law."

An order of the probate court of Brazoria county, dated January 8, 1838, reading as follows:

"This day was heard the petition of Samuel Damon praying that he be appointed administrator of the estate of Abraham Darst, deceased, and public notice of said petition having been given according to law and no objection being filed, it is ordered, adjudged, and decreed by the court that the prayer of the petition be granted and that letters issue to him as is usual and in conformity to law."

Inventory of said estate, reading as follows:

"Inventory of estate of Abraham Darst, dec'd, 200 acres of land on the Mound league 12 miles from Columbia."

Petition of Samuel Damon, praying for order of sale of 200 acres of land, reading as follows:

"The petition of Samuel Damon, administrator of the estate of Abraham Darst, deceased,

respectfully represents that the assets in his hands and accruing to said estate are insufficient to pay the debts due by the same.

"Wherefore, he prays for decree of the court to make sale of 200 acres of land lying on the Mound league, 12 miles above Columbia and belonging to said estate, upon a credit until the first day of January, next. The petitioner herewith makes an exhibit of the debts of said estate. And will pray."

An order of sale, dated September, 1838, reading as follows:

"This day was heard the petition of Samuel Damon, administrator of the succession of Abraham Darst, deceased, representing that the assets in his hands and accruing to the estate are insufficient to pay the debts due by the estate, and praying for a decree to make sale of 200 acres of land lying on the Mound league, 12 miles above Columbia, and belonging to said estate, upon a credit until the first day of January next, and the said administrator having made exhibit of the debts due by said estate, and the court being satisfied of the correctness of the allegation contained in said petition, it is ordered, adjudged, and decreed that the prayer of the petitioner be granted, and that said land be sold at the door of the courthouse in Brazoria after giving 30 days' notice on a credit until the first day of January next, with bond and security and mortgage on the premises until final payment."

Notice of sale, in the matter of the estate of Abraham Darst, deceased, No. 130, in probate court, Brazoria county, Tex., dated November 15, 1838, which reads as follows:

"Probate Sale. By virtue of a decree of the honorable probate court for the county of Brazoria, I shall offer for sale at the door of the courthouse in the town of Brazoria, on Monday, 10th day of December next, upon a credit until the 1st day of January, next, the following property belonging to the estate of Abraham Darst, deceased, to wit:

"200 acres of land lying in the Mound league 12 miles above Columbia.

"Bond and security will be required and a mortgage on the premises until final payment; the title to be made at the expense of the purchaser.

"Brazoria, Nov. 15, 1838.

"William P. Scott, Judge of Probate Court."

Indorsed on back as follows: "No. 130. Purchased by R. J. Townes, \$805."

The petition of Samuel Damon, administrator, asking for discharge as such administrator, together with exhibit thereto attached, and final account, reading as follows:

"To the Hon. Probate Court of Brazoria County:

"The petition of Samuel Damon, administrator of the estate of Abraham Darst, deceased, respectfully represents that he had fully administered said estate and paid all the debts. He therefore presents his account, which he

prays may be received, and that he be discharged from all further liability.

"Jack & Townes.

"Petition granted and administrator discharged. W. P. Scott, Probate Judge."

Exhibit:

Succession of Abraham Darst, Samuel Damon, Administrator, Dr.

To board of decedent, from the 1st September,

1834, to 1st June, 1836, and funeral expenses..\$150 00

To paid clerk's and judge's fees..... 18 00

To paid Jack & Townes, attorneys..... 25 00

Credits.

By sale of 200 acres of land under decree of probate court of Brazoria county, purchased by R. J. Townes at \$1.00 per acre.....\$200 00

And the order of the probate court of Brazoria county, dated December 2, 1840, reading as follows:

"This day came on to be heard the petition of Samuel Damon, administrator of the estate of Abraham Darst, deceased, representing that he has fully administered said estate and paid all the debts, and, having filed his account and exhibits, prays to be discharged from all further liabilities as said administrator, and the court having examined the same and being satisfied of the correctness of allegations in the petition contained, and also having examined the said account and exhibits, it is ordered, adjudged, and decreed by the court that the said account be allowed and recorded, and that the said Samuel Damon be and he is hereby fully discharged from all further liabilities as administrator of said estate on his paying the fees of court."

It was agreed by and between counsel for the parties to this suit that the land described in the plaintiff's petition in this suit was set apart to A. Darst, Jr., in the partition of the estate of A. Darst, Sr.

It was further agreed that Abraham Darst, Jr., is the common source of title to the 200 acres of land in controversy, of which this is a part, and being tract No. 2.

There was no evidence of the execution and delivery of the administrator's deed, but to account for the absence of such proof it is shown that the papers of R. J. Townes, deceased, were destroyed by fire shortly after the Civil War.

It was found by the trial court that the probate proceedings, proven upon trial, vested in R. J. Townes title to the 200 acres of land sued for by plaintiffs, independent of the deed. No attack is made on this finding.

From what has been said we think it fair to assume that the case is now before this court in full recognition on the part of defendants of the right of plaintiffs to recover, unless, as found by the trial court, plaintiffs are defeated either:

By the presumption of a transfer or sale from R. J. Townes to Samuel Damon after his purchase at the administrator's sale, or unless, as found by the trial court, the title of Townes or his heirs has been divested by the adverse possession of Samuel Damon or



those claiming and holding under him, or from the fact that plaintiffs, holding only an equitable title, cannot defeat the legal title held by defendants, because they failed to show that defendants were not innocent purchasers.

By the first assignment it is in effect insisted that the court erred in presuming from the facts and circumstances proven upon the trial by purported transfer of title to the land sued for, from R. J. Townes to Samuel Damon, because it appears from the facts proven that the papers of Damon, as well as the deed records of Brazoria county, are intact, and that no such transfer or conveyance of title was found among the papers of Damon or of record in said county, and because there is no evidence whatever of Samuel Damon claiming under a transfer of title from R. J. Townes to himself, but, on the other hand, there is evidence of a claim by Damon under a deed from the heirs of Abraham Darst, Jr., deceased, of date November 22, 1850, by which they conveyed the land in question to him, which was by him filed for record in the deed records of Brazoria county on the 31st day of March, 1853, thus fully explaining the nature and character of Damon's claim and excluding the presumption that he claimed under a transfer or sale from R. J. Townes, deceased.

The contention of appellants more forcibly stated is that there are no facts or circumstances shown from which a transfer or sale by R. J. Townes to Damon can be legally or logically deduced; but, on the contrary, the fact being shown that Damon took a deed from the heirs of Abraham Darst, Jr., by which they conveyed to him the land in question, the presumption that the same land had been theretofore sold and delivered to him by R. J. Townes is refuted, and the possession and holding thereof by him explained and accounted for.

In stating the foregoing contention, in speaking of the purported transfer from Townes to Damon, we have used the words "sold" and "transferred" advisedly, in view of the fact that prior to the act of the Fourth Congress of the Republic of Texas of 1840, making sales of land void unless evidenced by an instrument in writing, lands could be sold orally; no deed of conveyance being necessary for the transfer of title from one to another.

After a most careful consideration of the question presented by the first assignment, we have reached the conclusion that the same should be overruled. We think there was proof of facts and circumstances which would support the presumption of the trial judge that Townes had sold the 200 acres of land sued for by plaintiffs to Damon, after he (Townes) had purchased the same at the administrator's sale. We shall later undertake to set out some of the facts and circum-

stances which we think tend to support such presumption.

We shall, however, first call attention to the fact that from the 15th day of November, 1838, same being the date of Townes' purchase at the administration sale, to some time in the year 1840, at which time the act of Congress of the Republic of Texas above mentioned went into effect, lands could be lawfully sold and title thereto passed without the execution and delivery of a written conveyance, as this fact might to some extent tend to explain why no deed of conveyance of the land from Townes to Damon was found among the papers of Damon or found of record in Brazoria county, even if the presumed sale took place.

It is shown that of the debts of \$175, for the payment of which the land was purported to have been sold to Townes, the attorney representing the administrator Damon, \$150 was due to the administrator Damon and \$25 only to Townes.

It was shown that R. J. Townes became a resident of Brazoria prior to 1838, and that he continued to reside in said county until the year 1854; that he was during the time he so resided in said county first county judge and later district judge; that he was very intimate with Samuel Damon and was his attorney, and, we may add, presumably to some extent acquainted with his affairs.

The tax records of Brazoria county show no rendition by R. J. Townes, his heirs or legal representatives, of any land in the Darst survey, from the year 1838 to the year 1918, inclusive. The tax records of the State Comptroller's office show that R. J. Townes rendered land for taxation in Brazoria county as follows: 128 acres, presumably in 1839, also 1786 acres same year; 4,136 acres in 1840; 435 and 2,222 acres in 1842; 4,641 in 1843; 5,391 acres in 1844; 8,812 acres in 1845. (The name of the surveys of which these lands were parts were not given.) It is also shown that he rendered a number of tracts of land for taxation in Brazoria county in 1847, shown to be parts of the Parker, Hall, Austin, Demont, Harris, Alsberry, Gray & Moore, Perry, and Mitchell surveys, and none on the Darst survey. These renditions continued down to the year 1865, the year of his death; but there is no evidence whatever tending to show that in any of the years from 1838 to 1865 he rendered any land in the Darst survey for taxation.

It is shown that Samuel Damon rendered for taxation a large number of acres of land in the Darst survey from 1838 to 1873. It is shown that in 1850 Samuel Damon had a part of the land sued for inclosed with a fence, and that in August of that year he had growing thereon a crop of corn, and that he kept same so inclosed and cultivated for every year from 1850 to 1861; that while

he had this land so inclosed, and while he was so cultivating the same from 1850 to 1854, his intimate friend and attorney, R. J. Townes, was residing at Brazoria, and, as before stated, it was shown that neither Townes nor his heirs or legal representatives did any act indicating that they owned the land until this suit was filed in 1917.

The sale and transfer of the title by Townes to Damon to the land sued for by plaintiffs may be established by the existence of circumstances, or by a presumption reasonably arising from the existence of circumstances tending to establish such sale and transfer. Proof of the long and continuous possession, use, and an enjoyment of the land in controversy under a claim of title by defendants and those under whom they claim, together with the evidence that no claim had ever been asserted on behalf of, or by Townes or any one claiming through or under him, until the bringing of this suit some 70 years after Damon took actual possession, together with the other facts proven, is strongly persuasive and of such nature and tendency as to reasonably lead the trial court to presume a sale and transfer from Townes to Damon. *Herndon v. Vick*, 89 Tex. 469, 35 S. W. 141; *Le Blanc v. Jackson*, 161 S. W. 60.

[1] It is apparent from what has been said that we have reached the conclusion that the existence of the facts and circumstances stated were amply sufficient to support the presumption of a sale or transfer of the land by Townes to Damon, as found by the trial court.

What has been said fully answers the complaint made by the second assignment, and it is therefore overruled.

The third assignment is that—

"The court erred in finding and holding that Samuel Damon acquired any title to the land in controversy under the statutes of limitation, because there was no evidence of any continuous possession or use of said property by said Samuel Damon for any number of consecutive years sufficient to mature title in him under any of the statutes of limitation of the state of Texas, and because there was no proof of payment of taxes by said Damon, and was no proof of title or color of title to the land."

The trial court, among other things, found that on the 22d day of November, 1850, the sole heirs of Abraham Darst, deceased, conveyed the land in controversy to Samuel Damon; that this conveyance was duly recorded in Brazoria county on the 31st day of March, 1853; that Samuel Damon, under whom the defendants E. R. Moore and T. L. Smith hold the respective parts of said lot No. 2 of the Darst survey, claimed by them in their respective answers, had peaceable, continuous, and adverse possession of said lot No. 2, cultivating the same and paying all taxes thereon from and including the year

1854 to the year 1861, under a deed duly registered, or, that is to say, a period of seven years, said improvements consisting of an inclosed field upon said lot No. 2, and the cultivation of crops thereon annually, said inclosed field being used in connection with the home place of the said Samuel Damon, which was situated upon an adjoining lot of said Darst survey; that there are no tax records showing the payment of taxes in existence in Brazoria county back of the year 1885, the same having been lost, but from the long lapse of time and the fact that Samuel Damon rendered the land in controversy for taxes from the year 1854 to the year 1861, inclusive, for each of said years, that he paid taxes annually as the same accrued upon said premises.

That Samuel Damon held and claimed the land in controversy under a deed duly recorded in the county where the land was situated is undisputed. That he rendered said land for taxation for the years 1851 to 1861, inclusive, we think is amply supported by the evidence.

E. P. Stockwell testified that he knew the location on the ground of the southern boundary line of the Darst league, and also the east boundary lines of tract No. 2 in controversy, and that there were at the time he testified ridges extending from a point north of the north line of tract No. 2 southward to the most southern line of the Darst league; that these ridges extended across tract No. 2; that they were old ridges, had been there for about 35 to 40 years to his knowledge, and indicated that the land had been cultivated by some one many years before he saw them, but did not know when they were put there.

Mrs. Davis testified that she was born in 1838, that she was at Damon place in 1854 and for many years thereafter, and further testified as follows:

"I could show you where the south line of the Darst league was. It cornered down with Becker and Wheelwright, because the fence is there, and is there now. You can see it from my door. That is about a mile from the old Damon house, that is, the line going east. The other line toward Columbia came down that row of trees, and down the plowed furrows, and the old bed is there now, and the grass has grown over it; but I found the two furrows that Mr. Damon plowed to let the water off—a straight mark to six-mile point. I was living over there, and Mr. Stockwell came to our house and took my sister and me over there, and we went down the long lane, right by the Cates place, and turned off to go to the Bryan house, and in going to the Bryan house we went over the old cornfield ridges. I think that old field fence extended down to that lane or that road that we came down that day last fall when Mr. Stockwell was over there."

Mrs. Nash testified that she was born in 1833; that she visited the family of Samuel

Damon in 1850. Testifying further, she said:

"Last fall I had occasion to go out there with my sister, Mrs. Davis, and Mr. Stockwell, at which time I pointed out to Mr. Stockwell where the old fence was; and my sister, Mrs. Davis, pointed out to him, also, just the same as I had told him it was.

"From 1850 that field was cultivated every year, and he raised fruit trees also, which were where the pasture is now, and the corn-field was down below the orchard towards Columbia, and out back of the house they had the land in cultivation, but I could not tell you how many acres was in cultivation, but I know it was all in cultivation. This land was in cultivation in 1850, 1851, 1852, 1853, 1854, 1855, 1856, 1857, 1858, 1859, 1860, 1861, and all along there. It was in cultivation every year, and when Mr. Damon died they had a fine crop of corn on the place, but I don't know who it belonged to. They raised a crop there every year that the season would permit. Yes, sir; I would be out there every month or two, and sometimes I was there every week, and sometimes twice a month. I was out there every cropping season. Hardly a crop season went by that we were not out there, and I hunted out over the prairie with my husband, and we would always go up to Mr. Damon's. They had that field in cultivation when I went there in the middle of August, 1850, and for every year thereafter until 1861 that field was in cultivation every year."

The first conclusion of the trial court was that it should be presumed from the facts and circumstances proven that R. J. Townes sold the land in controversy to Samuel Damon, and that, as defendants hold under Damon, plaintiff should not recover; and, second, that each of the defendants E. R. Moore and T. L. Smith are entitled to recover from plaintiffs the parts of the land in controversy claimed by them in their respective answers by and under the statute of limitation of five years on account of the occupancy of the land, payment of taxes thereon under a duly recorded deed from the years 1854 to 1861.

In the very able brief of appellants it is very forcibly insisted that—

"Where payment of taxes is made an element of adverse possession, there is no presumption that the claimant has paid them, but he must show this fact; nor does any presumption of payment arise from the fact that the taxes were assessed to the claimant, and no default in payment was shown. On the other hand, in the absence of evidence by the claimant either that taxes assessed on the land were paid by him or that none were assessed, it will be presumed that taxes have been assessed and that he had not paid them."

[2] We have, however, reached the conclusion that the fact that Damon was in possession of the land under the claim of ownership and under deed duly recorded, and rendered it for taxation from 1851 to 1860,

inclusive, warrants the presumption of payment of the taxes when due in the absence of a contrary showing; he being dead and the tax records destroyed. *Surghenor v. Ayers*, 139 S. W. 28; *Watson v. Hopkins*, 27 Tex. 638-643; *Allen v. Woodson*, 60 Tex. 652.

In *Watson v. Hopkins*, above cited, it was held that—

"The payment of taxes is an essential ingredient of a title to land acquired by virtue of the statute of limitations of five years; but the law prescribes no more stringent rule respecting the proof of the payment of the taxes than for the establishment of the other facts in the case. The payment may be shown either by direct or circumstantial evidence of a legitimate character.

"There being evidence tending to prove that the party resisting the title asserted under the statute of limitations had himself, as a tenant of his opponent, been in possession of the land under that title for more than five years, and that he was bound to pay the taxes during that time—these facts should have been left to the jury with liberty to draw such conclusions, with regard to the payment of the taxes, as all the circumstances warranted."

And in *Surghenor v. Ayers*, *supra*, it was held that the fact that one in possession of land under claim of ownership, under registered deeds, rendered it for taxation from 1847 to 1859, warranted the presumption of payment of the taxes in the absence of a contrary showing; he being dead and the tax rolls destroyed.

[3] We conclude that evidence was sufficient to support both the finding of facts and the conclusions of law relative to the question of limitation.

What has been said in the discussion of assignment 3 is a complete answer to the complaint made by assignments 4 and 5, therefore they are overruled.

By the sixth assignment it is insisted that the trial court erred in holding that Samuel Damon held possession of any of the land in controversy sufficient under the statute of limitation, because such possession as Damon had was a mere encroachment, and because the land inclosed by such encroachment did not inclose those parts of tract No. 2 claimed by defendants Moore and Smith.

We overrule the assignment. We think the evidence is sufficient to support a conclusion that Damon had inclosed and cultivated some 30 or 40 acres or more of the land in controversy from 1850 to 1861, and that during such time he was claiming to own the whole of tract No. 2 and that such claim was adverse to all persons. It follows that we do not agree with appellants that the possession of Damon was a mere encroachment.

We think the complaints presented by the seventh to the fourteenth assignments, inclusive, have been answered by what has

been said in the discussion of assignment three; they are therefore overruled.

We have also considered the complaints presented by assignments 15 to 24, inclusive, and have reached the conclusion that none of them present cause for reversal of the judgment of the trial court.

What has been already said disposes of all the complaints presented by appellants, and our final conclusion is that the judgment of the trial court should be affirmed.

Having reached the conclusion that the judgment of the trial court should be affirmed upon the finding of said court on the question of presumption of a deed from Townes to Damon, and upon the question of limitation, we find it unnecessary to pass upon the question of innocent purchaser, or to find the facts bearing upon that issue, since they are shown by the undisputed evidence contained in the record.

Affirmed.

#### MANHATTAN LIFE INS. CO. v. STUBBS. (No. 7758.)

(Court of Civil Appeals of Texas. Galveston.  
Oct. 18, 1919. On Motion for Rehearing, Dec. 13, 1919.)

#### 1. INSURANCE ⚡602—TENDER ⚡14(5) — TENDER NOT UNCONDITIONAL DOES NOT RELIEVE FROM LIABILITY FOR DELAY.

Where, on the maturity of a 15-year endowment policy, the amount due thereon was in dispute, company's act in sending to assignee of policy draft for its admitted liability thereon, payable, however, to both original insured and assignee, with payment further conditioned upon the execution by them both of a full release of any further claims or demands on account of the policy, was not such an unconditional tender of its admitted debts as assignee was entitled to, and the company was thus left liable for delay under Rev. St. 1911, art. 4746.

#### 2. INSURANCE ⚡90—EFFECT OF POLICY PROVISIONS ON AGENT'S AUTHORITY TO REPRESENT AMOUNT OF FUTURE DIVIDENDS ON ENDOWMENT POLICY.

Where express limitation on agents' authority that no statements or promises by them, unless written on the application, shall bind the company, was contained in an endowment policy itself and the application therefor, assignee of the policy was bound thereby, and could not claim to have relied upon any apparent authority in agents to commit the insurer by their individual statements as to the amount of dividends there would be on the policy at its maturity, where no such statements appeared in application or policy.

#### 3. INSURANCE ⚡602—DELAY IN PAYING ENDOWMENT POLICY.

Where, on maturity of \$5,000 endowment policy, assignee of the policy claimed about \$1,200 extra dividends, while insurer admitted,

in addition to the \$5,000 face of policy, dividends due to extent only of \$90, assignee was entitled to have penalty and attorney's fee for delay in payment predicated upon the \$5,090, which was adopted by the court, rather than upon the \$1,200 involved in dispute between the parties, where no unconditional tender was ever made of the \$5,090, since, by reason of lack of unconditional tender of what was admittedly due, the assignee was forced into the courts in order to get, not only the disputed, but also the undisputed, portion of his claim.

#### On Motion for Rehearing.

#### 4. INSURANCE ⚡602—PENALTIES ON DELAYED PAYMENT OF ENDOWMENT INSURANCE; "LOSS;" "LIFE INSURANCE."

The survival of insured for the time limited in an endowment policy is a contingency involving a loss to the insurer, within Rev. St. 1911, art. 4746, imposing attorney's fees and penalties against the insurer for delaying payment after "loss" in case of life insurance, as well as other named kinds of insurance; endowment insurance being life insurance, since the amount of loss depends on the duration of life, and the word "loss" being used in the statute as a synonym of liability.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Life Insurance; Loss.]

Appeal from District Court, Galveston County; Robert G. Street, Judge.

Suit by James B. Stubbs against the Manhattan Life Insurance Company to recover on an endowment policy. Judgment for plaintiff for less than sum asked, and both parties appeal. Affirmed.

Seay & Seay, of Dallas, for appellant.

Charles J. Stubbs and F. Spencer Stubbs, both of Galveston, for appellee.

GRAVES, J. Appellant, Manhattan Life Insurance Company, of New York, on December 26, 1902, issued its life insurance policy No. 131054 for \$5,000 to Charles J. Stubbs. The annual premium was \$353.40; it was known as an endowment or survivorship policy, entitled to dividends or shares of the surplus at the end of the 15-year period, and matured on December 26, 1917. The policy was, on January 9, 1903, for value, by Charles J. Stubbs assigned to James B. Stubbs, appellee here, after the first premium had been paid by the former. The company was promptly notified of the assignment and furnished a duplicate.

Ira F. Collins, the agent who solicited the insurance and delivered the policy, represented to Charles J. Stubbs, the insured, that the dividend at the end of 15 years would amount to \$1,215, furnishing his written statement with figures to that effect, and if insured availed of the option which carried with it the dividend, he would receive the sum of \$5,000 plus \$1,215. The appellee,

before paying the second premium (the first having been paid by Charles J. Stubbs), corresponded with A. A. Green, Jr., manager of the Southwestern department of the insurance company, at Dallas, Tex., regarding the dividends and other rights under the policy. He had refused to pay the second premium and had caused to be returned to Mr. Green the official receipt, which had been sent through a bank. Mr. Green, the company's manager, on December 31, 1903, wrote appellee in response to his letter, and, among other things, stated to him:

"It is true the rates on this policy are high, but you will remember we had some difficulty in getting the company to issue the policy. It is a 15-year endowment policy. If the assured is living at the end of 15 years, the policy is worth its face value in cash, increased by the dividend additions, which will amount to about \$1,200 or \$1,300."

The policy and application, among others not deemed material, contained these provisions:

"That in the distribution of surplus or apportionment of dividends where the policy calls therefor, the principles and methods then in use by the company in its determination of the amount apportioned to any policy issued upon this application shall be, and are hereby adopted and accepted." "That no statements or promises of any agent of the company, unless written upon this application, shall be binding upon the company, nor shall any alteration of, or addition to, the terms and conditions contained in the application or the policy, be binding, unless in writing and signed by the president or secretary."

Before the policy matured in December, 1917, the company notified Mr. Stubbs that the dividends thereon upon the date of its maturity amounted to only \$90.19, and sent him its draft for \$5,090.19, being the face value of the policy with this sum for dividends added. The draft was made payable, however, to both Charles J. and James B. Stubbs, and its payment was further conditioned upon the execution by them both of a full release of any further claims or demands upon the part of either on account of the policy. This tender in like manner was again made on January 22, 1918. On both occasions James B. Stubbs returned the draft to the company, and stated that he would not accept it, because of the unfulfilled promises and statements of its agent, Collins, and Southwestern manager, Green, that he would get over \$1,200 in dividends, instead of the \$90.19 now tendered. In so declining, however, he offered to accept the face value of the policy, \$5,000, and then adjust or litigate as to the dividends; but the insurance company declined to do this and refused to pay the \$5,090.19 without the full release above referred to.

James B. Stubbs then filed this suit upon

the policy, praying for the amount due thereunder, which he alleged to be not less than \$6,200, for 12 per cent. penalty and reasonable attorney's fees, under Revised Statutes, art. 4746, together with 6 per cent. interest from the date the policy matured. He declared upon the above-mentioned representations as to the amount of the dividends made to Charles J. Stubbs by the local agent, Collins, at the time the insurance was taken out, and to himself by the department manager, Green, at the time he paid the second premium thereon, and averred that but for reliance thereon the insurance would never have been contracted for originally nor continued by payment of the second and succeeding premiums. There were also allegations in the alternative which it is not thought necessary to mention.

In answer, the insurance company denied knowledge of any such representations charged to have been made by its agents, averred that they had no such authority, and also pleaded the above-quoted provisions of the application and policy. At the same time, on June 19, 1918, it tendered into court, by turning the money over to the clerk, the sum of \$5,090.19, conditioned upon its being in full settlement of the appellee's demands.

Upon the trial, the court, after overruling exceptions of both parties, rendered this judgment:

"The court is of the opinion that the evidence fails to show any authority on the part of the soliciting agent, or general agent, of the defendant to bind the company by agreement or promises that the company would pay a certain amount as dividends, and it is adjudged by the court that the plaintiff recover nothing as dividends, except \$90.19 hereinafter allowed, and finds that the plaintiff is entitled to recover of the defendant the sum of \$5,090.19. The court is of the further opinion that no legal tender was made by the defendant to the plaintiff herein of said \$5,090.19 until June 19, 1918.

"The court further finds that plaintiff was entitled to 6 per cent. interest on the \$5,090.19 from December 27, 1917, until June 19, 1918, which the court finds to be, upon agreed calculations, \$150.

"The court is further of the opinion that plaintiff is entitled to recover penalties of 12 per cent. on said \$5,090.19, which totals the sum of \$610.82.

"The court is of the further opinion that the plaintiff is entitled to recover attorney's fees, as provided by said statute, and finds that \$1,000 would be reasonable attorney's fees in this case.

"It is further ordered, adjudged, and decreed by the court that plaintiff may withdraw from the registry of the court the said sum of \$5,090.19, and the clerk of this court is hereby ordered to pay said amount to plaintiff, but such payment not to be in full of plaintiff's claim against defendant.

"It is further ordered that, upon the plaintiff withdrawing said amount of \$5,090.19, said judgment shall be credited with such amount

and the remainder thereof shall bear interest at the rate of 6 per cent. per annum until paid.

"To that part of the foregoing as to dividends in excess of \$90.19 plaintiff excepts, and in open court gives notice of appeal.

It is therefore ordered, adjudged, and decreed that James B. Stubbs do have and recover of and from the defendant, Manhattan Life Insurance Company, of New York, the sum of \$6,851.01, together with interest thereon from this date at the rate of 6 per cent. per annum until paid."

Both parties complain upon appeal—the insurance company at having to respond for the penalty, attorney's fee, and costs of suit; Mr. Stubbs at being required to accept less in dividends than the agents represented to him would accrue. After giving the helpful briefs and arguments presented most careful consideration, this court is unable to hold that a different judgment should have been rendered and directs the affirmance of that entered below.

[1, 2] Under the undisputed evidence we conclude, upon the one hand, that appellant's prior to suit offer to pay was not such an unconditional tender of even its admitted debt of \$5,090.19 as the appellee was entitled to, thereby leaving it subject to liability for delay under article 4746, Revised Statutes of Texas. 2 Greenleaf (15th Ed.) § 605; Flake v. Nuse, 51 Tex. 98; Continental Ins. Co. v. Busby, 3 Willson Civ. Cas. Ct. App. § 103; 38 Cyc. 154, 155; 28 A. & Eng. Ency. Law (2d Ed.) 33; Ruppel v. G. S. & Bldg. Ass'n, 158 Mo. 613, 59 S. W. 1000; American Digest, Century Edition, vol. 45, p. 2847. Upon the other, that the appellee was bound by the express limitations upon the authority of the agents, contained in the policy itself and the application therefor, of all of which he had or was affected with notice, and was therefore in no position to rely upon any apparent or ostensible authority in the agents, Green and Collins, to commit their principal to their individual statements that the insured would at maturity receive a certain amount in dividends; none of the statements appearing either in the application or policy. Delaware Insurance Co. v. Harris, 26 Tex. Civ. App. 537, 64 S. W. 867; Sovereign Woodmen of the World v. Lillard, 174 S. W. 619; Equitable Society v. Carpenter, 184 S. W. 585.

The appellee made no attempt to show that the policy was in fact entitled to carry more than the \$90.19 in dividends, but relied in this feature of his case upon proof that the agents promised him over \$1,200 in dividends, contending that the company was consequently and accordingly so obligated. While he himself testified that he "felt reasonably sure" of having upon its receipt made several copies of Green's previously quoted letter of December 31, 1903, declaring what the increased dividend would be, and of having sent one of these "direct to

the Manhattan Life Insurance Company, of New York," he admitted never having gotten a reply or acknowledgment of its receipt; while the general officers of the company testified without dispute that neither the company nor its officers knew of any such representations, nor did the agents named have any authority to make them.

[3] While the conclusions already stated essentially determine, we think, the merits of the appeal upon both sides, the appellant's further contention that there was never more than \$1,200 involved in the litigation—that is, the amount of additional dividends claimed by the appellee—and that, if assessed at all, the penalty and attorney's fee should have been predicated upon that sum, rather than on the \$5,090.19 adopted by the court, may briefly be referred to. The position is not thought to be tenable. The facts show that appellee never in reality refused to accept the \$5,090.19 offered him, but declined to accede to the conditions coupled with it, that his assignor, Charles J. Stubbs, who was known by the appellant to have no interest in the policy, join with him in receipting for that sum as in full satisfaction of all claims either might have against the company. Indeed, as previously recited, he offered to accept that amount of money and then adjust or litigate as to the balance he claimed; but this the company declined, and so in effect forced him into the courts to get what it admitted owing him. Under the authorities above cited, we think he was entitled to an unconditional tender of the sum admittedly due, in the absence of which he was within his rights in refusing the tender as made, and was entitled to have the penalty and attorney's fee predicated upon the amount then found to be due.

All other matters presented have been considered, but none of them, in our opinion, point out in behalf of either party prejudicial error. The judgment is affirmed.

Affirmed.

#### On Motion for Rehearing.

[4] A contention of the insurance company not specifically mentioned in the former opinion was its insistence that the happening of the contingency it had insured against—that is, Mr. Stubbs' having survived the lapse of the 15-year period—did not involve a "loss" within the meaning of R. S. art. 4746. Our view upon this question is so well and succinctly stated in the brief of the appellee that the liberty of adopting this discussion of it is here taken:

"The judgment was not contrary to the law and evidence, and the litigation did involve a loss that is contemplated or defined by the statute invoking attorney's fees and penalties against insurance companies. R. S. art. 4746. The statute provides that 'in all cases where a

loss occurs and the life insurance company, or accident insurance company, or life and accident, health and accident, or life, health and accident insurance company liable therefor shall fail to pay the same within thirty days after demand therefor, such company shall be liable to pay the holder of such policy, in addition to the amount of the loss, twelve per cent. damages and reasonable attorney's fees.

"If the company's liability to pay the amount due under its policy does not constitute a loss within the meaning of the statute, it would not have been a loss in case of the death of the insured before the end of 15 years. It is uniformly held that endowment insurance is life insurance. 25 Cyc. 698; Briggs v. McCullough, 36 Cal. 542, and other cases cited in 25 Cyc. The amount of loss to be paid depends upon the duration of life.

"The statute does not mention an endowment policy, but does a life policy, which was evidently intended to include any form of insurance upon lives. The fact that it might mature in the lifetime of the insured does not render it any the less life insurance. The word 'loss' is often used in insurance policies as signifying the liability of the insurer."

See, also, N. L. S. Ins. Co. v. Gomillion, 178 S. W. 1050, where the death of live stock was recovered for as being a loss within the purview of this article, and R. S. art. 4724, defining life, health, and accident insurance companies.

In a word, we conclude that, although the character of the statute be penal and its purpose punitive, it would neither be too liberal nor inconsistent with an effectuation of its objects to say that the word "loss" is therein used as a synonym of liability.

Unconvinced of error in the original disposition of the cause, the motions of both litigants for rehearing have been refused.

**HOLGUIN et al. v. WOODLAWN REAL ESTATE & IMPROVEMENT CO.**  
(No. 1029.)

(Court of Civil Appeals of Texas. El Paso. Dec. 11, 1919.)

**APPEAL AND ERROR**  $\S$  770(1)—**FUNDAMENTAL ERRORS ONLY REVIEWABLE WHERE NO BRIEFS FILED.**

Where briefs have not been filed by any of the parties on appeal, the reviewing court can consider only fundamental errors.

Appeal from District Court, El Paso County; P. R. Price, Judge.

Trespass to try title by the Woodlawn Real Estate & Improvement Company against Carmen Holguin and others. Judgment for plaintiff, and defendants appeal. Affirmed.

S. J. Isaacks, of El Paso, for appellants.  
Burgess & Burgess, of El Paso, for appellee.

**HIGGINS, J.** Appellee sued the appellants in trespass to try title for the recovery of certain premises in El Paso county and obtained judgment. Briefs have not been filed by any of the parties. In this condition of the record only fundamental errors can be considered.

The record has been carefully examined, and no error of this nature is apparent.

The judgment is therefore affirmed.

**BUCHANNAN et al. v. GRIBBLE.** (No. 5991.)

(Court of Civil Appeals of Texas. Austin. Nov. 5, 1919. Rehearing Denied Dec. 17, 1919.)

**1. TRIAL**  $\S$  260(1) — **REFUSAL OF SPECIAL CHARGE EMBRACED IN GENERAL CHARGE.**

Refusal to give a special charge was proper, where it was in substance embraced in the court's charge to the jury.

**2. JUDGMENT**  $\S$  237(1)—**FAILURE OF JUDGMENT TO MAKE DISPOSITION OF CASE AS TO ONE DEFENDANT AGAINST WHOM CASE WAS ABANDONED.**

Where plaintiff abandoned his cause of action as against a defendant, there was no merit in an objection to judgment in plaintiff's favor that it was not a final judgment, because not in terms making any disposition of the case as to such defendant.

**3. DISMISSAL AND NONSUIT**  $\S$  24—**DISMISSAL AS TO ONE DEFENDANT AFTER VERDICT AND BEFORE JUDGMENT.**

Error is not shown by the fact that, after verdict was returned in favor of plaintiff, plaintiff was permitted to dismiss his suit as to one of the defendants as to whom the jury made no finding, where such defendant was disposed of by the judgment; plaintiff having the right to dismiss as to him at any time before the judgment was rendered.

Appeal from Coryell County Court; H. E. Bell, Judge.

Action by L. T. Gribble against Ed. Buchannan and others. From judgment for plaintiff, defendants appeal. Affirmed.

T. R. Mears, of Gatesville, for appellants.  
Watt L. Saunders, of Gatesville, for appellee.

**KEY, C. J.** Appellee sued appellants, and recovered a judgment for the value of two mules; and the defendants have appealed.

[1] The first assignment of error complains of the action of the trial court in refusing to give a special charge to the jury requested by the defendants. The charge was properly refused, because it was in substance embraced in the court's charge to the jury.

[2] The second assignment charges that

no final judgment was rendered, because the judgment does not in terms make any disposition of the case as to one of the defendants. In allowing appellants' bill of exception relating to that question, the trial judge made an explanatory statement which shows, in effect, that plaintiff abandoned his cause of action as against the defendant not mentioned in the judgment; and therefore, the assignment in question is overruled.

[3] The third and last assignment is predicated upon the fact that the record shows that after the verdict was returned the plaintiff was permitted to dismiss his suit as to one of the defendants, as to whom the jury made no finding. The defendant referred to is disposed of by the judgment, and we hold that the plaintiff had the right to dismiss as to him at any time before the judgment was rendered.

No reversible error has been shown, and the judgment is affirmed.

Affirmed.

#### MILLER v. BANDERA INDEPENDENT TELEPHONE CO. (No. 6306.)

(Court of Civil Appeals of Texas. San Antonio. Dec. 17, 1919.)

##### 1. TELEGRAPHS AND TELEPHONES 19 — RIGHT OF ACTION FOR REMOVAL OF WIRES FROM POLES.

If plaintiff did not own telephone wires, he had no right, title, or interest therein, and if he had no right of user on telephone poles sold to defendant telephone company, he cannot complain of the removal of the wire and has no cause of action for being excluded from use.

##### 2. APPEAL AND ERROR 1002—JURY FINDINGS ON DISPUTED ISSUES NOT REVIEWABLE.

Where all matters were dependent upon disputed issues of fact, and the jury has found against appellant, the court on appeal will not set aside the finding.

Appeal from District Court, Bandera County; R. H. Burney, Judge.

Suit by J. A. Miller against the Bandera Independent Telephone Company. Judgment for defendant and plaintiff appeals. Affirmed.

Geo. Powell, of San Antonio, and W. S. Ethridge, of Bandera, for appellant.

L. J. Brucks, of Hondo, and J. A. Eames, of Bandera, for appellee.

COBBS, J. This is a suit for damages, actual and punitive, growing out of the alleged wrongful acts of appellee in destroying appellant's alleged telephone line and connection in Bandera county.

Appellee challenges the statement made

by appellant of the nature and result of the case, and we ignore both statements. The transcript discloses, copied therein, both the original and amended original petition. For what purpose the former is copied is not disclosed.

We gather from the pleading appellant's cause of action is based on the allegations: Appellant, being a farmer and ranchman residing three miles from the town of Bandera, owned and operated a telephone line to the town of Bandera, a distance of three miles, for his private uses, performing no service for the public; that during 1907 he secured the Bandera Independent Telephone Company, a private corporation, to erect and construct his line of telephone, using appellant's telephone posts and other materials therefor, fully equipping and completing the line together with all attachments and necessary accessories, with the understanding, if said Bandera Telephone Company should build a line of telephone from Bandera to San Antonio using appellant's telephone poles, appellant would sell to said telephone company his said telephone posts from Bandera to his ranch and residence, reserving the right to use the telephone poles for his wire and equipment. The telephone line was completed by said Bandera Telephone Company and turned over to appellant, who used the same many months thereafter, and sold to said Bandera Telephone Company the telephone posts to be used by it to San Antonio, reserving the use to appellant of all the rights incident to said telephone posts for his own use, and did unereafter use and continue to use in his business and by his family for more than ten years, until about May 29, 1918, and possessed thereby a franchise right over said line, and on said last-named date appellant intending to make "a change," as he alleges, "of his telephone connections in Bandera county, Tex., from the defendant to the Southwestern Telephone Company at Bandera, when the defendant, its officers and agents, intending, driving, and conspiring to destroy plaintiff's telephone line, did unlawfully, tortuously, and in open defiance of the law, and in disregard of plaintiff's property rights in his telephone line, and with force and arms, did enter into and upon plaintiff's premises and telephone line aforesaid, then and there being, and with great force and violence did sever, disconnect, pull, and break and tear away plaintiff's telephone wire from its attachments to the said telephone poles and posts, and destroy plaintiff's telephone line between his ranch and residence and the town of Bandera, Tex., to plaintiff's damage in the sum of \$5,000." He alleges by reason of the wanton and willful destruction thereof he has sustained great injury and actual damages, and has been deprived of the use of his telephone line over the poles the entire distance between the town of Bandera and



his residence, to his actual damages \$2,500. By reason of the wanton and willful destruction of the telephone line aforesaid by appellee he has been compelled to build and erect a telephone line between his residence and Bandera at an actual cost of \$130. He also prays for further damages in the loss of his right of use in the telephone line in the further sum of \$1,000. He also sues for punitive damages in the sum of \$2,000 on account of the alleged malicious intent on the part of appellee to injure him.

Appellee answered by general exception and special exceptions, and general denial.

The case was tried before a jury on special issues, resulting in findings against appellant, upon which a judgment was entered in favor of appellee.

[1] The first error assigned is that the court erred in not submitting special charge No. 2 requested by him to find "that plaintiff's telephone line was by defendant wantonly and willfully destroyed, and that by reason thereof plaintiff was compelled to build himself a line between his residence and the town of Bandera," and "then to find such sum as you believe he was required to expend in building and erecting such telephone line." There were other issues he requested to be submitted, but not necessary to consider in view of the issues submitted by the court and found against appellant.

This charge undertakes to submit the issue of actual damages caused by denying to appellant his alleged use, thereby compelling him to go to the expense of building an entirely new line at a cost to him of \$130, expended by him in constructing the new line.

The court submitted five special issues and instructed the jury in case they answered issues Nos. 1 and 2 in the negative they need not answer the others. They were as follows:

"No. 1. Do you find from the evidence that the plaintiff, J. A. Miller, owned the telephone wire from a point on the Bandera and San Antonio road opposite the house of plaintiff to the town of Bandera prior to the time that the same was taken down and removed from the telephone posts by the defendant? Answer 'Yes' or 'No.'"

"No. 2. Do you find from the evidence that the plaintiff, J. A. Miller, had and reserved a right to use the telephone posts of the defendant from the town of Bandera along the Bandera and San Antonio road to a point opposite his house for the purpose of operating and maintaining a telephone line thereon? Answer 'Yes' or 'No.'"

And to each the jury answered "No."

We believe these charges were responsive to and a fair submission of all the issues made by the pleading and the evidence. By the answer to the first question the jury determined from the evidence appellant did not own the wire from a point on the Bandera and San Antonio road opposite his

house prior to its removal. This was a clear, direct, and distinct finding as to his title.

In answer to the second question the jury found that appellant had not reserved a right to use the telephone posts of the defendant from the town of Bandera along the Bandera and San Antonio road to a point opposite his house for the purpose of operating and maintaining a telephone line thereon.

These issues present a very clear conception of plaintiff's case.

If appellant did not own the wires, having himself alleged and shown he sold the poles, he had no right, title, or interest in it to sue for.

If, as the jury found, he had no right of user thereon, he cannot complain of the removal of the wire, and has no cause of action for being excluded from the use.

All the assignments raise questions of law that have no useful place in the case, since the material issues of ownership and use have been found against appellant.

[2] Since all the matters, the basis of this suit, were dependent upon disputed issues of fact upon every phase of the case and found against appellant, we do not feel at liberty to set aside the judgment. Nor do we think there are any assignments that present any reversible error, and they are overruled.

Judgment affirmed.

#### FOURMENTIN et al. v. SCOTT. (No. 1556.)

(Court of Civil Appeals of Texas. Amarillo. Dec. 17, 1919.)

#### 1. CHATTEL MORTGAGES $\S$ 43—REJECTION AS SURPLUSAGE OF CLAUSE RESERVING TITLE WHERE MORTGAGEE HAD NO TITLE ORIGINALLY.

A note reciting the consideration to be the sale of certain personal property and certain crops to be raised on a designated farm, and that title was not to pass from the payee until payment in full, held to constitute a chattel mortgage under Rev. St. 1911, art. 5654, when recorded under article 5655, as the recitation of reservation of title might be treated as surplusage.

#### 2. CHATTEL MORTGAGES $\S$ 43 — FORM AND REQUISITES.

No particular form is necessary to constitute a mortgage a chattel mortgage if it fairly indicates the creation of a lien specifying the debt and the property on which it rests, and when it is so drawn that a person reading cannot understand it otherwise than as a lien on the property described, and where it has been properly registered, it may be received in evidence as a mortgage.

Appeal from Collingsworth County Court; C. C. Small, Judge.

Action by R. L. Scott against Charles and Henry Fourmentin. Judgment for plaintiff, and defendants appeal. Affirmed.

Cocke & Gribble, of Wellington, for appellants.

Templeton & Templeton, of Wellington, for appellee.

HUFF, O. J. Only such of the pleadings and in so far as necessary to an understanding of the assignments presented in this court will be stated. Scott, as the owner of the Wellington Hardware Company, and the note sued on and an account, alleged the execution of the note by Charles Fourmentin and his title by virtue of being the sole owner of the hardware company, and that the note was for \$574.40, providing for interest and attorney's fees, totaling \$712.36, and the account for \$49.60. The note was executed by Charles Fourmentin, and the account was due by him, both of which, it was alleged, were due and unpaid. To secure the indebtedness the maker executed a chattel mortgage on certain personal property, a wagon, harness, horse, and ten bales of cotton, cotton seed, maize, or kaffir corn to be grown upon certain rented premises for the year 1918. The mortgage was duly filed for record as a chattel mortgage, of all of which both appellants had actual and constructive notice. The property so mortgaged was taken in possession by Henry Fourmentin and by him converted. The lien was asked to be foreclosed, and a judgment against Charles Fourmentin on the note and against Henry Fourmentin on account of the conversion of the property, and for the value of the property so converted, or so much as should be necessary to pay the debt. The defendants, appellants here, answered by general and special pleas, not believed to be necessary to be set out.

The first assignment is to the effect that the trial court committed error in admitting in evidence the note which recited that the title to the personal property was retained on the ground that it was shown thereby that it was not a lien in that it did not mention the property as sold by Scott to Charles Fourmentin; that it was not, and could not operate as, a chattel mortgage except by virtue of the statute.

The second assignment is to the effect that it was error to admit the note because not supported by the pleadings, in that it showed on its face that it was not a mortgage, but, if anything, a title retained in the note to property described therein, and that the evidence showed that the property was not sold to Charles Fourmentin by appellee or the hardware company. The note to the introduction of which objections were urged was for the sum of \$574.40, due on or before October 1, 1918, with interest from date and attorney's fees. It is recited therein the con-

sideration for the contract was for the sale of one low-wheel wagon and bed, all complete, one bay mare seven years old, two sets of shop harness, all complete, 10 bales of cotton, 20 tons of cotton seed, and 25 tons of maize, or kaffir corn, that the maker should raise on the C. L. Bowen place in the year 1918, "for which the note is given, is such that the title and ownership does not pass from the Wellington Hardware Company until the note is paid in full." After other provisions the note recites:

"It is expressly agreed by the mortgagor that should I be indebted to the Wellington Hardware Company in any other than the above-described note, not to exceed the amount of \$500, that the mortgage shall be security for said note or account and shall not be released until all such indebtedness shall have been paid in full."

The instrument also provided that the payee, when he deems himself insecure, could take possession of the property and sell it and apply the proceeds on the note. The petition declared on the instrument as a mortgage, describing the property therein and sought to establish a mortgage lien, and alleged that it was executed by Charles Fourmentin, and filed for record as such. It is apparently established by the evidence that the property described was not sold by the hardware company to the maker of the note, but that this note was in fact a renewal of two other notes. It seems to be appellee's contention that the lien is invalid because there could be no reservation of title in a chattel where the payee never had any title, and therefore the note was not effective as a chattel mortgage under the statute (Rev. St. art. 5654).

[1, 2] If there had been a reservation of title to the property under the statute, it would have been a chattel mortgage. If there was no title in the payee, the payor could nevertheless execute a mortgage on the property to secure the debt, which the instrument in question clearly does. The instrument is not void for uncertainty. The recitation of the reservation of title may be treated as surplusage and will be construed to effect the evident purpose of the parties. It is manifest the note was drawn on the blank form used in the business where articles were sold in which the vendor retained the title until the purchase price was paid. Article 5655, providing for instruments intended to operate as liens to be recorded, describes such instruments as chattel mortgages, deeds of trust, "or other instrument of writing intended to operate as a mortgage of or lien upon personal property." No particular form is necessary to constitute a mortgage if it clearly indicates the creation of the lien specifying the debt and the property on which it rests. When it is so drawn that a person

reading it could not have understood it otherwise than a lien on the property described, and it has been properly registered, it is proper to receive it in evidence as a mortgage. *Johnson v. Brown*, 65 S. W. 485; *Soell v. Hadden*, 85 Tex. 182, 19 S. W. 1087; *Adoue v. Jemison*, 65 Tex. 680; *McGeé v. Fitzer*, 37 Tex. 27; *Ranck v. Howard-Sansom*, 22 S. W. 773; *Thatcher v. Jeffries*, 91 S. W. 1091; *Watterman v. Silberberg*, 67 Tex. 100, 2 S. W. 578; *Lewis v. Bell*, 40 S. W. 747; *Bank v. Cathey*, 185 S. W. 661.

We think the trial court properly admitted the note in evidence. The appellant presents no other error by assignment, and, as the case appears to have been properly tried and a proper judgment rendered, the judgment will be affirmed.

### EUREKA PAVING CO. et al. v. BARNETT et al. (No. 471.)

(Court of Civil Appeals of Texas. Beaumont.  
Nov. 28, 1919. Rehearing Denied  
Dec. 10, 1919.)

#### 1. JUDGMENT $\S$ 487 — EQUITABLE RELIEF AGAINST DEFAULT JUDGMENT; EXCUSE FOR FAILURE TO APPEAR OR ANSWER IN FORMER SUIT.

In suit to enjoin enforcement of default judgment foreclosing improvement certificate against plaintiff's property, the petition alleging that she employed a named attorney to file an answer and take such steps as were necessary to her proper defense, and that she assumed he had answered, and that she was not apprised of the rendition of judgment against her until about 30 days before the instant suit was filed, was insufficient as a legal reason or excuse for failing to appear or answer.

#### 2. JUDGMENT $\S$ 429 — JUDGMENT FORECLOS- ING IMPROVEMENT CERTIFICATE ON HOME- STEAD CANNOT BE ATTACKED BY INJUNCTION TO PREVENT ITS ENFORCEMENT.

Where petition, in suit to foreclose improvement certificate, did not allege that the property upon which the lien was claimed was the homestead of the owner at any time, but simply that plaintiff had been so informed by the owner, and alleged, in the alternative, that if the property had ever constituted a homestead it was nevertheless subject to the claimed lien because far exceeding in value the constitutional exemption for homestead purposes, and the amount in controversy was within the court's jurisdiction, and defendant owner, being cited, failed to set up her claim of homestead exemption, judgment of foreclosure in such suit was res judicata of the claim of homestead exemption under Const. art. 16, §§ 50, 51, attempted to be set up in a later suit by the owner to enjoin enforcement of the foreclosure judgment by sale.

Appeal from District Court, Harris County; Henry J. Dannenbaum, Judge.

Suit by Mrs. Bessie B. Barnett and another against the Eureka Paving Company and others. From judgment for plaintiff, defendants appeal. Reversed and remanded, with instructions.

W. W. Moore and J. Y. Powell, both of Houston, and W. J. Howard, of Floydada, for appellants.

Elbert Roberts and Homer E. Stephenson, both of Houston, for appellees.

HIGHTOWER, C. J. On the 30th day of April, 1917, the city of Houston, acting for the use and benefit of Eureka Paving Company, as said city was authorized to do under its charter, filed a suit in the district court of Harris county, Tex. (Sixty-First district) against Mrs. Bessie B. Barnett, individually, and also against her as independent executrix of the estate of W. W. Barnett, her deceased husband. The number of said suit on the docket of said court was 72518. The object of the suit was to recover judgment on a certain improvement certificate issued by the city of Houston to the Eureka Paving Company, evidencing the pro rata share of the cost of improving Walker avenue in said city, which cost was levied and assessed against W. W. Barnett and also against his property abutting on said avenue, and it was sought to foreclose a lien there asserted against said property for the payment of said certificate. The plaintiff's petition in that cause alleged the death of W. W. Barnett, and that the said Bessie B. Barnett had become the owner of the property against which the foreclosure was sought; alleged further that the improvement certificate sued on was duly and legally executed, setting out the terms thereof, and the authority under which same was issued, and then further alleged that said certificate was secured in its payment "by a first and paramount lien against said property," and, after setting out the procedure had with reference to the creation of said lien, contained the further allegation:

"The said assessment and charge of personal liability herein sued on are valid and enforceable under and by virtue of said laws and the terms of said charter, and of said proceedings."

The petition in said cause further alleged, in substance, that the plaintiff therein had been informed by the defendant therein that the property upon which the lien was sought to be foreclosed constituted at the time of such assessment, and thereafter continued to constitute, the homestead of the defendant and her deceased husband, W. W. Barnett. The petition in said cause further alleged, however, in the alternative, that if said property then or at the time of said assessment constituted the homestead of Bessie B.

Barnett and her deceased husband, then at the time of its designation as such it was reasonably worth \$30,000 more than the value of property which at such time could be legally acquired as a homestead so as to be exempt from forced sale. Said petition in said cause further alleged default in payment of said certificate, the provision and necessity for attorney's fees, the damages arising, etc., and prayed for judgment against Mrs. Bessie B. Barnett, both individually and in her capacity as independent executrix of the estate of W. W. Barnett, deceased, for said debt as evidence by said certificate, and also for foreclosure of the lien which plaintiff in that cause was asserting against the property involved, for order of sale of same, and for general and special relief. The property there involved and against which the lien was claimed and foreclosure sought was the same property which is now involved in this suit, to wit, lot No. 5 and 50 by 75 feet of lot No. 11 in block No. 142 on the south side of Buffalo bayou in the city of Houston, fronting together 151 feet on the south side of Walker avenue.

Citation was duly issued and served upon Mrs. Bessie B. Barnett, both in her individual and representative capacity, as before stated, and was made returnable to the June, 1917, term of said court, and on appearance day of said term, to wit, June 19, 1917, said defendant, Mrs. Barnett, having defaulted, after hearing the evidence offered by the plaintiff in said cause, judgment was rendered that the plaintiff therein, the city of Houston, recover for the use and benefit of the Eureka Paving Company and against Bessie B. Barnett, both individually and as independent executrix of the estate of W. W. Barnett, deceased, the sum of \$701.45, with 7 per cent. interest thereon from date of the judgment until paid, also \$50 collection fee, and all costs of suit; and, further, that said assessment lien be foreclosed on said property, and that the property be sold under order of sale in satisfaction of said sums of money. The judgment further stated, as express findings of fact, that plaintiff's demand was liquidated, and that its payment was secured by a valid lien against the property involved, as declared and asserted by the plaintiff in said cause, and that such lien was superior to all other liens, claims, and interests, except for lawful ad valorem taxes, and that the lien was fixed on and against said property, and foreclosed by said judgment. The judgment in that cause further recites, as a finding by the court, that said property, at the time it was acquired by the defendant, Bessie B. Barnett, and her deceased husband, and ever since such time, was reasonably worth, exclusive of improvements, a sum exceeding \$5,000 by more than the amount of the plaintiff's claim in said cause.

The amount of the assessment levied

against the Barnett property as the pro rata cost of improvement was \$601.16, and this amount, together with the accrued interest, attorney's fees, etc., was the amount of indebtedness in controversy claimed by the plaintiff in said cause No. 72518.

The judgment rendered in favor of the city of Houston, for the use and benefit of Eureka Paving Company, against Mrs. Barnett, as above explained, and foreclosing the lien asserted by the plaintiff in that cause against the property there and here involved, was never appealed from, but became final in the trial court, and was in no manner attacked or sought to be set aside until the present suit was filed at a subsequent term of that court.

Now, this suit was filed by Mrs. Bessie B. Barnett in her individual capacity, and also in her capacity as independent executrix of the estate of her deceased husband, W. W. Barnett, against the said Eureka Paving Company and the said city of Houston, and also against M. F. Hammond, in his capacity as sheriff of Harris county, with a view on the part of the plaintiff of restraining the sale of said lot No. 5 and part of said lot No. 11, being the very same property that was involved in said prior suit between the parties, which sale she alleged was about to be made by said sheriff under an order of sale issued out of said district court of Harris county on said judgment in favor of said city of Houston, for the use and benefit of said Eureka Paving Company. As a reason for asking that such sale be enjoined, the plaintiff in this suit alleged, substantially, that the property involved at the date of the rendition of the prior judgment and at all times prior thereto, and especially at the date of the assessment made against it by the city of Houston, and since that time, constituted the homestead of herself and deceased husband, and still constitutes her homestead, and that no valid lien, therefore, was ever fixed against said property, as was attempted to be done by the levy made against it and the issuance of the improvement certificate by the city of Houston, and that no valid lien could be fixed against said property, as was sought to be done by said city, the same being exempt from any such attempted lien or charge by the Constitution of this state. The appellants in this cause, city of Houston and Eureka Paving Company, filed a joint answer to the appellee's petition, which, among other things, contained a special exception, raising the point that the question or issue which appellee in this case was seeking to have now adjudicated was *res adjudicata*, and that such fact appeared from the face of appellee's petition in this cause, when read in connection with the exhibits thereto attached and made a part thereof, said exhibits consisting of a copy of the plaintiff's petition in

said prior cause, and a copy of the judgment of the court pronounced and entered in said prior cause. There was another special exception interposed by appellants in this cause, to the effect that no valid reason was alleged by appellee in this cause for her failure to answer and make defense, if any she had, to appellant's demand in said prior cause. Appellants further answered by general denial, and then specially pleaded the judgment between the parties in the prior cause, as hereinbefore mentioned, in bar of appellee's recovery in this cause, upon the ground that such judgment constituted *res adjudicata* of the questions and issues now sought to be adjudicated.

We shall not go into detail as to the results on the trial below, but suffice it to say that the trial court granted the injunction prayed for by appellee, restrained the sheriff from selling the property in controversy on the ground that no valid lien ever existed upon the same, as claimed by the city of Houston and Eureka Paving Company in the prior suit, for the reason that said property was the homestead of W. W. Barnett and wife at the time such lien was sought to be fixed, and was the homestead of Mrs. Barnett at the time the judgment in said cause was rendered, and that, therefore, under the Constitution of this state, such attempted lien was void, and the judgment in the prior cause, attempting to give it validity, was void. The judgment went further and canceled the prior judgment and canceled the improvement certificate as constituting a cloud upon appellee's title, etc.

Upon inspection of appellee's petition for the injunction in this case, we find attached thereto as Exhibit A a copy of the petition filed by the city of Houston as plaintiff in said prior cause, and we quote portions of said petition, as follows:

"On the 12th day of September, 1914, there was levied and assessed a special assessment amounting to \$601.16 against certain property in block 142 SSB, fronting 151 feet on the south side of said street, more specifically described hereinafter, and against the owners of said property."

"That said assessment was levied by virtue of said ordinance, and previous ordinances, resolutions, and proceedings of the city council of the city of Houston, providing for the payment by W. W. Barnett, then husband of defendant, of his pro rata of the cost of improving Walker avenue under a contract between the city of Houston and the Eureka Paving Company of date the 17th day of August, 1914, for the improvement of said section of said street, and that by said proceedings said special assessment, with cost of collection and reasonable attorneys' fees if incurred, is declared a first and paramount lien against the said property and a personal charge against said defendant Mrs. Bessie B. Barnett in her individual capacity and as executrix of the estate of W. W. Barnett, deceased, payable to the Eureka Pav-

ing Company or its assigns in said installments with interest thereon at 7 per cent. per annum."

"That the said improvements have been completed and accepted by the said city, and that all the requisites to the fixing of the lien and the claim of personal liability evidenced by said certificate have been performed."

"(5) That the said ordinance was regularly passed and enacted and the said assessment levied by the city of Houston on the 12th day of September, A. D. 1914; that under and by virtue of the said ordinance the said assessment is payable as hereinafter set out in the said certificate; that the said certificate is in all respects valid and enforceable and in conformity with law, and that the recitals therein are true in every particular; that each and every step required or provided by law, or by the charter of the city of Houston, as a prerequisite to the making of said improvements or the fixing of said assessment and lien of said personal liability, have been done and performed in accordance with the said law and the terms of said charter, and that the said assessment and charge of personal liability herein sued on are valid and enforceable under and by virtue of the said laws and the terms of the said charter, and of the said proceedings."

Said Exhibit A, as shown by paragraph 12 thereof, further contained this alternative allegation:

"(12) The plaintiff has been informed by the defendant herein that the above-described land and premises constitute, and constituted at the time the aforesaid assessment was levied and certificate issued, the homestead of defendant and her deceased husband, W. W. Barnett; and plaintiff further alleges that in such event the said premises at the time of dedication as such homestead were reasonably worth in the sum of \$30,000 more than the value of property which defendant and her deceased husband at such time could legally acquire as homestead."

Exhibit B, attached to appellee's petition in this suit, purports to be a copy of the judgment rendered by the court in said prior suit, and, among other things, contains the following:

"This day came on to be heard the above styled and numbered cause, wherein the city of Houston, Harris county, Tex., is plaintiff, for the use and benefit of the Eureka Paving Company, a corporation, and Bessie B. Barnett is defendant, both individually and in the capacity of independent executrix of the estate of W. W. Barnett, deceased, and the plaintiff appeared by attorney and announced ready for trial, but defendant, though having been duly and legally cited in the manner and for the time provided by law, by personal services within Harris county, Tex., both individually and in her representative capacity, came not, but wholly made default."

"That said certificate is now past due and unpaid, and there is now due on same the sum of \$701.45, aggregate of principal and interest. That plaintiff has incurred attorney's fees and court costs in the collection of said certificate,

and that the reasonable amount of said attorney's fees is \$50, that payment of the above sums of money due on said certificate is secured by a valid and subsisting lien, superior to all other liens, claims, and interest, except for lawful ad valorem taxes, which lien was created by a valid ordinance of said city of Houston passed on the 12th day of September, A. D. 1914, and fixed on and against the following described land and premises, to wit: (Here follows description of the land in controversy in the present suit.)

"That defendant is the present owner of the above-described land and premises, and at the time same were acquired by defendant and her deceased husband, and ever since such time, same were and have been reasonably worth, exclusive of improvements, a sum exceeding \$5,000 by more than the amount of plaintiff's claim herein."

"It is further ordered, adjudged, and decreed by the court that the aforesaid lien as it existed on the 1st day of February, 1915, be and the same is hereby foreclosed against all defendants, and that the clerk do issue an order of sale," etc.

In this case appellee Mrs. Barnett made no contention touching the validity or regularity of any of the proceedings on the part of the city of Houston with a view to assessing the pro rata cost of paving against the property in question, but her sole contention is that the improvement certificate, declaring a lien against said property for such cost, was an absolute nullity, for the reason that no lien could be fixed for such purpose against the property in question, because prohibited by the Constitution of this state, and she further contends that the court's judgment in the prior cause was a nullity for the reason that the court was without power or jurisdiction to declare a lien against her homestead property for the pro rata cost of the street paving in front of said property.

[1] Let it be conceded, at the outset, for the sake of argument, that no valid lien could be created by the city of Houston against the property in question for the cost of improving the street upon which said property abuts, for the reason that such property was a homestead, as claimed by Mrs. Barnett, yet it does not follow that the judgment of the district court of Harris county in the prior suit, which determined that the plaintiffs in that case had a valid lien against said property for such improvements and foreclosed said lien against said property, was a nullity, but we think, on the contrary, that such judgment was a valid and binding one until set aside by some appropriate proceeding timely instituted for that purpose. We have no doubt that the district court of Harris county had jurisdiction of the parties and subject-matter involved in said prior suit, in which the plaintiff the city of Houston, for the benefit and use of the Eureka Paving Company, expressly alleged that it had a valid and

subsisting lien against said property to secure the payment of said improvement certificate, and prayed that the court so adjudge and order such lien foreclosed. Now, while it is true that plaintiff in that cause alleged that it had been informed by the defendant that such property constituted the homestead of herself and husband, still the allegation of the plaintiff that it had been so informed by the defendant did not amount to an allegation of fact that said property was the homestead of Barnett and wife at any time, but the allegation was only to the effect that the plaintiff in said cause had been so informed; plaintiff in that suit neither affirmed nor denied that such information was true, but, in the alternative, alleged that if such property ever constituted the homestead of the Barnetts, nevertheless, at the time it was so designated, it exceeded in value more than \$30,000, which was greatly in excess of the constitutional exemption of property for homestead purposes, and prayed that the lien claimed in that cause against said property be foreclosed, and the property ordered sold to pay the judgment recovered. Mrs. Barnett, defendant in that suit, admits in her petition in this suit that she was duly served with citation in that cause, but that she did not appear or answer, and offers as her only excuse for so failing this allegation in her petition:

"That she [plaintiff here and defendant in cause No. 72518 in the Sixty-First district court] employed one Jim H. Reeves, an attorney at law, practicing at the bar of Harris county, Tex., to file an answer in said cause and to protect her rights in said property as her homestead, and to take such other steps as were necessary to her proper defense in said cause; that she assumed that said Reeves had answered."

Then she further alleged that she had not been apprised of the rendition of the judgment against her in said cause until about 30 days before this suit was filed. Now appellants excepted to this allegation on the part of appellee, on the ground that the same showed no legal reason or excuse for her failing to appear or answer in said prior cause, and this special exception was overruled by the trial court. It should have been sustained. *Woolley v. Sullivan*, 92 Tex. 28, 45 S. W. 377, 46 S. W. 629; *Knox v. Horne*, 200 S. W. 259; *Stringer v. Robertson*, 140 S. W. 502; *Keller v. Keller*, 141 S. W. 581.

[2] Since it is clear that the district court of Harris county in the prior suit above mentioned had jurisdiction, both of the subject-matter and of the parties, when it rendered its judgment in that cause, it must be held that such judgment was valid and binding between the parties, unless the same was set aside by some proper proceeding timely in-

stituted for that purpose, and since the very issue, in so far as the property involved is concerned, was the same in both suits, that is, whether a lien existed in favor of the city of Houston, as claimed, to secure the payment of the improvement certificate, and since it was expressly decided in the prior suit that such lien did exist, and ought to be foreclosed, and was expressly foreclosed by the judgment in the prior suit, that judgment, under the facts in this case, must be held to be a bar, on the principles of res adjudicata, to the determination of the same issue now sought to be had by the appellee in this suit. We have no doubt of the correctness of our conclusion on this point. *O'Connor v. Lucio*, 14 Tex. Civ. App. 682, 39 S. W. 139; *Beer v. Thomas*, 18 Tex. Civ. App. 30, 34 S. W. 1010; *Nichols v. Dibrell*, 61 Tex. 539, and authorities there cited. Many other authorities more or less in point might be cited, but we think that the above will suffice.

Appellee's counsel, in support of their counter proposition to the effect that the district court of Harris county was without power and jurisdiction to render a judgment foreclosing a lien on a homestead for street improvements, because inhibited by article 16, sections 50 and 51 of the Constitution of this state, cite also the case of *Higgins v. Bordages*, 88 Tex. 458, 31 S. W. 52, 803, 53 Am. St. Rep. 770. It was said by the Supreme Court of this state in the *Higgins-Bordages* Case that the district court in that case was without power to declare a lien on the property there sought to be charged with street improvements, for the reason that the Constitution inhibited any such judgment. Upon a careful reading of that case, however, it will readily appear that the plaintiff's petition in that case (the city of Beaumont was plaintiff) expressly alleged that the property was owned and occupied by the old negroes Higgins and wife at the time the assessment levied against it was made, as well as at the time the judgment of fore-

closure was sought, and for that reason the Supreme Court said, substantially, that it appeared upon the very face of plaintiff's petition that there could be no lien against the property, as sought by the city, because the Constitution of this state so declared, and since the court in that case had no jurisdiction of the amount involved and sought to be recovered, to wit, the sum of \$20, that the court was entirely without jurisdiction and power to declare the lien as it did, and order the property sold to pay the money judgment. But in this case, we have a different situation. In the prior suit, between the parties, the plaintiff's petition did not allege that the property upon which the lien was claimed constituted the homestead of the Barnetts at any time, but, as before shown, simply alleged that plaintiff had been so informed by the defendant Mrs. Barnett, and then alleged, in the alternative, in substance, that if such property ever constituted the homestead of said parties, nevertheless it was subject to the lien claimed by the city, for the reason that it far exceeded in value the constitutional exemption. And, besides, the amount in controversy in that suit, being \$601.16, principal, besides interest and attorney's fees, as shown by the plaintiff's petition, unquestionably gave the court jurisdiction over the cause, and, having once taken jurisdiction, and a valid lien being asserted and claimed by the plaintiff against the property, and the defendant Mrs. Barnett, although duly cited, having failed to set up her claim to homestead exemption, if any existed, she must be held in this proceeding to be barred by that judgment upon the principles of res judicata.

The trial court erred in refusing to sustain the special exceptions interposed by appellant raising the issue of res judicata, and because of such error the judgment of the trial court is reversed, and the cause remanded, with instructions to the trial court to sustain the exception, and dismiss appellee's suit; and it will be so ordered.

**KERR et al. v. HUME. (No. 1036.)**

(Court of Civil Appeals of Texas. El Paso.  
Nov. 28, 1919. Rehearing Denied  
Dec. 18, 1919.)

**1. JUDGMENT  $\S$ 212 — ENTRY AT REGULAR TERM OF JUDGMENT RENDERED DURING VACATION.**

If, after hearing and decision by the county court of a cause in vacation, nothing had been done relative to the judgment at the succeeding regular term of the court but to have the clerk enter it upon the minutes of the court, it would have been a nullity.

**2. JUDGMENT  $\S$ 212 — RENDERED IN VACATION.**

A judgment of the county court did not appear void on its face as having been rendered and the cause heard in vacation, where, although it recited a hearing had in vacation, and that pursuant to said hearing the court "concluded" the plaintiff should recover, and further concluded that such judgment should be entered at the succeeding regular term, it further recited that at the succeeding regular term the court, "upon consideration of the pleadings \* \* \* and the evidence heard on" the prior date during vacation, "concluded" plaintiff was entitled to recover.

**3. JUDGMENT  $\S$ 461(1)—PRESUMPTION IN FAVOR OF JUDGMENT ALLEGED TO HAVE BEEN RENDERED IN VACATION.**

In suit to enjoin enforcement of judgment, recitals that the court, at a regular term, considered the evidence heard in vacation, do not preclude the presumption that sufficient other facts were proved to sustain the judgment, against objection that cause was heard in vacation.

**4. JUDGMENT  $\S$ 461(1)—PRESUMPTION OF REGULARITY SUPPLYING OMISSIONS IN JUDGMENT RECORD.**

In suit to enjoin enforcement of judgment, although record does not show affirmatively jurisdiction of defendant's person by service or answer, the judgment is not void for that reason, as, where the record is silent on the point, it will be presumed they had notice or were present at the trial.

**5. JUDGMENT  $\S$ 429—VALIDITY; MATTER OF DEFENSE.**

In suit to enjoin enforcement of judgment, that moneys sued for and for which judgment was rendered were in the custody of another court was a matter of defense, which should have been pleaded and urged in the suit, and could not render the judgment in the suit void.

Appeal from District Court, Terrell County; Walter F. Jones, Special Judge.

Suit by Joe Kerr and others against D. E. Hume. From order refusing temporary writ of injunction, plaintiffs appeal. Order affirmed.

A. T. Folsom, of Sanderson, for appellants.  
D. E. Hume, of Eagle Pass, for appellee.

**HARPER, C. J.** Mrs. Maggie Anderson, survivor in community of the estate of D. L. Anderson, and Ella May Anderson, only surviving child and heir, and Joe Kerr brought this suit in the district court of Terrell county, Tex., for three purposes: (1) Temporary injunction restraining the constable from levying execution upon the goods, lands, etc., of defendants issued out of the county court of Maverick county; (2) to declare said judgment void; and (3) to permanently enjoin issuance of further executions by the clerk of said county court of Maverick county by virtue of said judgment.

The judgment sought to be set aside is as follows:

"David E. Hume v. D. L. Anderson et al. No. 413. In the County Court of Maverick County, Texas, October Term, 1917. On the 19th day of October, A. D. 1917, during a regular term of this court, the plaintiff, David E. Hume, appealed in person and moved the court to enter judgment in his favor by reason of the following circumstances, which the court found in fact existed, to wit: At the July term, 1917, of this court this case was regularly called for trial, and both parties duly appeared in person, and defendant D. L. Anderson and Joe Kerr, by attorney, and the following agreement was entered into and approved by the court, to wit:

"David E. Hume v. D. L. Anderson. No. 413. In County Court Maverick County, Texas, July Term, 1917. In the above entitled and numbered cause it is hereby agreed by and between plaintiff and defendant, defendant, Anderson, being herein represented by Ben V. King, his attorney, that this case will be called for trial and tried within thirty days from and after July 16, 1917, subject, however, to any legal excuse for a postponement as would be applicable under the rules of law governing such cases, in the discretion of the court. The parties hereto agree that the records and minutes of this court may show said trial and proceedings as had at a regular term of said court, and that no objections or exceptions will be taken or raised in this court or any appellate court relative or pertaining to the question of said trial being had in vacation.

"It is understood, however, that their agreement shall in no wise be accepted or construed as a waiver of defendant's bills of exceptions to the action of the court in overruling defendant's plea of privilege or permitting said plea of privilege or alleged waiver thereof, being construed or contested in the absence of a controverting plea, under oath, being first filed by plaintiff. Witness our hands at Eagle Pass, Tex., this 18th day of July, 1917. David E. Hume, Plaintiff, D. L. Anderson, Defendant, by Ben V. King, His Attorney. Approved by me this 18th day of July, 1917. E. H. Schmidt, County Judge, Maverick County, Texas."

"On August 16, 1917, during vacation (notice of this setting having been given plaintiff and defendant's attorney), the judge of this court



called the case for trial as contemplated by the agreement, and the plaintiff, David E. Hume, appeared in person and was ready for trial, and the defendants appeared by their attorney, Judge Ben V. King, and, not being ready for trial, asked a postponement, which the court overruled, and defendants' attorney retired from the room and was not present and did not participate in the trial. The court heard the pleadings and the evidence and concluded that plaintiff was entitled to judgment against defendant D. L. Anderson for \$251, with interest thereon at the rate of 6 per cent. per annum from October 19, 1917, and all costs, and the court concluded that such a judgment should be entered at the following October term, 1917, of this court. Thereafter, on the 19th day of October, 1917, during a regular term of this court, the case was called, and the plaintiff, David E. Hume, duly appeared in person, but the defendant D. L. Anderson, though his answer had long since been filed, failed to appear either in person or by attorney, and the court, upon consideration of the pleadings, the agreement hereinbefore set out, and the evidence heard on August 16, 1917, as hereinbefore explained, concluded that plaintiff was entitled to judgment against defendant for \$251, with 6 per cent. interest per annum from October 19, 1917, and all costs of suit. It is therefore ordered, adjudged, and decreed by the court that the plaintiff, David E. Hume, do have and recover of and from the defendant D. L. Anderson and Joe Kerr the sum of \$251, with 6 per cent. interest per annum thereon from October 19, 1917, and all costs of suit, and that execution and all other writs issue that may be necessary to carry their judgment into execution."

The grounds pleaded for declaring the above judgment void are:

First, that the money for which the judgment was rendered was held by D. L. Anderson as sheriff under order and judgment of the district court, wherein one Villareal was being prosecuted for its theft from Bilboa, and bringing same into this state; that said Villareal had been prosecuted and convicted, had appealed, and that defendant D. L. Anderson, as sheriff, had by order of the court duly entered as provided by statute been commanded to retain the identical money in his possession until the final disposition of the case, to be used as evidence in case the cause was reversed for a new trial; that Hume knew these facts, and, notwithstanding his knowledge, fraudulently procured the county judge of Maverick county to enter said judgment.

Second, because of the facts recited in the judgment it appears that the case was tried in vacation; therefore the judgment entered is void.

The petition in this proceeding was presented to Hon. Walter F. Jones, special judge in term time, and after hearing evidence the temporary writ of injunction was refused, and from the order refusing the writ the case is appealed.

The only question urged by appellant is that the judgment of the county court of Maverick county is void.

[1, 2] The exact point urged is that it affirmatively appears from the face of the judgment that the hearing was had and the judgment of the court as entered was rendered in vacation August 16, 1917, and, the county court not being authorized to hear causes of action and render judgments outside of regular terms, the judgment so rendered is void.

It needs no citation of authorities to support this proposition of law, but the question for determination for the trial court, and likewise this court, is: Does the judgment pleaded upon its face sustain the contention, or has plaintiff by his pleadings set up facts to be shown by the face of the record in this case (county court of Maverick county) which would, if introduced, show the judgment sought to be set aside to be void? *Baker v. Crosbyton South. P. Ry. Co.*, 107 Tex. 566, 182 S. W. 287. The only thing we have to determine the question by is the judgment itself. The question is to be answered by the recitals in the judgment. It recites an agreement in writing entered into and approved by the judge, at a regular term of the county court, to try the case in vacation, that the hearing was had August 16, 1917, which was at a date when the county court of that county had no term, and that pursuant to said hearing the court concluded that the plaintiff should recover against one of the defendants, and further concluded that such judgment should be entered at the succeeding October term of court. If there had been no other thing done relative to the judgment as entered October 19, 1917, but to have the clerk enter it upon the minutes of the court, it, such judgment, would have been a nullity (*Hodges v. Ward*, 1 Tex. 244; *Hardware Co. v. Perry et al.*, 88 Tex. 468, 27 S. W. 100), but its recitals further say:

"On October 19, 1917, during a regular term of this court, the case was called, and plaintiff \* \* \* duly appeared, \* \* \* and the court upon consideration of the pleadings, the agreements, etc., \* \* \* concluded that plaintiff was entitled to recover, etc. \* \* \*"

[3] The fact that it recites that the court considered the evidence taken in the hearing in vacation does not preclude the presumption that sufficient other facts were proved to sustain the judgment. *Chapman v. Sneed*, 17 Tex. 428; *Delaware Ins. Co. v. Hutto*, 159 S. W. 73. Besides, this record discloses that the court heard other evidence when the case was called for trial at the October term. True, it recites that at the hearing in vacation the court "concluded" that plaintiff should recover, but, if we could construe the term to mean that he then, as judge, rendered his judgment, we are confronted with the

further recital that in term time he again "concluded" that plaintiff should recover; so, if the use of the term means the same as "rendition of judgment," in the absence of a showing that no such proceeding took place in open court at the regular term as in this case, the record lacks that affirmative proof from plaintiff which is required before he can have the judgment declared void because rendered in vacation.

[4, 5] The record now before this court shows affirmatively that the county court had jurisdiction of the cause, that its judgment was rendered and entered during a regular term of court, and, though the record does not show affirmatively that it had service or that the defendants answered, one of which was necessary to give jurisdiction of the person of the defendants, such judgment is not void for that reason (*Clayton v. Hurt*, 88 Tex. 595, 32 S. W. 876; *San Antonio U. & G. R. Co. v. Hales*, 196 S. W. 903); for, in the absence of evidence that they were not served, it will be presumed that they had notice or were present at the trial. But in this we are not left to presumption; for at the hearing before the trial court before passing upon the application for a temporary writ, it is in testimony that their answers were on file. That the moneys sued for were in the custody of another court was a matter of defense which should have been pleaded and urged in the court of Maverick county, and could not render the judgment void.

Finding no error, the order refusing the temporary writ is affirmed.

#### DALLAS POWER & LIGHT CO. v. EDWARDS et al. (No. 8226.)

(Court of Civil Appeals of Texas. Dallas. Nov. 22, 1919. Rehearing Denied Dec. 20, 1919.)

#### 1. EMINENT DOMAIN §224—STATEMENT OF JUROR, AS TO OFFER MADE FOR SIMILAR LAW NOT GROUND FOR NEW TRIAL.

In proceedings to condemn a 25-foot square plat of ground for steel electric transmission line tower and for easement for wires, that a juror had stated in the presence of other jurors, during the jury deliberations and before verdict, that he had been authorized to offer for similarly situated land \$750 per acre, *held*, not such misconduct that refusal of new trial therefor constituted abuse of discretion under *Vernon's Sayles' Civ. St.* 1914, art. 2021.

#### 2. EMINENT DOMAIN §262(5)—IRREGULARITIES NOT AFFECTING AMOUNT OF DAMAGES HARMLESS ERROR.

Incorrect charges as to the measure of damages, improper testimony, or other irregu-

larities such as an authorized statement of a juror as to value, when it can certainly be said that such matters affect only the amount of the verdict, are not ground for reversal, in the absence of any claim the verdict is excessive.

#### 3. APPEAL AND ERROR §1078(5)—CLAIM NOT BROUGHT FORWARD IN BRIEF IS ABANDONED.

Claim of appellant in its motion for new trial that the verdict was excessive, not being brought forward in its brief, is to be considered abandoned.

#### 4. EMINENT DOMAIN §224—CONCEALED BEAS OF JUROR; DISCRETION OF THE COURT.

In condemnation proceedings, refusal of motion for new trial of condemnor on the ground that a juror concealed upon examination on voir dire his preconceived notions and ideas as to the value of the land sought to be condemned was not an abuse of discretion, where it appeared merely that such juror knew at the time that he had been authorized by another party to pay \$750 per acre for land similarly situated.

Appeal from Dallas County Court; T. A. Work, Judge.

Condemnation proceeding by the Dallas Power & Light Company against Walker G. Edwards and others. From judgment rendered, the company appeals. Affirmed.

Templeton, Beall, Williams & Callaway, of Dallas, for appellant.

Cockwell, Gray, McBride & O'Donnell, of Dallas, for appellees.

RASBURY, J. This is a proceeding by appellant in the exercise of the right of eminent domain possessed by it to condemn to its use a plat of ground 25 feet square out of an 8-acre tract owned by appellees upon which to construct a steel tower, from which to string its wires for the transmission of electricity, and to acquire an easement over and across the entire tract for its wires. The proceeding was referred in the usual way to commissioners who reported. The report was objected to by the appellees on the ground that the amount awarded for the land and easement was inadequate. The issue of the amount of damages was in turn referred to a jury, which returned a verdict for \$500. Judgment followed the verdict.

The matters presented for review on appeal are not contained in the motion for a new trial, but are reflected in a bill of exceptions taken after the court had overruled the motion for a new trial and the appellant had given notice of appeal to this court. The bill discloses briefly and in substance the following facts: L. O. Pyron was among the jurors who sat in the trial of the case, and, in answer to questions propounded by counsel for appellant, under oath denied any knowledge of the

facts involved in the issue to be tried or any bias or prejudice for or against either party, and pledged himself, if chosen, to fairly and impartially try the issues on the evidence adduced and the charge of the court. Relying upon such statements and believing the juror to be fair and impartial, counsel accepted him. Upon the hearing of appellant's motion for a new trial, it was developed that the juror Pyron, during the deliberations of the jury and before a verdict had been reached, in the presence and hearing of the other jurors, stated:

"That he had been authorized by another person to offer one Woods, the owner of some overflow lands some two miles south of the city of Dallas, \$750 per acre for a strip of the same, but had never submitted said offer to Woods; and that if he succeeded in buying the same he was to be allowed to use a part of it as a cow pasture in connection with his dairy."

H. D. Haskins, also a juror, testified that he heard the statement made by Pyron, and that it probably influenced him in determining the amount of damages to be awarded, inasmuch as Pyron was older than he and had had more experience in dealing in lands. Haskins further testified that he was originally in favor of awarding \$250 in damages, but finally agreed to \$500, to which all the other jurors assented, and that he rendered such verdict upon the evidence given by the witnesses and the law given by the court. Another juror, W. D. Davis, testified that he heard Pyron make the statement detailed, but that it did not influence him, and that he was governed solely by the evidence given by the witnesses and the law given by the court.

As indicated, the forgoing facts were not contained in appellant's motion for a new trial, but were developed upon the hearing of that motion while the jurors were being examined upon other issues raised in the motion and was the first time that counsel for appellant was cognizant of the statement of the juror Pyron. The hearing on the motion at which said facts were elicited commenced at 11 o'clock a. m. and continued until 12 o'clock m., at which time the court passed the motion until the following day at 11 o'clock a. m., at which time further argument was heard and the motion overruled. At about 3 o'clock p. m. of the same day, in the absence of appellees' attorneys and after the court had noted appellant's appeal and granted it 90 days in which to make up statement of facts and bills of exceptions, appellant prepared and presented another motion for a new trial alleging gross misconduct on the part of the jury; the gravamen of the charge being the receiving and considering of the statement of the juror Pyron already detailed. The motion was presented to the judge of the trial court, who refused to allow it to be filed and refused to consider same, on the

ground that it was the last day of the term and appellees' attorney was not present, and that the motion would probably be overruled, but that he would file same if agreeable to appellees' attorney, but would not do so in his absence or without notice to him.

[1] The first assignment is the basis for the claim that the facts set out in the second motion for a new trial disclose such misconduct on the part of the juror Pyron as warranted the granting of a new trial, and that the court in refusing to consider same and denying appellant a new trial abused the discretion vested in him by article 2021, Vernon's Sayles' Civil Statutes.

We have reached the conclusion that the court did not abuse its discretion in the respect stated. The view of this court on such matters found recent expression in *Andrews Lumber Co. v. Missouri, Kansas & Texas Ry. Co.*, 158 S. W. 1194. In that case a witness, whose expenses were paid by the defendant while in attendance upon court, and who accompanied a juror to his home pending adjournment of court and before verdict, said to the juror that another witness, for reasons detailed, had lied in testifying before the jury to a state of facts which would have sustained a verdict for plaintiff. Both juror and witness agreed that their discussion of the case should be kept secret. The trial court concluded that the facts which we have briefly recited did not constitute such misconduct as to warrant a new trial. The case was appealed, and the contention made in this court that, when the trial court has proceeded under article 2021, his action is conclusive. With that contention this court differed and held in effect that the action of the trial court was reviewable. The case reached the Supreme Court, which, through the agency of the Commission of Appeals, reversed our holding. 206 S. W. 823. If we correctly interpret the opinion of that tribunal, it held, not that the holding of the trial court could not be reviewed, but that the facts held by us to constitute misconduct did not, in its opinion, do so. As authority for reversing our decision, the Commission of Appeals relied upon *H. & T. C. Ry. Co. v. Gray*, 105 Tex. 42, 143 S. W. 606. The rule announced in that case, as a guide for determining whether the court had abused its discretion in refusing a new trial because of alleged misconduct, is: Did the unauthorized communication made to the jurors leave it "reasonably doubtful" as to its effect upon the verdict? That suit was one to recover damages for personal injuries (137 S. W. 729), and the facts alleged as constituting misconduct were that—

"One or more of the jurors stated that the plaintiff ought to have a verdict for \$15,000, because the lawyers would get half."

Such argument or communication to the jury was held to be one that did not leave

It "reasonably doubtful" as to the effect it had upon the verdict, and as a consequence the trial court did not abuse its discretion in refusing a new trial. It thus appears that it is a matter of weighing the testimony, in the trial court, this court, and the Supreme Court, with the attendant varying impression it may make on each court. As a consequence, and in view of the facts disclosed in the cases cited, we are constrained to hold that the trial court did not abuse its discretion. We are unable to see that the statement of Pyron in the instant case can be said to have exercised greater influence on the verdict of the jurors than did the statements in the cases cited. A number of expert witnesses testified to the value of the land sought to be condemned. These witnesses knew the value of the land, and it is reasonable to suppose that the jury were controlled by such evidence rather than by the chance statement of Pyron. In the cases cited the statements to the jurors were in the one case confidential and insidious, the effect of which was difficult to estimate, while in the other it was obviously calculated, if considered at all by the jury, to increase the verdict.

[2, 3] While we have discussed the issue on its merits, it may further be said that the assignment does not present ground for reversal for the reason that it is not claimed that the verdict of the jury was excessive. Incorrect charges as to the measure of damages, improper testimony, or other irregularities, such as the unauthorized statement of the juror Pyron, when it can certainly be said that such matters affect only the amount of the verdict, are not ground for reversal, in the absence of any claim that the verdict is

excessive. *Railway Co. v. Boozer*, 70 Tex. 530, 8 S. W. 119, 8 Am. St. Rep. 615; *Houston Elec. Co. v. Pearce*, 192 S. W. 558. Appellant did in its motion for new trial charge that the verdict was excessive, alleged to be the result of passion and prejudice, and not because of the statement of the juror Pyron. The claim, however, was not brought forward in the brief, and is to be considered abandoned, even if the ground set out in the motion would cover Pyron's action, which is obviously doubtful.

[4] The second and third assignments form the basis of the further contention that the court abused its discretion in refusing appellant a new trial on the ground that the facts adduced on trial disclosed that the juror Pyron concealed from appellant upon examination on voir dire his preconceived notions and ideas as to the value of appellees' land which was the one issue in the case. It will not be denied that litigants are entitled to fair and impartial jurors, and that it is the duty of prospective jurors to disclose on examination any convictions on the issues to be tried which would disqualify them as such. At the same time, whether the juror Pyron, because he knew at the time he was selected that he had been authorized to pay \$750 per acre for land similarly situated to that sought to be condemned, was not a fair and impartial juror, was as much a matter within the discretion of the trial court as was his misconduct while serving as a juror, and for which reason we are constrained also to hold that there was no abuse of the court's discretion in that respect.

The judgment is affirmed.

## JOHNSON v. JOHNSON et al. (No. 19556.)

(Supreme Court of Missouri, Division No. 1.  
Dec. 1, 1919. Motion for Rehearing  
Denied Dec. 20, 1919.)

**1. DEEDS ¶208—EVIDENCE OF WIFE'S MOTIVES ADMISSIBLE IN HUSBAND'S ACTION TO SET ASIDE DEEDS PROCURED BY HER FRAUD.**

In husband's action to set aside deed from husband and wife to third party and from third party to wife, upon the ground that deed to third party had been fraudulently procured upon the representation that it was necessary to procure a loan, pursuant to conspiracy between wife and third party to divest husband of title, evidence as to the motives that may have actuated the wife, and the husband's susceptibility to the deceit alleged to have been practiced by her, held pertinent.

**2. DEEDS ¶211(3)—EVIDENCE SUFFICIENT TO SHOW FRAUD OF WIFE IN PROCURING DEED TO THIRD PARTY FOR HER BENEFIT.**

In husband's action to set aside deed to third person and from third person to wife, evidence held to support finding that deed to third person was procured by representation that it was necessary to obtain loan, pursuant to fraudulent conspiracy between third party and wife, to divest husband of title and invest wife therewith, and had not been executed pursuant to husband's agreement to convey land to wife.

Appeal from Circuit Court, Vernon County;  
B. G. Thurman, Judge.

Action by O. H. Johnson against Lillian M. Johnson, J. W. Miller, and another. Judgment for plaintiff, and defendants appeal. Affirmed.

W. M. Bowker, and A. E. Elliott, both of Nevada, Mo., and Chris H. Rucker, of Kansas City, for appellants.

Hubert Lardner, of Ft. Scott, Kan., and W. H. Hills and Guy S. Manatt, both of Enid, Okl., for respondent.

**RAGLAND, C.** This is a suit in equity to set aside two deeds on the ground of fraud; one a deed executed by the plaintiff and the defendant Lillian M. Johnson while husband and wife, to the defendant J. W. Miller, and the other a deed made by the defendant Miller to the defendant Johnson, and to reinvest plaintiff with the title to the land conveyed by these deeds.

Stated as briefly as may be to disclose their probative value, the facts favorable to plaintiff's contentions which the evidence tends to show are as follows: In April, 1913, plaintiff was a widower, aged 55 years, residing in Bronson, Kan., with his minor children, aged 19, 16, 11, and 8 years, respectively. He owned 160 acres of land in Allen county, Kan., subject to a mortgage of \$3,000; 80 acres near Ft. Scott in Bourbon county, Kan., subject to a mortgage of \$500; 240 acres in Vernon coun-

ty in this state, the land in controversy, subject to a mortgage of \$2,200; and a life estate in 160 acres in Iowa which was unincumbered. He also had \$7,000 or \$8,000 in notes secured by mortgages. One Mrs. Grover was his housekeeper. On a certain occasion Mrs. Grover's daughter, defendant Lillian M. Johnson, came to plaintiff's house to visit her mother. Almost immediately thereafter the daughter displaced her mother as plaintiff's housekeeper. The daughter was a widow with three minor children living with her, aged 18, 16, and 14 years, respectively, and she had been residing in Kansas City. When she became plaintiff's housekeeper, these three children came to live with their mother in plaintiff's home. Six months after her coming, defendant Johnson, then Evans, and plaintiff were married. Prior to the marriage, defendant Johnson, hereinafter referred to as defendant, had become thoroughly familiar with plaintiff's financial affairs and had personally inspected the most of his real estate.

In November following their marriage in October (1913), plaintiff and defendant with their consolidated family moved to Enid, Okl. On their arrival there they entered into negotiations with a real estate agent for the purchase of a suburban property of about eight acres with a dwelling house and other improvements. The price, \$4,500, was agreed on, and they went into possession. Plaintiff did not have the cash, but he turned over to the agent a secured \$6,000 note to be discounted by him. After some weeks defendant became persistent in her inquiries of her husband regarding a deed to the place. After much evasion he told her that the place could not be bought, but that he had leased it for six months. He finally confessed, however, that the real estate agent had told him that his (plaintiff's) wife had shown him, the agent, some love letters that she had received from a young man in Kansas City, and that as soon as she got title to the land property she meant to divorce her husband and marry this other man. On the strength of this alleged disclosure, the agent had persuaded him to take a farm in Western Kansas, that plaintiff had never seen, and stock in one or more corporations, of which he had no knowledge, for his \$6,000 note. Thereupon defendant procured counsel and instituted a proceeding in a local court to have her husband adjudged of unsound mind and herself appointed his guardian. He was adjudged incompetent to manage his affairs, but the court appointed another than herself guardian, whereat she was greatly angered and chagrined. The real estate agent was compelled after some fashion to disgorge, and a deed conveying the Enid property to plaintiff was deposited in escrow to be delivered upon the payment of the balance of the purchase money, some \$700.

Soon after the appointment of a guardian,

about February 1, 1914, defendant took her husband to Kansas City and put him in a hospital. His general health seemed to be poor and he was extremely despondent. She took the remainder of the family, or the most of them, to Ft. Scott, where they stayed at a hotel for a while and then in a boarding house. Here she endeavored to procure loans on the lands of her husband in that vicinity, the 80 acres in Kansas, and the 240 acres in Missouri. She was advised that she could do nothing while her husband was under guardianship without the sanction of the court having supervision of his estate. She then went to Kansas City and caused to be filed in the probate court there an information alleging that her husband was a resident of Jackson county and was of unsound mind and praying the appointment of a guardian. A hearing was had March 6, 1914, at which plaintiff was represented by counsel appointed by the court. He was found by a jury to be of sound mind and a nonresident of the state. Defendant then sent her husband back to the hospital, and she returned to Ft. Scott for the time. The last of March she took him back to Enid and instituted a proceeding to have him declared restored mentally and the guardian discharged. In this she was successful. The same day that the guardianship was terminated, she took her husband to the office of her attorney, for the purpose, as she stated, of devising a way to get money to pay the expenses that had been incurred in the various legal proceedings, for the support of the family, and to pay past-due interest on the several farm mortgages. At this conference she secured a change in the deed in escrow, making herself grantee therein, whereby she acquired the title to the Enid property of her husband; she also obtained from him two powers of attorney authorizing her to mortgage the 80 and the 240 acre farms near Ft. Scott for the sum of \$1,500 and \$4,500, respectively. Within a day or two afterward, armed with these powers of attorney, she left for Ft. Scott. There, after some delays, she negotiated a loan on the Kansas 80 acres of \$1,500, which, after paying off the subsisting mortgage and incidental expenses, netted her something over \$800. With this money she went directly to Kansas City, and, without any previous consultation with her husband as to this or any other business venture, purchased fixtures and lease and opened a restaurant. This was in the latter part of April or the first of May. After using the proceeds of the loan to purchase a restaurant, plaintiff did not write her husband directly, telling him what she had done, but wrote one of her children and directed that the older boys come to assist her in the restaurant. Thereafter she continued to write to other members of the family at Enid from time to time. In these letters she stated that she was unable to obtain an additional loan on the land in Vernon county; that about the

time she had the matter arranged some one would interfere and the negotiations would go for naught; that somebody was always "knocking on it."

Finally, about the middle of May, plaintiff concluded to go to Ft. Scott himself and find out why the loan could not be procured. He did not notify his wife of his intention to do so, but got on the train at Enid and started to Ft. Scott. When he got off the train at the latter place, his wife, having been previously notified by wire of his departure by one of her children, met him. They got into a cab and started to the business part of the town. In response to her inquiry, he told her he had come to see about getting the loan. She told him that there was no use, he could do nothing. She ordered the cabman to turn around and take them back to the station. There she bought two railroad tickets, put him on the train he had gotten off, and took him to Kansas City. That evening she told him that he could not get a loan at Ft. Scott because of his reputed mental condition; that there was a bank in Kansas City that would make the loan, but that it would charge a commission of \$200, and that she would not pay it; that she had a friend by the name of J. W. Miller living at Lawrence, Kan., who could get the money for them without having to pay any commission, but that it would be necessary on account of his mental condition for them to deed the land to Miller; and that Miller would get the loan, turn the money over to them, and deed the place back. To this he apparently assented. The next day, when plaintiff went into his wife's restaurant, she was talking to a man, who afterward proved to be a notary public who had an office on the fourth or fifth floor of the building in which the restaurant was located. As soon as plaintiff came in, his wife, said, "Here, now, we will go up and have that deed made out now." The three of them went to the notary's office, where the deed was prepared. Nothing was said there as to the purpose for which the deed was made. After it was signed and acknowledged, it was delivered to the defendant. Plaintiff did not see his wife any more that day. The next day she told him that she took the deed to Lawrence, but that Miller was not at home, and she left it for him. A day or two later, defendant told her husband that the bank would now make the loan for a commission of \$100, that Miller had returned by special delivery the deed she had left for him, and that they would get the loan from the bank. Plaintiff asked her where the Miller deed was, and she replied that "was well enough," she would "take care of it." They then executed a mortgage to a loan company for \$4,500, from which was realized, after paying the prior incumbrance, \$2,000. This the defendant took into her possession and used as she saw fit without consulting plaintiff in any particular.

Plaintiff remained in Kansas City with defendant until the latter part of June, when he returned to Enid. Defendant continued in the conduct of her restaurant until she was forced to turn it over to creditors, apparently about the middle of August. Then she returned to Enid, where she remained for about two weeks. When Miller got the deed, he put it in his trunk to keep it until he should have further directions from defendant. While she was in Enid in August, she was expecting to receive it, and also one from Miller conveying the land to her. She had one of plaintiff's sons who was then under her influence help her in watching the mail so that a letter from Miller would not fall into plaintiff's hands. About that time she received a letter from Miller addressed to her as Mrs. Lillian Evans, dated August 21, 1914. In this letter Miller said, among other things:

" \* \* \* I am not in a position to advise you in regard to the home you have or the 80-acre tract. \* \* \* I have never tried to send you the deeds, as I was afraid you wouldn't receive them. \* \* \* I will return the deeds to you as soon as I hear from you again so I can be sure you will receive them. \* \* \* I would like to see you personally in regard to same if it can be arranged. The way to do this is to have the deed recorded, the deed that you and Mr. Johnson made to me and returned to me. Then I will send the one made to you. Then if Johnson ever tried to cause me trouble I would have my deed to show I had the right to sell the same. You want to be careful what you sign, as placing your name on paper sometimes means something. \* \* \* "

Later defendant met Miller at the Union Station in Kansas City by appointment, and he gave her the deed that had been made to him by plaintiff and defendant. This deed she recorded August 31, 1914. At the time of its execution it was dated May 14, 1914, and recited that it was subject to an incumbrance of \$2,400; when filed the date had been changed to May 19th, and the incumbrance to \$4,500. Miller seems to have hesitated about making the conveyance to defendant instead of to her husband, apparently on the ground that Johnson might cause him some trouble. Finally, after assurances given him by defendant's attorneys in Kansas City, he executed a deed to her September 26, 1914, and another in correction of the first October 27, 1914, conveying to her the land in controversy. These deeds were both filed for record by defendant October 29, 1914. October 30, 1914, defendant instituted suit for divorce in the circuit court for Jackson county. The petition, however, had been verified October 9, 1914. During the spring and summer of 1914, the defendant stated in effect to different persons, on sundry occasions, that she had had the land deeded to Miller to get a loan for them and then deed it back to her husband, but that her husband was mentally incapable of at-

tending to business and that she would have Miller make her a deed; that she was going to get possession of the Missouri farm and then leave her husband; that, if she could get her husband to Kansas City away from his lawyers at Enid, she could get him to do anything she wanted, including a conveyance to her of the oil land too; that her husband was crazy, and she intended to get all she could while she had a chance; that she could not persuade her husband to deed the Missouri land directly to her, but that she got him to deed it to Miller, ostensibly to put a loan on it; and that Miller would deed it to her; and much more of the same tenor.

The defense rests on the testimony of the defendant Stiff, the notary who prepared and took the acknowledgment to the deed to Miller, and Wimmer, a lawyer, residing at the time of the occurrences narrated in Kansas City.

According to defendant, she and plaintiff made a trip to Enid prior to their marriage and in contemplation thereof for the purpose of selecting a home to which they would move, and on that occasion they made choice of the property hereinbefore referred to. At different times before they were married, plaintiff intimated that he would deed her some of his property by way of a settlement, and finally on one occasion, when they were out riding, he definitely promised to convey to her after they were married the Enid property and the Missouri farm. After their marriage, she was advised by several lawyers, both at Enid and at Kansas City, that in order for him to make a conveyance to her it would be necessary for both of them to join in a deed to a third party and for such third party to make a deed to her. At and just prior to making the deed to Miller, she and her husband were discussing the matter, and he said he could convey directly to her; she said he could not. While they were talking, Mr. Wimmer came into the restaurant, and she appealed to him. Wimmer told them that she was right; that a deed would have to be made to a third party, who would convey to her. She thereupon immediately called Miller over the long distance telephone, explained what they wanted done, and asked, if they made a deed to him, would he convey the land to her, and he assented. That they went to the notary's office and the deed was drawn and signed. She kept the deed until after the \$4,500 mortgage was put on record. Her husband then suggested that there ought to be a new deed on account of the change of incumbrance. At this juncture Wimmer again appeared on the scene and advised that the notary who had taken the acknowledgment could change the date and the amount of the incumbrance recited and thus save them the expense of a new deed. She then took the deed to Stiff, who made the changes, and

presently came down with it. Plaintiff looked over it and handed it to Wimmer, with the request that he draw a deed from Miller to defendant. Wimmer took the deed away with him, and the next day came in with that deed and one he had prepared for Miller to execute and gave them to plaintiff. Plaintiff carefully examined them and handed them to his wife. She put them in her desk, and they remained there until she went to Oklahoma (whether in June or August is meant is not clear). She used the proceeds of the two mortgage loans to pay the expenses of the legal proceedings that it had been necessary to institute and her husband's hospital bills and support his children and hers, the burden of which had fallen upon her on account of his ill health.

Stiff testified: That he went into the restaurant to get a lunch, that the plaintiff and defendant were standing at the cash register, and when he went to pay his check they asked him to draw a deed for them and take the acknowledgment. Later they came to his office. Plaintiff furnished a memorandum of the description of the land, a deed was drawn, signed and acknowledged. Plaintiff stated that they were deeding the land to Miller for the purpose of having him deed it to defendant. Witness suggested that it would be safer to have Miller make a deed to defendant before delivering one to him, but plaintiff said that his wife knew Miller well and could trust him. Defendant did most of the talking, but that plaintiff did some and suggested some corrections to be made after the deed was drawn. A day or two later, defendant brought the deed back to him to make changes to conform to the changed incumbrance on the land. He made these modifications, gave the deed to plaintiff, and asked him if it was now like he wanted it. Plaintiff examined it, and said that it was.

Wimmer testified that he had been practicing law in Kansas City ten years, that he had known defendant nine or ten years, that he ate regularly at her restaurant, that she introduced him to plaintiff, and they asked him as to the procedure necessary to effect a conveyance of land from husband to wife. At another time plaintiff and defendant asked him about making some changes in the deed Stiff had drawn. After that plaintiff and defendant were again talking the matter over when he came into the restaurant, and plaintiff gave him the deed to Miller and directed him to prepare one for Miller to execute to defendant, which he did and returned both deeds to plaintiff and defendant.

Plaintiff in rebuttal testified that he had no conversation with Stiff, that the purpose of making the deed to Miller was never mentioned to Stiff in his presence, and that he never spoke to Wimmer in his life on any matter pertaining to these deeds. What be-

came of the Wimmer deed the evidence does not disclose. It seems never to have been heard of afterward. The deeds that Miller executed (an original and one of correction) were prepared probably by another conveyancer in September or October, three or four months after Wimmer says that he drew one. Plaintiff also testified that he did not know Miller, had never seen or communicated with him in any manner at any time; that he did not make the deed to Miller for him to convey to defendant; and that at no time, either before or since his marriage, had he promised to give the land in controversy to his wife.

The petition is lengthy, pleading in extenso matters of evidence, but it in effect alleges that defendant and defendant Miller conspired to fraudulently divest plaintiff of his title to the land in controversy and vest the same in defendant; that pursuant to such conspiracy defendant falsely and fraudulently represented that she had tried for weeks to obtain a loan on said land, but that in every instance, when it became known to the parties with whom she was negotiating that plaintiff owned the land, they broke off negotiations on account of his mental incapacity; that in order to obtain a loan it was necessary for him to deed the land to a third party who would get such loan for him and reconvey to him; that defendant Miller was an honest and reliable man whom she had known for years; if plaintiff would deed the land to Miller, Miller would secure the loan, pay the proceeds thereof to plaintiff, and deed the land back to him; that plaintiff believed and relied on such representations, and, being induced thereby, executed the deed to defendant Miller, who thereafter pursuant to the fraudulent conspiracy aforesaid conveyed to his codefendant. It further alleges that plaintiff has a weak mind and is susceptible to the influence of defendant, and that she exercised over him a dominating influence that he was unable to resist.

The answer of defendant sets up the antenuptial agreement testified to by defendant, that the deeds were made pursuant thereto, and denies all other allegations of the petition.

Leslie, the tenant, was made a party because he was owing rent which he refused to pay to either party. After the institution of this suit, he paid the amount into court and was relieved of further liability.

The court found the issues for plaintiff against the defendants Johnson and Miller, and rendered judgment accordingly, setting aside the deeds and reinvesting plaintiff with the title. From this judgment defendant has appealed.

The issue of fact tendered by the pleadings is not whether the deed to Miller was obtained from plaintiff through the undue in-



fluence of defendant, but whether plaintiff made the deed for the purpose of having Miller obtain a loan for plaintiff and then re-convey the land to him, or for the purpose of using Miller as a conduit to pass title to defendant. Because the issue is thus narrow and well-defined, appellant insists that in its determination only the evidence having a direct bearing on the execution of the deed to Miller should be considered; that the mass of other matters introduced in evidence should be discarded as having no probative value. To state her position more concretely, she contends that only the testimony of plaintiff, defendant, the notary, and the lawyer, Mr. Wimmer, relating directly to the execution of the deed to Miller, including the purpose for which it was made, has any bearing on the issue, and, having brought the evidence within this narrow compass, she next insists that the overwhelming weight is with the defendant.

[1] 1. Generally speaking, in actions growing out of actual fraud, as distinguished from what is sometimes denominated legal fraud, every fact or circumstance from which a legal inference of fraud may be drawn is admissible. In such cases it is permissible for the evidence to take a wide range, and all matters which have a natural tendency to explain the motives with which the transaction in controversy may have been effected and which are not too remote or conjectural may be gone into. The question here is whether plaintiff made the deed to Miller for the purpose of passing the title to the land to his wife, or whether he made it for an altogether different purpose, being induced thereto by the wife's false representations, made pursuant to a fraudulent scheme on her part to obtain such title without his consent. On this inquiry the motives that may have actuated the wife and the husband's susceptibility to the deceit alleged to have been practiced by her are pertinent.

The evidence tends strongly to show that defendant either before her marriage to plaintiff, or soon thereafter, conceived and put into execution, as best she could, a design to get control of all his property. While this design and defendant's efforts to effect it are not inconsistent with the plaintiff's having purposely conveyed to her the land in controversy, they are fairly convincing that she would not have hesitated to use the artifice that plaintiff charges that she did use if she had found it necessary, and taken together constitute a circumstance that should be considered in connection with the other facts in evidence.

The evidence also shows that plaintiff, at least from the time of the institution of the first sanity proceeding until long after the execution of the deed to Miller, was absolutely dominated by his wife. He was a

mere puppet moved at her will. For example, after waiting weeks for his wife to negotiate a loan on the Missouri land to pay his debts and the past-due interest on his farm mortgages, and after she had written a number of times that it could not be effected at Ft. Scott, because somebody interfered, he concluded to go and investigate for himself. She thereupon hurried from Kansas City, met him at the train at Ft. Scott, caught him as though he were a runaway boy, put him back on the train, and took him with her to Kansas City, where she negotiated the loan herself, wholly ignoring his existence. Appellant says that there is no evidence that plaintiff had a weak mind. As to whether such supineness on the part of a man in the presence of his wife's assertive will is an evidence of a weak mentality we need not commit ourselves. For the purposes of this case, it is sufficient to say that the Ft. Scott incident, and the credence that the plaintiff gave the ridiculous representations of the real estate agent at Enid, upon the strength of which he parted with a secured \$6,000 note for an unknown Western Kansas farm and worthless stocks plainly indicate that his credulity was unbounded. In the vernacular of the street, he was decidedly "an easy mark."

Having disposed of these preliminary matters, we now come to a consideration of the facts and circumstances attending the execution of the deeds in controversy. In this connection, the first thing that impresses one is the method of indirection employed by defendant in the selection of a third person through which the title could be transmitted from her husband to herself. Ordinarily, where it is deemed necessary to use a third person as a conduit through which to pass title, the two deeds are prepared and executed contemporaneously; there is no question of selecting a person who can be trusted. Under the circumstances of this case, plaintiff and defendant could have taken a mutual acquaintance to the notary's office or the scrivener himself could no doubt have found a "straw man," the two deeds could have been made and exchanged then and there as one transaction, and the conveyance would have been instantly effected. That is the usual and ordinary way of doing such things. Instead of following this obvious course, defendant selected for the third person an intimate friend of hers, wholly unknown to her husband, who lived in a distant town and whom her husband probably would be unable to see or communicate with, because, as she suggested, he was honest and she could trust him.

The next phase of the transaction that obtrudes itself on the attention, assuming it to have been a fair, open and straightforward one, is the peculiar conduct of defendant

and Miller after the execution of the deed by plaintiff. Defendant kept the deed in her possession from the date of its execution, May 14th, until June or August following, or she delivered to Miller immediately, according to whether the one or the other view is taken of the evidence. Miller, when he did receive it, did not immediately execute a reconveyance as would naturally have been expected, but secretly put the deed in his trunk to await further directions of the defendant. While defendant was at her husband's home in Enid in August, she was expecting to receive from Miller the two deeds, the one to him and one from him to her. At this time no estrangement, or even unpleasantness, had arisen between defendant and her husband. She testified that on this trip home he consented to move to Kansas City with her. There was nothing to indicate that he had repented of having given her the land in controversy, if he had given it to her. Yet she was so afraid that the expected letter from Miller would fall into his hands that she had plaintiff's son, then in her confidence daily watch the mail and anticipate his father in getting it. She directed Miller to, and he did, address letters to her under her former name of Lillian Evans. Finally, they were afraid to trust the mail, and at Miller's suggestion she met him at the Union Station in Kansas City, where he delivered to her in person the deed that had been made to him. Miller did not at this time give defendant a deed conveying the land to her. He was afraid that plaintiff would give him trouble. He made no effort to communicate with plaintiff to find out whether he was consenting to a conveyance to defendant. On the other hand, he insisted that defendant first record and return to him the deed made by plaintiff so that, "if Johnson ever tried to cause me trouble, I would have my deed to show I had the rite to sell same." After the deed to him had been recorded, Miller still hesitated about making a deed to defendant; but, finally after urgent letters from her attorneys in Kansas City, he made her a deed September 26, 1914. It is evident that his trepidations were caused by information imparted to him by the defendant.

[2] The conduct of defendant and Miller is wholly inconsistent with any honest belief on their part that plaintiff had made the deed to Miller for the purpose of having him convey to the defendant. This, in connection with the statements made by defendant that she was unable to persuade her husband to deed the land directly to her, so she had him deed it to Miller to get a loan for him, and that Miller would convey it to her, and her evident design to get all her husband's property, by fair means or foul, and leave him,

would be conclusive on the question of her fraud, but for the testimony of the notary and Wimmer. It is impossible to reconcile their testimony with other facts indubitably established by the evidence. They say that they talked to the defendant about the subject of this controversy both when her husband was present and when he was not present, and that when both were together she did most of the talking. It may be that they have confused what was said in plaintiff's absence with what was said in his presence. There is nothing on the face of the record that in any way impugns their veracity or integrity, yet the chancellor who tried the cause and who had the opportunity of seeing and observing them on the witness stand must have found the facts to be at variance with their testimony. On the evidence as a whole, we are constrained to approve and adopt as our own the finding of the trial court.

The judgment is affirmed.

BROWN and SMALL, CC., concur.

PER CURIAM. The foregoing opinion of RAGLAND, C., is adopted as the opinion of the court.

All the Judges concur.

#### NEWELL v. BOATMEN'S BANK. (No. 20493.)

(Supreme Court of Missouri, Division No. 1.  
Dec. 1, 1919.)

#### 1. HEALTH $\S$ 32—"DORMITORIES" FOR WHICH FIRE ESCAPES ARE REQUIRED.

Seven-story nonfireproof building, occupied by a club, containing kitchen, dining room; library, banquet and dancing hall, and 85 bedrooms, furnishing sleeping accommodations, above second floor, for 125 persons, held a "dormitory," within Rev. St. 1909,  $\S$  10668, regulating number of fire escapes on "dormitories" of nonfireproof construction, three or more stories in height.

[Ed. Note.—For other definitions, see Words and Phrases, Dormitory.]

#### 2. EVIDENCE $\S$ 59—PRESUMPTION OF LOVE OF LIFE.

In action for death in fire, against owner who had failed to provide required number of fire escapes, defended on ground that deceased did not avail himself of existing facilities of escape, it will be presumed that deceased tried to escape, and that he wanted to live rather than die.

### 3. LANDLORD AND TENANT $\Leftrightarrow$ 169(11)—PROXIMATE CAUSE OF DEATH IN FIRE A JURY QUESTION.

In action for death in fire, against owner of building who had failed to provide the required number of fire escapes, where defense was that lack of fire escapes was not proximate cause, and where there was no evidence as to whether deceased made any effort to avail himself of existing means of escape, question of proximate cause held for jury, under *res ipsa loquitur* doctrine.

### 4. APPEAL AND ERROR $\Leftrightarrow$ 979(1)—WEIGHT OF EVIDENCE WITHIN DISCRETION OF COURT ON MOTION FOR NEW TRIAL.

Whether verdict of jury was against weight of evidence was a matter that lay wholly within the discretion of trial court on motion for new trial.

Appeal from St. Louis Circuit Court;  
John W. Calhoun, Judge.

Action by James P. Newell, Public Administrator of the city of St. Louis, and as such in charge of the estate of A. J. Odegaard, deceased, against the Boatmen's Bank, a corporation. Verdict for defendant, and from an order granting a new trial, defendant appeals. Affirmed and remanded.

Lehmann & Lehmann and Fauntleroy, Cullen & Hay, all of St. Louis, for appellant.

Watts, Gentry & Lee, of St. Louis, for respondent.

RAGLAND, C. John Odegaard lost his life in the fire which destroyed in the early morning of March 9, 1914, the building occupied by the Missouri Athletic Association. He was about 32 years of age, had never been married, and left no relatives in this state. Aged parents, dependent upon him for support, and to whose support he was contributing at the time of his death, survived him, and were living in the city of Chicago. This suit was instituted by the public administrator of the city of St. Louis, having in charge his estate, and wherein he seeks to recover damages against defendant as owner of the building for having negligently caused the death of his intestate, in that it had not prior to the fire equipped said building with suitable and safe fire escapes and balconies, as required by the statutes of this state. The defendant answered by way of general denial. An affirmative defense was also pleaded, but it seems to have been abandoned.

The building in question was a seven-story brick structure situated at the northwest corner of Fourth street and Washington avenue in the city of St. Louis. The east half of the building up to the third story was occupied by the defendant as a bank and was fireproof. The remainder of the building was not fire-

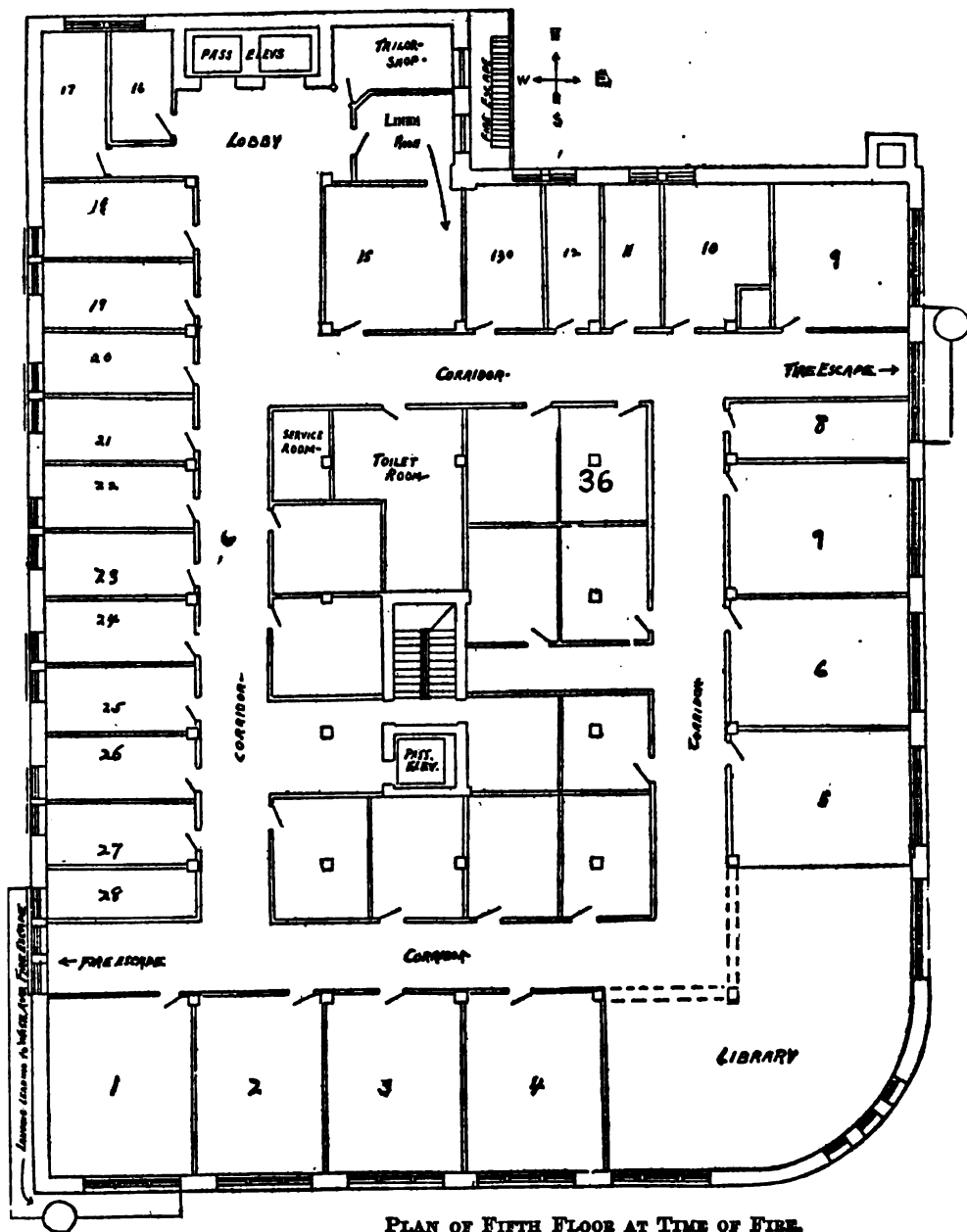
proof, and was occupied by the Missouri Athletic Association for its various club activities. The kitchen and dining room were on the third floor; a large room used for a banquet hall and dancing and about 10 sleeping rooms were on the fourth floor; 36 sleeping rooms and a library were on the fifth floor; and 39 bedrooms were on the sixth floor. Some of these rooms were equipped with two beds, so that the sleeping accommodations above the second floor were sufficient for as many as 125 persons. About 70 persons were sleeping in this part of the building at the time of the fire. Working accommodations were also provided for 120 persons above the second floor. There was a three or four story building, occupied as a seed store, on the west side of defendant's building and immediately adjacent to it. There was a spiral fire escape on the south side, on Washington avenue, near the southwest corner of the building, which connected with landings at openings into the fifth and sixth stories; there was a stair fire escape on the east side, on Fourth street, near the north end of the building, which extended from the seventh floor and passed windows in each story all the way down; and there was a metal stairway, inclosed in a brick shaft, outside of the main wall of the building on the north side, and adjoining the projecting ell, which extended from the seventh down to the first floor, and with which each story communicated by a door. To get to it from the fifth floor it was necessary to go from a lobby through what was known as the linen room. There was sufficient blank wall on the Fourth street side near the southeast corner of the building for a fire escape to have been placed there without passing any window.

The alarm was turned in about 1:55 A. M., and the fire chief arrived on the scene approximately 3 minutes later. He first observed flames pouring out of the windows in the second and third stories on the south and east sides; the heat being more intense on the east or Fourth street side. About 20 minutes thereafter the entire east wall went down, carrying with it the major portions of all the floors. The north, south, and west walls were left standing, and the rooms adjoining the south wall, as well as most of the floor of the corridors immediately adjoining them, remained intact. The fire must have originated on the floor separating the second and third stories. After it got under headway, the central stairway and the central elevator shaft operated as huge chimneys through which masses of flame and smoke shot upward, pouring out in great volumes into the adjacent halls and corridors on each floor. Up and down these corridors men were running to and fro, uttering cries, in vain efforts to escape. No one got out of the building by way of the Fourth street fire escape, be-

cause the flames coming from windows below the sleeping quarters by which it passed made its use impossible. A few found their way out down through the inclosed stairway, and some jumped from the windows on the west side onto the seed store roof. Some half dozen persons came down the Washington avenue escape, but, so far as the evidence discloses, only one from the fifth floor, a man who occupied room 1, which had a window opening directly onto the balcony leading to the escape.

The accompanying plat shows the plan of the fifth floor:

Odegaard occupied room 2 the night of the fire. It will be observed that the east and west corridor into which his room opened had two windows at its west end, through which, apparently, a person could go onto the balcony or landing leading to the Washington avenue fire escape, and that but a few steps would have sufficed to have taken him from the door of his room to these windows. There were double sliding doors between rooms 1 and 2, but they were kept locked, and the occupant of room 2 had no key. From some hearsay evidence to which no objection was made it appears that the door



from room 1 into the corridor was locked at the time of the fire and during its progress. This was probably true. An examination of the plat will further disclose that before the partitions were burned the smoke could not get into the east corridor until it had passed up and down the west corridor and around through the north and south corridors. In this connection it may be said that the occupant of room 9 tried the Fourth street fire escape and found it too hot, then went west in the north corridor, running east and west to the west corridor, running north and south. At this point he found that he could not go south in this corridor on account of the flame and smoke issuing from the elevator shaft and stairway. Occupants of the sixth floor on the north and west sides experienced similar conditions. The body of the occupant of room 3 was found just inside the door of his room; it was not burned, but from its appearance he died from suffocation. Room 4 was not occupied.

The deceased was last seen alive, so far as the evidence discloses, when he left the dining room a few minutes after 11 o'clock the night of the fire, stating to friends that he was tired and was going to bed, and bidding them good-night. After the fire, and when the firemen were able by means of the Washington avenue fire escape to go into rooms 1 and 2, which were scorched and burned, but still intact, as was the corridor leading to the fire balcony on the west side, they found deceased's watch, jewelry, and the clothes that he had worn the previous day placed in the room in the same way that he usually disposed of them on retiring, and the bed had the appearance of having been occupied; but his body was not found in any of these rooms on the south side, nor in the corridor. The evidence does not show where his body was found; but a body that was taken from some part of the ruins was identified as his from certain characteristics it was known to possess, principally that of an enlarged knee joint.

The cause was tried to a jury, and a verdict for defendant returned. The court sustained a motion for a new trial on the sole ground that the verdict was against the weight of the evidence. From the order granting a new trial defendant has appealed. For reversal of this order it relies on two propositions: (1) That the building in question was not a "dormitory," within the meaning of section 10668, R. S. 1909, which prescribes for buildings so used a minimum number of fire escapes, and plaintiff, having based his action upon the theory that it was a dormitory, was not entitled to go to the jury; and (2) that there was no evidence proving or tending to prove that the failure of the bank to construct and maintain additional fire escapes was the proximate cause

of the death of deceased; that the facts themselves show lack of proximate cause.

[1] 1. The case of *Ranus v. Bank*, 214 S. W. 156, was to recover damages for a death that occurred in this same fire and on the same ground of negligence alleged here. In that case the same question as to the character of the building was presented as here; and after a full consideration we held that the use that was made of the building in part constituted it a dormitory, within the meaning of said section 10668. With that ruling we are entirely satisfied. In that case it was conceded, as it is in this, that the building was not equipped with fire escapes in compliance with sections 10666, 10667, and 10668, R. S. 1909.

2. In support of its second contention appellant points out:

"That deceased's room was No. 2; that he was occupying it at the time of the fire; that it was within a few feet of a fire escape, which was accessible either through the folding doors into room 1, or through the hall running straight from room 2 to the balcony at the end thereof; that these rooms and the fire escape and immediate environs were measurably intact after the fire; that the body of Odegard was not found in his room, or at any point between his room and the fire escape."

From this it draws the conclusion:

"That deceased, with the means of escape at hand, failed to avail himself of them; that not lack of facilities of escape, but failure to use those supplied, caused his death."

[2] Appellant is slightly inaccurate in its statement of the facts. It does not appear that the fire escape was accessible to the deceased through room 1. The sliding doors were certainly locked, and it is probable that the door opening from room 1 into the corridor was also locked. However, so far as the evidence discloses, unless the fire itself barred the way, there was no physical obstruction between the deceased and the exit to the balcony at the west end of the corridor. What efforts, if any, he made to reach it, cannot be known. If any saw him, their voices are also silent. The presumption is that he tried to escape—to live rather than die. It may be that some temporary barrier prevented his leaving the building by this window. It may be that at the time he was aroused and started from his room the smoke and gas and flame, coming through the elevator shaft and stairway, had so filled the south end of the west corridor and the west end of the south corridor that he could not make his way through it, and that the east end of the south corridor and the east corridor were still comparatively free from smoke and gas, in which event he no doubt went east in the south corridor, seeking a way out, and had there been a fire escape at the southeast corner of the building, attached to the blank wall, or had the one on the east side near the

north end, been so placed as not to have passed windows, he probably would have escaped. These are possible inferences. One thing is reasonably certain, and that is, that not a single person on the fifth floor escaped through the exit leading to the fire balcony at the west end of the south hall.

[3] The facts of this case bring it squarely within the rule announced in *Burt v. Nichols*, 264 Mo. 1, 173 S. W. 681, L. R. A. 1917E, 250, viz:

"Where \* \* \* fire safety appliance laws are violated, and death, unexplained, except by the physical facts, occurs by fire in the burning of a building not equipped with the required appliances, but which is by law required so to be, the rule of *res ipsa loquitur* should be invoked to take the case to the jury, where all inferences pro and con and all matters of contributory negligence can be resolved under proper instructions by the triers of fact."

[4] There was evidence, therefore, to take the case to the jury on the issue of proximate cause; whether their verdict should have been set aside on the ground that it was against the weight of the evidence was a matter that lay wholly within the discretion of the trial court.

The order granting a new trial is affirmed, and the cause remanded.

BROWN and SMALL, CC., concur.

PER CURIAM. The foregoing opinion of RAGLAND, C., is adopted as the opinion of the court.

All the Judges concur.

TROLL, Public Adm'r, v. THIRD NAT. BANK OF ST. LOUIS. (No. 17872.)

(Supreme Court of Missouri, Division No. 1. Dec. 1, 1919.)

EXECUTORS AND ADMINISTRATORS  $\Rightarrow$  24—PUBLIC ADMINISTRATOR HAS RIGHT TO NONRESIDENT'S STOCK IN BANK DOMICILED IN STATE.

Under Rev. St. 1909, § 302, cl. 4, public administrator had the right to demand and take possession of stock of bank domiciled in Missouri owned by nonresident decedent, though certificates were in possession of executor duly appointed in other state wherein decedent resided and was domiciled and had certificates at time of her death; the situs of the stock being in state in which bank is domiciled.

Appeal from St. Louis Circuit Court; Leo S. Rassieur, Judge.

Suit by Harry Troll, Public Administrator, against the Third National Bank of St. Louis. Judgment for plaintiff, and defendant appeals. Affirmed.

Thomas F. Galt, of St. Louis, for appellant.

Marshall & Henderson, of St. Louis, for respondent.

SMALL, C. I. This is a suit in equity by plaintiff, public administrator of the city of St. Louis, in charge of the estate of George Roth, deceased, against defendant, a national bank, duly incorporated under the laws of the United States and located and doing business in the city of St. Louis, to compel the said defendant to issue to plaintiff a certificate for 35 shares of stock in defendant bank, which were owned by said Roth at the time of his death, May 30, 1911, and then stood upon the books of the bank as his property; also to recover dividends declared thereon. Said Roth, at and prior to his death, was a resident of Illinois, and had the certificates for said stock at his domicile at the city of Highland in said state. He also owned valuable property in Illinois, and Walter Roth was duly appointed and qualified as his administrator in said state, and as such had in his possession said certificates of stock. June 20, 1912, plaintiff, as such public administrator, took charge of and was duly appointed and qualified as an ancillary administrator of the estate of said George Roth in the city of St. Louis, and immediately thereafter notified defendant of that fact, and demanded of defendant a certificate for said 35 shares of stock, and for all dividends, but defendant refused the plaintiff's demand, and continued to so refuse.

The above facts appear from the petition, and are admitted by the answer. There is no dispute therefore concerning the facts.

The prayer of the petition was that defendant be ordered to issue plaintiff a certificate or certificates for said shares, and be required to pay over to plaintiff all dividends declared on the stock since the death of said George Roth, and for general relief.

There was judgment on the pleadings for the plaintiff, and defendant has duly appealed to this court.

II. This case must be ruled by the decision of this court en banc in the case of *Troll, Public Administrator, v. Third National Bank at St. Louis*, 211 S. W. 545, handed down at the last April term, but not yet officially reported. In that case the identical question of law and the same facts in substance were before the court as presented in this case, and it was held, following *Richardson v. Busch*, 198 Mo. 175, 95 S. W. 894, 115 Am. St. Rep. 472, also a case en banc, that the situs of stock in the defendant bank is in St. Louis, Mo., where said bank is domiciled, and said stock is property in this state. Therefore, under the fourth clause of section 302, R. S. Mo. 1909, in relation to public

administrators, the plaintiff had a right to demand and take possession of the stock in said bank of the nonresident decedent in that case, Mrs. Lucia M. Laird, notwithstanding the certificates therefor were in the hands of her duly appointed executrix at Alton, Ill., where she resided and was domiciled and had said certificates at the time of her death. The learned counsel for appellant, however, vigorously questions the correctness of that decision. We have carefully read the carefully prepared brief of counsel, but we are entirely satisfied with the conclusion reached in the case of Mrs. Laird, and feel that we would but "muddy the waters" were we to attempt to add anything to the clear and able opinion of our learned Brother Graves in that case. *Stare decisis*.

The result is the judgment of the circuit court is affirmed.

BROWN and RAGLAND, CC., concur.

PER CURIAM. The foregoing opinion of SMALL, C., is adopted as the opinion of the court.

All the Judges concur.

TROLL, Public Adm'r, v. UNITED RYS. CO.  
OF ST. LOUIS. (No. 17580.)

(Supreme Court of Missouri, Division No. 1.  
Dec. 1, 1919.)

Appeal from St. Louis Circuit Court; George O. Hitchcock, Judge.

Action by Harry Troll, Public Administrator, against the United Railways Company of St. Louis. Judgment for defendant, and plaintiff appeals. Reversed and remanded, with directions.

Marshall & Henderson, of St. Louis, for appellant.

Thomas F. Galt, of St. Louis, for respondent.

SMALL, C. This appeal from the circuit court of the city of St. Louis involves the same question just decided in cause No. 17872, Harry Troll, Public Administrator, v. Third National Bank of St. Louis, 218 S. W. 922, and on the authority of that case this case is reversed and remanded, with directions to the circuit court to set aside its judgment in this cause and proceed therewith in accordance with the law as declared in said cause No. 17872.

BROWN and RAGLAND, CC., concur.

PER CURIAM. The foregoing opinion of SMALL, C., is adopted as the opinion of the court.

All the Judges concur.

TROLL, Public Adm'r, v. NATIONAL BANK  
OF COMMERCE IN ST. LOUIS.

(No. 17857.)

(Supreme Court of Missouri, Division No. 1.  
Dec. 1, 1919.)

Appeal from St. Louis Circuit Court; Wilson A. Taylor, Judge.

Action by Harry Troll, Public Administrator, against the National Bank of Commerce in St. Louis. Judgment for defendant, and plaintiff appeals. Reversed and remanded, with directions.

Marshall & Henderson, of St. Louis, for appellant.

Thomas F. Galt, of St. Louis, for respondent.

SMALL, C. This cause involves the same question as the case of the same plaintiff against the Third National Bank of St. Louis, just decided, being cause No. 17872, 218 S. W. 922. It is accordingly reversed and remanded, with directions to the lower court to set aside the judgment herein and proceed with the cause in harmony with our ruling in said cause No. 17872.

BROWN and RAGLAND, CC., concur.

PER CURIAM. The foregoing opinion of SMALL, C., is adopted as the opinion of the court.

All the Judges concur.

MEEKER v. UNION ELECTRIC LIGHT &  
POWER CO. (No. 19784.)

(Supreme Court of Missouri, in Banc. Nov. 17,  
1919.)

#### 1. ELECTRICITY $\S$ 19(2)—PLEADING.

A petition, stating that defendant electric company had negligently permitted its wires to become uninsulated, and to break in two and to fall to the ground, charges three distinct acts of negligence, but proof of one of them is sufficient to make out plaintiff's case.

#### 2. ELECTRICITY $\S$ 16(3)—NEGLIGENCE IN PERMITTING WIRES TO FALL.

Where a power company negligently permitted a wire to become uninsulated and to come in contact with the branches of a tree or another wire for such a length of time as to have enabled it to have discovered the defects in time to have prevented an injury, and the wires fell to the ground and injured one who subsequently came in contact therewith, the power company was liable, even though the wire was not down for more than a moment.

#### 3. ELECTRICITY $\S$ 16(3)—FAILURE TO REPAIR WIRES AFTER NOTICE OF DEFECT.

A power company which was notified that its wire was uninsulated and was coming in contact with branches of a tree and failed to remedy the defect within 10 days, was liable

for injury to one who came in contact with the wire, the wire having been worn or broken in two by reason of its contact with the branches of the tree.

**4. NEGLIGENCE §119(1) — PROOF OF ALL CHARGES OF NEGLIGENCE UNNECESSARY.**

While plaintiff in a negligence case has the right to prove all the charges of negligence, he is not required to do so, and the proof of any one or more of them is sufficient.

**5. EVIDENCE §148—COMMUNICATIONS OVER TELEPHONE ADMISSIBLE.**

Where evidence showed that the U. company had a telephone in its office, with a given number, which was published in the telephone book, and that witness picked up the book and called that number, and in response thereto some one answered, "This is the U. Company" the witness could testify as to what was said; such communications being admissible upon the theory that the person who has charge of the telephone is presumably an agent or servant for the purpose of receiving communications.

**6. DAMAGES §132(1)—AMOUNT ALLOWED FOR PERSONAL INJURIES NOT EXCESSIVE.**

A verdict of \$50,000, reduced to \$35,000 by the court, was not excessive for a boy 14 years of age, whose arms and chest were burned to the bone by electricity.

Blair and Graves, JJ., dissenting in part.

Appeal from St. Louis Circuit Court; Rhodes E. Cave, Judge.

Action by Prosper Meeker, by guardian, etc., against the Union Electric Light & Power Company. Judgment for plaintiff, and defendant appeals. Affirmed.

The plaintiff brought this suit in the circuit court of the city of St. Louis against the defendant, to recover the sum of \$75,000 for personal injuries received by them through the alleged negligence of the defendant. The trial resulted in a judgment for the plaintiff in the sum of \$50,000, which upon motion by the defendant was by the court reduced to \$35,000. After taking the proper preliminary steps therefor, the defendant duly appealed the cause to this court.

The charging part of the petition was as follows:

"The defendant negligently and carelessly permitted one or more of its said wires, then and there charged as aforesaid, to become uninsulated and broken in two, and to fall to the surface of said alley, and to remain broken in two and down then and there while fully charged with electricity as aforesaid, when it knew, or ought by the exercise of the highest degree of care and caution to have known, that said wires were so uninsulated and broken and down as aforesaid, and liable, if touched by any human being while so uninsulated, broken and down and charged as aforesaid, to cause serious injury or destroy human life."

After the general denial the answer contained the following:

"Further answering, defendant states that, although plaintiff saw, or by the exercise of ordinary care on his part might have seen, that the wire referred to in the petition had burned through, and that one end was lying in the alley, and although he was warned not to touch it because it was dangerous to do so, and well knowing that there was such danger, he nevertheless approached it or came in contact with it, and his negligence in the above particulars was the proximate cause of his injuries, or directly contributed thereto."

The petition then alleges that while said wires were thus in said alley, "uninsulated, broken in two and down and charged with electricity as aforesaid," the plaintiff, while walking along in said alley, came in contact with said wires, and was thereby violently precipitated to the ground, and seriously, painfully, and permanently injured. He sued for \$75,000 damages.

There is no controversy as to what the evidence of the plaintiff tended to prove, but there were numerous objections made and preserved as to the competency and relevancy of much of that evidence; and I will therefore set out the substance of the testimony of the witnesses as preserved in the record, and thereafter pass upon the objections thereto saved.

The plaintiff was about 14 years of age at the date of the injury, which occurred in the city of St. Louis on June 15, 1915.

The defendant, Union Electric Light & Power Company, is a corporation, engaged in the business of furnishing and selling electric light and power in said city. In certain portions of St. Louis it strings its wires upon poles, and such wires extend along, over, and across streets and alleys. On the date in question, and for a long time prior thereto, the defendant maintained a wire carrying 2,200 volts of electricity along a public alley running east and west from Clifton avenue to Tamm avenue, in the southwestern part of St. Louis, and in the rear of a number known as 6273 Magnolia avenue. Surrounding this alley are streets as follows: Clifton avenue, running north and south; Magnolia avenue, running east and west; Columbia street, running east and west, and Tamm avenue, running north and south. The wire in question was strung on poles on the south side of the alley and at a point in the rear of 6273 Magnolia avenue; it crossed the alley diagonally, and extended through the top of a tree. Nearby, located upon the cross-arms of one of the posts, was a transformer, the purpose of which was to reduce the current carried on the primary wire, that is, the 2,200 volts, to 110 and 220 volts, in order that it might be distributed to residences and business houses near by, for elec-



tric lighting and other purposes. Such distribution was made to a saloon conducted by Charles Meyer, at 6400 Old Manchester road, about 125 feet from the point where the accident occurred, and to the residence of Mrs. G. B. Huffington, 6283 Magnolia avenue, as well as to the residences of other persons residing in that neighborhood.

About two weeks previous to the accident Mrs. Joseph Stewart, who then lived at 6273 Magnolia avenue, and whose rear gate opens on the alley at the point where the plaintiff was injured, noticed the electric light wire which ran in the rear of her house, and at the place where the boy was injured, burning like a street car wire would be "when the trolley would be off." Her house sat some distance back from the alley, and she was sitting in her bedroom, rocking her baby. The boughs of the trees were waving, and every time the tree rubbed against the wire it would cause a flash and a flame to be thrown sufficient to light up the bedroom in which she sat. The flashes and flames would occur when the wind blew the tree against the wire. After the accident she saw the limb, and it looked as if it were dead, and there was a groove in it about the size of the wire, indicating where the wire had rubbed.

Miss Gertrude Castle, who resided at 6263 Magnolia avenue, noticed, two days before the accident, that at a point close to the pole to which the wire in question was attached there was no insulation upon the wire; that it was in a sizzling condition and cast a blue flame. On the Sunday preceding the Tuesday on which the accident occurred, there had been an electrical storm, and Miss Castle and her mother, Mrs. G. B. Huffington, heard a sizzling sound, and saw a blue flame flashing from the wire at the pole outside of the house, in this alley and at the point where the wire subsequently broke. They discovered that the electric lights in their house were not burning. Miss Castle looked up the defendant's number in the telephone book, placed the call, and was answered by a lady, who said "Union Electric Light & Power Company." Miss Castle told her that the lights were out, and asked her to attend to it. The person speaking for the Union Electric Light & Power Company said, "Just a moment; I will speak to the man who has charge of that division;" and a moment later she said, "Yes; some one will be out to fix them this afternoon." The record discloses the fact that this witness, as well as all the others who testified that they called the defendant over the telephone to complain of the defects or the troubles they were having with the wires and phones, had no personal knowledge of the persons who answered the phone, or who they represented, except that they presumed that they were agents of the defendant from the facts that they called its number and

the response came therefrom. This evidence was objected to and exception duly saved. This was about 1 o'clock. About 4 o'clock Miss Castle again tried the lights, and found they were not on, and she telephoned again to the Union Electric Light & Power Company, got the same party, who told her the same thing, and about 6 o'clock the lights were on. The sizzling noise and the popping which she heard continued throughout the day, and was about as loud as a firecracker. This occurred on Sunday, June 13th. The accident happened about 4 o'clock on the afternoon of Tuesday, June 15th. For 10 days or two weeks before that Sunday she had noticed that the lights in the house would be off sometimes as long as three or four minutes. At other times they would gradually get dimmer and dimmer, until the wires in the incandescent were just a red glimmer, then gradually get brighter. When Miss Castle telephoned to the defendant company she told it that the wires were defective, and the party answering the telephone stated that some one would be out. The statement of Miss Castle is corroborated in every particular by that of her mother, Mrs. G. B. Huffington, with whom she resided. Their house was located 50 feet back from the alley, and there were three houses on lots 40 feet wide, between the Huffington house and the point where the sizzling noises were heard and where the accident occurred. Mrs. Huffington heard this noise continuously from Sunday, the 13th, to Tuesday, the 15th, about 11 o'clock, at which time she left home.

Charles F. Meyer, who conducted the saloon at 6400 Old Manchester road, about 100 or 125 feet from the point where plaintiff was injured, and who received power and light from the wire in this alley, which subsequently broke and caused the injury to Prosper H. Meeker, noticed, a week or 10 days before the accident, that the wires were slack, and that every time the wind blew the wires would touch, and such contact would cause his lights to go out or flicker. He could see the wires from his bedroom, and noticed a blue flame thrown from the wires every time they came in contact. At one time it threw a blue flame the same as if a trolley wire got off the trolley. Meyer got the telephone books, found the telephone number of the Union Electric Light & Power Company, called it on the phone, and asked if he was talking to the Union Electric Light & Power Company, and was informed by the person at the phone that he was. He then said, in the telephone conversation, that his lights were out; "that there was something wrong on the outside." He called the trouble department of the Union Electric Light & Power Company twice, and made similar reports. On another occasion he had James Crecellus call the defendant on the phone

and make a similar report. The first time he called the defendant he reported that he didn't have power, and the answer was, "We will attend to it." These reports were made by Meyer to defendant a week or ten days before the injury was sustained by Prosper H. Meeker, and at that time it was evident that the wires which later became burned and broken in two and fell to the surface of the alley were uninsulated, sagging together, producing flashes, making popping and sizzling noises, and causing the lights in dwelling and business houses to flicker, grow dim, and go out. Defendant was repeatedly informed of this condition. There was no insulation upon the wire at all between Meyer's place of business and the pole for a long time prior to the time the wires burned through and fell to the ground. The insulation was hanging down in strings. This was the wire with which plaintiff came in contact when it, due to its uninsulated condition and its sagging and touching wires, became burned, broken in two, and fell to the surface of the alley. The second time he telephoned to defendant he specifically stated that the wire in the alley was throwing blue flames, and the reply was that they would attend to it. This conversation occurred four or five days before the accident.

James Crecelius likewise called the defendant on the telephone, and reported the lights out at Meyer's place, five days before the accident. He, too, called the number of the Union Electric Light & Power Company on the telephone, obtained a response, and was referred to the trouble department. Crecelius is a man who has electrical knowledge, and he discussed the situation with the company's representative on the phone at that time. Crecelius told him positively that there was nothing wrong with the lights on the inside. The defendant promised to send a man out there as soon as possible. This was about five days before Prosper Meeker was hurt. Crecelius states that he has had about 18 years' experience in the electrical business; that when wires charged with electricity come in contact a short circuit is caused, producing a flashing, blowing out of fuses, the going out of lights, the flickering of lights, and that the final effect of such contact, if continued, will be that the wires will become crystallized and burned until they come apart. The evidence of F. H. Worthington, general foreman for defendant, is to the same effect. This is exactly what happened in this case. Upon the breaking of such wires, if a secondary wire, that is, one carrying a small voltage, should come in contact with a primary wire, that is, one carrying a large voltage (in this case 2,200 volts), the secondary wire would take the primary voltage. It is amply proven in this record and is an admitted fact in this case that wires when coming in contact unin-

sulated and charged with electricity will burn and break in two (defendant's answer). The flames, flashes, sizzling noises, and flickering lights are all indications of a meeting of such wires, and are warnings of a dangerous condition which results in a severance of wires.

Defendant produced as a witness one Henry Burgeatz, who testified that on June 11, 1915, at 1:04 a. m. the Union Electric Light & Power Company received a call from Columbia and Clifton that a primary fuse was out, and they sent a trouble man, John Schneider, to find out the cause. On the same day, at 6:16 a. m., it received a complaint in reference to condition of wires in this locality. On June 13th, at 7:27 p. m., they received a complaint from 6239 Magnolia avenue. On each occasion a man was sent out to find the trouble. A trouble man is supposed to look for the trouble, and it is his duty to examine the wires in the immediate neighborhood to find out the cause of the trouble. This the defendant did not do, although the dangerous condition was making itself manifest for ten days or two weeks prior to the injury.

Mrs. Carrie Menkhaus, who lived at 6271 Magnolia avenue, was in the basement of her home about a quarter of 4 o'clock on the afternoon of June 15, 1915. While there she heard a popping noise, which sounded so distinctly that she came out of the basement to see the cause of it. As she came up, she saw the wire in question break and fall apart, one piece falling over the tree heretofore mentioned, and extending down through the branches to the alley. Mrs. Charles Murphy, of 6267 Magnolia avenue, was in her kitchen, and she heard a cracking sound, and she, too, came out to see the cause. She saw the wires break; two fell towards the west down into the alley, and the other two along the pole into the alley. The day was pleasant, and the sun was shining. It had rained on the Sunday previous, but had not rained thereafter. The wires broke and fell about ten minutes before the plaintiff was injured.

Prosper H. Meeker was 14 years of age on the 24th day of September, 1914, and on the day on which he sustained the injuries herein complained of, viz. June 15, 1915, he had been at school. He was acquainted with the alley, and formerly lived at 6273 Magnolia avenue, in the rear of which the alley runs. After he reached home he started to go to Clifton Heights Park in company with Dedrich Schumacher, a boy 17 years of age. They entered the alley at the west end and started to run down it at top speed. This is the testimony of the injured boy, Dedrich Schumacher, and Bertha Stevenson. Prosper Meeker was a little ahead of Dedrich as they ran. The latter noticed the wire hanging down through the trees, and shouted "Look out for the wire!" Prosper did not hear

this admonition. Immediately he either ran into or fell against the wire, there was a flash of electricity, the wires wriggled around Prosper's body, his clothing burst into flames, and he fell prone to the earth, blood pouring from his mouth. Dedrich tried to take the wire from him, and was knocked down, receiving a severe shock. He ran to Meyer's saloon, called for help, called Dr. Kirkpatrick, and returned to the scene of the accident. Prosper had been in contact with the wire two or three minutes before Dedrich ran to the saloon. Floyd Benson and Charles Campbell ran from Meyer's saloon, and extricated the injured boy. Benson had to look for a place on the wire where it was insulated, and at the time was wearing rubber soles and heels; hence he escaped injury. When these men came to Prosper's relief he was lying on his face, with the wires crumpled up underneath his body. Blood was rushing out of his nose and mouth and his shirt was in flames. His clothes were burning, and as the wires were removed from contact flesh came with the smouldering clothing; there was an arc of electricity.

Dr. Kirkpatrick found the injured boy in a vacant lot near the scene of the injury, where he had been borne by his rescuers. Blood was oozing from his nose and mouth, and his body showed severe burns. An examination by Dr. Upshaw at the hospital disclosed "an extensive burn, including the entire arm, upper part of the left arm and inner surface down to the wrist, and the middle finger. Extensive burns extended irregularly over the chest, down over the abdomen, around over the abdomen and back, up irregularly over the back close to the spine, back up to the shoulder. The surface was entirely burnt off down into the muscle. He was also suffering from a severe burn to the right hand, completely baring the bones of all four fingers and the first phalanx of the thumb; also the entire palm surface of the hand; the side up into the wrist was all burnt out. He also had a burn on each thigh, anteriorly, at the time that I examined him." All four of the fingers and the first joint of the thumb on the right hand were removed. He suffered severe pain, and it was four days before he became rational. The left arm is fastened to the body for three-fourths of the distance of the upper arm. The muscles of the upper arm are completely destroyed. His back and side are in a contracted condition, scarred, and at the time the case was tried had not entirely healed. He has no use of the left arm and hand. There is no movement scarcely of the elbow, and no operation will remedy the condition. The right arm is normal, but the hand and fingers are entirely destroyed. The wrist motion is badly impaired. The palm of the right hand is scarred tissue. The left breast is completely destroyed.

The chest cavity is narrow, due to contraction, and this is the case with the abdominal cavity. The treatment extended for over a period of four months. During the treatment, something like 234 skin grafts were made at different intervals. He suffered great pain, and is permanently impaired from performing any work with his hands in any occupation he may take up. His nervous organism is impaired, and there will remain considerable pain caused by the pinching of the nerves. Dr. Henry, a practitioner of 25 years' experience, testified that "the injured boy had the most extensive burn I have ever had the opportunity of observing, and recover."

The different doctors who attended plaintiff have described his injuries as follows:

Dr. Robert Y. Henry:

"I am a practicing physician and surgeon, having graduated from the Homeopathic Medical College of Missouri, then afterwards the Polyclinic, Chicago, and have been practicing since 1890. I have had a good deal of experience. I know the plaintiff, and treated him for injuries. I saw him first in consultation with Dr. Upshaw, who had charge of his case in St. Anthony's Hospital in June, 1915, shortly after he was injured. He had the most extensive burn I have ever had an opportunity of observing, and recover. When I first saw him I did not think it was possible for him to recover from the injury. I found his right forearm and hand so badly burned it required the amputation of some of his fingers, and a burn extending over the left side of his body, including his arm and back and side and shoulder. The burn extended nearly to the hip, around past the median line front, and extending back nearly to the middle of the back. This arm had a third degree burn; that is, the skin was entirely burned from it, including some of the muscular tissues. We afterwards did repeated skin grafts. I don't remember exactly; it was something like 140 grafts were made at different intervals, and succeeded ultimately in getting the raw surface covered with skin, but he has a permanent—what we call a burn contracture, on the left side of the body; that is, the arm is bound to the body from the shoulder practically to the elbow, and I want to say that that condition cannot be remedied, even though the arm would have been dressed in this position (illustrating) and were in the position during the entire term this repair was going on.

"Burn contractures will draw down; it will fasten it to the body; and that is what is taking place in this case, and will be permanent, and no operation will ever be able to correct it. If we had kept the arm in an extended position in this manner (illustrating) while the skin was healing over the burned surfaces, that just as soon as you would have to remove the extension of the limb, that the contracture would have taken place; it will draw right down to the body. We have that experience in burned hands. He will have some use of forearm; he will have absolutely no use of that arm from the shoulder to the elbow. It is as completely bound to the body as it can be, and will always remain so, but he does have some

use with the forearm and hand. The use of the fingers is impaired to a certain extent, but he will have some use of his hand, you understand. He cannot raise his hand to his face, for the reason he has no use of the arm. He does have some use of the forearm. He was severely burned, and is burned all over his chest and these constrict—will restrict and impair the function of the left lung, for the reason there is no expansion of that side of the chest, and there is a lot of inflammatory exudates which prevents the complete function of his left lung. His right forearm and right hand were so badly burned it required an amputation of the fingers. We tried to save them, but had to amputate them. A little of the thumb was saved, but not enough to be of any functional benefit. He had a burn in under the under surface of his right arm, forearm chiefly. The burns are permanent, and he has lost the permanent use of the forearm of his right hand.

"The last examination I made of the boy was probably six weeks or two months ago. When I first saw him, all over the burned surface which I have mentioned, the skin and part of the flesh was entirely burned away, leaving a perfectly raw, seared surface; the muscles were exposed; the facias were entirely exposed over this burned area; a complete third degree burn in every part. By a third degree burn is meant a burn into the muscular tissue. At this time there is a scarred tissue all over this region that was burned white; it is plainly visible all over this burned area. The right hand has a scarred appearance. It is slick and reddish in appearance, and ultimately will become more white in appearance. The condition I have described could have been brought about by a burn from electricity. The injuries are permanent.

"He is permanently impaired from performing any work with his hands of any consequence, in any occupation that he may take up. As to the effect upon his physical and general health, I think it will be means of shortening his life, and he certainly will not have the resistance a normal man will have; he will be a weaker man in every respect. While I was treating him I only saw him probably seven or eight times in consultation, and during the various skin-grafting operations. He was unconscious part of the time, and did not know what he was talking about. At all times he was highly nervous in suffering intense pain, and the repeated dressings which the wound required kept him highly nervous during the entire time. The nervous system is made up of nerve cells which may be shocked in many ways, that is, either from fright or from pain or from actual injuries, and in this case no doubt all of these elements had something to do with shocking the nervous system. I think in many ways he will have a permanent impairment of the stability of his nervous organism by having so severe an injury and shock as he received at this time. From the scarred tissue and contractures there will be impingement or pinching of the nerves, which will cause him considerable pain, because there is not the freedom of motion or movement of any of the tendons or nerves, as there would be in a perfect physiological condition, and this will be permanent. He has had intense pain from the shock and burns while he had raw surfaces.

"I think any burn from any cause is painful. I do not know that an electrical burn is more painful than burns from fire, friction, or what it may be. A burn is painful at all times, and continues over a great period of time, unless there is a complete destruction of the nerves supplying the parts; then it would not be so painful. He has extensive scars over the regions I mentioned, and they will be permanent and distinctly visible."

Dr. Harry E. Kirkpatrick testified:

"I found Prosper Meeker lying on a vacant lot about 20 yards from the alley in the rear of 6200 Magnolia avenue. He was right there on the ground, with his shirt practically burned off him, and blood oozing from his nose and mouth. He was bleeding, and I ran back half a block for my automobile and took him home. His residence was about two blocks and a half from the place of injury. Meeker was put on a bed, and I stripped him of all clothes remaining on him, and examined his injuries and dressed them.

"These injuries were severe burns over the left shoulder and arm, the whole left side of the chest and the entire armpit, and the burn was dense, brawny, hard nature, which caused me to fear a third degree burn. His right hand, especially the third finger of the right hand, at that time showed the burnt bone sticking through the flesh. The other fingers of the right hand and thumb were injured, but at that time it was impossible to determine the extent of the injury. I treated him that day, and in the evening I was called back again.

"A few days later I saw him at St. Anthony's Hospital, at the invitation of Dr. Upshaw, and about six weeks later, after he was brought home, I saw him at the home, in a bathtub, where Dr. Upshaw was dressing him. At St. Anthony's Hospital I was given an opportunity to see his injuries, but more especially I saw the condition of the boy. He was running temperature, and there were symptoms of sepsis or blood poison. His temperature was 103 or 104. It is impossible to handle an extensive burn of the kind without some degree of infection. At that time the operation had not been performed on his right hand. The skin at that time showed some separation at the edges, where it was beginning to slough, and there was pus material oozing from the wounds that necessitate constant dressing and redressing. The fingers of the right hand were blackened at that time, showing they were no longer giving their circulations, so that they were practically dead. He was delirious from the absorption. He was very sick, and my opinion at that time was that he would not live.

"It is always painful to dress burns as extensive as these burns were. The last time I saw him at his home, about six weeks after the injury, the right wrist looked at that time as though it was going to be necessary to amputate the right hand about the wrist. The fingers at that time had been amputated, at least some of them had. The burn at the left arm and shoulder and armpit showed at that time the extensive sloughing that had taken place, showing the muscles beneath. His temperature had gone to normal, and he was resisting the blood poison. He was very sensitive to pain, and as to his nervous system I could not say

much, except that he was very sensitive to pain. He was at the time suffering from pain, and it was severe. At least it would be painful during and after the dressing—how long after I don't know. The injuries described are permanent, and I think the effect that they will have on his general health will be to shorten his days and to retard his growth."

Doctor H. A. Upshaw testified:

"I was called in consultation in the case of Prosper Meeker by my brother on the day of the injury, June 15, 1915. I examined the plaintiff, having met the case at St. Anthony's Hospital, and found the boy suffering with an extensive burn, including the entire arm, upper part of the left arm and inner surface down the wrist, and the middle finger. Extensive burns extended irregularly over the chest, down over the abdomen, around over the abdomen and back, irregularly over the back close to the spine, back up to the shoulder. The surface was entirely burned off down into the muscle. He was also suffering a severe burn to the right hand, completely baring the bones of all four fingers and the first phalanx of the thumb; also the entire palm surface of the hand; the side up into the wrist was all burned out. He also had a burn on each thigh, anteriorly, at the time when I examined him. We immediately applied treatment to allay the irritation, and also to prevent toxemia, the absorption of toxin, to assist the kidneys in elimination, on account of the loss of the fissures of the skin, the glands of elimination, and we watched him closely for several days before we could do anything surgically. He was not unconscious, but seemed in a dazed condition. The pulse got high as 160, and his temperature ran up and he became in a very critical condition for several days. For five or six days the first week we hardly thought he would live. We had to remove all four of the fingers and the first joint of the thumb on his right hand. We continued the moist-pack treatment until we got rid of the burnt tissue, then we applied skin graft. The treatment continued over a period of about four months. His health during this time was very bad. He suffered with uremia a great deal and also albuminuria, due to the loss of secretion of the glands and skin. The urine was constantly full of albumin, which we had to combat continuously. The effect on his nervous system will be permanent. The termination of all these nerves had been destroyed and that is bound to cause an effect upon the nervous system. He suffered very severe pain, and was semiconscious and unconscious for about four days before he became really rational. The left arm is fastened to the side for about three-fourths of the distance of the upper arm. The muscles of the upper arm are completely destroyed. The arm has grown tight to the body, due to contracting of the scarred tissue, and everything was done that could be done to prevent it. His back and side are now in a contracted condition, scarred, contraction of the scarred tissue, and it is not entirely healed, and won't be for some time. Practically, as far as labor is concerned, he has no use now of the left arm and hand. There is no movement scarcely at all of the elbow, just of the wrist and arm, and no operation will remedy the condition, because, when you sep-

arate the scarred tissue, it will immediately draw back again. You cannot prevent it. It has been tried again and again. The right arm is normal, but the hand, fingers are entirely destroyed. The thumb motion is very good, but the wrist motion is badly impaired. The palm of the right hand is just contracted scarred tissue. It was all destroyed, all sloughed out. The left breast on the left side of the chest is completely destroyed. The chest cavity is narrow, due to contraction. The abdominal cavity is also narrow, due to contraction. It has the effect of narrowing the chest, and that causes a pressure on the lung, and does not allow the lung to respond in respiratory as it should, and throws more work on the right lung. The condition in which I found this boy could have been produced by a burn from electricity. The effect of all these injuries will be an impairment to his general health, due to the narrowing of the cavity lung, which interferes with peristalsis of the bowels and will impair the nerves, and this condition is permanent. The conditions I saw in this boy, will, without question, shorten his life, and he will suffer some pain continually on account of these contractions. The pain was intense each time the dressings were changed, and they had to be changed often on account of the sloughing of the tissues. All the sloughed tissues would hang on."

Doctor Ira W. Upshaw testified:

"Prosper Meeker's case was my case, and I first saw him about 6 o'clock on the day of the injury at his home. He was taken to the hospital as soon as I could get an ambulance. I examined him, and found the right hand, the palm of it, practically destroyed; the burn ran over the back of it. The fingers, the flesh was burnt off and exposed the bones. About half the bone of the thumb was exposed. The left side burn extended down over the chest to about the lower edge of the ribs or just below, even to the abdominal cavity and down the back about the same distance. The forearm was almost entirely destroyed. The flesh not entirely, but it was very badly burnt down the elbow. Below the elbow burns were not very severe. On each thigh he had a burn on the anterior part of the thigh. The majority of these burns were third degree burns, and that means complete destruction of the tissue. To relieve the shock as much as possible and to allay the pain, he was given elimination treatment, the usual treatment in cases of burns. Following his admission to the hospital he was semiconscious. Toxemia was somewhat developed, that is, the absorption of poison through the destruction of the skin; and we combated that with serums and the treatment usually used in those cases. The boy became very seriously ill, his pulse got very high, his temperature high and after six or eight days we thought he would not live. Following that there were times when we thought he was improving; times when we thought he was not. After a time the tissue came off, the majority of it, and after we got rid of the burnt tissue the boy got in a better condition, for the skin grafted and improved materially. It was necessary to take off all the fingers and the thumb at the first joint of his right hand. On account of the contraction of the scarred tissue his left arm is adherent to

his side. He has good motion of the wrist and hand and a slight motion of the elbow, but not above. About three-fourths of the arm from the shoulder to the elbow is now grown and bound down to his left side, and the motion there is destroyed. I think he can bring it up to his chin by bringing his head down to it. These injuries were a very severe shock to his nervous system, and it is permanent. These other injuries are permanent. On account of the contraction of the tissues he will have considerable trouble, and his trouble will increase. On account of the contraction there is pressure on the lung, causing more or less solidification of the upper part of the lung, and the lung will not grow any larger. We grafted skin on at least three-fourths of the tissue that was burnt on his body."

Doctor H. A. Cleveland testified:

"I am acquainted with nervous disorders and injuries to the nerves, not as a specialist, but in a general way. I know Prosper Meeker, and examined him about the middle of June at the request of Dr. Upshaw, as consultant. I found him in a condition of profound shock; shock being injury to the nervous and vascular system that may result from physical or psychical strain. It creates a permanent instability of the nervous system. On examination I found his right hand practically destroyed, the fingers and part of the thumb. A very extensive burn at the left side, in front, the chest, the abdomen and back, and the entire left arm, down to the wrist, part of the hand and fingers on the left side. They were third degree burns. I saw him frequently after that. His condition during the first or second weeks became progressively worse; his condition was very serious. He went into a coma, not continuous, and was delirious at times. Then he began to improve to the extent that the wounds began to heal. The edges of this burn began to heal exceedingly slowly, and after several weeks the condition of the urine appeared, it having been exceedingly toxic and containing much albumin. This was on account of the overworking of the kidneys. Several operations were performed for skin grafting. The earlier operations were the removal of his fingers and dead tissue, as it seemed somewhat loosened. He was not put under an anesthetic for every operation, and they were exceedingly painful. His condition to-day is one of permanent disability, resulting directly from the burn. By that I mean that he is practically unable to use his left hand at all. The arm is fastened to the side of his body, and he is going to have a marked restriction of normal respiration because of the contraction of the left side, and he is going to have more or less symptoms from his gastrointestinal tract due to contraction and pulling of the abdominal wall. He is going to have a permanent injury to his nervous system, as readily can be seen by his face to-day. That is the direct result of the shock received at the time. I have not examined this boy since about the 1st of October. At that time the contraction was excessive. The left arm down to the elbow was fastened directly to the body. There was no muscular tissue in the upper part of the arm practically at all, and then the excessive scar tissues through the forearm and on the left hand. On his right hand I remember

three or four of these fingers were practically gone, and a part of his thumb. The scars are burned white, more or less bloodless along the edge, as no blood vessels were working there. They had a pink or overred color. The effect of these injuries and this shock and the treatment will shorten his life. He suffered excessive pain up to about the 1st of September from the time of the injury. In the treatment he was required to sit in a chair night and day. I cannot remember accurately the number of skin grafts, but something over 200, about 234."

Plaintiff's instruction No. 1, in which the case was submitted to the jury (Abstract, pp. 113-115):

"(1) If the jury believe from the evidence that on the 15th day of June, 1915, the defendant company owned and was then and there and for a long time prior thereto had been using the wires mentioned in the evidence in the conduct of its business, and that defendant was at all said times engaged in the business of furnishing and selling electricity in the city of St. Louis, and that its said wires were strung to poles, and that said poles and wires at the place mentioned in the evidence where plaintiff was injured, if you so find, were on, in, along, and over a public alley and highway in said city, and that said wires, in the conduct of defendant's business, were then and there charged with and carrying currents of electricity;

"And if the jury further believe from the evidence that, at a point in said alley in the rear of residence No. 6273 Magnolia avenue, in said city, the defendant negligently permitted one of its said wires, then and there charged with electricity, to become uninsulated and to come in contact with another wire or wires or some other object, and to chafe and rub against said wire or wires or some other object, and to become broken in two, and to fall to the surface of said alley;

"And if the jury further believe from the evidence that on the 15th day of June, 1915, by reason of said wire then and there being uninsulated and coming in contact with and rubbing and chafing against another wire or wires, or some other object, if you so find, said wire was, while so charged with electricity, if you so find, negligently permitted by defendant to become broken in two at said point in said alley, and then and there fall to the surface of said alley at said place, while charged with electricity, and that plaintiff, while traveling on said alley, came in contact with said wire, and that an electric current from said wire was then and there communicated to plaintiff, and he was thereby shocked, burned and injured;

"And if the jury further believe from the evidence that defendant knew, or by the exercise of the utmost care of an ordinarily careful and prudent person engaged in the same or similar business, under like or similar circumstances, could have known, that said wire was so uninsulated, and was so coming in contact with and rubbing and chafing against another wire or wires, or some other object, and was on account thereof liable to break in two and fall to the surface of said alley a sufficient length of time before the plaintiff was injured, if you find he was injured, for the defendant, in the exercise of the utmost care of an ordinarily

careful and prudent person engaged in the same or similar business under like or similar circumstances, to have remedied the same, and averted the injury to plaintiff, and negligently failed to do so, and that by reason thereof the plaintiff was injured, and that plaintiff himself was not guilty of any negligence which directly contributed to cause his injuries, if any—then you must find for the plaintiff."

Jourdan, Rassieur & Pierce, of St. Louis, for appellant.

Henry G. Miller and Samuel W. Baxter, both of East St. Louis, Ill., and Charles E. Morrow, of St. Louis, for respondent.

WOODSON, J. (after stating the facts as above). I. Counsel for defendant first complain of the action of the court in refusing to give its demurrer to the plaintiff's evidence. The ground of this complaint is that the petition contains but a single charge of negligence, namely, in permitting its wires to become separated and suspended in the alley where the plaintiff was injured, when the uncontradicted evidence shows that the injury occurred within ten minutes after they were parted and fell, which was too short a time in which the defendant could possibly have rejoined the same or otherwise avoided the injury.

The plaintiff's answer to this complaint is that the petition does not consist of a single charge of negligence as previously stated, but contains three separate and distinct allegations of negligence, namely: (1) That the defendant negligently permitted the wires to become uninsulated; (2) to break in two; and (3) fall to the ground.

[1] In our opinion the contention of counsel for plaintiff is the correct construction of the petition. It clearly charges the defendant with negligently permitting the wire to become uninsulated, to break in two, and to fall to the surface of the alley. The three allegations are connected with the copulative conjunction "and," which word connects the two last charges with the first, which in plain English means that the defendant, not only negligently permitted the wire to become uninsulated, but negligently to break in two and negligently to fall upon the surface of the alley.

[2] The law is well settled in this state that the plaintiff did not have to prove all three of those charges. Any one or more of them, if proven, were sufficient to make out the plaintiff's case. If the defendant negligently permitted the wire to become uninsulated and come in contact with the branches of a tree or another wire for such a length of time as to have enabled it to have discovered the defects in time to have prevented the injury, but did not do so, and on that account the plaintiff was injured, then the defendant is liable, even though the wire was not down for more than a moment.

[3] The evidence not only showed that the defendant had ample time in which to have discovered the defects mentioned and to have remedied the same in time to have prevented the injury, but it also showed that it was repeatedly notified of those defects 10 or 15 days before the injury occurred, and that it neglected to remedy the same during all that time, which was clearly negligence of the grossest kind. Under those conditions the length of time the wire was down was wholly immaterial, for the negligence consisted in permitting the wire to part and fall upon the surface of the alley; that was the continuing and the proximate cause of the injury, just as much so as if the wire had fallen upon the plaintiff, instead of upon the ground, and he had run into it while it was in that position. The foregoing ruling is well supported by the following cases: *Hoover v. Railway Co.*, 159 Mo. App. 416, loc. cit. 421, 140 S. W. 321; *Booker v. Railroad*, 144 Mo. App. 273, 128 S. W. 1012; *Heberling v. Warrensburg*, 204 Mo. 604, loc. cit. 618, 103 S. W. 36. This point is ruled against the defendant.

II. Counsel for defendant next insist that the court erred in giving instruction No. 1 for the plaintiff. The ground of this insistence is that the instruction broadens the issues made by the pleadings, it being their contention that the petition, as previously contended, charged only a single act of negligence, while the instruction submitted the three charges before mentioned. There is no merit in this insistence, for the reasons stated in paragraph 1 of this opinion in connection with the ruling of the court in refusing the defendant's demurrer to the evidence.

[4] While the plaintiff had the right to prove and submit to the jury all the charges of negligence contained in the petition; yet he was not required to so do, the proof of any one or more of them being all the law required, and the finding of the jury upon such in his favor justified a verdict in his behalf. *Van Horn v. Transit Co.*, 198 Mo. 481, 95 S. W. 326; *Newlin v. Railroad*, 222 Mo. 375, loc. cit. 393, 121 S. W. 125; *Gannon v. Gaslight Co.*, 145 Mo. 511, 46 S. W. 968, 47 S. W. 907, 43 L. R. A. 505; *Moyer v. Railroad*, 198 S. W. 839, loc. cit. 842; *Spaulding v. Met. St. Ry. Co.*, 129 Mo. App. 607, 107 S. W. 1049; *Dutro v. Met. St. Ry. Co.*, 111 Mo. App. 258, loc. cit. 264, 86 S. W. 915; *Hoffman v. Walsh*, 117 Mo. App. 278, 93 S. W. 853; *McMurry v. Prairie Oil & Gas Co.*, 159 Mo. App. 623, 141 S. W. 463; *Yost v. Atlas*, 191 Mo. App. 422, loc. cit. 434, 177 S. W. 690; *Mullery v. Tel. Co.*, 191 Mo. App. 118, loc. cit. 126, 127, 177 S. W. 1098.

III. Counsel requested the court to give the following instruction to the jury, which the court refused, and the defendant duly excepted:

"The court instructs the jury that if they shall find and believe from the evidence that the wires in question fell so short a time before the plaintiff was injured that the interval of time was not reasonably long or sufficient in which to have enabled defendant to remedy or remove the danger, then the plaintiff cannot recover, and it will be the duty of the jury to return their verdict in this case in favor of the defendant."

This instruction was practically a demurrer to the evidence, and, if it was error to refuse it, it was for the same reason error to refuse the demurrer. I say this for the reason that the undisputed evidence was that a sufficient time did not elapse between the falling of the wire and the happening of the injury to have permitted the defendant to have repaired the defect, and thereby have avoided the injury. Under the facts of this case, as previously stated, the length of time the wire was down is wholly immaterial. The action of the court in refusing this instruction was proper.

[5] IV. It is next insisted by counsel for defendant that:

"The court erred in permitting the witness Meyer to testify to an alleged telephone conversation supposed to have been had with a representative of the company, although the witness admitted that he did not know whom he was talking to"

—and cites the following case in support thereof: *Strack v. Telephone Co.*, 216 Mo. loc. cit. 614, 116 S. W. 528. While the language of that case seems to lend support to the defendant's contention, yet the facts are so meagerly and imperfectly stated that it is difficult to determine what was the real point held in judgment, and for that reason that case has but little weight in the determination of the question here involved.

Here the evidence shows that the defendant had a telephone in its office, with a given number, which was published in the telephone book, and that the witnesses in this case picked up that book and called that number, and in response thereto some one answered and said, "This is the Union Electric Light & Power Company," and thereupon the complaints heretofore set out in the statement of the facts were related to that person, who replied in substance to each and all of the witnesses, "All right; we will send some one out and have it repaired."

This court, in the case of *Wolfe v. Missouri Pacific Ry. Co.*, 97 Mo. 473, on page 481, 11 S. W. 49, on page 51 (3 L. R. A. 539, 10 Am. St. Rep. 831), passed squarely upon this question, and held this character of testimony admissible, and in discussing the question Judge Barclay, speaking for the entire court, used this language:

"A question arose incidentally at the trial upon the admission in evidence of a conversation held through the telephone between some

one at the instrument in plaintiffs' private office and the witness. It was admitted, though the witness did not identify the voice of the speaker as that of either of the plaintiffs or their clerk. The courts of justice do not ignore the great improvement in the means of intercommunication which the telephone has made. Its nature, operation, and ordinary uses are facts of general scientific knowledge, of which the courts will take judicial notice as part of public contemporary history. When a person places himself in connection with the telephone system through an instrument in his office, he thereby invites communication, in relation to his business, through that channel. Conversations so held are as admissible in evidence as personal interviews by a customer with an unknown clerk in charge of an ordinary shop would be in relation to the business there carried on. The fact that the voice at the telephone was not identified does not render the conversation inadmissible. The ruling here announced is intended to determine merely the admissibility of such conversations in such circumstances, but not the effect of such evidence after its admission. It may be entitled, in each instance, to much or little weight in the estimation of the triers of fact, according to their views of its credibility and of the other testimony in support or in contradiction of it."

The same rule is announced in the following cases: *Globe Printing Co. v. Stahl*, 23 Mo. App. 451; *Publishing Co. v. Warehouse*, 123 Mo. App. loc. cit. 18, 99 S. W. 765; *Reed v. Railroad*, 72 Iowa, 166, 33 N. W. 451, 2 Am. St. Rep. 243.

The latter case well considers the question, and it holds that, although the witness did not recognize the voice of the person whom he was talking to at the other end of the line, the conversation had between them was nevertheless admissible, just as much so as if the witness had gone personally to the defendant's "trouble department" and had talked to this same person in charge of it, whose name he did not know.

We must heartily approve that doctrine. This court cannot shut its eyes to the fact that the telephone systems of this country extend all over it, penetrating almost every business house and residence throughout the length and breadth of the land, and that a very large percentage of the gross business of the country is transacted over the telephone; and, in view of these facts, to hold that conversations had over them regarding business transactions are inadmissible in evidence would virtually destroy their usefulness, for the simple reason that but few who talk over the telephone are personally acquainted with the telephone boy or girl to whom he talks, nor can they recognize their voices. And, as was well held in case of *Wolfe v. Railway Co.*, supra, when one places himself in connection with a telephone system through an instrument placed in his office, with a given number thereto, he thereby in-



vites communications with him regarding business through that channel, and that such communications are admissible in evidence upon the theory that the person who has charge of that telephone in his office is, presumably, his agent or servant for the purpose of receiving those communications.

The court properly overruled the defendant's objections to that evidence, and its ruling in admitting the same was correct.

[6] V. The final and last error complained of by counsel for defendant is that the amount of the verdict is excessive. The jury returned a verdict for \$50,000, but the court required the plaintiff to remit \$15,000, and then rendered judgment for the plaintiff for \$35,000.

During the argument of this case the writer was impressed with the idea that the verdict was excessive, but since carefully reading the evidence of the entire record regarding the plaintiff's horrible injuries, their character, extent, and permanency, I have changed my opinion in that regard, and I am inclined to concur with the learned trial judge who heard this evidence and saw the plaintiff and observed the character and extent of his injuries, which placed him in a far better position to observe and judge what would be a reasonable sum to compensate the plaintiff for his injuries than this court is in.

Finding no error in the record, the judgment is affirmed.

All concur except BLAIR and GRAVES, JJ., who dissent as to amount of judgment.

# MEEKER v. UNION ELECTRIC LIGHT & POWER CO. (No. 20489.)

(Supreme Court of Missouri, Division No. 1.  
Dec. 1, 1919.)

## 1. APPEAL AND ERROR §527(1)—MEMORANDA OF JURY NOT PART OF RECORD.

Where in addition to writing a general verdict in the usual form, after the jury were dismissed and the court had adjourned, the foreman handed a memoranda to the judge, and stated that it might be of some benefit to the court in reviewing the verdict, such memoranda showing items of damage and the amount allowed on each, and the clerk inadvertently pasted the memoranda on the verdict, and later in the same term the court of its own motion expunged the same from the record, the losing party cannot complain that there was a discrepancy between the evidence and the amount of certain items of expense allowed by the jury as shown by the memoranda; such memoranda not being a part of the record in the case.

## 2. DAMAGES §186—PROOF OF EARNING CAPACITY.

In action by parent for damages for the loss of services of a minor, evidence of minor's

age, previous health, and condition in life was sufficient to enable the jury to determine the minor's earning capacity, aided by their own knowledge and experience.

## 3. DAMAGES §210(2)—INSTRUCTION IN ACTION FOR DAMAGES PROPERLY LIMITED AMOUNT OF ITEMS.

In an action by a parent for damages for loss of services of an injured minor child, and medical expenses, etc., an instruction, limiting the amount of the several items recoverable to not exceeding the amount claimed for such items in the petition, was proper.

## 4. DAMAGES §133 — AMOUNT FOR LOSS OF SERVICE OF MINOR AND EXPENSES.

In an action by a parent for loss of services of a minor child, totally disabled through the defendant's negligence, when 14 years of age, and for medical expenses, etc., a verdict of \$9,500 held not excessive.

## 5. EVIDENCE §192—EXHIBITION OF BODY OF INJURED PERSON.

In an action by parent for loss of services of a minor child, claimed to have been totally disabled through defendant's negligence, it was within the discretion of the lower court to permit plaintiff to exhibit the body of the injured child to the jury for the purpose of showing his injuries.

Appeal from St. Louis Circuit Court; John W. Calhoun, Judge.

Action by Florence Meeker against the Union Electric Light & Power Company. Judgment for plaintiff, and the defendant appeals. Affirmed.

Jourdan, Rassieur & Pierce, of St. Louis, for appellant.

Henry G. Miller and Sam W. Baxter, both of East St. Louis, Ill., and Charles E. Morrow, of St. Louis, for respondent.

SMALL, C. I. This case is a companion to the case of Prosper H. Meeker, by, etc., v. Union Electric Light & Power Co., 216 S. W. 923, decided by this court en banc, at this term, but not yet officially reported. Both suits grew out of the same injury to Prosper H. Meeker, a boy 14 years of age, and the son of the plaintiff in this case, in being badly burned by electricity from the wires of the defendant in the city of St. Louis.

The pleadings in both cases are the same, except the son's case was for personal injuries he sustained, and this case for loss of his services by the plaintiff during his minority, expenses incurred and sustained, and to be incurred and sustained by the plaintiff, during that time for medical and surgical treatment, medicines, hospital, and nurses' bills, and the like for her son, made necessary by the injuries he received.

The evidence and instructions on the question of defendant's liability for said injuries and their extent, and the extent and

character of the medical and surgical treatment he received, stay in the hospital and nursing there and elsewhere, are, in substance, the same in both cases.

In the son's case, this court upheld a verdict for \$35,000 in his favor, on account of the most unusual and lamentable character and extent of his injuries. We shall not attempt to restate the case here, but refer to the very full statement thereof contained in the opinion of the court in the son's case. The defendant's liability for the injuries to the son was established in his case, and all the points regarding such liability raised in this case were raised and decided against the appellant in that case. There remains for our consideration in this case, therefore, only matters touching the amount of the verdict complained of by the appellant. The verdict was for the plaintiff for \$9,500. The plaintiff in her petition asked for damages as follows: \$3,000 for loss of her son's services; \$5,000 for money expended and liabilities incurred for the services of physicians and surgeons and nurses, medicines and appliances in hospital; \$2,000 for hospital bills; \$500 for medicine and appliances at other places than at the hospital; \$100 for special diet, and for all money to be expended and liability to be incurred for all such purposes in the future, praying for a total sum of \$15,000.

As to the measure of damages, the court, at plaintiff's instance, instructed the jury as follows:

"IV. The court instructs the jury that if under the other instructions you find the issues in this case for the plaintiff, you should assess her damages at such sum as you believe from the evidence will be fair and reasonable pecuniary compensation to her.

"First. For any sum she has necessarily expended or incurred liability for in the treatment of the injuries of her said son, Prosper H. Meeker, directly caused by the negligence of the defendant, as defined in other instructions; for physicians and surgeons, if any, to the reasonable value thereof, not to exceed on that account the sum of \$5,000; and for nurses, medicines, and appliances at the hospital and hospital bills, if any, to the reasonable value thereof, not to exceed on that account the sum of \$2,000; and for medicines and appliances other than at the hospital, if any, to the reasonable value thereof in a sum not to exceed \$500.

"Second. And also for loss of services of her said son during his minority, and until he arrives at the age of 21 years, if any, directly caused by the negligence of the defendant, as defined in these instructions, to the reasonable value thereof, not to exceed on that account the sum of \$3,000, and the reasonable expense, if any, of caring for her said son in the future, and during his minority, up to the time he arrives at the age of 21 years, from which should be deducted the reasonable cost of keeping her said son from the date of his injury until he arrives at the age of 21 years. The plaintiff's

damages, however, cannot exceed in all the sum of \$15,000."

In addition to returning a general verdict in the usual form for the sum of \$9,500, after the jury were discharged and court had adjourned, the foreman handed the following memoranda to the judge, and stated that it might be of benefit to the court in reviewing the verdict to see whether or not the jury had complied with the judge's instructions:

Physicians and surgeons.....	\$3,250 00
In arriving at this basis, the operating physician, \$150.00, and the assistant at operation, \$75.00	
Hospital fees and nurses.....	1,500 00
Medicines and appliances, other than the hospital .....	500 00
Income for maintenance or loss of services..	3,000 00
Prospective fees for five years' illness.....	1,250 00
	<b>\$9,500 00</b>

This memorandum was by the clerk inadvertently pasted on the verdict and put upon the record as a part of said verdict without authority from the court; and was by an order of the court, of its own motion, subsequently, at the same term, expunged from the record.

[1] II. Appellant contends that there is some discrepancy between the evidence and the amount of certain items of expense allowed by the jury, as shown by said memoranda. We hold this immaterial, as such memoranda were no part of the verdict, nor of the record of the case, and were properly expunged from the record by the court.

[2] III. Instruction No. 4, given for plaintiff on the measure of damages, is objected to, because there was no evidence of the son's earning capacity, save the circumstances of his age, previous health, and condition in life. This was sufficient to enable the jury to determine his earning capacity, aided by their own knowledge and experience. *Parsons v. Railroad*, 94 Mo. loc. cit. 296, 6 S. W. 464.

[3] Nor is said instruction faulty because it limited the amount of the several items recoverable to not exceeding the amount claimed for such items in the petition. This was proper. *Smoot v. Kansas City*, 194 Mo. 513, 92 S. W. 363.

[4] IV. It is urged the verdict is excessive. We do not so regard it. It is admitted that \$3,250 was proven as the value of the physicians' and surgeons' services prior to the date of the trial, and \$1,805.30 as the reasonable charge for hospital, nurses, and medicine bills during the same time. These two items alone equal nearly one-half of the amount of the verdict. The evidence showed there would in the future likely be necessity for much expense for medicines and for doctors', hospital, and nurses' services, and necessarily the extra expense to plaintiff to support her son in anything like rea-

sonable comfort, rendered necessary by his injured condition, would be very substantial, in addition to which she was also entitled to the value of his services during his minority. All this was for the consideration of the jury in arriving at the amount of their verdict (*Parsons v. Railroad*, supra), which we do not think is immoderate.

[5] V. The exhibition of the body of the plaintiff's son to the jury for the purpose of showing his injuries was within the discretion of the lower court, and we do not find that it abused its discretion in so doing in this case.

The verdict was fair and for the right party. The judgment below is therefore affirmed.

BROWN, C., concurs.  
RAGLAND, C., concurs.

PER CURIAM. The foregoing opinion of SMALL, C., is adopted as the opinion of the court.

All the Judges concur.

# SWIFT et al. v. CENTRAL UNION FIRE INS. CO. (No. 19865.)

(Supreme Court of Missouri, Division No. 1.  
Dec. 1, 1919.)

## 1. INSURANCE §145(1)—IN ACTION ON ORAL CONTRACT TO RENEW, PETITION MUST ALLEGE CONSIDERATION.

Petition in action on parol contract renewing insurance on certain property against fire is fatally defective without an allegation as to a consideration.

## 2. PLEADING §245(7)—PETITION STATING NO CAUSE OF ACTION CANNOT BE AMENDED AFTER JUDGMENT.

Where petition in action on parol contract insuring certain property against loss by fire stated no cause of action because it failed to plead a consideration, the defect could not be cured by amendment after judgment.

## 3. PLEADING §243 — RULES APPLICABLE WHERE NO CAUSE OF ACTION STATED.

The rules applicable to defectively stated causes of action have no application in cases where no cause of action is pleaded.

## 4. INSURANCE §685(2)—EVIDENCE AS TO CONTRACT.

In action on parol contract insuring property against loss by fire, testimony held to show a contract in presenti and not a mere agreement to enter into a contract.

Case certified from Circuit Court, Jackson County; Kimbrough Stone, Judge.

Action by William S. Swift and another, copartners under the name of the American

Scale Company, against the Central Union Fire Insurance Company. Judgment for plaintiffs in the circuit court was reversed by the Court of Appeals (217 S. W. 1003) and the case was duly certified to the Supreme Court. Reversed and remanded.

Hugh C. Smith, of Kansas City, Paul E. Bradley, of Joplin, and Leslie J. Lyons, of Kansas City, for appellant.

George H. English, Jr., of Kansas City, for respondents.

GRAVES, J. This case reaches us upon due certification by the Kansas City Court of Appeals. Majority and minority opinions are here to enlighten us.

The action is one on a parol contract of insurance and such contract, omitting description of the property, is thus averred in the petition:

"Plaintiff states that on or about the 15th day of July, 1913, defendant by its oral contract of insurance made and entered into between the plaintiff and the defendant insured for one year the following described property, the same being the property of these plaintiffs, namely:

"Said contract of insurance so entered into as aforesaid between plaintiffs and defendant was upon the same general terms and conditions so far as those embraced in a certain written contract of insurance made and entered into between the defendant and these plaintiffs under date of July 30, 1912, which said last-named contract or policy of insurance is in words and figures as follows."

Following this was set out in *hæc verba* an old policy on the same property, which covered a period from noon July 30, 1912, to noon July 30, 1913. Then followed averments of due performance of the contract by plaintiffs, and of the destruction of the property by fire.

Plaintiffs had judgment in the circuit court, which judgment is reversed by the majority opinion of the Court of Appeals, and the cause remanded.

Defendant urges two reasons for the reversal of the judgment: (1) That the petition failed to state a cause of action, in that it failed to allege a consideration for the pleaded parol contract of insurance; and (2) that the contract proven by the evidence was not the contract pleaded, and that this variance between proof and pleading was fatal.

The trial court, after judgment, permitted the petition to be amended so as to aver a consideration, and this is urged by plaintiff. Defendant says that the petition was fatally defective and it was error to permit its amendment. Such are the issues here.

[1] I. This action is on a parol contract of insurance. Whilst the parties may differ as to the exact nature of the contract, there is no disagreement upon the matter of it being

a parol contract. It is further clear that the petition avers no consideration for this parol contract. It is averred that defendant agreed to insure the property of plaintiffs, but in consideration of what is not stated. The petition neither avers the payment of a premium, nor a promise to pay such. In actions upon the kind of contract here sued upon, the petition is fatally defective without an allegation as to a consideration for the promise alleged to have been made by the defendant. In 4 Ency. of Plead. & Prac. it is said:

"In the absence of statutory enactments to the contrary, it is necessary, in actions upon contracts, to allege a consideration, except in the case of contracts under seal, bills of exchange, and negotiable promissory notes, all of which by intendment of law import a consideration."

In Missouri we have a statute (section 2774, R. S. 1909), but it only applies to instruments in writing. It does not cover a parol contract of insurance as here involved. The very recent work, 13 C. J. p. 722, thus states the rule:

"If the contract in suit is under seal it imports a consideration and none need be alleged, and the same is true if the instrument sued on is negotiable according to the law merchant. And by statute in some jurisdiction every written contract is made to import a consideration, and where this is so, it is not necessary for plaintiff to allege the consideration. But the consideration is an essential part of a contract, and, in the absence of statutory relief from the rule, a party declaring on a contract which at common law does not import a consideration must fully and truly state the consideration as well as the promise founded on it, and must prove it as laid. If no consideration is stated, it is a fatal defect which may be taken advantage of by demurrer, motion in arrest of judgment, or writ of error."

The rule above stated is practically a re-script from 9 Cyc. p. 717.

Going to the text-writers, we find that Bliss on Codes Pleading (3d Ed.) p. 400, § 268, says:

"Contracts, to be valid, must be founded upon a consideration, and, except as to those that import it, the consideration must be proved, and, consequently, should be stated. The petition should set it out, or show the contract to be one where the law so imports it as dispense with the proof. Contracts, thus, at common law, importing consideration, are: First, 'Deeds,' that is, instruments of writing executed with the formality of a seal, our law thus following the Roman, which validated contracts without consideration if 'clothed' with certain, though not the same, formalities, while those unclothed were 'nude' and invalid, unless supported by a consideration; and, second, 'bills of exchange' and 'negotiable promissory notes.'"

See, also, section 308 of same author.

In Chitty's Treatise on Pleading (16th Am. Ed.) vol. 1, star page 300, we find:

"In declaring upon a contract not under seal, it is in all cases necessary to state that it was a contract that imports and implies consideration, as a bill of exchange or promissory note, (i) or expressly to state the particular consideration upon which it was founded; (k) and it is essential that the consideration stated should appear to be legally sufficient to support the promise, for the breach of which the action is brought."

And further, on the same page, we find:

"In declaring upon bills of exchange and promissory notes and some other legal liabilities, the mere statement of the liability which constitutes the consideration is sufficient; (1) but in other cases of simple contracts, it is necessary that the declaration should disclose a consideration, which may consist of either benefit to the defendant, or detriment to the plaintiff; (2) or the promise will appear to be nudum pactum, and the declaration will consequently be insufficient."

So in the case at bar the promise of the defendant to insure the property of the plaintiffs is a nudum pactum under the facts pleaded. No consideration for the promise is averred. Boone's Code Pleading, p. 29, § 19, states the rule very tersely in this language:

"Where a consideration is not implied, it is the very gist of an action founded upon contract, and must be specially averred."

As seen from the authorities cited supra, the contract involved here is not one which imports a consideration, or one wherein there could be an implied consideration. In other words, the very gist of this action has been omitted in the pleading.

This court from an early day has recognized this rule. In one of the later cases (county of Montgomery v. Auchley, 92 Mo. loc. cit. 129, 4 S. W. 425) Black, J., said:

"Generally, in cases of simple contracts, the consideration should be formally and expressly pleaded."

See, also, Hart v. Harrison Wire Co., 91 Mo. 418 et seq., 4 S. W. 123; McNulty v. Collins, 7 Mo. 69; Wesson v. Horner, 25 Mo. loc. cit. 82.

In the latter case the answer pleaded an alleged contract or agreement. To this agreement the plaintiff made the point that no consideration was pleaded. This court said:

"The agreement set up in the defendants' answer amounts to no defense to the plaintiffs' action. There is not the slightest consideration set forth or mentioned moving to plaintiffs for any such promise or agreement; it is a mere nudum pactum."

From these authorities it is clear that the petition in this case is defective in its failure to plead a consideration for the contract sued upon herein. To our mind it is fatally defective, but this question we take next.

[2] II. Plaintiffs contend that the defect was cured by amendment after trial and judgment; defendant, contra. We think this petition states no cause of action at all, and from nothing, a live cause of action cannot be evolved by amendments, and especially by amendments after judgment.

As the petition stood, it pleaded a nudum pactum which was not actionable. Where a nudum pactum, i. e., no contract, is pleaded, can you, after trial and judgment, amend your petition so as to show a contract? It is not a cause of action defectively stated in this petition, but it is a petition stating no cause of action at all, because the nudum pactum pleaded was not binding and not actionable.

As stated by Boone, an allegation of a valid consideration was the gist of the action.

In *Andrews v. Lynch*, 27 Mo. loc. cit. 189, this court said:

"The old rule of the English judges that a verdict would supply whatever of necessity must have been proved to the jury has never been held to extend to cases where the gist of the action is omitted. Nor have the various statutes of amendments and jeofails enacted in several of our states and embodying this principle ever been construed to embrace a case where no cause of action is stated. 1 Bac. Abr. p. 16; 1 Petersdorf, Ab. 871; Winston's Ex'r v. Francisco, 2 Wash. [Va.] 189; Chichester v. Voss, 1 Call [Va.] 71 [1 Am. Dec. 509]. Our statute upon this subject contains nothing new or additional to the old rule."

The omission of the petition before us was not one as to form, but one as to substance. The very gist of the action was omitted. This petition was bad, and should have been held bad upon a general demurrer. Defendants objected to the introduction of any evidence thereunder, because it failed to state a cause of action. Speaking to a similar situation, this court in *Hart v. Harrison Wire Co.*, 91 Mo. loc. cit. 420, 4 S. W. 125, said:

"This objection, if of the character we hold it to be, is not one of form, but goes to the substance of the action, and is good, on motion in arrest of judgment, and may be made at any stage of the proceedings, and, even in this court, for the first time. The rule is that wherever a general demurrer would be well taken, a motion in arrest is equally available, and if the petition is bad on general demurrer thereto, the judgment, for the same reason, is equally bad on motion in arrest. *Grove v. City of Kansas*, 75 Mo. 672; *Weil v. Greene County*, 69 Mo. 281."

[3] It cannot be questioned that the petition in this case was bad upon general demurrer. A statement of a nudum pactum is not the statement of a cause of action. A petition which states absolutely no cause of action is not one subject of amendment after trial and judgment. As said by Napton, J., in the *Andrews-Lynch Case*, supra, our stat-

utes of jeofails do not avail. In other words, the rules applicable to defectively stated causes of action have no application in cases where no cause of action is pleaded.

The trial court was in error in permitting the amendment after trial and judgment, and in error in refusing to sustain the defendant's request for a directed verdict. These errors necessitate a reversal of the judgment herein. Upon the question here involved, the learned opinion of Ellison, J., well expresses the rule. In such opinion he fully distinguishes the cases relied upon by the plaintiffs, and the learned judge writing the minority views. The curious can consult those opinions.

But as this case must go back for a retrial, it is well to note a question urged here, which is not dealt with by the Court of Appeals. It is urged that, even after the amendment of the petition by averring a parol contract upon a valid consideration, there is a fatal variance between the contract pleaded and the contract proven. This question we take next.

[4] III. Defendant urges that the contract pleaded is a parol contract of insurance in present, whereas the evidence showed a mere agreement to enter into a contract of insurance at a later date. Judge Johnson in the minority opinion in the Court of Appeals thus fairly quotes the testimony of the plaintiff, leaving out immaterial portions:

"He said to me that the \$2,400 policy would expire in a short time. \* \* \* I told him then distinctly to renew that one, because there was no other place I could get it, and I wanted that policy continued, and he said he would do it. I understood him to say he would do it and supposed it was done. \* \* \* I dismissed it then from my mind, supposing, of course, he would renew it just as he said he would. I left town and went away soon after that supposing the insurance was taken care of."

As a fact the old policy did not expire for some 20 days. The record also shows that the agent issued policies ordered by plaintiffs and collected later. In other words, the agent of defendant kept an account with plaintiffs on insurance matters. The agent said he did not agree to renew the policy, nor did the plaintiffs order it renewed, because of an advance in the rates. However, upon the point now before us, this is by the wayside.

We are not prepared to agree with defendant's version of the alleged parol contract. We think the evidence discloses a contract in present. This conclusion is reached by the application of a simple illustration. What plaintiffs wanted was a policy of insurance which would cover their property from July 30, 1913, to July 30, 1914. On the day that Swift talked to Clinton, defendant's agent, such agent could have made out and signed a written policy of insurance

specifying therein that the property was insured for \$2,400 from the 30th day of July, 1913, to the 30th day of July, 1914, and dated such policy on the day of the talk, i. e., July 9 or 10, 1913. If the agent had actually done this, there would have been no liability under the policy until July 30th, but there would have been thereafter. In other words, the agent of the defendant agreed to renew the old policy, except as to premium, and the time covered for the insurance. It was within the power of the agent on July 9th to then or on that day renew or issue a policy covering the property described in the old policy, for a premium then agreed upon, with liability fixed between July 30, 1913, to July 30, 1914. What they could have done in writing on July 9th, they could do by parol. If on July 9th the agent could have, by a written policy issued and dated July 9th, insured plaintiff's property for a period from July 30, 1913, to July 30, 1914, a valid parol contract to same effect could have been made. In fact, a parol agreement of insurance always precedes the actual written agreement. And it is these parol contracts that the courts enforce.

We think that a fair construction of Swift's testimony makes a parol contract of insurance in presenti, in which contract there was the provision that the dates between which liability for fire existed were from July 30, 1913, to July 30, 1914.

This we think is a reasonable construction of the language of the witness Swift. They were not actually renewing or extending the old contract, because they were changing the consideration. But even if they were actually renewing the old policy, it could have been done as well on the 9th of July, as upon the expiration of the old policy. The renewal would simply be dated July 9th, and the term of insurance therein named would have been from July 30, 1913, to July 30, 1914. We see no variance between the pleading and the proof, save and except there was proof of an agreed consideration, and no pleading of a consideration.

For the reasons stated in paragraph 1, above, the judgment is reversed, and the cause remanded.

All concur.

KRINARD v. WESTERMAN. (No. 20486.)

(Supreme Court of Missouri, Division No. 1.  
Dec. 1, 1919.)

1. APPEAL AND ERROR §179(3)—CHARGE OF NEGLIGENCE, ABANDONED IN INSTRUCTIONS, NOT REVIEWABLE.

Plaintiff in her instructions having abandoned another charge of negligence, that matter is not before the reviewing court.

2. NEGLIGENCE §136(5) — INFERENCE FROM FACTS MAY MAKE QUESTION FOR JURY.

If the legitimate inferences which may be drawn from the facts establish negligence, a case of negligence is made.

3. PHYSICIANS AND SURGEONS §18(9)—NEGLECT IN PERFORMING OPERATION; QUESTION FOR JURY.

In an action for malpractice, where defendant physician had removed a fibroid tumor from plaintiff's uterus, evidence held to justify the submission to the jury of the question whether the defendant, in operating, negligently cut plaintiff's bladder.

4. PHYSICIANS AND SURGEONS §18(9)—MALPRACTICE; QUESTION FOR JURY.

In malpractice action against a physician, who had removed a fibroid tumor from plaintiff's uterus, evidence of negligence in cutting or tying the ureter leading from the left kidney to the bladder held to justify overruling demurrer to the evidence.

5. PHYSICIANS AND SURGEONS §18(10)—INSTRUCTION; DEGREE OF SKILL REQUIRED FOR OPERATION NOT LIMITED TO THAT OF SURGEONS IN THE COMMUNITY.

In a malpractice action, an instruction that in performing the operation it was defendant's duty to exercise reasonable skill and care, such as an ordinarily skillful and careful surgeon is accustomed to exercise and use in like surgical operations under like circumstances, is proper, and should not be limited to "the degree of skill possessed by reasonably skillful surgeons in the community" in which defendant is practicing.

6. APPEAL AND ERROR §1033(5)—INSTRUCTION ON DEGREE OF SKILL REQUIRED OF SPECIALIST FAVORABLE ERROR.

Even though instruction that defendant was required to exercise such skill and care as an ordinarily skillful and careful surgeon is accustomed to exercise in a like surgical operation did require too high a degree of skill for ordinary cases, yet, where plaintiff alleged in her petition charging malpractice that defendant represented himself to be a specialist in such operations, and proof accorded with averment, instruction requires a lesser degree of skill than required of defendant, and defendant cannot complain.

7. PHYSICIANS AND SURGEONS §18(9)—MALPRACTICE; SUFFICIENCY OF EVIDENCE OF FUTURE SUFFERING FOR SUBMISSION TO JURY.

In an action against a physician for damages for malpractice, evidence of the certainty of plaintiff's future sufferings held sufficient to submit the question to the jury for consideration in assessing damages.

8. TRIAL §295(4)—USE OF WORD "MAY" IN INSTRUCTIONS HARMLESS, IN VIEW OF WHOLE CHARGE.

In an action for malpractice, an instruction on the question of reasonable certainty of future operations and suffering, while the use of the word "may" might give the jury the meaning of "bare possibility," instead of "rea-

sonable certainty," yet where the instruction refers to such suffering as the jury "believes she will in the future endure," the word "may" was not likely to mislead, and must be considered as harmless, and not warranting reversal.

#### 9. PHYSICIANS AND SURGEONS §18(10)—ACTION FOR MALPRACTICE; INSTRUCTIONS.

In a malpractice action against a physician, the injury having resulted in other necessary operations, the inclusion in an instruction of the phrase "surgeon's fees" was not error, where plaintiff, in listing the items, had stated that she had not paid certain surgeon's fees, and did not know what they were, and defendant's counsel waived the details, and asked that she state in a lump sum what she had paid, which she did, and plaintiff's counsel made it clear to the jury that surgeon's bills not paid were not to be considered.

Appeal from St. Louis Circuit Court; William T. Jones, Judge.

Action by Lillian Krinard against Clarence M. Westerman. Judgment for plaintiff, and defendant appeals. Affirmed.

Watts, Gentry & Lee, of St. Louis, for appellant.

O'Neill Ryan and Guy A. Thompson, both of St. Louis, for respondent.

GRAVES, J. Action for alleged malpractice. Defendant is a physician and surgeon in the city of St. Louis, and plaintiff is also a resident of said city. By the petition it is alleged that plaintiff was troubled with a fibroid tumor of the uterus, and went to defendant for an operation for its removal. It is averred that defendant had represented to plaintiff that he was specially skilled in the performance of such operations, having performed 500 operations of like character. The charge of negligence is thus stated:

"That on the 13th of November, 1915, pursuant to said employment, the defendant performed said operation upon the plaintiff, but that he performed the same negligently, carelessly, and unskillfully in this, to wit: First, that he cut, punctured, or tore a large hole in plaintiff's bladder; second, that he failed and neglected to mend the bladder at once; third, that either during said operation, or during one of the operations thereafter performed by him and hereinafter referred to, he so cut or tied off, or so damaged, plaintiff's left ureter as to cause it entirely to lose its functions and to atrophy, and to cause plaintiff's left kidney also to lose its functions, to atrophy, and become lifeless."

The petition then alleges two succeeding operations, as indicated above, and their failure, and further alleges that plaintiff had to undergo three other painful operations by other surgeons in an attempt to remedy the trouble occasioned by the alleged negligence of defendant. The petition thus closes:

"Plaintiff says: That immediately because and by reason of defendant's negligence, carelessness, and unskillfulness, aforesaid, her bladder has been permanently injured and in part destroyed, so that the urine flows constantly and unnaturally from her bladder. That her left ureter and left kidney have been rendered useless and lifeless. That she has been compelled to undergo five serious and painful surgical operations since defendant's first operation upon her on November 13, 1915, and, as aforesaid, will be compelled to endure further operations. That she has suffered, still suffers, and will continue throughout her life to suffer most intense, excruciating, and continuous mental and physical pain, anguish, torture, and distress. That her nervous system has been wrecked. That she has been and will continue to be compelled to expend large sums of money for medicines, nurses, railroad fare, hotel, hospitals, and surgeons' fees. That she is permanently disabled, is an invalid, and will continue to be an invalid the remainder of her life. That she has lost and will continue to lose the earnings of her work and labor, and will continue to suffer intense physical and mental pain."

Then follows a prayer for damages in the sum of \$25,000.

The answer admitted that defendant was a regularly licensed and practicing physician and surgeon, and held himself out as such. The answer also admits that he performed the operation first mentioned by plaintiff for the removal of a fibroid tumor; admits that he cut the hole in plaintiff's bladder, but avers that it was not negligently done, but that it became necessary for him to make such cut in removing the tumor. The answer also admits the two subsequent operations for the purpose of closing the hole, but avers that they were unsuccessful for the reason that the parts were diseased. All other matters were denied.

The reply specifically placed in issue all new matter contained in the answer. Upon a trial before a jury the plaintiff obtained a verdict for \$15,000, and from a judgment entered thereon the defendant has appealed.

The assignments of error made here cover the refusal of the court to sustain a demurrer to the evidence of plaintiff, and the giving of instructions, 1, 2, 3, and 4, for plaintiff. The further facts can be best detailed in connection with the several assignments of error.

[1] I. The first assignment of error is the failure of the trial court so sustain defendant's demurrer to the evidence. This goes to the sufficiency of the facts. It should be stated at the outset that, although the defendant's professional conduct was on trial, and in the balance, he did not testify himself, nor did he offer other testimony in his behalf. The case went to the jury on the evidence adduced for plaintiff. Dr. Mansfield and two nurses, and other parties, were present at the operation.

The case was submitted to the jury upon

two of the alleged negligent acts, i. e.: (1) The negligent cutting of the bladder; and (2) the negligent cutting or tying off of the ureter. Were there facts showing negligence as to either of these? Plaintiff in her instructions having abandoned the other charge of negligence, it is not here for review.

[2] It stands admitted that defendant did cut a hole in plaintiff's bladder. Plaintiff says he negligently did it, and defendant says that he purposely did it, because the degenerated condition required it to be done. Negligence may be inferred from the facts. If the legitimate inferences which may be drawn from the facts establish negligence, the case of negligence is made. Now for the facts, as to whether or not this hole in the bladder was intentionally and necessarily made, or negligently made.

[3] At the solicitation of the plaintiff a Mrs. O. D. Rizer was in the operating room during the whole time of the operation. She was plaintiff's friend. Mrs. Rizer testifies that after the operation the defendant showed her the parts which had been removed; that she asked him if the operation was a success, and he replied: "That is a perfect operation, perfectly successful." Not a word was said about cutting the bladder at that time. Nor did the defendant tell the plaintiff about it for a long time thereafter, and then only when plaintiff complained about the constant flow of urine, and told him that she believed that he had injured her bladder. This was a month after the operation, and then for the first time the defendant said that he had cut the bladder, and taken out the diseased portion, and there would have to be a second operation. During all this month he was telling plaintiff and her friends that plaintiff was getting along nicely.

In addition to these facts, when the necessity arose for the third operation, and plaintiff wanted that eminent physician, Dr. Mudd, called in to assist, the defendant became enraged and mad, and used some rather forceful language, with the result that the third operation was performed without the presence of Dr. Mudd. The very conduct of the defendant tended to show his guilt. But this is not all. Plaintiff was examined both before and after these operations by different physicians. None of these found any evidence of a cancerous or diseased condition. The fact is that, as shown by the experts, a cut of this kind is hard to cure, and it took three operations at Mayo's Hospital to get the cut closed. But the surgeons there found no diseased or cancerous condition. The experts further say that, if it had been cancerous, the condition would return, notwithstanding the cut. In our judgment the evidence justified the submission of this ground of negligence.

[4] Now, as to whether the evidence tended to show that defendant negligently cut or tied the left ureter. The left ureter connects the left kidney with the bladder. Upon this

ground of negligence, the evidence shows that the cutting or tying of the ureter would kill the kidney. The evidence further tended to show that this woman had been normal in all these parts, but that now there was a left kidney, but no life in it. Before the operation plaintiff had not been bothered with kidney troubles. A fair inference from these facts would indicate that defendant had destroyed this left ureter in one of his operations. The operation he attempted to perform was a delicate one, and required skill. He proved not to be equal to the task. We think the court committed no error in submitting the case to the jury by the overruling of the defendant's demurrer.

What is said above also disposes of appellant's third and fourth assignments of error. These assignments simply go to the effect that the court erred in giving instructions 2 and 3 for the plaintiff, because there was no sufficient evidence upon which to base them. The instructions are not otherwise criticized. Upon the demurrer, *supra*, we have held that there was evidence upon which each of these instructions could be predicated. These assignments of error must likewise fall.

[5] II. It is next urged that there was error in giving plaintiff's instruction No. 1. This instruction reads:

"The court instructs the jury that it is admitted that defendant as a surgeon undertook, on November 13, 1915, to operate on the plaintiff and remove a fibroid tumor and remove the uterus, and the court instructs you that in performing this operation it became and was his duty to exercise reasonable skill and care, as an ordinarily skillful and careful surgeon is accustomed to exercise and use in like surgical operations under like circumstances."

The contention is that the instruction fixed the wrong standard of efficiency, in this: That the instruction covered the whole world's physicians, whilst the defendant's efficiency should have been gauged by "the degree of skill possessed by reasonably skillful surgeons in the community in which he is practicing." We are cited to *Vanhooser v. Berghoff*, 90 Mo. 487, 3 S. W. 72; but that case does not cover the fine distinction urged by distinguished counsel in this case. On the other hand, in that case the opinion (90 Mo. at pages 490, 491, 3 S. W. 73) does say:

"Under the law his contract is not one of warranty that a cure will be effected, but only that he possesses and will use reasonable skill, judgment, and diligence, such as is ordinarily possessed and employed by members of the same profession."

Other cases (from other jurisdictions) cited by appellant do not discuss the doctrine contended for here at all. Why they should have been cited we do not understand. We find but three cases authorizing the doctrine contended for by appellant. This doctrine limits the skill of the operating surgeon to that degree of skill possessed by reasonably skillful



surgeons "in the community in which he is practicing." The cases we find are *Nelson v. Harington*, 72 Wis. loc. cit. 597, 40 N. W. 228, 1 L. R. A. 719, 7 Am. St. Rep. 900, *Wurde-mann v. Barnes*, 92 Wis. loc. cit. 208, 66 N. W. 111, and *Pike v. Honsinger*, 155 N. Y. 201, 49 N. E. 760, 63 Am. St. Rep. 655.

So far as we find, the only other limit along the line contended for by appellant is the rulings which limit the skill of the operating surgeon to that of reasonably skillful surgeons in similar communities. 22 Am. & Eng. Ency. of Law (2d Ed.) p. 800. This annotator says:

"The skill and care of physicians in the particular locality or neighborhood is not the standard, but that ordinarily possessed by physicians practicing in similar localities. *Gramm v. Boener*, 56 Ind. 497; *Whitesell v. Hill*, 101 Iowa, 629 [70 N. W. 750, 37 L. R. A. 830]; *Pelky v. Palmer*, 109 Mich. 561 [67 N. W. 561]; *McCracken v. Smathers*, 122 N. C. 799 [29 S. E. 354]."

Besides the cases cited by the writer of the above, as announcing the same doctrine, there might be added the following: *Hathorn v. Richmond*, 48 Vt. loc. cit. 559; *Small v. Howard*, 128 Mass. loc. cit. 182, 186, 35 Am. Rep. 363; *Dunbaned v. Thompson*, 109 Iowa, 199, 80 N. W. 324; *Dorris v. Warford*, 124 Ky. 768, 100 S. W. 312, 9 L. R. A. (N. S.) 1090, 14 Ann. Cas. 602; *Kelsay v. Hay*, 84 Ind. loc. cit. 193; *Reeves v. Lutz*, 179 Mo. App. loc. cit. 64, 162 S. W. 280; *Hales v. Raines*, 146 Mo. App. loc. cit. 241, 130 S. W. 425. Some of these cases urge as a reason for the rule that the operating surgeon or physician might have in his immediate vicinity only quacks, and his skill would be measured by theirs. Hence they say that he must possess the skill of the reasonably skillful surgeon in similar communities. This rule appears to be more reasonable than the one contended for by appellant in this case.

On the other hand, in *Wheeler v. Bowles*, 163 Mo. loc. cit. 406, 63 S. W. 675, we have a very similar instruction to the one given in the instant case, and it met with the approval of this court, when (163 Mo. at page 410, 63 S. W. 678) we said:

"Indeed, we may remark that we have rarely found a fairer set of instructions in a negligence case. Surely defendant has no right to complain of them."

In the very early case of *West v. Martin*, 31 Mo. 375, 80 Am. Dec. 107, we find that this court approved of an instruction for the plaintiff which contained this language:

"Then he was bound by the law to use the ordinary skill of his profession in the treatment of said case."

The defendant had been called to treat a broken thigh for the plaintiff. To see just what we did approve, I sent for the old files in the case. So that we have made the test

"the ordinary skill of his profession" in that case. The approved instruction in the *Wheeler Case*, supra, contains this clause:

"Or failed to exercise such care and skill as is used by the average members of his profession under like conditions and circumstances."

It is not far from the rule in *West's Case*. In one it is the "ordinary skill of his profession," and in the other "such care and skill as is used by the average members of his profession." There is also added in the last case the phrase "under like conditions and circumstances." These words, we take it, do not change the situation materially. In *Longan v. Weltmer*, 180 Mo. loc. cit. 828, 79 S. W. 637, 64 L. R. A. 969, 103 Am. St. Rep. 573, where the instruction fixed the required skill as "ordinary care and skill," the instruction passed muster here, and the plaintiffs' judgment was affirmed.

So far as we can find, up to the *Longan Case*, supra, this court had never fixed any qualifications to what was said in the *West* and *Wheeler Cases*, supra; but in *Grainger v. Still*, 187 Mo. loc. cit. 213, 85 S. W. 1119, 70 L. R. A. 49, *Marshall, J.*, quoted, with approval, the following from 22 Am. & Eng. Ency. of Law (2d Ed.) p. 799:

"The standard by which the degree of care, skill, and diligence required of physicians and surgeons is to be determined is not the highest order of qualification obtainable, but is the care, skill, and diligence which are ordinarily possessed by the average of the members of the profession in good standing in similar localities, regard being also had to the state of medical science at the time."

The *Springfield* and *St. Louis Courts of Appeals* have followed this rule to the extent of including the phrase "in similar localities." Save and except what we find in the *Grainger Case*, supra, this court has never adopted this particular phrase, although it is approved by several courts as indicated above. In 30 Cyc. p. 1570, the measure of skill required is thus stated:

"A physician or surgeon undertaking the treatment of a patient is not required to exercise the highest degree of skill possible. He is only required to possess and exercise that degree of skill and learning ordinarily possessed and exercised by the members of his profession in good standing, practicing in similar localities, and it is his duty to use reasonable care and diligence in the exercise of his skill and the application of his learning, and to act according to his best judgment."

From it all we can safely say that the contention made by appellant's learned counsel cannot be sustained. There should be no limiting to the local vicinity of the practitioner. The weight of authority is against that doctrine.

The instruction criticized is a good one under the *West* and *Wheeler Cases*, supra. In the *Wheeler Case* the skill required is:

"Such care and skill as is used by the average members of his profession under like conditions and circumstances."

It is likewise good under the Longan Case, *supra*. But the point was not specially at issue in either of those three cases. It was not urged, as here. Nor was this point an issue in Grainger's Case, *supra*. On the whole, we are disposed to adopt the rule as given in 30 Cyc., *supra*, which seems to have caught the judgment of our Courts of Appeals.

By this we do not mean to criticize the instruction in the Wheeler Case, *supra*. The phrase "under like conditions and circumstances" is broad enough to cover "in similar communities." *Ghere v. Zey*, 128 Mo. App. loc. cit. 366, 107 S. W. 419. So that the instruction in the instant case is correct.

[6] But, even though the instruction was technically wrong, this does not avail the defendant in this case. The plaintiff sued the defendant as a specialist in this line of operations. Her petition so avers, and her evidence so shows. The rule applicable to defendant's case is stated thus in 30 Cyc. at p. 1571:

"A physician holding himself out as having special knowledge and skill in the treatment of particular diseases is bound to bring to the discharge of his duty to a patient employing him as such specialist, not merely the average degree of skill possessed by general practitioners, but that special degree of skill and knowledge possessed by physicians who are specialists in the treatment of such diseases, in the light of the present state of scientific knowledge."

The instruction complained of imposed a lesser degree of skill than was required of him as a specialist in this class of operations. The petition avers:

"That he represented to the plaintiff that he was specially skilled in the performance of such operations, having performed 500 such operations."

The proof accorded with the averment of the petition. Having been given an instruction requiring a lesser degree of skill, the defendant is in no position to complain.

[7] III. A more serious question is raised on the instruction as to the measure of damages. This instruction (in material parts) reads:

"If you find for plaintiff under the other instructions given, because of the hole cut, punctured, or torn in the bladder (if you find that said bladder was so cut, punctured, or torn), and the loss of the left ureter and left kidney (if you find that ureter and kidney were lost), or because of either, then you will assess the damages as follows:

"First. In such sum as you find will be reasonable compensation to her for the mental and physical pain and suffering you find she has endured, if any, and that you believe she will in the future endure, if any, as a result thereof, including what suffering she endured, if any, or may endure in the future, if any, in neces-

sary operations she has had performed, or may hereafter be required to have performed, as a result of the negligence of the defendant (if you find he was negligent under the other instructions given), and including any permanent impairment or disability, if any, to plaintiff that you may believe will follow, and directly caused thereby.

"Second. In such sum as you find from the evidence will compensate plaintiff for money, if any, she has reasonably and necessarily expended, or expenses, if any, she has reasonably and necessarily incurred for medicines, nurses, railroad fares, hotel, hospitals, and surgeons' fees in endeavoring to remedy her physical condition, which you find resulted from the negligence of the defendant (if you find he was negligent under the other instructions given you), if you find defendant liable under the other instructions given."

The italicized portions are the portions criticized. Of these in order. A clear statement of the rule is made by Black, P. J. (who always expressed his ideas clearly) in *Barr v. City of Kansas*, 121 Mo. loc. cit. 30, 25 S. W. 563. Judge Black said:

"The plaintiff, in these personal injury cases, may recover damages suffered up to the date of the verdict, and also such damages as will be suffered in the future; but no allowance for future damages should be made, except for such as it is reasonably certain will result from the original injury. 2 Shear. & Red. on Neg. (4th Ed.) § 743. The question whether future damages will, with reasonable certainty, flow from the injury is one for the jury. But it does not follow that the witness must be interrogated in language which would be proper and appropriate in an instruction. The object of the examination is to get the opinions of persons competent to express an opinion on the subject, and the different shades of opinion which the physicians may entertain, leaving it to the jury to say whether future damages are reasonably certain. Here there was evidence that the plaintiff received severe and permanent injuries to the spine and womb. In such cases the most that any physician can say as to the effect of the injuries on the life of the injured person, however experienced or learned in his profession, is to give his opinion as to the probable consequences. An opinion being expressed, it becomes a proper subject for cross-examination, and in the end it is for the jury to determine the question as to the degree of certainty."

That reasonable certainty of future sufferings must be determined by the jury is the rule here announced. Of course, if there is no evidence upon which to submit this question to this jury, it should not have been submitted. So in this case the real matter for consideration is as to whether or not there was sufficient evidence to submit the question of future sufferings, and the question of future sufferings from a future operation. As to future sufferings from what had been done, up to the date of trial, there is no question. There was sufficient evidence for the submission of that matter. But it is urged that the evidence was insufficient upon the

proposition of there being a reasonable certainty of a future operation, to include the future sufferings upon the occurrence of that operation. Upon this question counsel for appellant quotes from one doctor, but omits a part of his testimony. He also omits material testimony of another. The future operation referred to in the instruction was the one for the removal of the dead kidney. As to this Dr. Caulk, among other things, said:

"Q. What might result from the present condition of that left kidney? A. Infection.

"Q. And if infection should result, would it be necessary that she have an operation to have the kidney removed from the body? A. Chances are she would."

Upon the same question Dr. Judd, among other things, said:

"Q. The connection between the kidney and the bladder is called the ureter? A. Ureter; yes, sir.

"Q. If that connection is in any way destroyed, what is the result upon the kidney? A. The kidney dies.

"Q. It loses its function? A. Yes.

"Q. Is it necessary to have it removed, if it is dead? A. Not necessary.

"Q. A patient may live with a dead kidney? A. Yes, sir.

"Q. Would it be advisable to have it removed? A. Not unless it was making trouble.

"Q. Would it be liable to make trouble? A. I presume about 50 per cent. of the dead kidneys make trouble.

"Q. That requires an operation? A. Yes, sir.

"Q. It is what you call a major operation, is it not? A. Yes, sir.

"Q. That would entail expense and pain and discomfort and all that to the patient?"

This evidence sufficed to allow the question to be submitted to the jury. For aught we know, the jury may have made no award to plaintiff upon these matters. If there was sufficient evidence upon which to submit the matters, then it was a question for the jury. We rule that there was sufficient evidence.

[8] But appellant urges that, although there might be evidence upon which to submit to the jury the question of the "reasonable certainty" of the future operation, and suffering consequent thereupon, yet this instruction as to "future sufferings" uses the word "may" throughout. Our courts have continuously criticized the use of this word, but have never made the criticism so strong as to base a reversal thereon. See *Reynolds v. Transit Co.*, 189 Mo. loc. cit. 421, 88 S. W. 50, 107 Am. St. Rep. 360; *Dean v. Railroad*, 199 Mo. loc. cit. 395, 97 S. W. 910, and cases cited. Personally I have thought these criticisms just. *Garard v. Coal & Coke Co.*, 207 Mo. loc. cit. 257, 105 S. W. 767. The trouble with the use of the word "may," in such connections, is that the jury might give to it the meaning of "bare possibility," instead of "reasonably certain." But this court has never reversed for the use of that word. In-

structions as to future sufferings and damages should, in some appropriate way, carry the idea of "reasonable certainty." However, we have usually taken the whole instruction, and if the word "may," as used in the context, does not appear positively misleading, we have said that it was harmless. The present instruction says:

"In such sum as you find will be reasonable compensation to her for the mental and physical pain and suffering you find she has endured, if any, and that you believe she *will in the future* endure, if any, as a result thereof."

Note the use of the word "will" as to future pain and sufferings; so that, when the whole instruction is read, we do not feel that we should reverse the case on account thereof, in view of our previous rulings.

[9] It is next insisted that the inclusion of the phrase "and surgeons' fees" in the second paragraph of the instruction was error. Appellant urges that this refers to the fees at Mayos' Sanitarium, Rochester, Minn., and that there was no evidence as to their value. It is true that there is no evidence as to the value of these services. It was openly stated by plaintiff that she had not paid for the operations at Mayo's and had not received their bills therefor. She also stated that she had not paid Dr. Ernst for the X-ray picture, nor Dr. Caulk for his services. The plaintiff had a list of items that she had paid, and receipts for most payments, as is indicated by the evidence. After she spoke of the doctors whose bills she did not have, she gave the following testimony:

"Q. Leaving out the bill of the Mayos, and leaving out the bill of Dr. Caulk, which you say you have not received, and Dr. Ernst—that is for the X-ray? A. Yes, sir.

"Q. Just leaving those aside, tell the jury what your other items of expense were. A. Well, besides the Mayos' bill—

"Q. Well, just leave the Mayos' bill out of consideration, and leave Dr. Caulk's and Dr. Ernst's bills out. A. Well, these others are \$1,690.

"Q. Well, give the items there, Miss Krinard. Mr. Gentry wants you to give the items of that. A. Well, I am afraid I haven't those, Mr. Thompson.

"Q. Have you the items? A. I have not. These are all the receipts, and these are things I have no receipts for. You see, I have no receipt for that (indicating papers). No, Mr. Thompson; I haven't those here.

"Q. Well, you have down here, 'Drugs—prescriptions, \$25.50.' A. That is, just what is on that paper I have no receipt for, you understand.

"Q. And you have 'Incidentals.' What do you mean by that? A. Those are expenses that come up during my illness, that my people paid, don't you know.

"Q. You have that as \$75? A. Yes.

"Q. Well, can't you tell us what that is, any more definitely than that? A. Well, it is very hard to say. They got me everything for my

comfort. I had to buy cotton; I don't know how many dollars' worth of cotton that it was. I had \$15 or \$20 worth of cotton. And besides I had to buy urinal vessels, and many, many things that were necessary.

"Q. You have here 'Nursing, \$90.00.' What was that for? A. I brought that in for this reason: My sister, who waited upon me, was losing her time at the office. Her time was worth twice more than that. She stayed with me, the only sister I had with me at the time that waited on me, and she did the nursing, saved a nurse, and so I put down \$90 for nursing.

"Q. Over what period of time was that? A. For the four months.

"Q. 'Transportation, board and room at Rochester, \$374.95.' Is that correct? A. Yes; that is correct.

"Q. By 'transportation' you mean your railroad ticket? A. Yes; I kept track of every cent, to have it just right.

"Q. 'St. Mary's Hospital.' What hospital is that? A. That is the hospital at Rochester.

"Q. '\$66.00.' Is that what you paid them? A. Yes, sir; three weeks' board.

"Q. And you have here 'Use of operating room, \$5.00.' What was that? A. That was when I was taken there for one of the operations—the second operation—I was taken to the operating room.

"Q. That is just for that one operation? A. Yes, sir; just for that one operation.

"Mr. Gentry: I don't believe I heard the details of that examination. And I will waive further details of it. Just let her go on with her statement of the total amount she paid.

"Witness: Well, everything is there.

"Mr. Thompson: Q. You have kept an accurate account of your expenses? A. Yes, sir. I have receipts for all the others, but I simply put those down. Here are the receipts to show for everything except those; I haven't the receipts for those."

It clearly appears, from other testimony, that Dr. Bartlett examined the plaintiff, and Dr. Raines treated her, after defendant's operations, and before she went to Mayos' Sanitarium. She said that she had paid all her expenses, except Ernst, Caulk, and the Mayos. She had the items before her, and was being questioned in detail about each, when counsel for defendant waived the details and asked that she state it in a lump sum, which she did as \$1,690. In these items were at least two physicians and surgeons, Raines and Bartlett. This was sufficient to justify the inclusion of the phrase objected to by defendant now.

In addition to this, it is clear that the counsel for the plaintiff made it clear to the jury that the bills of Ernst, Caulk, and the Mayos were not to be considered. The specific statement in the record makes it clear that no jury would consider those items, when plaintiff had been directed to omit them, because she did not have them. On the whole, this portion of the instruction is good, under the evidence.

From it all, it follows that the judgment should be affirmed; and it is so ordered. All concur.

**CITY OF ST. LOUIS v. COOPER CARRIAGE WOODWORK CO. et al.**  
(No. 20128.)

(Supreme Court of Missouri, Division No. 1.  
Dec. 1, 1919.)

**1. MUNICIPAL CORPORATIONS — 648 — PRESCRIPTIVE RIGHTS TO LAND FOR STREET PURPOSES LIMITED BY USER.**

Where the rights of the public to land for street purposes are predicated upon user alone, the width of the way or the extent of the servitude is measured by the character of the user; for the easement cannot be broader than the user.

**2. EMINENT DOMAIN — 237(5) — ERRONEOUS REPORT OF COMMISSIONERS IN STREET OPENING PROCEEDINGS SET ASIDE.**

In street opening condemnation proceedings, where evidence showed easement in public over a strip of land not exceeding 30 feet in width, report of commissioners, based on theory that 80 feet was burdened with the easement, was properly set aside.

**3. EMINENT DOMAIN — 237(2) — COURT MAY CONFIRM REPORT OF COMMISSIONERS IN STREET OPENING "PROCEEDING" NOTWITHSTANDING DISAPPROVAL BY MUNICIPAL ASSEMBLY.**

Where commissioners, ascertaining damage to property owners in proceedings for establishment, opening and widening of street, were appointed and filed their report after charter of city of St. Louis 1914 took effect, the disapproval of the report by the municipal assembly did not preclude court from confirming report under Charter of 1876, art. 6, § 9, requiring court to set aside report if disapproved by municipal assembly, since section 2 of schedule of charter of 1914 requires that "subsequent proceedings" in condemnation proceedings be conducted as nearly as practicable in accordance with the provisions of such charter; the rejection of report upon disapproval of municipal assembly being a "proceeding," and not a substantive right.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Proceedings.]

**4. WORDS AND PHRASES—"PROCEEDING" IN CIVIL ACTION.**

A "proceeding" in a civil action is an act necessary to be done in order to attain a given end, and a prescribed mode of action for carrying into effect a legal right, the proceeding presupposing and following the right.

**5. CONSTITUTIONAL LAW — 106 — NO VESTED RIGHTS IN PROCEDURE.**

A party litigant has no vested rights in mere matters of procedure.

**6. EMINENT DOMAIN §246(2) — CITY MAY ABANDON PROCEEDINGS.**

City of St. Louis charter of 1914 does not interfere with the exercise of an absolute discretion by the legislative body of the city to dismiss or abandon a condemnation proceeding at any stage before final judgment if in its power the public interest demands such action.

**7. MUNICIPAL CORPORATIONS §654—ACTS OF TAX AUTHORITIES EVIDENCE AGAINST CITY'S CLAIM TO STREET BY USER.**

While the prescriptive rights of the public cannot be conclusively admitted away by the taxing officers of the city, such acts of the municipal authorities may properly be considered as circumstances in connection with all the other facts in evidence on the issue of whether the public user was permissive or hostile and adverse.

**8. MUNICIPAL CORPORATIONS §648—PERMISSIVE USE OF LAND CONVEYS NO PRESCRIPTIVE RIGHT FOR STREET PURPOSES.**

Where public travel over tract of land of which owner was in actual occupation was not confined to a certain and well-defined line, but was variant and indiscriminately over the entire tract, including portion within extended lines of certain street, the public acquired no right of way by user to portion within extended lines of such street; the use thereof being permissive.

**9. MUNICIPAL CORPORATIONS §648 — USE CONVEYS NO PRESCRIPTIVE RIGHT FOR STREET PURPOSES UNLESS ADVERSE.**

The public cannot acquire a prescriptive right to pass over land generally known over a certain and well-defined area unless its use is adverse.

**10. EMINENT DOMAIN §238(6) — FINDINGS INVOLVING DETERMINATION OF TITLE NOT REVIEWABLE.**

In suit to condemn land for establishing, opening, and widening of certain street, where the proceeding was at the instance of the city converted into one for determination of title, it was in the nature of an action at law in which parties were entitled to a jury, and findings of facts by the court, where abundantly supported by substantially competent evidence, were not reviewable on appeal.

Appeal from St. Louis Circuit Court; Wm. M. Kinsey, Judge.

Condemnation suit by the City of St. Louis against the Cooper Carriage Woodwork Company and others. From judgment confirming report of commissioners, the City appeals. Affirmed.

Charles H. Daues and G. Wm. Senn, both of St. Louis, for appellant.

Eliot, Chaplin, Blayney & Bedal, McLaran & Garesche, and E. H. Wayman, all of St. Louis, for respondents.

RAGLAND, C. This is a condemnation suit instituted by the city of St. Louis No-

vember 6, 1913, pursuant to an ordinance theretofore enacted for the establishment, opening, and widening of Bulwer avenue as an 80-foot street from Adelaide avenue to Harris avenue.

Bulwer avenue runs north and south and Adelaide and Harris run east and west, Harris being the next street north of Adelaide. The locus in quo was originally a part of the O'Fallon farm, which in a partition proceeding in 1870 was laid out into blocks and lots, with streets and alleys conforming to the streets and alleys in the subdivisions immediately north and south, a plat thereof made and duly recorded. Bulwer avenue was designated on this plat as Fourth street, 80 feet wide, and the proceedings had in the partition suit effectually dedicated for street purposes all of the land included within the street sought to be established in this proceeding except two parcels. Prior to 1858 Bulwer avenue, under the name of Fourth street, had been dedicated in the subdivision of Lowell as far north as the O'Fallon farm, which was separated from Lowell by O'Fallon avenue, now Adelaide. In 1858 O'Fallon conveyed for school purposes a lot 150 feet square, fronting 150 feet on the north line of O'Fallon avenue, and bounded on "the southwest by Fourth street when extended." When the commissioners in the O'Fallon partition proceeding made the plat subdividing the land into lots and blocks and laying out the streets and alleys, they evidently supposed that the east line of Fourth street as shown on their plat was coincident with the west line of this school lot. Their plat so indicates. In this, however, they were in error. Fourth street as laid out by them cut off of the school lot a small triangular parcel of ground about 7 feet in width at its base on O'Fallon avenue. In 1860 O'Fallon conveyed to the St. Louis Railway Company a tract of land, fronting 400 feet on the east side of Bellefontaine road (now Broadway) and extending eastwardly between parallel lines 545 feet, known afterwards as the "Anderson tract." The southeast corner of this tract lay diagonally across the prolongations of the lines of Fourth street between Harris and O'Fallon avenues. The plat of the commissioners in the O'Fallon partition discloses this, and hence they only attempted to dedicate Fourth street from Harris avenue south to the Anderson tract and from O'Fallon avenue north to said tract. The object of this suit, therefore, was to condemn that part of the school lot and that part of the Anderson tract that lie within the lines (extended) of that part of Bulwer avenue that was dedicated under the name of Fourth street by the O'Fallon partition proceeding. As will appear hereafter, the exact descriptions and areas of these two

parcels of land, so far as the questions involved in this appeal are concerned, are of no importance. The school lot is owned by the defendant board of education, and the Anderson tract by the defendant Cooper Carriage Woodwork Company (an incorporated company), subject to liens and leases held and owned by the remaining defendants.

In 1870 and for many years thereafter the land embraced within the O'Fallon estate and the Anderson tract, as well as large surrounding areas, was in part open, in part fenced and used for dairy and other agricultural purposes. The streets and alleys laid out through the O'Fallon estate were mostly unused, the few improvements in that territory were widely scattered, and the region had the appearance of suburban rather than of urban property. In time fences were partly built along the line of Bulwer avenue where it had been dedicated, buildings were erected upon disconnected lots, and by looking south from some point in Bulwer avenue north of the Anderson tract the avenue appeared to be continuous across the Anderson tract, and the same appearance presented itself in looking northwardly from some point in Bulwer avenue south of the Anderson tract. In time people living in that vicinity and having occasion to travel over Bulwer avenue began to use that part of the Anderson tract in question as if it were a part of Bulwer avenue, and thus a roadway similar to an ordinary country road about 20 or 25 feet wide began to appear. The land immediately east of the land in question was as early as 1878 inclosed with a fence and on what was supposed to be the east line of Bulwer avenue. The roadway just mentioned as passing over that portion of the Anderson tract in controversy ran about 15 feet west of the fence just referred to. The Anderson tract was uninclosed until the defendant Cooper Carriage Woodwork Company became the owner, and the tract was used as commonly by persons driving or walking obliquely across it at various angles as across the part within the extended lines of Bulwer avenue. The defendant Cooper Carriage Woodwork Company, hereinafter referred to as the defendant, or respondent, acquired the Anderson tract in 1908, and at once constructed a manufacturing plant on the west side of an extension of the west line of Bulwer avenue. It did not inclose its land until December, 1912, when it constructed a fence following the boundaries of its land obliquely across Bulwer avenue. The school lot was fenced as early as 1869. In 1899 the city laid a 20-inch water main from a point south of Adelaide avenue northwardly through the area in dispute to a point north of Harris avenue along a line 22 feet east of the west line of Bulwer avenue. In 1903 it installed street lamps along Bulwer avenue between Harris and Adelaide, though

none of these lamps were placed within the limits of the disputed area.

Commissioners to assess the damages and benefits were appointed February 2, 1914. Their report was filed June 17, 1914, in which they reported that the part of the Anderson tract within the lines of Bulwer avenue (extended) had theretofore been used adversely and continuously by the public as a street for more than 20 years, and that "said parcel constitutes a part of Bulwer avenue extending north and south from said parcel," but it awarded defendant \$50 damages. The defendant filed exceptions to the report; those pertinent to the matters presently to be considered being: That the plaintiff by its pleading was estopped to claim any right or interest in the land in controversy adverse to defendant; that the commission was without authority to try questions of title; that in fact there was no such adverse user as they reported; and that it had not been given an opportunity to be heard on the plaintiff's claim in that respect. The exceptions were tried to the court; a jury being waived. It was practically conceded that defendant had not been afforded an opportunity to be heard on the question of adverse user, and the sole issue tried before the court was whether the public had acquired an easement for street purposes over the land in question by prescription. Both parties requested the court to state separately its finding of facts and conclusions of law. The court sustained defendant's exceptions, ordered a new appraisalment, and appointed another commission. The court made a tentative finding of fact to the effect that not more than a strip approximately 25 feet wide and running about 15 feet west of the east line of Bulwer avenue across the land in question had been used by the public as a highway adversely for more than 10 years. At the time of making the order sustaining the exceptions the court was of the opinion both that the plaintiff was estopped to claim an easement adverse to defendant and that the commission was without power to hear and determine that question. However, on the hearing of plaintiff's motion to set aside that order these views seem to have undergone a modification, and the court based its action in awarding a new appraisalment on his finding that the prescriptive right of the public, if any, was over a strip not exceeding from 25 to 30 feet in width and on the failure of the commission to give defendant an opportunity to be heard in respect to such claimed user.

The second commission was appointed August 10, 1915. It filed its report June 14, 1916. This report made no mention of the plaintiff's claim of an easement over defendant's land. It awarded defendant substantial damages. Thereafter the board of aldermen of the city of St. Louis by resolu-

tion disapproved of the report, and on July 6, 1916, a certificate of the clerk of said board was filed in the cause reciting such action and disapproval. Thereupon the plaintiff moved that the report be set aside and another appraisement ordered, basing its motion on the action of the board of aldermen. This motion was overruled, and thereupon plaintiff filed exceptions to the report. The exceptions were tried to the court, a jury being waived. In this as on the hearing on the exceptions to the first report the sole issue tried was that of adverse user by the public of the land in controversy as a street. All the evidence adduced on the first hearing, preserved by bill of exceptions, was offered, together with additional evidence on the part of both plaintiff and defendant. Both parties requested a separate finding of fact. The court found, in effect, that the use of defendant's land by the public was permissive, and not adverse, overruled the exceptions, and confirmed the report.

Appellant seeks to have the judgment of the trial court reversed, with directions to that court to set aside the report of the second commission and to reinstate and approve the report of the first, all to the end that the defendant be awarded nominal instead of substantial damages.

[1, 2] 1. The trial court set aside the first report because: (1) It found as a fact that the way that had been used by the public over that part of defendant's land in controversy did not exceed from 25 to 30 feet in width; and (2) the commission had not given the defendant a hearing on the question of adverse user. As to the first, appellant asserts that the court was led into error because it ignored "color of possession, which in this instance carried beyond the limits of the generally used and defined roadway and to the lines which would make the highway by prescription correspond with the lines of the admitted highway adjacent to the disputed portion." The court's finding, at least to the extent that it found that that part of defendant's land in controversy that had actually been traveled over by the public did not exceed a strip 30 feet in width is fully supported by the evidence; in fact, there was none to the contrary. The evidence does not show that there was ever any attempted dedication of the land in question, or that there had ever been a proceeding had to condemn it, defective or otherwise, nor does it disclose any other fact or circumstance upon which could be predicated a claim of color of title to the way in question, either in the city of St. Louis or in that intangible entity "the public." The rights of the public claimed by appellant are predicated upon user alone. In such case the rule is firmly established that the width of the way or use extent of the servitude is measured by the character of the user; for the easement can-

not be broader than the user. Elliott on Roads and Streets (3d Ed.) 193. This rule, construed most liberally in its application to highways acquired by user and prescription, would limit their width to the land actually occupied and reasonably necessary for their use and repair as highways. What would be reasonably necessary in the instant case is purely a question of fact. The authorities cited by appellant do not militate against the views herein expressed. Considered most favorably for appellant, the evidence on the first hearing showed an easement in the public over a strip of defendant's land not exceeding 30 feet in width, and, as the first commission assessed defendant's damages on the mistaken view that the entire 80 feet was burdened with the easement, the court's action in setting aside its report was fully justified on that ground alone.

[3] 2. The appellant next insists that, as the board of aldermen disapproved the second report, the court erred in not setting it aside and ordering a new assessment of damages and benefits on the motion of the city. This contention is based on section 9, article 6, of the charter of 1876, which provides:

" \* \* \*. If the municipal assembly fails to act upon such report in the time limited (by order of the court), said report shall be deemed approved, but if during said time limited the municipal assembly disapproves said report of said commissioners the said court shall set aside said report and order a new assessment of damages and benefits. \* \* \*"

The new charter, which became effective August 29, 1914, contains no such provision, but leaves the city in a condemnation proceeding in precisely the same attitude in this respect as the defendants therein; that is, that it may invoke the action of the court to review such report upon exceptions duly filed, and for cause shown may have the same set aside and a new assessment made by other commissioners. Section 2, schedule of the 1914 charter, provides:

"All ordinances authorizing \* \* \* the appropriation \* \* \* of private property for public use \* \* \* in force when this charter takes effect, and all things done thereunder, shall remain valid, and subsequent proceedings thereunder, including those in pending condemnation proceedings shall be conducted as nearly as practicable in accordance with the provisions of this charter."

[4] The second commission was appointed and filed its report after the new charter went into effect, notwithstanding appellant insists that section 9 of the old charter gave it an absolute right to have the report set aside on the disapproval of the board of aldermen, and that this right was in no wise affected by the adoption of the new charter; in other words, that this provision did not merely prescribe a mode of procedure, but

conferred a substantive right. The section of the new charter above quoted provides that "subsequent proceedings" in pending condemnation proceedings shall be conducted as nearly as practicable in accordance with the provisions of that charter. A "proceeding" in a civil action is an act necessary to be done in order to attain a given end. It is a prescribed mode of action for carrying into effect a legal right, and, so far from involving any consideration or determination of the right, presupposes its existence. The proceeding follows the right. *Rich v. Husson*, 8 N. Y. Super. Ct. 617; *Hopewell v. State*, 22 Ind. App. 489, 54 N. E. 127.

[5, 6] Under the old charter the appellant had the right to take and damage private property for public use upon the payment of a just compensation for such taking and damaging. As its right to appropriate and damage private property was dependent upon its payment of a just compensation therefor, it had the right to have that compensation fixed at a sum that was just. All the acts prescribed by that charter for the ascertainment of that sum were proceedings. Under it the city by its legislative body could arbitrarily reject the report of a commission assessing damages and benefits and have new appraisements ad libitum until a report was brought in that conformed to the municipal assembly's idea of fairness and justness. This was but a method of ascertaining a just compensation for private property appropriated or damaged for public use. The new charter fully preserves the city's power to condemn; but it changes the procedure in the respect that it requires the city to show wherein an assessment of damages and benefits is unjust instead of permitting it to reject it arbitrarily. This change in no wise limits or restricts the right to have a just compensation assessed; it merely effects a slightly different method of its ascertainment. It follows that the rules governing the setting aside of reports of commissioners in condemnation proceedings prescribed in both charters were rules of procedure. Those of the old charter were superseded by those of the new before the filing of the report of the second commission, and hence the latter were controlling. A party litigant has no vested rights in mere matters of procedure. *St. Louis v. Calhoun*, 222 Mo. 44, 120 S. W. 1152. In passing it should be said that the new charter in no way interferes with the exercise of an absolute discretion by the legislative body of the city to dismiss or abandon a condemnation proceeding at any stage before final judgment, if in its view the public interest demands such action.

3. The appellant complains that on the hearing on the exceptions to the second report: (1) That the trial court admitted incompetent evidence over its objection; (2)

that the finding resulted from incorrect views of law entertained by the court; and (3) that the finding is against the weight of the evidence.

[7] (1) A search of the record discloses that the only evidence received by the court over appellant's objection was that relating to the assessment and collection of taxes by the city, both general and special, against the land in controversy, and the payment thereof by the successive owners without protest. While it is true that the prescriptive rights of the public, if any, cannot be conclusively admitted away by the taxing officers of the city, yet such acts of the municipal authorities may properly be considered as circumstances in connection with all the other facts in evidence on the issue of whether the public user was permissive or hostile and adverse. *Detroit v. Myers*, 152 Mich. 666, 116 N. W. 620; *Railroad v. City of Bloomington*, 167 Ill. 9, 47 N. E. 318. The trial court so held at the time of the reception of the evidence complained of. We rule the point against appellant.

[8, 9] 2. The trial court during the progress of the cause filed several memorandum opinions expressive of its views of the rules of law applicable to the facts in proof. Appellant has devoted several pages of its brief to a discussion of these views, pointing out wherein it deems them erroneous. The court found as facts that the Anderson tract, up to the time defendant bought it and went into the actual occupation of it in 1908, was an open and unused common, that the public travel over it was not confined to a certain and well-defined line, but that the travel over it was variant and indiscriminately over the entire tract, including that portion within the extended lines of Bulwer avenue, and that such use was permissive. In such circumstances the public acquired no right of way by user; it cannot acquire a prescriptive right to pass over land generally nor over a certain and well-defined area, unless its use is adverse. As the trial court's conclusion, based on these facts, is correct, it is immaterial by what mental process it was arrived at.

[10] (3) There is no suggestion in appellant's brief that the damages awarded defendant by the second commission and approved by the court are excessive, if as a matter of fact the city or the public did not have a prescriptive way over defendant's land. As between the plaintiff and the defendant Cooper Carriage Woodwork Company, this proceeding was as at the instance of the appellant converted into one for the determination of title. Having been invoked and used to that end, the same character of procedural attributes would attach as are found in the ordinary actions of ejectment, or to determine title, where no equitable relief is sought. In other words, it



was a plain action at law in which the parties were entitled to a jury. It follows that, as the trial court's finding of facts is abundantly supported by substantial competent evidence, it is not subject to review by this court.

The judgment is for the right party, and should be affirmed.

It is so ordered.

BROWN and SMALL, CO., concur.

PER CURIAM. The foregoing opinion of RAGLAND, C., is adopted as the opinion of the court. All the Judges concur.

**DRAINAGE DIST. NO. 1 OF BATES  
COUNTY v. BATES COUNTY.**  
(No. 21588.)

(Supreme Court of Missouri, Division No. 1.  
Dec. 1, 1919.)

**1. APPEAL AND ERROR §1195(1)—DECISION ON FORMER APPEAL IS LAW OF CASE.**

A decision on a former appeal is, on retrial, conclusive as the law of the case.

**2. COURTS §183—RECORD OF LIMITED COURT MUST SHOW JURISDICTION.**

The county court is bound by the general rule that court of limited jurisdiction cannot act unless its records affirmatively show all jurisdictional facts, though this rule may be altered by statute.

**3. DRAINS §35—RECITAL IN ORDER OF COUNTY COURT AS TO NECESSITY OF PROJECT.**

While under Rev. St. 1909, § 5578, drainage improvements cannot be ordered by the county court unless necessary, etc., *held* that under section 5584, relating to the records of the county court, a judgment providing for a drainage project is not open to attack because the order therefor did not contain recitals as to its necessity; the provisions in the latter section making no provision for recital of such matter in the record.

**4. DRAINS §70—ASSESSMENT MAY BE MADE AGAINST COUNTY FOR TOWNSHIP ROAD.**

Under Rev. St. 1909, § 5591, providing for assessments for drainage districts against public or corporate roads, whether county, state, or free turnpike roads, etc., a township road is a public road, and benefits thereto are properly assessed or apportioned to the county.

**5. DRAINS §79—DIVISION OF ASSESSMENTS AGAINST COUNTY INTO INSTALLMENTS.**

An order of the county court relating to assessments or apportionments against the county for public roads *held*, regardless of a clerical omission, to divide the apportionment or assessment into installments.

**6. DRAINS §79—DIVISION OF ASSESSMENTS AGAINST COUNTY INTO INSTALLMENTS.**

Rev. St. 1909, § 5601, providing for division of assessments into installments, is broad enough to include apportionments against coun-

ties for public roads provided for section 5591, and hence it was not error for the county court in creating a drainage district to divide the apportionment against the county into installments.

**7. LIMITATION OF ACTIONS §34(7)—DRAINAGE ASSESSMENT BARRED BY 5-YEAR STATUTE.**

An installment of an apportionment on account of public roads against a county for a drainage project is barred by a 5 years' delay in enforcing collection of the same.

**8. DRAINS §70—ASSESSMENT AGAINST COUNTY FOR ADDITIONAL WORK.**

Under Rev. St. 1909, § 5614, providing for assessments for additional work, the cost of such additional work may be apportioned against the county on account of public roads within the district; section 5591 providing for apportionment of costs against such roads in the first instance.

**9. DRAINS §2(3)—LIBERAL CONSTRUCTION OF DRAINAGE LAW.**

Drainage acts being highly remedial, statutes designed to accomplish a great and beneficial public purpose must be liberally construed.

**10. DRAINS §90 — INTEREST AND ATTORNEY'S FEES ALLOWABLE ON APPORTIONMENT AGAINST COUNTY.**

In a suit against a county to collect installments of apportionments made against the county on account of public roads pursuant to Rev. St. 1909, § 5591, *held*, in view of section 5573, the interest and attorney's fees provided for by section 5599 in an action to enforce drainage assessments may be allowed.

**11. DRAINS §79—NOTICE OF ASSESSMENT AGAINST COUNTY NOT NECESSARY.**

As the state can tax itself or a county without any proceedings, a county cannot defeat an apportionment against it for expenses for a drainage project based on the extent of public roads within the district, on the ground that it was not given special notice of the proceedings furnishing the basis for the apportionment.

**12. DRAINS §71—ASSESSMENT MAY BE MADE ON ROADS AND LANDS NOT ACTUALLY DRAINED; "ANY," "OR."**

Under Rev. St. 1909, § 5578, providing for the creation of drainage districts to drain "any lands, or any roads, or any railroads," the cost of the improvement may be apportioned against public roads or lands in the districts, although drainage is not necessary for the roads or lands so assessed, where the general project is beneficial to all of the property, public and private, in the district; the word "any" not meaning "all," and "or" not meaning "and."

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Any; Or.]

Appeal from Circuit Court, Bates County; Charles A. Calvird, Judge.

Suit by the Drainage District No. 1 of Bates County against Bates County. From a judgment for defendant, plaintiff appeals. Reversed and remanded.

Gardner Smith, W. O. Jackson, and D. C. Chastian, all of Butler, for appellant.

T. W. Silvers, J. A. Silvers, and W. B. Dawson, all of Butler, and E. B. Silvers, of Kansas City, for respondent.

SMALL, C. I. This is a suit for the collection of certain installments of assessments for benefits to the public roads in the drainage district against Bates county. It is the second appeal by the plaintiff. On the first trial the circuit court sustained a demurrer to the petition on the ground that it failed to state a cause of action. This court reversed the ruling of the lower court, and held the petition sufficient. Our opinion was delivered by Graves, J., and is reported in 269 Mo. 78, 189 S. W. 1176. After the cause returned to the circuit court, the defendant filed an amended answer, consisting of a general denial, and setting up certain objections to the validity of the taxes sued for, which, so far as insisted on in this court, will be referred to in the course of the opinion.

On the trial of the case, the defendant introduced no evidence, but the plaintiff introduced evidence, consisting of documents and records supporting all of the material allegations of the petition, unless respondent's objections thereto are well taken. We shall refer to such portions of the evidence as pertain to such objections.

The order of the county court of June 20, 1906, dividing the assessment or apportionment to the county into installments, was as follows:

" \* \* \* The court \* \* \* doth determine and order that each and every tract of land and corporate road and railroad \* \* \* is hereby assessed with a fund as set out in the report of the engineer and viewers \* \* \* as here-tofore confirmed by the court.

"It is further ordered that said assessments \* \* \* be placed on the tax book for said drainage district \* \* \* against the lands, corporate roads and railroads, respectively, so assessed, and that said principal sum, with annual interest thereon, be paid in 18 annual installments at the same time each year that the ordinary state and county taxes are due and payable, and that said assessments respectively bear interest at the rate of 6 per cent. per annum on the principal sum so assessed and remaining unpaid each year. It is further ordered that the principal sum so assessed against each tract of land, public and corporate road, and railroad in said district shall be paid in installments at the following rate per annum on such principal sum, to wit: For the year 1907, 1 per centum of each such assessment,"

and so on, stating the per centum of each such assessment for each of the 18 years to and including 1924.

There was also an entry of an order by the county court made August 8, 1905, "reciting the proper publication of notice, etc., and that more than two-thirds in quantity of the owners of the land to be affected by the pro-

posed drainage are in favor of the construction of the work as petitioned for, and finding that the proposed ditch and improvements petitioned for are necessary for agricultural and sanitary purposes, and that they would be of public utility and conducive to the public health, convenience, and welfare, and would prevent overflows. This order was in due form, and reserves the appointment of engineer and viewers for the future."

The evidence further showed that the roads in the drainage district for which the benefit assessments sued for were made had been opened and used by the public for many years prior to such assessment, but some of them had been laid out by the township board, and some of the older ones had not, but the public had used them all for more than 10 years.

The case was tried by the court without a jury, and the court found for defendant, and against plaintiff, and rendered judgment accordingly.

Plaintiff duly appealed to this court.

II. On the former appeal, this court said (269 Mo. loc. cit. 84, 189 S. W. 1176):

(1) "Plaintiff does not ask for a lien or the enforcement of a lien. Under the instant petition the only question is whether or not the plaintiff is entitled a general judgment against the county for these assessments made for conceived benefits to the public roads of the county. \* \* \*"

(2) "In our judgment the Legislature could say that public property may be benefited by public improvements, and could further say that for such benefits an assessment should be made, and the municipality be made to respond by a general judgment to be paid out of funds in the general treasury. \* \* \*"

(3) Benefits, so far as a public road is concerned, are not assessed against the public road, but are apportioned to the county 269 Mo. 86, 189 S. W. 1178. " \* \* \* The right created in favor of the drainage district, so far as public roads are concerned, is one against the county, and not against the public roads." 269 Mo. 88, 189 S. W. 1179. " \* \* \* In the case at bar, the statute ([Rev. St. 1909], § 5591), authorizes the benefits accruing to public roads to be charged to the county. There is no adequate remedy provided, and the usual remedy would be an action, as here, against the county, \* \* \* and \* \* \* this action is properly brought for a general judgment against the county. \* \* \*" 269 Mo. 89, 189 S. W. 1179.

(4) "Nor should the demurrer have been sustained because the assessments sued for were barred by the statute of limitations. The general rule in this state is that the statute does not begin to run until the tax has become delinquent under the law. State ex rel. v. Wilson, 216 Mo. 291 [115 S. W. 549]. These assessments apportioned to Bates county would become delinquent on December 31st each year. The statute reads: 'The said tax shall become delinquent if not paid on or before the thirty-first day of December of each year, and when so delinquent shall bear interest at the rate of one per cent. per month until paid, and the collector shall bring suit for all delinquent as-

assessments or installments thereof, and interest thereon, within six months after an assessment or installment thereof becomes delinquent.' It is urged, because this portion of section 5599, above quoted, says the collector shall bring suit within six months, that therefore the action is barred after that time. The words should not be so construed. \* \* \* With this point out of the way we have not considered whether or not one or more installments may not be barred, because the demurrer is general and goes to the whole petition, and as to most of the items there is no bar, under our 5-year statute of limitations. It is suggested that at least one item is barred, and, if that is so, and the matter is properly raised, it can be eliminated on the trial. The judgment nisi is reversed, and the cause remanded." 269 Mo. 90, 91, 189 S. W. 1180.

[1] What we decided on the former appeal is not open to further controversy on this appeal, and if it were we are entirely satisfied with the opinion rendered and conclusions reached at that time.

[2, 3] III. It is contended by learned counsel for respondent that as section 5578, R. S. 1909, only gives the county court power to cause drainage improvements to be made, such as those upon which these assessments are based, "when necessary" for certain drainage purposes, there must be an affirmative statement on the records of the county court of the necessity of the proposed improvement for such purposes.

It is true that the county court is a court of limited jurisdiction, and it is a general rule that it cannot act unless its records affirmatively show all jurisdictional facts made necessary to its power to act. (Although this rule is somewhat shaken as applied to drainage tax cases by State ex rel. v. Wilson, 216 Mo. 215, 115 S. W. 549.) But there can be no question that this rule may be altered by statute. There is no complaint that the petition, as required by section 5579, R. S. 1909, did not set "forth the necessity therefor," but the complaint is that the court in its order initiating the improvement and assessment did not do so. This is not required, because section 5584, R. S. 1909, provides what the record shall recite in this respect, and that is, upon the hearing of the second report of the viewers, "If the county court shall find that the proposed ditch \* \* \* is necessary for sanitary or agricultural purposes, or would be of public utility or conducive to the public health, convenience or welfare, it shall cause to be entered upon the record of the court such finding, and an order reappointing," etc., to lay out and proceed with the work shall be made. The statute having expressly stated what facts the court's record shall state to give it power to act and proceed with the improvement, it is not necessary for the record to state other facts. "Expressio unius est exclusio alterius." The evidence set out, supra, shows that the recitals on the records of the county court complied

with said section 5584. We must therefore rule this point against the respondent.

[4] IV. It is next objected that the statute limits the charge against the county to benefits to county roads, and that by reason of the township organization of Bates county the roads were township roads. The statute, said section 5591, provides:

"When any ditch \* \* \* drains, either in whole or in part, or benefits any public or corporate road or railroad, the viewers shall apportion to the county, if a county or state or free turnpike road, or if a corporate road or railroad, to the company \* \* \* controlling the same, the same proportion of the costs \* \* \* in proportion to the benefits received as to private individuals."

The words "county, or state or free turnpike road," which we have italicized in above section refer to the "public" roads just previously mentioned and are used as synonymous therewith. The benefits to all "public" roads are thus to be charged to the county. This court so held in the former appeal, as the excerpt from the opinion, supra, shows. The so-called township roads in the drainage district were public roads. A road opened and maintained by a township for public use is a public road. All roads opened and maintained by the public, or any part or agency thereof, for public use are public roads. In building or maintaining roads for the public use, the city, county, town, township, road district, and adjoining landowners, that build and maintain and pay the cost thereof, are but agencies or trustees of the general public—the sovereign, the state—in so doing. The state holds an easement in all such roads for highway purposes for the public—the general public, and not for any part of it, although the people of such part may, under the law, be required to and do pay the entire cost of creating and maintaining such road or highway.

We hold, therefore, that the roads in question here are all public roads, and the benefits thereto were properly assessed or apportioned to the county.

[5] V. It is also asserted by respondent that the county court by its order never divided the apportionment or assessment against the county into installments payable yearly. The first two paragraphs of the record entry set forth in our statement of facts omit the words "public roads," but the last paragraph expressly states that:

"It is further ordered by the court that the principal sum so assessed [i. e., by the paragraphs preceding and shown by the report of the viewers] against each tract of land, public and corporate road and railroad in said district shall be paid in installments, at the following rate per centum on such principal sum, to wit: For the year 1907, 1 per cent. of each such assessment"

—and so on, stating the per cent. of *each* assessment to be paid each year until and including 1924.

The whole entry must be read together, and when so read, it is plain that the words "public roads" were inadvertently omitted from the preceding paragraphs by a clerical error, because the last paragraph assumes that the public roads had been assessed by the preceding portion of the order. To carry out the intention and evident meaning of the whole order, the words "public roads" will be read into the preceding paragraphs at their proper place, so as to make such paragraphs relate in all respects to assessments for public roads, the same as to assessments against lands and corporate roads and railroads.

We rule this point against respondent.

[6] VI. It is also urged that the county court had no authority to make the apportionment against the county payable in installments. Section 5601, R. S. 1909, provides:

"\* \* \* The county court shall determine in what number of installments they will require the assessments and the interest thereon, as confirmed by the court, to be paid, and also the rate of interest that said assessments shall bear."

It is true that in other sections of the statutes the charge against the county is referred to as an apportionment, and the charge against lands as an assessment; but both are general terms, having the same general meaning and significance, and we see no reason why the word "assessments" may not in said section 5601 also embrace "apportionments" against the county mentioned in section 5591. The "apportionments" against the county and "assessments" against the land were both confirmed by the county court, and are both intended to be payable in such number of installments as the county court may determine. There is no reason for any distinction. It is all matter in *pari materia*. Furthermore, this court, on the former appeal, in holding that only the first installment due in 1908 might be barred by the 5-year statute of limitations, determined that under this law such assessment or apportionment might be made payable in installments. Otherwise the court would have held all of the installments barred, and not simply the first falling due. The question is therefore no longer an open one, but is foreclosed by our former opinion. We overrule the contention of respondent in this regard.

[7] VII. We sustain the respondent's point that the installment sued for falling due December 31, 1908, is barred by the 5-year statute of limitations, but the other installments are not barred, because they were not due nor delinquent 5 years prior to the bringing of the suit. This was also in effect so decided in the prior opinion of this court.

[8] VIII. It is also contended by respondent that a portion of the installments sued for was for "additional work," and that assessments for such work, by section 5614, R. S. 1909, are limited to assessments against lands in the district, and nothing can be charged to the county for public roads. Said section 5614 provides:

"\* \* \* The county court shall divide the cost of any such work pro rata according to the original assessments of benefits against the land" in the district.

Then follow provisions for ascertainment of damages, advertisement, letting the contract, performance, and paying for, and then details of the additional work, all of which are required to be "as provided for in this article and the amendments thereto" for constructing the ditch. It cannot be doubted, after reading the whole of said section 5614, and giving it a liberal construction in connection with the remainder of the article, that there was no intention of excluding "public roads, corporate roads and railroads," all of which were embraced in the assessment for the original work under said section 5591 (which is in the same article), but to include them all in the assessment for such additional work. Any other construction would "stick in the bark," and violate the spirit of equal taxation against all property in the district benefited in proportion to benefits which pervades the whole act.

[9, 10] IX. As to attorneys' fees and interest. It is true, this court decided on the former appeal that section 5599, R. S. 1909, which provided a remedy for enforcing the lien on lands, did not provide "for the enforcement of the right created by section 5591" against the county, and that the court held, therefore, that a right to sue the county and obtain a general judgment was implied. But the court did not hold that the provisions of said section 5599 relating to substantive rights, such as interest and costs of collecting installments including attorney's fees, did not apply to the apportionment or charge against the county provided for by said section 5591. This court, in our former opinion (269 Mo. 90, 189 S. W. 1179) said, "the word 'assessment' in the first line of this statute [section 5599] is used in a very broad sense," and in paragraph VI (269 Mo. 91, 189 S. W. 1180) the court says, "These assessments apportioned to Bates county would become delinquent on December 31st each year," etc. The opinion then refers to and quotes from said section 5599 as prescribing the time when the installments sued on fall due. Thus, in effect, this court held that the substantive provisions as to the assessments and installments mentioned in said section 5599, as distinguished from the mere matter of the remedy to enforce them, also applied to the apportionment or charge against the

county sued on and created by said section 5591. In any event, we are satisfied that such was the intention of the Legislature. Not only has this court frequently held that said drainage act is a highly remedial statute designed to accomplish a great and beneficial public purpose, and must therefore be liberally construed (*State ex rel. v. Bugg*, 224 Mo. 554, 123 S. W. 827; *State ex rel. v. Bates*, 235 Mo. loc. cit. 293, 138 S. W. 482; *In re Mingo Drainage District*, 267 Mo. loc. cit. 278, 183 S. W. 611), but the Legislature, "lest we forget," in section 5573, which is in pari materia and should be therefore construed as applying to said section 5599 (*State ex inf. v. Standard Oil Co.*, 218 Mo. loc. cit. 354, 116 S. W. 902 et seq.) expressly provided that the act should be liberally construed.

We hold, therefore, that interest and attorney's fees may be recovered in this case, as provided in said section 5599. That is, interest at the rate of 6 per cent. per annum on each installment for the original work from January 1, 1907, until its maturity, and on each installment for the additional work at 6 per cent. per annum from July 1, 1911, until maturity, and after maturity, on all installments, at the rate of 1 per cent. per month until paid, and a reasonable attorney's fee covering services in this court on both appeals, as well as all services in the lower court.

[11] X. It is further objected that the county had no notice of the proceedings for the additional work. The notice is in the form prescribed by the statute, and is addressed to all "the Landowners of Drainage District No. 1, Bates County, Missouri." The term "landowners" is sufficient to include the public—the state and all of its agencies or trustees, such as the county—which owned or held the public easement for highway purposes in the public roads. Indeed, in our view, respondent's contention on this point is entirely misconceived. This being a tax against the public or the state, although payable by the county, no special notice of the proceedings to the state or county was necessary. The only notice necessary is to the private persons, and not to the public, which really institutes the proceedings in such cases. The state can tax itself or the county, without any proceedings whatever, by a mere mandate of the statute. The Legislature could have provided that the state or county should pay one-half, or any part, or all of the cost of a public improvement, without more, and no provision of the state or federal Constitution would have been violated. It was not a constitutional necessity that either the state or county be a party (in the usual sense) to, or have special notice of, the proceedings to establish the cost, or do the work,

or make assessments, therefor. That was a matter wholly within the province of the Legislature. Both the state and county and the public had all the notice in this case required by the statute, and that was sufficient.

[12] XI. Nor do we agree with respondent's contention that no land or public roads can be included in the drainage district and subjected to assessment or apportionment for benefits, unless it is necessary to drain such lands or roads.

This district was formed upon the petition of one or more landowners to the county court under article 4 of chapter 41, R. S. 1909, relating to drains and levees. Section 5578 provides:

"The county court \* \* \* shall have power, \* \* \* when the same shall be conducive to the public health, convenience or welfare, or where the same will be of public utility or benefit, to cause to be constructed \* \* \* any ditch \* \* \* within said county, when the same is necessary to drain *any* lots, lands, public or corporate roads, or railroads."

This does not require that the ditch must be necessary to drain *all* the lots, lands, public *and* corporate roads *and* railroads. It is sufficient if it is necessary to drain *any* lands, or *any* roads, public or corporate, or *any* railroads. The law has put the different kinds of property in the district, which it may be necessary to drain, asunder in the disjunctive, and we are not authorized to join them together in the conjunctive. "Any" used in the above statute clearly means "any" and not "all," and "or" clearly means "or" and not "and." (In said section 5578 above quoted the italics are ours.) The drainage of a single tract of land or road or railroad, which needs draining, may be conducive to the public health, convenience, or welfare, or be of public utility and benefit to all of the property, public and private, in the district, in which event the ditch is authorized to be constructed at the expense of all of the lands, public roads, corporate roads, and railroads in the district in proportion to benefits received, as provided for in the sections following said section 5578. In *re Mingo Drainage District*, 267 Mo. 268, 183 S. W. 611. We rule this point also against the respondent.

Our conclusion is the cause should be reversed and remanded for retrial according to the views herein expressed. It is accordingly so ordered.

BROWN and RAGLAND, CC., concur.

PER CURIAM. The foregoing opinion of SMALL, C., is adopted as the opinion of the court.

All the Judges concur.

**HURST AUTOMATIC SWITCH & SIGNAL  
CO. et al. v. TRUST CO. OF ST.  
LOUIS et al. (No. 19495.)**

(Supreme Court of Missouri, Division No. 1.  
Oct. 10, 1919. Rehearing Denied Dec. 20,  
1919.)

**1. CORPORATIONS ¶656—FOREIGN CORPORATION MAY OWN PROPERTY IN STATE BEFORE QUALIFYING TO DO BUSINESS.**

A foreign corporation may own real property in the state before qualifying, under Rev. St. 1909, § 3037, to do business in the state.

**2. CORPORATIONS ¶661(2)—FOREIGN CORPORATION MAY SUE FOR WRONG TO PROPERTY BEFORE QUALIFICATION TO DO BUSINESS.**

A foreign corporation may sue in the state for a wrong committed in derogation of its title to property in the state before it qualified to transact business in the state in its corporate capacity.

**3. MORTGAGES ¶117—PROVISION FOR MATURITY BY DEFAULT DOES NOT AFFECT LAST NOTE.**

Provision of deed of trust securing a principal note and several interest notes that, when one note should remain unpaid five days after maturity, all the notes should become due and payable, at option of holder, does not extend time of payment of principal note and last interest note maturing at same time, being applicable only to the preceding interest note.

**4. MORTGAGES ¶341—PROVISION FOR SALE BY SHERIFF AS SUBSTITUTE TRUSTEE NOT OPERATIVE ON REFUSAL OF TRUSTEE TO ACT.**

Power in deed of trust for the sheriff to make sale on refusal or inability of the trustee to act and request of the legal holder of the note does not become operative on mere refusal of trustee to act.

**5. EVIDENCE ¶383(3)—RECITAL IN DEED ON SALE BY SHERIFF AS SUBSTITUTE TRUSTEE PRIMA FACIE EVIDENCE OF REQUEST TO SELL.**

Recital in deed made by sheriff on making sale as substitute trustee under deed of trust that he acted at request of the legal holder of the note, while prima facie evidence, was not conclusive of that fact, necessary under provision of the deed of trust to transfer the power of sale to him.

**6. MORTGAGES ¶137, 138—LEGAL TITLE IN MORTGAGEE AND TRUSTEE.**

A mortgage invests the mortgagee with a legal title, and like title passes by deed of trust in the nature of a mortgage to the trustee.

**7. MORTGAGES ¶209, 360—GOOD FAITH AND IMPARTIALITY REQUIRED OF TRUSTEE.**

Duties of trustee under deed of trust require the utmost good faith and impartiality on his part as regards both the debtor and the creditor, and likewise the grantee of the equity of redemption; and he cannot shake off his responsibility by simple refusal to act, nor impose it on the sheriff, who by provision of the deed of trust takes only the naked power of sale on condition, among others, that the trustee refuse to perform its covenant.

**8. MORTGAGES ¶353—DUTY OF TRUSTEE TO GIVE NOTICE OF SALE TO HOLDER OF EQUITY OF REDEMPTION.**

The trustee under deed of trust being called on by the holder of the secured note to collect it out of the mortgaged property, his first duty was to notify the holder of the equity of redemption.

**9. MORTGAGES ¶369(3)—PURCHASERS DISCOURAGING BIDDING CANNOT RETAIN ADVANTAGES ACQUIRED THEREBY.**

The purchasers at sale under deed of trust discouraging bidding and thereby obtaining the property for a less amount commit a wrong against the holder of the equity of redemption, the advantage of which equity will not permit them to retain.

**10. PLEADING ¶406(7)—DEFECTS IN PETITION WAIVED BY GOING TO TRIAL.**

The petition in suit to set aside a sale under deed of trust alleging it was made pursuant to a conspiracy between the trustee and purchasers with fraudulent intent to have the property sold at much less than its value, and so resulted, is sufficient to authorize admission of evidence tending logically to prove it, insufficiency of the general charge of fraud and collusion not having been questioned by special demurrer or motion in due course of pleading asking a statement of particulars, but defendants having proceeded to trial without suggestion of such insufficiency.

**11. MORTGAGES ¶369(3)—UNLAWFUL AGREEMENT TO SUPPRESS BIDDING AT SALE GROUND FOR RELIEF.**

Contract between one planning to purchase at sale under deed of trust, and who did become the purchaser, and holder of second mortgage note, that the latter should not bid, was an unlawful agreement to suppress bidding, sufficient to authorize the owner of the equity of redemption to relief against the sale.

**12. MORTGAGES ¶369(7)—PRESUMPTION OF FINANCIAL ABILITY OF PARTY AGREEING NOT TO BID AT SALE.**

That one who contracted with the purchaser at sale under deed of trust that he would not bid at the sale had financial ability to purchase will, in the absence of evidence to the contrary, be presumed, in suit to set aside the sale for fraud.

**13. MORTGAGES ¶369(7)—EVIDENCE IN SUIT TO AVOID SALE SHOWING FRAUDULENT ARRANGEMENT BETWEEN TRUSTEE AND PURCHASER.**

Evidence in suit by owner of equity of redemption to avoid sale under deed of trust held to show an arrangement, existing for some time before the sale, between the trustee and the purchaser, that the latter should become the purchaser, and that the former would assist him by discouraging competition or by refraining from any effort to sell the property at its real value.

**14. APPEAL AND ERROR ¶837(12), 1009(1)—DUTY OF APPELLATE COURT TO EXAMINE EVIDENCE IN EQUITY SUIT.**

It is the duty of the court on appeal in an equity case to examine the evidence for itself,

with all due regard for the findings of the chancellor, considering all competent evidence admitted, but afterwards erroneously stricken out against objection duly brought into the record by exception.

Error to St. Louis Circuit Court; G. A. Wurdeman, Judge.

Suit by the Hurst Automatic Switch & Signal Company and another against the Trust Company of St. Louis County and others. Decree for defendants, and plaintiffs bring error. Reversed and directed.

W. W. Cohick and S. E. Eaken, both of St. Louis, for plaintiffs in error.

Stonewall J. Walton, of St. Louis, for defendant in error Walton.

BROWN, C. This is a suit instituted in said court on April 8, 1914, by petition in the nature of a bill in equity, in which Hurst Automatic Switch & Signal Company, a corporation, and Fred Hurst, are plaintiffs, and the Trust Company of St. Louis County, Stonewall J. Walton and Rebecca L. Walton, his wife, F. J. Hollocher, and George A. Bode, are defendants. Its general nature and object is to secure the cancellation of a trustee's sale and deed made thereunder by the defendant Bode, purporting to convey 131 acres of land in said county to the defendant Walton, by virtue of a power of sale contained in a deed of trust executed on the 4th day of February, 1911, by Sarah A. Massey to the defendant trust company as trustee, to secure the payment of her promissory note of the same date for \$16,850, payable three years after date, and six interest notes for the interest thereon at 6 per cent. per annum, maturing successively at the end of each semiannual period, all payable to one C. M. Smith.

The petition states that Mrs. Massey, soon after the execution of the deed of trust, conveyed the land in fee to one Christian J. Steffan, who, on the 4th day of March, 1911, conveyed it to the defendant trust company, trustee, to secure his promissory note of the same date for \$2,768.87, payable in three years, with semiannual interest notes for 6 per cent. interest during that period, all payable to Mrs. Massey. These two deeds of trust are designated "the first and second deeds of trust."

The petition then proceeds to state:

That the "first deed of trust provided that, in the event of a default being made in certain covenants therein contained, the said trustee thereunder, the Trust Company of St. Louis County, should proceed to sell the said real estate in the manner and form prescribed by and under the terms of said deed of trust, and that, in case of the Trust Company of St. Louis County refusing to act or its inability or disability to act for any cause whatsoever, then and in that event the then acting sheriff for

the time being of the county of St. Louis and state of Missouri, as successor trustee, upon request of the legal holder of said notes, his agent or attorney in fact, might proceed to sell the property therein conveyed or any part thereof at public vendue or outcry at the east front door of the courthouse in the county of St. Louis, state of Missouri, to the highest and best bidder for cash, first giving notice of the terms and place of said sale and of the property to be sold by advertisement; that the defendant George A. Bode was then and there sheriff of said St. Louis county; that the said trustee in said deed of trust did not refuse to act as trustee thereunder, nor was it at any time under any disability or unable to act as said trustee, nor did it at any time authorize or empower said sale or any sale, or authorize the said Bode, sheriff of St. Louis county, or the acting sheriff of St. Louis county, or any one to act for it as trustee under said deed of trust, and no one interested in the collection of the debt described in said deed of trust requested or empowered said Bode so to do; nevertheless the said Bode pretended to act under the terms and provisions of the said first deed of trust, and as successor in trust therein, but without authority of law, on or about the 28th day of February, 1914, attempted and pretended to sell and attempted and pretended to convey to the said defendant Stonewall J. Walton the property hereinabove described for the sum of \$17,605; and that the action of the said Bode in that behalf was in direct violation of the terms and provisions of the said first deed of trust as aforesaid."

It further states that the property so sold was reasonably worth \$60,000; that on the date of the sale and before it took place the plaintiff Hurst Automatic Switch & Signal Company tendered to the Trust Company of St. Louis County the full amount of principal and interest then unpaid on said notes, together with all charges due thereon, which the said trust company refused to receive, and refused to discontinue or prevent the sale.

It then charges that all the defendants had agreed and conspired together to force said pretended sale of the property for the purpose of procuring it for less than its value, and that the sale was made in pursuance of such unlawful agreement and conspiracy; that the amount of the bid was in fact not paid; that the defendants Walton and his wife executed their note for \$13,000 to defendant Hollocher, secured by deed of trust on the property purchased, to the defendant trust company as trustee, to secure its payment; that plaintiffs are informed and believe that Walton received no part of the said \$13,000; that after acquiring title to said property, and on August 2, 1913, the plaintiff Hurst Automatic Switch & Signal Company, by its instrument in writing, leased the said land to the plaintiff Fred Hurst for a term of three years from that date, and placed said lessee in possession thereunder; that after the trustee's sale de-

fendant Walton brought suit before a justice of the peace against said Hurst for unlawful detainer of said premises, which suit was still pending.

The prayer is that the trustee's sale to Walton and deed thereunder be declared void and canceled; that the note and deed of trust to Hollocher be canceled, and an accounting be had between the parties as to their respective rights and interests, and for general relief. The defendants, except Stonewall J. Walton, answered by general denial. In their answer they admitted the execution of the instruments charged in the petition, denied generally all charges of fraud and conspiracy, and alleged, in effect, that all the transactions pleaded were intended to be, and were in effect, as appears upon their face, and honestly represented the real transactions between the parties. They denied that the property was worth \$60,000, as stated in the petition, and stated that it was worth only \$30,000. As a special defense, they alleged that the plaintiff Hurst Automatic Switch & Signal Company was a corporation incorporated under the laws of the state of Wyoming, that it never had, prior to the third day of March, 1914, complied with the laws of the state of Missouri relating to foreign corporations doing business in this state, although it had continuously, from a time prior to receiving the conveyance under which it claims the property in question, maintained an office and did business in this state up to the 3d day of March, 1914, when it received its certificate of compliance with such laws authorizing it to do business in this state from the secretary of the state of Missouri.

Upon the filing of the petition the plaintiffs moved for an injunction pendente lite restraining the prosecution of the unlawful detainer proceeding pending in the justice's court, which was granted, and afterwards dissolved on defendants' motion. This matter is an incident of this appeal. The evidence, some of which, after being placed before the court, was stricken out on defendants' motion, is of such a nature that it can be more appropriately stated in connection with the points raised as they are reached for consideration.

At the close of the plaintiffs' evidence in chief the defendants moved for judgment, and the court entered final judgment dismissing the petition, and, after all necessary preliminary proceeding, the case is before us on this writ.

1. The sole object of this suit is to cancel a trustee's deed to the land in question executed by the sheriff of St. Louis county February 28, 1911, and for accounting and redemption of the land from the deed of trust under which the sale was made. The issues are simple. At the opening of the trial it was formally admitted that the plaintiff

corporation was the owner of the land prior to the sale, subject to the deed of trust, and that the defendant Stonewall J. Walton was the owner of a second mortgage for \$2,768.67 executed by Christian J. Steffan, the plaintiffs' grantor, to Sarah A. Massey. When these admissions were made the court stated the issue as follows: "You are trying the question of the validity of that sale under that deed of trust first?"

[1, 2] Notwithstanding these admissions, the defendant Walton, as owner, is making the point that the plaintiff corporation, which was incorporated and organized under the laws of Wyoming, did not receive its certificate of authority to transact business in this state as provided by section 3037, Revised Statutes 1909. It had an office in this state at which its stock was offered for sale, but how much, if any, had been sold through this office, does not appear. It was licensed as a manufacturing corporation, but it does not appear that it had ever done any business for which it was incorporated unless the acquisition of this land was for the purpose of constructing thereon works for the manufacture of its product. The sole question so presented is whether or not the corporation was at the time of the sale under the Massey deed of trust the owner of the equity of redemption in the land subject to the second mortgage. The land itself was, of course, subject to taxation, and it is shown that all the taxes had been paid up to the time of the trustee's sale.

The question whether the bare ownership of property, real or personal, in this state by a foreign corporation, is rendered unlawful by the statutory provision we have cited, had become a stale one in this state prior to the trustee's sale, which is the subject of this litigation. *Roeder v. Robertson*, 202 Mo. 522, 100 S. W. 1086; *United Shoe Machinery Co. v. Ramlose*, 231 Mo. 508, 132 S. W. 1133; *Wulfin v. Cork Co.*, 250 Mo. 723, 157 S. W. 615; *Cement Co. v. Gas Co.*, 255 Mo. 1, 164 S. W. 468, Ann. Cas. 1915C, 151. All these cases, in their last analysis, stand upon the proposition that we must look to the statute, which is prohibitory, and therefore not to be extended by interpretation to subjects not coming within its terms. These do not purport to deny existence in this state to the foreign corporation for all lawful purposes, but only deny it the privilege of prosecuting the business for which it is incorporated without compliance with our laws. *Wulfin v. Cork Co.*, supra, is precisely in point upon this question. In that case we held that the Cork Company, a foreign corporation, was entitled to hold the building it had leased as a business office before qualifying itself under the statute to do business in this state. With reference to this same provision of the statute we said in the *Wulfin Case*:



"We note that this provision requires certain things to be done that necessarily involve the making of contracts before it shall be permitted to transact business in the state or to continue its business if already established. As a condition precedent to the transaction of any business it must make all necessary contracts for the purchase or lease of real estate, and the construction or renting and fitting up of its office for the keeping of all books and the performance of all work necessary to enable it to comply with the constitutional and statutory provisions which will govern it in its new domicile. That this section contemplates the right of the corporation to purchase as well as to lease lands for that purpose is shown by the provision which forbids it to hold any real estate for more than six years 'except such as may be necessary and proper for carrying on its legitimate business.' This demonstrates that it is not the making of a contract for performance within the state which is intended to be forbidden without regard to its nature or object, but that the inhibition is directed against the making of all contracts and the doing of all acts which constitute the transaction of business within the meaning of its terms. Further light is thrown upon the same question by the initial provisions of the next succeeding section (1025), which require the corporation to file in the office of the secretary of state a certified copy of its charter with a sworn statement of 'the proportion of its capital stock represented by its property and business in Missouri,' and to pay the incorporating taxes and fees thereon, as preliminaries to the issue of its certificate of authority to do business in the state. These last provisions are directed against companies 'now or hereafter doing business within this state,' and contain no provision limiting the duty to the time before they begin the transaction of their business here. The duty is a continuing one, and if it is forgotten or neglected or evaded to-day, the corporation is not outlawed so that it must pack up its effects and leave the state, but the duty is expressly continued by the very words of the law creating it. And by the next section the punishment is fixed, not by outlawry, but by fine."

The *Ramlose Case*, supra, went still further in upholding the right of the foreign corporation to hold personal property in this state without having conformed to this statute. In that case it had, under an unlawful contract void under this same statute, brought a machine into the state and delivered it to one of our citizens to hold and use. It was held that the corporation continued to be the owner in this state, and that, the lease being void, it might come into the state and sue in its own corporate name to recover its property, so that it might enjoy its possession as well as its ownership under our laws. The trial court in this case properly held that the plaintiff corporation might sue in this state for a wrong committed in derogation of its title before it qualified itself to transact business here in its corporate capacity.

2. The petition is in a single count presenting two theories as grounds of recovery.

The first of these is that the trustee's sale and deed executed by Bode, as sheriff of St. Louis county and successor to the Trust Company of St. Louis County in that capacity, is void because the sheriff was without power to act. The deed of trust vested the legal title to the land in the trust company, and provided that, in case the debt should be paid according to the tenor and effect of the notes and the other covenants of the deed be performed, then the deed should be void and the property released, but, if the debt should not be paid or the covenants performed, it should remain in full force, and the said trustee, "or, in case of its refusal to act or its inability to act from any cause whatever, then and in that event the then acting sheriff for the time being of the county of St. Louis and state of Missouri, as successor trustee, upon request of the legal holder of said notes, his agent or attorney in fact, may proceed to sell the property hereinbefore conveyed, or any part thereof, at public vendue or outcry at the east front door of the courthouse in the county of St. Louis and state of Missouri, to the highest bidder for cash, first giving notice of the time, terms, and place of said sale, and of the property to be sold by advertisement," and execute a deed therefor to the purchaser. The trust company, which joined in the execution of the deed, covenanted by its terms to "faithfully perform and fulfill the trust herein created, not being liable or responsible for any mischance occasioned by others." It also leased the premises to the party of the first part for a rental of one cent per month. It also provided that, when one note should remain unpaid five days after maturity, all the notes should become due and payable at the option of the holder thereof.

[3] At the time of the sale all the interest notes except the last, which was due at the date of the maturity of the principal note, had been paid, and all the other covenants contained in the deed of trust had been faithfully performed. The plaintiffs contend that the sale was void because the last provision above quoted extended the time for the payment of both the principal note and the last interest note. We can see nothing in this provision which admits of such construction. There were six interest notes, and it was intended by this clause that the deed of trust should not only secure the payment of each at maturity, but should also provide for its foreclosure by sale and application of the proceeds to the payment of the principal note should any one of the five first interest notes remain unpaid for five days after maturity.

[4, 5] Plaintiffs also contend that the sale was void because the conditional power of sale vested in the sheriff by the deed had not been perfected or made operative by the performance of the condition that the trustee holding the legal title under the deed

should refuse or be unable to act. The sheriff, in making the sale, acted upon the following letter signed by its president and dated February 5, 1914:

"The Trust Company of St. Louis County hereby refuse to act as trustee under deed of trust dated February 4, 1911, recorded in Book 268, page 455, Sarah A. Massey to the Trust Company of St. Louis County, trustee, and hereby requests you to act."

It will be observed that this letter contains no statement indicating that the trustee has authority to make this request. The sheriff could only act upon a request made by the legal holder of the due and unpaid note. The trustee might refuse to act, but this would not, by the terms of the deed, transfer the power of sale to the sheriff so as to give validity to his deed. It recited, to be sure, that he acted at the request of the legal holder of the note, and that recital was prima facie evidence, but not conclusive of the fact. The payee in the note was one Smith, who was prima facie the holder and owner at the time of its maturity. The affidavit of the sheriff which was filed by Walton upon his motion to dissolve the preliminary injunction granted upon the petition in this case asserts that he acted upon the foregoing request of the trustee, which says nothing about the legal holder of the note. The only evidence tending to support the authority of the sheriff to execute the naked power of sale appendant to his office as "successor trustee" was presented by the plaintiffs at the final hearing in the form of a sworn statement of Mr. Hereford, the president of the trust company, in which he makes oath that his trust company was at all times the owner and holder of the note, and that when he wrote the letter to the sheriff refusing to act he did it upon the conviction, which he still entertained, that he was for this reason disqualified as trustee. The necessary conclusion is that the payee was a straw man representing the trustee as the owner of the note. The object of setting the stage in this manner does not directly appear, but lies, no doubt, in the desire to add fees to the profit of its investment. No argument has been furnished us in support of the legal position assumed by Mr. Hereford that his trust company was disqualified by its interest from executing the trust. If so, he knew it as well at the time of making the investment as he did when he directed the sheriff to make the sale. Reserving this circumstance, as well as the allegation of the petition that tender of the amount of the debt, interest, and expense incurred was made before the sale, for use in a subsequent paragraph, we will assume for the present that the provision of the deed of trust conferring the power of sale upon the sheriff upon the contingency that the trustee holding the legal title should refuse to act be-

came operative by the refusal of the trust company to act in its capacity as trustee, and its request to the sheriff in its capacity as beneficiary, and consider upon its merits the right of the plaintiffs to have the sale canceled and redeem the property upon the case presented by the pleadings and evidence.

[6, 7] 3. It has always been the law in this state that a mortgage invests the mortgagee with a legal title upon which ejectment will lie after forfeiture, and that by deed of trust in the nature of a mortgage a like title passes to the trustee. In this case that effect is emphasized by the terms of the instrument, which contains a formal lease by the trustee to Mrs. Massey, the grantor, to terminate upon her default, in any particular, to perform any of its conditions. Deeds of trust have been favored in this state by legislative recognition with respect to their foreclosure. R. S. 1909, § 2829. The object of this form of security "is, by means of the introduction of trustees, as impartial agents of the creditor and debtor, to provide a convenient, cheap, and speedy mode of satisfying debts on default of payment." Pomeroy's Equity Jurisprudence (3d Ed.) § 995. The powers of the trustee are a confidence which cannot be delegated, and his duties "require the utmost good faith and impartiality as regards both the debtor and the creditor. He is personally liable, in a suit at law, for damages to the party aggrieved, for a failure to use reasonable diligence, or an abuse of his discretionary powers; and a sale may be enjoined or set aside at the instance of the injured party." Id.

The object of these rules, in so far as they apply for the protection of the debtor, is to insure him fair and equal protection in the enforcement of the security. The creditor is entitled to his best services in realizing the amount of his debt from the mortgaged property. The debtor is entitled to like honest service with reference to the conservation of his property so far as is consistent with the rights of his creditor. He does not and should not occupy the position of the wounded wolf that in his helplessness affords a meal for the entire pack, but must only reckon fairly and honestly with his creditor to the extent of his debt. The trustee, like other fiduciaries, must exercise diligence and care for his protection, and equity will relieve against loss sustained by his failure to do his duty. In this case the trust company voluntarily assumed the fiduciary relation of trustee and bound itself by special covenant to perform its duties. Its relation as trustee followed the property into the hands of every person who acquired the equity of redemption while it held the legal title under the terms of his trust. It could not shake off its responsibility by a simple refusal to act; nor could it impose it upon the sheriff, who took by the deed only the

naked power to make the sale upon the condition, among others, that the trustee should refuse to perform its covenant.

The Massey deed of trust under which the land was sold was executed on February 4, 1911, to secure a note payable three years after date, bearing interest at 6 per cent. per annum, represented by semiannual interest notes. On the 14th day of the following month Mrs. Massey sold the land to Christian J. Steffan for \$23,200. Mr. Steffan, as a part of the consideration, assumed the debt secured by this deed of trust, and executed his note for \$2,768.67, payable to her March 14, 1914, with semiannual interest notes at 6 per cent. for that period, securing the same by deed of trust to the defendant trust company as trustee. On March 19th of the following year the plaintiff corporation purchased the land from Steffan for \$27,300, assuming as a part of the consideration the two deeds of trust mentioned above. On the day following the maturity of the note secured by the first deed of trust the defendant trust company, through Mr. Hereford, its president, began proceedings to foreclose the same by writing the letter to the sheriff, which we have set forth in the preceding paragraph. Some time in January preceding, Mr. C. M. Hurst, the president of the plaintiff corporation, made arrangements with one Faribault, a money loaner, for a loan to take up the Massey notes, but the foreclosure, if not hastened by this, proceeded without delay, so that the next day after the letter was written a notice of the contemplated sale covering a little more than two closely printed pages of this record appeared in the Clayton Argus, a weekly newspaper printed in St. Louis county, and also appeared in the three succeeding issues, the last being on February 27, 1914, the day before the sale.

[8] There is no doubt that upon default in the payment of the Massey note the holder had the right to direct the trustee to proceed without unnecessary delay with its collection out of the mortgaged property. But it could only proceed in accordance with its duty as trustee holding the legal title for the plaintiff corporation. It had a wide discretion in the performance of its duties. The first and most obvious of these duties was to notify the owner of the equity of redemption. There is no evidence of an attempt to do this, or that this cestui que trust was consulted. As trustee and creditor it might exercise its statutory right to go into a court having equity jurisdiction, where the questions of law and equity affecting the title might be tried and determined in the interest of all, or it might proceed to foreclose their rights by a sale under the shadows that might be cast upon the title by those who desired to depreciate its value for the purpose of purchase. He chose the latter course with so little hesitation and so

little attention to the rights of the owner as to indicate a determination formed before the default occurred. We will assume that a default had occurred at the close of the business day of February 4th. The next day was an active one, including in its proceedings the refusal of the trustee in that capacity to accede to an imaginary request of itself in the capacity of creditor to make the sale, the communication of that embarrassing situation to the sheriff, the preparation by the latter of his advertisement, and acquiring what knowledge was necessary of the property and interests involved in the duty he had assumed.

[9] We have referred to its promptness in this respect simply that it may be considered in connection with other circumstances in determining the fairness of the transaction. The real controversy is between the plaintiffs and the purchaser, who holds the title which they are attempting to redeem. While the Waltons had the undoubted right to become bidders at the sale, they had no right to discourage others from bidding, and thereby obtain the property for a less amount than would otherwise have been realized. If they or either of them did so, they committed a wrong against the plaintiffs of which equity will not permit them to retain the advantage. Mr. and Mrs. Walton answered separately, and Mr. Walton, who was an attorney at law, appeared for them in the suit, disclaiming at the trial his appearance for either of the other defendants, so that his statements in the course of the hearing are entitled to consideration in the light of his interest in the subject-matter.

[10] The petition, after setting out the proceedings which culminated in the sale by the sheriff and asserting that the sale was void for want of authority in the latter to make it as well as the fact that the amount of the debt, including interest and expense of preparation for the sale, had been tendered to the trust company before the sale and refused, contained the following charge:

"Plaintiffs are informed and believe, and so allege on information and belief, that the said defendants and all of them had agreed and conspired together to force a pretended sale of said property by the said Bode as aforesaid for the purpose of unlawfully acquiring title and possession of the same at a price much less than the said property was worth, and that the refusal of the said trust company in the manner and form aforesaid and the said pretended sale of the said property by the said Bode as aforesaid were dictated by and made pursuant to the terms of the same unlawful agreement and conspiracy aforesaid."

The defendants insisted at the trial that this charge of fraud and conspiracy could only be sustained by proof of the specific acts charged in the petition. In other words, although the petition charged that the sale was

brought about under the circumstances we have stated, and that it resulted in a sacrifice of the entire equity of redemption, amounting, according to the admission of the answer, to between \$12,000 and \$13,000, yet, because particular facts, conversations, and circumstances which constitute the evidence of fraudulent intent were not set forth in the petition, they could not be proved. It is not questioned that the injury is well pleaded; nor is it denied that all the specific acts from which it resulted are also well pleaded. These acts may have been innocent and unavoidable, so that the injured party has no remedy, or they may have been fraudulently and wrongfully done by conspiracy among the wrongdoers to produce that very injury. In the latter case the fraudulent intent is the ultimate fact, and, if generally stated, is sufficient to authorize the introduction of evidence tending logically to prove it, unless a statement of particulars be asked by special demurrer or motion in due course of pleading. In this case the defendants answered and went to trial without suggesting the insufficiency of the general charge of fraud and collusion between the defendants in procuring the sale and purchase of the land at a grossly inadequate price. We think that the evidence to which we shall refer, in so far as it may tend to prove the general charge of fraud and conspiracy, was admissible.

The interest of Mr. Walton in this land seems to have been aroused some months before the maturity of the Massey note. It then fixed itself upon the note of \$2,768.67 given by Steffan to Mrs. Massey as part consideration of his purchase from her of the equity of redemption. This note would, of course, be an element of strength to any one who should desire to bid for the land in case of a foreclosure under the first mortgage, as it would represent about \$3,000 in the distribution of the surplus realized from such a sale. A controversy existed between Steffan and Mrs. Massey in which Walton was Steffan's attorney, and secured the surrender of the note to Steffan, who pledged it to him on June 18, 1913, as security for some money which he had advanced in the deal. He afterwards told Steffan that he was going to hold that note over him, and, if the property was sold under the first deed of trust and did not bring enough to pay the second, he would make it out of him. Mr. Steffan also testified that he talked with Mr. Walton about the sale of the land under the first mortgage, and that Mr. Walton told him that he (Steffan) could not bid at the sale; that Hereford would not loan money to him for that purpose, nor would he loan money to Hurst. About three days before the sale he was in Mr. Walton's office, where the latter and a Mr. Scherer were talking about purchasing at the sale, and he asked them to let

him into the deal, but Walton refused, and said that he would give him his own note for his interest in the second mortgage. On the morning of the sale Walton handed him a note signed by himself and Scherer for \$2,700, for which he then agreed not to become a bidder. The giving of this note can be explained on no other theory than that the second mortgage note belonged to Steffan, the maker, and was therefore paid. Steffan explains this by saying, in effect, that it was given as a guaranty that Walton would not try to enforce the payment of the second mortgage note should he purchase the land at the sale.

[11, 12] It is this transaction which characterizes the entire scheme. If the mortgage note was already paid it could serve no other purpose than to enable Walton to use the amount appearing to be due upon its face to enhance the amount of his bid to that extent, if necessary, using the note in payment. If it should not be necessary, he could return the mortgage note to Steffan, receiving the joint note of Walton and Scherer in return. Before the Walton-Scherer note was given Steffan was at perfect liberty to bid, paying cash for the purchase and litigating his difference with Walton over the purchase money in the hands of the trustee. To avoid this horn of the dilemma he took the note and gave his promise not to bid, which he kept. That this was an unlawful agreement to suppress bidding there can be no doubt. Although as between Walton and Steffan the former might have obtained the possession of the note honestly enough, the contract he secured from Steffan to give him free hand at the sale was in violation of the right of the plaintiff corporation to have a free and honest sale. Walton at the trial successfully objected to the introduction of evidence of Steffan's financial ability to purchase, but that will, in the absence of evidence to the contrary, be presumed. After executing its covenant that it would faithfully perform and fulfill its duties as a disinterested trustee by the acceptance of the deed of trust the trust company became silent as a sphinx. Although it reserved to itself the right, as holder of the secured note, to go into court for foreclosure without first proceeding under the terms of the deed, it took no such step, but on the very day the security became due, and without notice to anybody connected with the transaction, dropped its fiduciary mantle from its shoulders and requested the sheriff to pick it up. The only explanation it makes is that its office had been a farce from the beginning.

It began to be talked that the Hurst Automatic Switch & Signal Company had not received a license to transact business in this state, and the question was raised whether, if it should purchase the land, the title would

be good as security for money borrowed for that purpose. The trustee still made no sign. It had no confidant except Walton, and he told Steffan that the trustee would not loan money either to him or to Hurst. Neither Walton nor Hereford has testified which of them was the original source of this information, although it turned out to be true as to Hereford. Although the plaintiff corporation had already made an arrangement with Faribault to loan the money for the purchase, this story put a stop to the negotiation, and when Hurst and Faribault appeared with an offer to take up the note uncanceled, Hereford refused, for the trustee and holder, to discuss any other method of saving the Hurst interest than the absolute payment then and there of the note, and neglected, though he, as trustee, owed them the utmost good faith and confidence, to tell them that Walton was to become a bidder, and that he had agreed to advance money for that purpose. The fact that there were desultory bids at the sale below the amount needed to satisfy the trustee's claim, some of which were made by Steffan, is so common an artifice that it does not tend in the least to weaken the force of the charge made in the petition.

[13] We think the evidence, including the failure of the defendants Walton and Hereford to deny the statement made by Steffan that he was bribed by the \$2,700 note of Walton and Scherer, his partner, to abstain from bidding, and that Hereford had before the sale completed arrangements with Walton for the purchase of the land, shows conclusively that there was an arrangement between these two existing for an indefinite time before the sale that Walton should become the purchaser, and that the trust company would either assist him by discouraging competition or would, as it did, refrain from any effort to sell the land at its real value, and closed its eyes to the efforts of Walton to control the bidding. As to Walton his arrangement with Steffan was a loan sufficient to entitle the plaintiffs to relief against his title. The most flattering inference that can be drawn from the conduct of the trust company is that it succeeded in taking care of its own interest at the expense of a total disregard of its duty with respect to all others. This is not the full measure of good faith which equity requires from a trustee.

The entire evidence creates the impression that when it refused to perform the duty it assumed by the deed it cast off all responsibility to the owners of the equity of redemption and became a partisan of those who desired to depress the bidding. Even its invitation or request to the sheriff was written in such a form as to cast a cloud upon any title that officer might sell and convey. Its

language could not be interpreted as the request of the only one who had the right to make it, the legal holder of the note.

[14] 4. The final judgment of the court dismissing the plaintiffs' bill was entered at the request of defendants without offering any evidence. The suit is in equity, and it becomes our duty to examine the evidence for ourselves, with all due regard for the findings of the chancellor who tried the case. In doing so we consider all competent evidence admitted at the trial and afterward erroneously stricken out by the court upon the defendants' motion, and against the objection of plaintiffs duly brought into the record by exception. The ground upon which the trial court failed to consider it has, under such circumstances, no connection with our duty in determining the merits of the case upon the entire evidence properly before the trial court. Incompetent evidence excluded by the court at the instance of the defendants we have excluded from our consideration.

The whole evidence leaves no doubt in the mind of this court that the price at which the land was sold was inadequate to the extent at least of \$12,395, and that this inadequacy, or so much of it as operated to deprive the plaintiff corporation of the power to protect its own equity of redemption, was caused by the action of defendant Walton tending to suppress bidding, that the fact that the plaintiff corporation had not received its certificate to transact business in this state was unfairly used for the purpose of disabling it from saving the property until the sale could be held, and that the sale was hurried by the trustee with reference to these conditions.

Under these circumstances no choice is left us other than to reverse the decree of the circuit court for St. Louis county, and remand the cause, with directions to enter its decree in proper form setting aside the said trustee's sale and the deed of trust to secure \$13,000 executed by Walton and wife on the same day, for an accounting between the parties, and granting such reasonable time as to the court shall seem just and proper for the redemption of the property upon payment by the plaintiffs of the sum found to be justly due for that purpose, which is accordingly done.

RAILEY, C., concurs.

PER CURIAM. The foregoing opinion of BROWN, C., is adopted as the opinion of the court.

WOODSON and GRAVES, JJ., concur.  
BLAIR, P. J., concurs in the result.

## JONES v. NICHOLS et al. (No. 20304.)

(Supreme Court of Missouri, Division No. 1.  
Sept. 27, 1919. Rehearing Denied  
Dec. 20, 1919.)

## 1. FRAUD ⚡50—PLAINTIFF HAS BURDEN OF PROOF.

Plaintiff in a suit based on fraud has the burden of making out his case by clear and convincing evidence.

## 2. FRAUD ⚡50—NO PRESUMPTION OF FRAUD UNLESS FACTS EXCLUDE HONEST PURPOSE.

While fraud may be inferred from facts and circumstances, it is never to be presumed; and, where a transaction may as well consist with honest and fair dealing as with a fraudulent purpose, it is to be referred to the better motive.

## 3. WILLS ⚡211 — EVIDENCE OF PARTICIPATION IN FRAUDULENT CONCEALMENT OF WILL INSUFFICIENT.

Evidence held insufficient to show participation by a widow in the fraud of her children, who, though their father, by will not probated, had devised his lands to his widow, mortgaged interests therein, as though the father had died intestate.

## 4. HUSBAND AND WIFE ⚡69½ — ADVERSE POSSESSION BY WIDOW WILL NOT RUN AGAINST MARRIED DAUGHTERS.

A widow to whom dower had never been assigned by possession for 10 years, after death of her husband, of his homestead, did not acquire title by adverse possession, she having daughters by him, who when he died, and for at least part of the 10 years, had husbands.

## 5. WILLS ⚡481—TITLE RELATES BACK ON PROBATE EXCEPT AS TO INNOCENT PURCHASERS.

Though title to land does not pass by will till will is probated, on probate thereof, however long after testator's death, there being no limitation for probate, the will relates back, and conveys title as of the date of testator's death, except as against intervening innocent purchasers.

## 6. VENDOR AND PURCHASER ⚡232(1) — EXTENT OF CONSTRUCTIVE NOTICE FROM POSSESSION BY WIDOW.

Possession by his widow of decedent's homestead is constructive notice to a purchaser thereof of whatever rights she has therein, including her right under his unprobated will; the purchaser having no right to attribute her possession solely to her right as widow.

Appeal from Circuit Court, Pike County;  
Edgar B. Woolfolk, Judge.

Suit by M. J. Jones against Margaret Nichols and another. Judgment for plaintiff, and defendants appeal. Reversed, with directions.

Pearson & Pearson, of Louisiana, Mo., for appellants.

Jones & Corwine, of Frankford, and Hostetter & Haley, of Bowling Green, for respondent.

SMALL, C. This suit in equity was instituted in the circuit court of Pike county to vest title in an undivided two-thirds interest in 120 acres of land in said county in the plaintiff, subject to the dower rights of Margaret Nichols, as widow of Josephus Nichols, deceased, on the theory that as to the plaintiff said Josephus Nichols died intestate. Margaret Nichols and Dolly Seeley are defendants.

Plaintiff alleges that said Josephus Nichols died at his residence on said land January 5, 1903; that he left surviving him his widow, the defendant Margaret Nichols, and his three daughters Susan Foutes, wife of Andrew Foutes, since deceased, Nancy Foutes, wife of Edward Foutes, and Dolly Seeley, wife of William H. Seeley; that said Josephus Nichols died testate, and by his will devised the whole of the land to his widow; that as to all the world, except Mrs. Nichols and her daughters and their husbands, it appeared that said Josephus Nichols died intestate, and plaintiff had no knowledge to the contrary until the will was probated, which was July 26, 1915; that defendants and A. N. Foutes, then the husband of Susan Foutes, "combined, confederated, and conspired" together to keep said will from being probated and its existence a secret, in order to deal with the land as if it belonged to the widow and her daughters under the laws of descent, and to defraud the plaintiff by inducing him to loan \$875 on the two-thirds interests of Susan Foutes and Nancy Foutes; that in pursuance of such conspiracy Susan Foutes and her husband, A. N. Foutes, conveyed her one-third interest to Edward Foutes, and Edward Foutes and his wife, on March 28, 1911, borrowed \$875 from the plaintiff, secured by a deed of trust on two-thirds interest in said land; the money not being paid when due, the property was sold under the deed of trust November 16, 1914, and bought in by William C. Smith for the plaintiff, who afterwards conveyed to the plaintiff; that defendant Margaret Nichols, by keeping the existence of the will a secret from the plaintiff, aided Nancy Foutes and Edward Foutes "in the perpetration of their skillful scheme to cheat and defraud the plaintiff as aforesaid"; and that the will was probated March 26, 1915, and the property afterwards conveyed by Mrs. Nichols to her daughter Dolly Seeley "in furtherance of the scheme and conspiracy hereinbefore mentioned."

The answer of the defendants admitted the

death of Josephus Nichols, the making and probating of the will, and alleged that ever since his death defendant Margaret Nichols had been in open and notorious possession, claiming to own said property under said will, and also by adverse possession of 10 years. The answer also contained a general denial.

Plaintiff took the depositions of the defendants, and read them at the trial as admissions.

In her deposition, defendant Margaret Nichols testified: That she was 79 years old. That her husband died March 5, 1908. That they lived on this 120 acres until the time of his death. That he left three children at his death, Nancy, Susie, and Dolly, all of them married, as stated in the petition. They lived with their husbands a mile or two away from the home place, except Mrs. Seeley, who lived near Madisonville, about 10 miles away. Mr. Brown wrote her husband's will. She was present, together with her daughter Susie, Andrew Foutes, Mr. Shaw, and Dr. Burns. The will was made a week before her husband's death. She did not have the will probated because Mr. Brown said it was not worth while; that it was all hers any way, whether the will was probated or not. The probate judge, Judge Motley, and Gov. Major also told her that it was not worth while to go to any expense in probating the will. Mr. Brown kept the will until just before he died, which was about 2 years before it was probated. She never knew of Edward Foutes buying any land from her daughter Susie. She knew nothing about their borrowing money from the plaintiff until long after it was done. She never knew that her daughters claimed to own any interest in the land. She knew nothing about their transactions with each other or the plaintiff. She says:

"I didn't make any effort to learn anything, because they were mad at me, and I didn't know what they were driving at. They never spoke to me about nothing. They never had nothing to do with me."

Edward Foutes never told her that he wanted to buy the place from the girls. He never told her that Andrew Foutes' wife wanted to sell her interest to him. "I don't remember any such thing, because it never happened." She deeded the farm to her daughter Dolly Seeley, "because she helps support me and takes care of me, and does for me, and none of the rest did. She paid up the taxes and paid me some money." She, however, lived at home, and her daughter would come there to care for her. She was feeling very badly when her deposition was taken. She was suffering from a fall she got the week before. She was in misery all of the time. She got Pearson and Pearson to probate the will after Mr. Smith had brought

suit against her, which was afterwards dismissed.

In her deposition, read by the plaintiff, Dolly Seeley testified: She knew when her father died he left a will; so did the other members of the family. Brown had custody of the will. She knew the property had been left to her mother, but she did not know that her sisters knew it. She knew nothing about her sisters borrowing money on their supposed interests, until after they had borrowed it, nor of one of her sisters selling her interest to Edward Foutes, until after it was over, when her sister said she did it because her husband was sick and they were in need. She never discussed with her mother or sisters whether or not her sisters had any interest to sell. Nancy and Ed Foutes knew about the will. Mrs. Susan Foutes and Mrs. Nancy Foutes also testified for the plaintiff. The substance of their testimony is that they knew Mr. Brown made some kind of a writing a few days before their father died, but they did not know it was a will; that their mother never told them that it was a will, and they never discussed with her whether they had any interest in the farm. They never claimed to have any such interest to their mother. She always remained in possession of the farm, cultivating it and getting all of the proceeds, and she "just went on and managed the farm as her own." They thought they owned one-third interest each in the farm, when Mrs. Susan Foutes sold her interest to Edward Foutes, and when Edward Foutes and his wife borrowed the money from the plaintiff, Mrs. Susan Foutes got \$700 of this money for her third interest, besides a tract of land worth \$300. The money was obtained from the cashier of the Exchange Bank, of which plaintiff was president.

Edward Foutes testified for the plaintiff. He did not know that Josephus Nichols had made a will, but he learned of it afterwards through Mr. Brown. This was before he bought his sister-in-law's interest. He had never heard what was in the will. At the time of Josephus Nichols' death, he and his family lived at Frankford. But at one time Mr. Brown, who had an adjoining 40 acres, asked him to help him build a fence between his land and the land in question. Brown said he would furnish the materials, if he (Foutes) would do the work. "It is as much to your interest as mine," Brown said. And Brown further said: "You will have an interest in the place." That was all of the conversation he had with Brown. When he bought his sister-in-law's interest, he thought he was getting what the deed called for. He had a conversation with his mother-in-law before he purchased from his sister-in-law. "Q. State what that conversation was? A. Well, I told her that Susie wanted to sell her part of the place, that they needed money,

and that they had a buyer, and I don't know that I told her it was Mr. Cash or not, but, anyhow I told her likely I would buy it if I could. If I could make arrangements to get the money, thought perhaps it would suit better. Q. Is that all that was said? A. No, Sir; I think not. I think that she said they couldn't sell it, and cited as a reason that she had redeemed this land, seemed like her brother, William Wilson, when he was administrator of the place, had given a bond and lost it or forfeited the property and Joe Nichols had bid it in. I suppose you are more familiar than I am it was in the probate court, but she claimed it under the right of redemption. Q. Did she say anything about a will of her husband's? A. Never mentioned the will to me in her life, not a word said about the will. Q. Now, what did you give your sister-in-law Susie for her supposed one-third interest in the farm? A. I think that she got \$600 or \$700—I wouldn't say which—and a piece of land in consideration that was between the two places."

On cross-examination this witness said that he had heard that his father-in-law made a will before he died, but had not heard until lately that he left the farm to his wife. Mr. Brown was a justice of the peace and was a neighbor. Mr. Brown told him that he had written the will. He did not ask about its contents. He did not tell the cashier what he knew or had heard about his father-in-law making a will. At the time he was trading with his sister-in-law he had heard that his father-in-law had made a will, but, notwithstanding that, he went ahead and traded with her. He did not know why he did not tell the cashier what he had heard about the will. He did not think anything about it. The cashier said, "He knew more about it than I did." The conversation with his mother-in-law took place at her home a few days before he purchased his sister-in-law's interest. No one was present with them. "Q. And you think you told your mother-in-law that you were figuring on buying Susie's interest? A. Yes, sir. Q. And your mother-in-law told you that Susie could not sell her interest? A. Yes, sir. That is what she said. Q. Notwithstanding your mother-in-law told you that, you went ahead and bought it anyhow? A. Yes, sir."

The testimony of other witnesses for the plaintiff, Jesse B. Jones and the plaintiff himself, shows that plaintiff loaned the money to Foutes in good faith, without any actual notice of the will, after examining the records of the probate court. That plaintiff had lived at Frankford within a stone's throw of the property, and had known the Nichols family and property practically all of his life. He knew that Mrs. Margaret Nichols was in possession, but that neither the plaintiff nor any one for him inquired of her as to her rights in the property, or said

anything to her about the transaction with her daughter or her son-in-law, Foutes. It further appeared that William Seeley, husband of Dolly Seeley, defendant, bid \$600 on the property at the trustee's sale, but that it was sold to Mr. Smith for the plaintiff for \$900.

Defendants introduced in evidence the petition in the case of Smith v. Margaret Nichols et al. It was a suit to have the land sold in partition. Plaintiff, Smith, alleged he owned two-thirds interest and the defendant Dolly Seeley owned one-third interest, subject to the dower of the defendant Margaret Nichols, who, the petition alleged, had since her husband's death been in the open, notorious, and exclusive possession adversely to all the world, except as to the plaintiff, his grantors, and Dolly Seeley. The defendants were not present at the trial, and offered no testimony other than their depositions.

The court found for the plaintiff, and decreed that he had a lien upon an undivided two-thirds interest in said real estate for the amount of money he had loaned thereon, together with interest, because, as found by the court—

"The defendant Margaret Nichols had at the time of such transaction knowledge of the conveyances made by her two daughters, as aforesaid, and of the fact that plaintiff was loaning money on the apparent title which said daughters owned in said real estate, based on the apparent intestacy of Josephus Nichols, and that the plaintiff had no knowledge of the existence of such unprobated will."

The court further ordered that the undivided two-thirds interest in said real estate be sold subject to such rights, as said Margaret Nichols would have therein in the event of her husband, Josephus Nichols, having actually died intestate, viz. homestead, dower, and quarantine right. Defendants duly appealed to this court.

[1-3] I. The evidence wholly fails to sustain the allegations of fraud and conspiracy charged against the defendants, or either of them. The burden of proof in such cases is upon the plaintiff to make out his case by clear and convincing evidence. While fraud may be inferred from facts and circumstances, it is never to be presumed without or against the evidence. And where the transaction under consideration may as well consist with honesty and fair dealing, as with a fraudulent purpose, it is to be referred to the better motive. *Garesche v. McDonald*, 108 Mo. 1, 15 S. W. 379; *Hardwicke v. Hamilton*, 121 Mo. 465, 26 S. W. 342; *Warren v. Ritchie*, 128 Mo. 311, 30 S. W. 1023. Viewed in the light of these rules, we are constrained to find from the record that all of her daughters, and both of her sons-in-law, Andrew and Edward Foutes, knew that the property had been devised to Mrs. Nichols by their father's will before Mrs. Andrew Foutes made her deed to



Edward Foutes, and that Mrs. Nichols never told Edward Foutes that she claimed to own the property under a right of redemption, and never said to him that her daughter could not sell her interest for that reason. Indeed, the petition itself, in effect, alleges that all of her daughters and sons-in-law knew the will devised the property to her, and conspired with her to suppress all knowledge of its existence, so as to mislead and defraud the public and the plaintiff. And the petition further alleges that the deed from Mrs. Andrew Foutes to Edward Foutes was made and the loan from the plaintiff secured by Edward Foutes in pursuance of said conspiracy. The evidence totally fails to prove any such conspiracy, so far as the defendants are concerned, but all tends to disprove it.

We are also satisfied that Mrs. Nichols never willfully withheld the will of her husband from probate for any such sinister purposes as alleged in the petition. She gave the will to Mr. Brown, the justice of the peace who wrote it, and advised with him as to probating it, and he informed her it was not necessary to do so; that the property was hers just as well without being probated. The probate judge, Judge Motley, and Mr. Major, afterwards Gov. Major, whom she also consulted, gave her similar advice. If this venerable mother intended to commit a wrong or defraud the plaintiff or the public by secreting the existence of the will, would she have gone to these public officials to advise her in regard to probating it? But it is not necessary to prolong the discussion of this branch of the case. Suffice it to say that there is in this record not even the breath of suspicion of wrongdoing on the part of Mrs. Nichols in failing to probate and record the will, or that she ever knowingly stood by and allowed her daughters to deal with the property as their own, or had any knowledge of plaintiff's transactions with her daughters and sons-in-law until subsequent thereto.

[4] II. The claim of title by the defendants by adverse possession must be denied, because the property was the homestead of Josephus Nichols, and dower had never been assigned to the widow, and the daughters were married women when their father died, two of them remaining so until the trial, and the husband of the other had not been dead for 10 years before that time.

[5, 6] III. As to the title of Mrs. Nichols under her husband's will. It is true, as asserted by respondent's learned counsel, that title to land does not pass by will until the will is probated. *Snuffer v. Howerton*, 124 Mo. 637, 28 S. W. 166. But it is equally true that title does pass upon the probating of the will, and relates back and takes effect as of the time of the testator's death. *Barnard v. Bateman*, 78 Mo. loc. cit. 415; *Wilson*

*v. Wilson*, 54 Mo. 213. Our statute nowhere fixes a time within which a will must be probated after the testator's death, nor is there any provision making a will void until it is probated. A sheriff's sale does not pass title until a sheriff's deed is made and acknowledged as required by the statutes. Yet upon the making, acknowledgment, and delivery of the sheriff's deed, it relates back and conveys title as of the inception of the lien of the execution or judgment, except as to intervening innocent purchasers; that is, purchasers without notice of the sheriff's sale. *Strain v. Murphy*, 49 Mo. 337; *Leach v. Koenig*, 55 Mo. 451; *Lewis v. Curry*, 74 Mo. 49; *Land & Lumber Co. v. Franks*, 156 Mo. loc. cit. 689, 57 S. W. 540. The same rule must apply to wills. Upon their being probated they relate back to the death of the testator, and eliminate all intervening purchasers who had notice, actual or constructive, of the will. In this case the plaintiff had no actual knowledge of the will. So that the sole question for our decision is whether he had constructive notice of it by reason of the open possession, to his knowledge, of the property by Mrs. Nichols, at and before the time he made his loan to the Foutes. Respondent's learned counsel do not deny that such possession and knowledge thereof by the purchaser would generally charge the purchaser with notice of the title of the party in possession, but they contend that this should not be so in this case, because plaintiff knew that Mrs. Nichols was the widow of Josephus Nichols, and occupied the homestead, and therefore he had a right to attribute her possession to her right as widow, and was not bound to inquire as to any other right she might have in the property. No authorities are cited in support of the suggestion of learned counsel; but we find that in some other jurisdictions there are exceptions to the general rule, and one is, that when a tenant goes into possession under a lease and afterwards buys the landlord's title and fails to put his deed on record, but remains in possession under circumstances not sufficient to attract attention to the change of his former title, his possession is not notice to third parties of his title under his deed from the landlord. 2 *Devlin on Deeds*, § 1412, citing among other cases, *Lincoln v. Thompson*, 75 Mo. 613. But the author closes the discussion, in support of which he cites many authorities, by saying (Id.):

"But the proper rule seems to be that possession should be held to be notice of all the rights of the party in possession, when that possession is open, visible, exclusive, distinct, and unequivocal."

*Pomeroy's Eq. Jur.* vol. 2. § 616, also notes the same distinction, and says of the cases holding that such exception is not well founded (note 2):

"In my opinion these decisions are much more in harmony with the general doctrine than those others which have drawn refined distinctions upon the amount of notice derived from the occupant's original right to the possession. The reasons upon which the whole doctrine rests seem to be conclusive. The possession of a third person is said to put a person upon an inquiry; and he is charged with notice of all of that he might have learned by a due and reasonable inquiry. Clearly a purchaser, who is put upon inquiry, is bound to inquire of the occupant with respect to every ground, source, and right of his possession; anything short of this would clearly fail to be the 'due and reasonable inquiry'"—citing numerous cases.

But we do not regard the case in hand as coming within the exception which these learned authors say is not supported in principle, nor by weight of authority. The reason for the exception is lacking here. In this case Mrs. Nichols' rights as devisee and widow were cast upon her at the same instant by the death of her husband, so that it cannot be said that she went into possession under one right or claim and afterwards acquired another. We hold, therefore, that the law in this state is that open, exclusive, separate, and distinct possession, such as is shown here to have been in Mrs. Nichols, after the death of her husband, is and was notice to the world of all of her rights, those as devisee of her husband, as well as those cast by the law upon her as his widow. In the case of *Lincoln v. Thompson*, 75 Mo. 613, above noted, the remarks of the court tending to support the exception to the general rule above mentioned, the wife had not been in exclusive possession, nor possession at all. The possession had been in her husband. The remarks of the court were therefore obiter. On the other hand, in *Davis v. Briscoe*, 81 Mo. loc. cit. 37, this court, per Phillips, C., said, quoting *Buck v. Holloway*, 2 J. J. Marsh. (Ky.) 180:

"The only sensible rule is that actual residence upon the land is notice to all the world of every claim which the tenant may legally assert in defense of his possession."

The Supreme Court of Kentucky, thus quoted with approval, further added:

"We cannot split up the claims under which tenants in possession may hold, in this manner, for the benefit of those who purchase over their heads."

The rule that open and unequivocal possession of land gives notice to the world of the rights of the occupant, as fully as actual notice or record of the muniments of title, has always been the law of this state. *Bartlett v. Glascock*, 4 Mo. 62; *Leavitt v. La Force*, 71 Mo. loc. cit. 357; *Masterson v. Railroad*,

72 Mo. loc. cit. 342; *Davis v. Briscoe*, 81 Mo. 27; *Ins. Co. v. Smith*, 117 Mo. 261, 22 S. W. 623, 38 Am. St. Rep. 656; *Destelguer v. Martin*, 162 Mo. 417, 63 S. W. 107; *Myers v. Schuchmann*, 182 Mo. 159, 81 S. W. 618; *Shaffer v. Detle*, 191 Mo. loc. cit. 393, 90 S. W. 131; *Stuart v. Ramsey*, 196 Mo. loc. cit. 415, 95 S. W. 382; *Squires v. Kimball*, 208 Mo. 119, 106 S. W. 502; *Stone v. Railroad*, 261 Mo. loc. cit. 76, 169 S. W. 88; *Titus v. Development Co.*, 264 Mo. loc. cit. 245, 174 S. W. 432.

In *Shaffer v. Detle*, 191 Mo. loc. cit. 393, 90 S. W. 135, this court, per Lamm, J., says:

"But it is strenuously urged by appellant that the proof showed no notice to him; and that he was an innocent purchaser. The record bears earmarks indicating all the parties resided in New Madrid county, and hence no question of nonresidence is in the case. We assume appellant's contention is based on the doctrine that under our registry acts a deed should be recorded in order to impart notice. But visible possession of real estate, with acts of dominating control, improvements, the continuous cultivation of the land, etc., are as potential in imparting notice of a claim of title as the record of a deed. One may not be allowed to blindfold himself to the visible indices of ownership, such as abound in this case, and say that he had no notice. To this effect has always been the law in Missouri. *Bartlett v. Glascock*, 4 Mo. 62; *Davis v. Briscoe*, 81 Mo. 27. And such is the general doctrine. 2 Dev. on Deeds (2d Ed.) §§ 760, 769. The possession of J. C. Morehead was continuously perpetuated, down to the day of the trial, under the chain of title relied upon by the respondents, and it became either actual notice or put appellant on inquiry and he is impaled on either horn of the dilemma."

And in *Squires v. Kimball*, 208 Mo. 119, 106 S. W. 504, this court, per Fox, J., says:

"It is no longer an open question in this state that a person who buys property in the visible possession of a third person is chargeable with notice of the title and right of that person to the premises."

We hold that under the facts and circumstances shown in the case the circuit court erred in not rendering judgment for the defendants. We therefore reverse the case, with directions to the lower court to set aside the judgment rendered for the plaintiff and enter up judgment for the defendants.

BROWN and RAGLAND, CO., concur.

PER CURIAM. The foregoing opinion of SMALL, C., is adopted as the opinion of the court.

All the Judges concur; BOND, J., in the result.

STATE ex rel. KANSAS CITY THEOLOGICAL SEMINARY v. ELLISON et al.,  
Judges. (No. 21071.)(Supreme Court of Missouri, Division No. 1.  
Dec. 1, 1919.)1. TRUSTS  $\Leftrightarrow$ 59(1)—REVOCATION OF COMPLETED TRUST WITH CONSENT OF ALL BENEFICIARIES.

A completed trust, though voluntary, can be revoked only by consent of all the beneficiaries, unless the power of revocation is reserved.

2. TRUSTS  $\Leftrightarrow$ 59(2)—RESERVATION OF RIGHT OF REVOCATION BY USE OF POWER OF ATTORNEY.

A power of attorney not coupled with an interest was a mere naked power or authority, and one of its main incidents was the right of revocation; for, where trustors used such an instrument to create the trust, they intended to reserve and did reserve the right of revocation.

3. TRUSTS  $\Leftrightarrow$ 37½—VOLUNTARY TRUST MUST BE EXECUTED TO BE ENFORCEABLE.

To be enforceable, a voluntary trust must be fully executed, that is, so fully consummated that nothing remains to be done by the grantor or donor to complete the transfer of title.

4. TRUSTS  $\Leftrightarrow$ 37½—MANNER OF EXECUTION OF VOLUNTARY TRUST.

In order to execute a voluntary trust, it is necessary that the trustor do everything that can be done, the character of the property comprising the trust considered, to transfer the property to the trustee in such mode as will effectually pass title, which he may do (1) by declaring himself a trustee for the purposes of the settlement, (2) by transferring the property to a trustee for such purposes, or (3) by actually transferring the property to the persons for whom he intends to provide.

5. TRUSTS  $\Leftrightarrow$ 37½—WHEN SYMBOLIC DELIVERY TO TRUSTEE BY POWER OF ATTORNEY SUFFICIENT.

Where trustors were not in possession of the assets of the estate of a decedent whose heirs they were, and had only an equitable title thereto, only a symbolic delivery thereof to their trustee was possible, and in order for their power of attorney to be construed as having effected such delivery it must be taken either as a declaration by the grantors that they held the assets as trustees, as having passed their title to the trustee, or as having passed the title directly to the beneficiaries.

6. PRINCIPAL AND AGENT  $\Leftrightarrow$ 37—NO RIGHT OF REVOCATION OF POWER OF ATTORNEY IN CASE OF POWER COUPLED WITH INTEREST.

Where a power of attorney is not naked but coupled with an interest for the purposes of the trust, there is no power of revocation unless expressly reserved or necessarily implied from other terms of the trust, which is true regardless of the form of the instrument by which the power is granted.

7. COURTS  $\Leftrightarrow$ 231(4)—JURISDICTION OF COURT OF APPEALS IN CASE OF CONFLICT OF DECISION.

On certiorari to quash the opinion and judgment of a Court of Appeals as in conflict with previous decisions of the Supreme Court, it is not within the scope of the Supreme Court's duty or prerogative to decide whether the holding of the Court of Appeals was right or wrong; such court having jurisdiction to decide wrong as well as right.

8. COURTS  $\Leftrightarrow$ 231(4)—NO CONFLICT BETWEEN DECISIONS OF SUPREME COURT AND COURT OF APPEALS RELATIVE TO REVOCATION OF POWER OF ATTORNEY.

Opinion and judgment of a Court of Appeals relative to the revocation of a power of attorney not coupled with an interest held not in conflict with prior decisions of the Supreme Court so as to be quashed by the latter court on certiorari.

9. CERTIORARI  $\Leftrightarrow$ 42(4) — BURDEN TO POINT OUT CONFLICTING DECISIONS GIVING SUPREME COURT JURISDICTION.

On certiorari to quash the opinion and judgment of a Court of Appeals as in conflict with previous decisions of the Supreme Court, relator assumes the burden to point out previous opinions of the Supreme Court impugned by the alleged conflicting decision of the Court of Appeals.

10. PRINCIPAL AND AGENT  $\Leftrightarrow$ 3(5) — DUTIES OF TRUSTEE AND AGENT.

An agent's duty is primarily to his principal for whom he acts and to whom he must account; a trustee's duty is primarily to his cestui for whom he acts and to whom he must account, though his authority comes from another.

Certiorari by the State of Missouri, on the relation of the Kansas City Theological Seminary, against James Ellison and others, Judges of the Kansas City Court of Appeals. Writ quashed.

Ed. E. Aleshire, of Kansas City, for relator.

W. E. Suddath, of Warrenburg, for respondents.

RAGLAND, C. Certiorari. This is an original proceeding in which relator seeks to have quashed the opinion and judgment of the Kansas City Court of Appeals in the case of Kansas City Theological Seminary v. Kendrick, 203 S. W. 628, because, as it is alleged, they are in conflict with previous decisions of this court. The opinion is as follows:

"On August 31, 1914, Jane Mock, a resident of Johnson county, Mo., died intestate. However, prior to her death she attempted to execute a will making various bequests to relatives and charitable institutions, one of which was a gift of \$1,000 to plaintiff. The will was not witnessed, and therefore was ineffective. After her death her heirs executed the following power of attorney to defendant:

"Know all men by these presents, that we, C. F. Nissen, Hattie Shepherd, Alice Charles, W. M. Nissen, S. J. Nissen, M. E. Laugenour, B. S. Nissen, Stella Montague, Harry Nissen, Fred Nissen, Clara Ellis, Claude Nissen, Frank Nissen, and Jennie Nissen, being the heirs, and only heirs at law of Jane Mock, deceased, late of Knobnoster, Johnson county, Missouri, do by these presents appoint J. M. Kendrick, of Knobnoster, Missouri, our true and lawful attorney, for us and in our names to make settlement with the public administrator of Johnson county, Missouri, of any and all sums due us from the estate of the said Jane Mock, deceased, and to collect from the said administrator, and from any person having in charge the said estate, any and all sums that may be due us from the said estate, and to receipt therefor, the same as if we were present and acting in person, and to do any and all things necessary to be done in the settlement of the said estate, that we might or could do if present and acting in person. This power of attorney is executed and delivered for the purpose of making it possible for the said J. M. Kendrick to carry out the terms and provisions of a certain written will, left by the said Jane Mock, deceased, a copy of which is hereto attached which said will was refused probate for failure of witnesses, as provided by law. Granting to the said J. M. Kendrick full power of substitution."

"After the execution of this power of attorney defendant collected the money mentioned therein from the public administrator, proceeded to carry out the terms of the will, and had paid nearly all of the bequests, but refused to pay the bequest to plaintiff. Thereupon plaintiff brought this suit for the sum of \$1,000. Defendant's answer contained a number of allegations, including one that the power of attorney mentioned above had been revoked by said heirs by a paper denominated a 'Revocation and Ratification,' wherein all the acts of the defendant were ratified by said heirs, and, for various reasons assigned but not necessary to set out here, they revoked the power of attorney to defendant to pay over the bequest of \$1,000 to plaintiff, and prohibited him from doing anything further with the funds that came into his hands other than had already been done by him. To this answer plaintiff filed a demurrer, and the court overruled the same. Thereupon, after taking the proper steps, plaintiff appealed.

"(1) It is the contention of plaintiff that the power of attorney as above set forth made the defendant a trustee for the purpose of collecting from the public administrator the money of deceased, empowering and directing the defendant to pay the bequests mentioned in the will, including the \$1,000 to plaintiff.

"Whether or not the power of attorney created a trust estate, made defendant a trustee to administer the same, and made plaintiff a beneficiary to the extent of \$1,000, is a matter we need not pass upon, for the reason that, admitting that defendant was made such a trustee, we do not believe that plaintiff is entitled to recover.

"(2, 3) A power of attorney may be revoked by those executing the same. (There is no contention that this power of attorney was coupled with an interest.) The fact that the

heirs of Jane Mock executed an instrument one of the main incidents of which was the power of revocation shows that, even if they had intended to create a trust estate, they reserved the right of revocation. That a power to revoke a trust may be reserved in the instrument creating the same is well settled (*Kelly v. Johnson*, 34 Mo. 400; *Mize v. Bates County National Bank*, 60 Mo. App. 358; 39 Cyc. 94), and, of course, there is no question that when the right to revoke is retained in an instrument the same may be exercised at any time before the trust is executed (*Mize v. Bates County National Bank*, supra; *Schreyer v. Schreyer*, 101 App. Div. 456, 91 N. Y. Supp. 1065).

"(4) The power of attorney did not amount to a gift inter vivos to plaintiff by the heirs of Jane Mock. The direction contained in the power of attorney to defendant was that defendant give to plaintiff the \$1,000 as provided for by the defective will of Jane Mock, deceased. This direction was to the agent of said heirs, and not to the agent of plaintiff. Under such circumstances there could have been no executed gift until there had been a delivery of the money by defendant to plaintiff. *Tomlinson v. Ellison*, 104 Mo. 105, 18 S. W. 201; *Burchett v. Fink*, 139 Mo. App. loc. cit. 385, 123 S. W. 74; *Chandler v. Hedrick*, 187 Mo. App. 664, 173 S. W. 93; *In re Estate of Souard*, 141 Mo. 642, 43 S. W. 617.

"(5) It is said in *Reynolds v. Hanson*, 191 S. W. 1030, and *Brannock v. Magoon*, 141 Mo. App. 316, 125 S. W. 535, the test is, 'Has the delivery of possession been such as to put it out of the power of the donor to repossess the property?' As the heirs of Jane Mock reserved the right to revoke the authority of defendant to make the gift to plaintiff, it was manifestly their intention not to put it out of their power to repossess before delivery the property or money. There is nothing in the cases of *Walter v. Ford*, 74 Mo. 195, 41 Am. Rep. 312, and *McCord v. McCord*, 77 Mo. 166, 46 Am. Rep. 9, cited by plaintiff, contrary to the position herein taken. If we are to understand that plaintiff claims that the power of attorney was a symbolic delivery, of course the contention will be denied.

"The judgment is affirmed."

[1] As shown by the opinion, the court bases its final conclusions on two principal holdings: (1) That admitting that the power of attorney referred to created a trust, yet it impliedly reserved a power of revocation in the grantors, and this power was exercised before the trust was executed; and (2) that the power of attorney did not effectuate a gift inter vivos. In the first of these rulings it is obvious that the court distinctly recognized controlling decisions of this court to the effect that a completed trust, though voluntary, can only be revoked by consent of all the beneficiaries, unless the power of revocation is reserved. *Ewing v. Shannahan*, 113 Mo. 188, 20 S. W. 1065; *Sims v. Brown*, 252 Mo. 58, 158 S. W. 624. However, it is the construction the court places on the instrument in question to the effect, that even if it creates a trust it contains an implied power

of revocation thereof, that relator complains of and says is in conflict with many decisions of this court. It specifies those in the following cases only: *Walter et al. v. Ford*, 74 Mo. 195, 41 Am. Rep. 312; *McCord v. McCord*, 77 Mo. 103, 46 Am. Rep. 9; *Thomas et al. v. Thomas*, 107 Mo. 459, 18 S. W. 27; *Dunn v. American Bank*, 109 Mo. 90, 18 S. W. 1139; *In re Estate of Soulard*, 141 Mo. 642, 43 S. W. 617.

[2-5] 1. The reasoning of the opinion in this respect seems to be as follows: The power granted was not coupled with an interest, and was therefore a mere naked power or authority; one of the main incidents of a power of attorney conferring such a power is the right of revocation; as the trustors in this case used such an instrument to create the trust, they thereby intended to reserve and did reserve the right of revocation. A voluntary trust to be enforceable must be fully executed; that is, so fully consummated that nothing remains to be done by the grantor or donor to complete the transfer of title. The hypothesis that the power of attorney created an enforceable voluntary trust assumes that its language was not only sufficient to express an intention to create a trust, but that it operated, in connection with the delivery of the instrument itself, to execute the trust so declared. In order to execute a voluntary trust, it is necessary that the trustor do everything that can be done, the character of the property comprising the trust considered, to transfer the property to the trustee in such mode as will be effectual to pass the title. This he may do (1) by declaring himself a trustee for the purposes of the settlement, or (2) by transferring the property to a trustee for those purposes, or (3) by actually transferring the property to the persons for whom he intends to provide. In *re Estate of Soulard*, 141 Mo. 642-662, 43 S. W. 617. In this case, as the trustors were not in possession of the assets of the estate of Jane Mock, deceased, and had only an equitable title thereto, only a symbolic delivery thereof was possible. In order for the power of attorney to be construed as having effected such a delivery, it must be construed either (a) as a declaration by the grantors therein that they held the assets as trustees for the uses declared by the terms of the defective will, or (b) as having passed the title of said grantors thereto to the grantee therein for such uses, or (c) as having passed such title directly to the beneficiaries under said will. Now the question is: Which of these possible constructions did the court entertain tentatively in making the ruling under review?

According to construction (a), the heirs of Jane Mock, deceased, the grantors in the power of attorney, declared themselves trustees of the beneficiaries under the will, and merely empowered Kendrick, the grantee, to

act as agent for them as such trustees, and of course a revocation of Kendrick's agency would not have affected the trust in any way. Evidently, this possible construction was not in the mind of the court because the opinion deals with a hypothetical trust wherein Kendrick is trustee, and such construction was not considered by the plaintiff (relator) when it instituted the suit; otherwise it would have made the heirs parties. This possible view of the legal significance of the power of attorney may therefore be definitely eliminated from further consideration.

[6] According to construction (b), the interest of the heirs in the assets passed to Kendrick as trustee for relator and the other legatees under the will. It follows that under this view the power given Kendrick was not a naked power, but one coupled with an interest for the purposes of the trust. In such case it is elementary that there is no power of revocation unless expressly reserved or necessarily implied from other terms of the trust. This is true regardless of the "form" of the instrument by which the power is granted.

According to construction (c), the beneficial interest of the heirs in the assets to the extent of \$1,000 was passed directly to relator by the power of attorney itself. Relator's equitable title was not dependent, therefore, in any way upon the execution by Kendrick of the power given him as trustee. Kendrick was merely given the power to make settlement with the administrator, collect \$1,000, and deliver it to relator; in other words, to do such things as would perfect relator's ownership by investing it with the legal title and possession. This a court of equity could have done without the aid of a trustee. It is not entirely clear, therefore, why the incidental right to revoke the power of the trustee, if it existed, should be construed as a reservation of the right to revoke the trust also. Had Kendrick died without having executed the power, the power, if a naked one, would not have survived; yet it will hardly be contended that relator's equitable title in such event would have been in any wise affected or impaired.

[7-9] What has been said with reference to the possible interpretations that might be made of the power of attorney in question, whereby it would be held to have created a voluntary executed trust (the only kind at all pertinent to the decision of the questions involved), shows that it is at least not obvious upon what view of construction the Court of Appeals could have held that that instrument, if it created a trust, also contained an implied reservation of the power to revoke it. However, it is not within the scope of our duty or prerogative to decide whether that holding was right or wrong. The Court of Appeals, like ourselves, has "jurisdiction" to decide wrong as well as to

decide right. The only question we may consider and determine is whether such decision contravenes any of ours. A careful reading of the cases pointed out by relator does not disclose any conflict; indeed, they seem to be far afield on this precise point. So far as we are advised, this court has never passed on either the precise question disposed of by the ruling under review, or any similar one involving the same considerations. Certainly in cases of this kind our constitutional duty to preserve harmony of decision cannot be held to require us to make critical examination of all the previous opinions of this court to ascertain, if perchance, any of them contain an utterance that is impinged by the alleged conflicting decision. The relator assumes the burden in this respect.

[10] 2. We are relieved of all embarrassment arising from a consideration of the Court of Appeals' ruling based on the hypothesis that the power of attorney created an enforceable trust, because the concluding portion of the opinion, in our view, holds by necessary implication that the execution of that instrument did not create such a trust. It specifically holds that the power of attorney was not a symbolic delivery. From considerations heretofore stated, a symbolic delivery of the property comprising the alleged trust was the only character of delivery possible, and, if the execution of the power of attorney did not operate as such a delivery, either to Kendrick as trustee, or directly to relator as beneficiary, there never was a delivery. Hence the alleged trust was not executed, and therefore was not enforceable. The opinion also holds:

"The direction contained in the power of attorney to defendant was that defendant give to plaintiff the \$1,000 as provided for by the defective will of Jane Mock, deceased. This direction was to the agent of said heirs, and not to the agent of plaintiff."

This is inconsistent with any theory of a trust under which Kendrick was trustee. If Kendrick was the agent of the heirs and was not the agent of the plaintiff, he was not a trustee. An agent's duty is primarily to his principal; he acts for and must render an account to him. A trustee's duty is primarily to his cestui que trust; he acts for him and in his behalf and must account to him, although his authority comes from another.

These holdings of the court, that the power of attorney in question did not operate as a symbolic delivery of the grantor's interest in the assets of the estate of Jane Mock, deceased, and that it created a mere agency and not a trust, as well as its rulings as to the necessary requisites of a valid gift *inter vivos*, are not in conflict with any previous decision of this court that has come to our attention.

It follows from the views herein expressed that our writ should be quashed.

It is so ordered.

BROWN and SMALL, CC., concur.

PER CURIAM. The foregoing opinion of RAGLAND, C., is adopted as the opinion of the Court.

All the Judges concur.

#### STATE v. OSBORNE. (No. 2538.)

(Springfield Court of Appeals. Missouri. Dec. 6, 1919.)

##### 1. INTOXICATING LIQUORS §238(1) — EVIDENCE DOES NOT SHOW UNLAWFUL DELIVERY IN LOCAL OPTION TERRITORY.

Evidence that defendant, on his return from a trip by train, brought intoxicating liquors in a suit case and requested a neighbor boy, who met him at the station, to "pack my grip for me," held insufficient to warrant submission to jury of defendant's guilt of delivering intoxicating liquors in local option territory.

##### 2. CRIMINAL LAW §1159(2) — REVERSAL WHERE PROOF CONTRADICTS FINDING.

Appellate courts cannot permit verdicts of conviction to stand, where the proof introduced by the state flatly contradicts such finding, which is based merely on a refusal of the jury to believe every witness that the state introduced who was in a position to, and did, know the actual facts as they existed.

Sturgis, P. J., dissenting.

Appeal from Circuit Court, Laclede County; L. B. Woodside, Judge.

Fred Osborne was convicted for delivering intoxicating liquors in local option territory, and appeals. Reversed.

D. O. Vernon and I. W. Mayfield & Son, all of Lebanon, for appellant.

Phil M. Donnelly, of Lebanon, for the State.

FARRINGTON, J. The appellant was convicted in the circuit court of Laclede county on an information drawn by the prosecuting attorney of that county, in which it was charged that he did unlawfully and willfully keep, store for, and deliver to another person than him, the said Fred Osborne, certain intoxicating liquor, to wit, five quarts of whisky and two quarts of alcohol. After trial to a jury, a verdict was returned, finding the defendant "guilty of delivering five quarts of whisky and two quarts of alcohol to Orville Hufft." The defendant was sentenced to pay a fine of \$300, together with the costs, and it is from this judgment that he appeals. No briefs are filed by either the

attorney for defendant or the state in the cause, and it is submitted to us upon the full record as sent up by the clerk of the circuit court.

[1] We find that the form of the information and verdict complies with the law, and that there is no irregularity disclosed in the proceedings of the trial. The question, however, of whether the state made a case against the defendant which should have been submitted to a jury is the one on which we think this appeal should turn.

The evidence as introduced by the state, shows that on or about the 3d day of March, 1918, the defendant, who resided in Laclede county, some seven or eight miles from Lebanon, the county seat, came to town with a team, and some time during the day got a suit case at a hotel, which belonged to another party, and took the train for Springfield, Mo. He started for Springfield in the afternoon, and returned to Lebanon that night, arriving there at 12:45 a. m. After getting off the train at the depot with the suit case, and while the train was standing, three boys, all of whom lived in the country and neighbors to defendant, came up to him and were engaged in conversation in a group. The defendant had put his team up at a livery stable in the town of Lebanon, and the evidence shows that these neighbor boys of his, who met him and were talking to him at the depot, knew where his team was put up; that, after talking several minutes on the platform, the defendant said to one of the young men, whose name was Orville Hufft, "If you don't care, pack my grip for me." The evidence shows that at this time Orville Hufft picked up the suit case, and the whole group started off up town; the boy with the suit case and another boy walking in front, and the defendant and the other boy following. Shortly after starting, the sheriff started to come up, and got in between the four boys; two being in front of him and two behind. They all proceeded uptown, until the two first boys arrived at the livery stable where defendant's team was put up, and set the grip down by the side of the barn. In going from the depot to the livery stable, after packing the suit case a while, Orville Hufft asked the boy who was with him to pack the grip while he buttoned his coat, and it was this boy who carried the grip on to the stable and set it down at the north side. Shortly after this the sheriff arrived, and after calling the boys a very vile name demanded the suit case of Orville Hufft, who informed him that he did not have it. The other boy told him that it was setting down there by the side of the stable, where he had put it. It was, of course, dark, and the sheriff says it was setting down by the stable under a scraper. The boy who set it there says he does not know whether it was

under a scraper or not, as he simply set it down in the dark to await the defendant. The defendant and the other boy arrived shortly after the sheriff had taken possession of the grip, and upon inquiry the sheriff told him the whisky and alcohol belonged to him, and that no one else had any interest in it or right to it.

The state put on as witnesses the three country neighbor boys who met the defendant at the station, and every one of them testified positively that they had not sent the defendant to Springfield, and did not know that he was going there, until after they arrived in town, and learned that after they came to Lebanon, and after the defendant had gone. They all three denied positively, as did defendant, that they had any interest whatever in this whisky and alcohol; that no part of it belonged to them, and that none of them knew that there was any whisky or intoxicating liquor in this suit case. There is no evidence whatever in the case that this defendant, or any of these boys, were what is ordinarily termed as "bootleggers," or had ever been charged with violating any of the intoxicating liquor laws of the state. The defendant frankly admits that he was the owner of all of this intoxicating liquor; testifies that he bought it in Springfield for his own use, and the use of a sick sister at home, who was down with rheumatic fever. Two physicians were placed on the stand, both of whom testified that they had recommended to the family of the defendant to get some alcohol, in order that the sick sister might be given alcohol rubs. One of the doctors testified that, considering the distance it was necessary to go and get alcohol, two quarts would not be an unreasonable amount to be used for the purpose for which it was recommended. He stated that the sickness from which she was suffering would probably last a number of months. The sheriff testified that the two boys who went ahead with the grip at one time ran across the street. This was denied by the boys who were in front, and who were the state's witnesses. It will be remembered that this was between 12 and 1 o'clock at night, and that the evidence of the state's witnesses shows that it was dark.

We therefore have a case wherein the defendant is convicted of having delivered intoxicating liquor in local option territory to Orville Hufft, under the circumstances detailed. As we view it, there was not sufficient testimony to put this case to a jury on this charge. The court gave an instruction for the defendant, in which it told the jury that, unless they believed that the intoxicating liquor was delivered to Hufft for the purpose of evading detection, they must find for the defendant, and to our minds there is a failure of any proof of sufficient dignity to find such a fact to exist, as every particle

of proof introduced by the state tended to show that all of this intoxicating liquor belonged to the defendant, that it was not purchased by him for any other use than his own personal use and that of his sick sister, and that there was no attempt to deliver any intoxicating liquor to any one of his associates who met him at the train.

We are unwilling to lend our sanction to a construction of the local option law that would convict a party for having delivered intoxicating liquor to another by the mere request of asking a friend to help him pack his grip uptown. There is no evidence of any attempt or intention to deliver the control, or to part with the possession, of this grip by the defendant; nor is there any evidence to show that either of the boys who packed this grip uptown were attempting or expected to take possession of it, with a view of keeping it for the defendant. The act at most was merely the request of a party to pack a suit case uptown as the group started off together, and a granting of that request by one of his neighbor farm boy friends. To find that he was delivering this liquor to Orville Hufft, or that the defendant was parting with the control or possession of this liquor to one who had some interest in it, or to one assisting the defendant in smuggling it into the county, would be basing such finding on the vaguest conjecture and contradiction of every particle of testimony of the parties, who knew all about it, and who were introduced by the state as witnesses.

It was undoubtedly the theory of this prosecution from the beginning to the end that the defendant had gone to Springfield to bring back some whisky to Laclede county, some of which would be parceled out to these neighbor boys, who met him at the train; and there is not only a failure on the part of the state to show the existence of such facts, but, on the other hand, the testimony introduced by the state all flatly contradicts any such arrangement.

[2] Appellate courts cannot permit verdicts of conviction to stand which, under the law, must be based upon such proof as leaves the question as settled beyond a reasonable doubt, where the proof introduced by the state flatly contradicts such finding, and bases such finding merely upon a refusal of the jury to believe every witness that the state introduced, who were in a position to, and did, know the actual facts as they existed.

The judgment will be reversed.

BRADLEY, J., concurs.

STURGIS, P. J. (dissenting). If the case of *State v. Galliton*, 176 Mo. App. 115, 161 S. W. 848, is good law, and I think it is, as it has frequently been cited, and never crit-

icized or overruled, then this case should be affirmed, as the learned trial judge clearly followed that case. We there held that the offense created by section 7227, R. S. 1909, of "keeping for another" intoxicating liquors in local option territory need not be in any way connected with an illegal sale or intent to sell. This is true, also, of the offense of "delivering to another" intoxicating liquors in local option territory. This court so ruled in the *Galliton* Case, *supra*, on the authority of *State v. McMurtry*, 161 Mo. App. 400, 411, 143 S. W. 521; and it has since been so ruled in *State v. Parkel*, 185 Mo. App. 70, 78, 170 S. W. 915, *State v. Burns*, 237 Mo. 216, 140 S. W. 871, and *State v. Lane*, 193 S. W. 948. In the *Parkel* Case, this court adopted the meaning of "deliver" as being "to place in the power or possession of another; to surrender possession of," and distinctly ruled that so far as the offense of delivering to another was concerned—

"whether the title passes with possession, or merely possession passes from the seller or barterer on the one part, or the storer or keeper on the other, to another person, a delivery must take place. Where intoxicants are delivered from one person to another, the title to the goods, prior to the delivery, was either in or not in the deliverer, and from the acts prohibited in the law it will be seen that it matters not in whom the title to the goods was vested."

In the *Galliton* Case the facts are quite similar to those in this case, in that one person arriving on the train from another town had five quarts of whisky in a suit case, and, to avoid being caught by the sheriff with such intoxicants, resorted to the device of turning over such suit case and whisky, to another, a friend, who was willing to carry it uptown for him. In that case the accommodating friend who thus carried the suit case was held guilty of "keeping for another" intoxicating liquors in violation of the statute, though the title to the liquor remained in the party for whom it was kept. The court held that there was a delivery of the intoxicants by the owner to the other party, and a consequent keeping for another person (the owner), by the act of such other person and while carrying such suit case uptown, there to be redelivered to the owner. In that case the court said

"After a careful examination of the statute and the authorities cited in appellant's brief, we declare the law to be that under the statute every keeping, consciously, for another of intoxicating liquors in a county which has adopted the local option law, is *prima facie* unlawful. This puts the burden of explanation upon the party who is best able to explain, and follows the rule of statutory construction which requires the defendant to bring himself within the exception."



It was explained in the Galliton Case that this statute does not apply to one who might casually and as a matter of pure courtesy assist another in carrying or keeping for another a package containing intoxicants, or who might act as a mere messenger or porter in assisting a traveler with his baggage. See state v. Brown, 188 Mo. App. 248, 175 S. W. 131. It is held, however, in this last-cited case, and in the Burns and other cases, that the fact that the person to whom the owner delivers it, and who thereafter keeps it for the owner, is an agent or servant of such owner, and who keeps it only temporarily for such owner, does not render him guiltless, though for other purposes the possession of the agent is the possession of the owner. Under the cases cited I find the rule to be that, while a person may himself procure intoxicating liquor, and bring it into local option territory, and keep the same for himself, yet no one else can do this for him, or assist him in doing so, subject to the exceptions just noted. As said in State v. Burns, supra:

"The lawmakers intended to cover each step in the process by which one gets liquor for another."

It seems to me that there is abundant evidence, when we consider the circumstances of this case, to warrant the jury finding that the defendant went to Springfield, and procured and brought to Lebanon (that is, into local option territory), five quarts of whisky and two quarts of alcohol in a suit case; that, whatever may have been his intent as to using or disposing of the same, he was anxious to avoid being caught by the sheriff with this liquor in his possession, and to evade detection delivered it to his accommodating friend, Orville Hufft, at the depot, who thereafter kept it for him, as did defendant in the Galliton Case, by carrying it uptown to the livery stable, where defendant expected to regain its possession, and that such friend expected to be rewarded for his service by receiving a drink, if nothing more. It is quite evident that Orville Hufft and his companions fully expected, if they did not know, that defendant would return to Lebanon with intoxicating liquors, and to this end, though living eight miles in the country, they waited in town and met the midnight train. The sheriff being on the platform when defendant arrived with the suit case, defendant set the suit case

down, and Hufft and his companions drew near. Defendant then directed Hufft to carry the suit case, which he did. Nothing was said as to where to take the suit case and contents, but Hufft took it to a livery stable, where he had ascertained the defendant left his horse while going to Springfield. The sheriff followed Hufft some 200 feet behind, and Hufft quickened his pace at one time to a run. Hufft hid the suit case at the side of the barn under a road scraper, to await defendant's coming, and defendant did not arrive until the sheriff had found the suit case and opened it up. Hufft then followed the sheriff to a hotel, and was far more solicitous as to what the sheriff was going to do with the liquor than was defendant. Hufft and his companions said they did not know what "in particular" was in the suit case until the sheriff opened it; but they certainly were not surprised or shocked when the contents were revealed. That they believed it contained whisky is clearly shown by the circumstances. The defendant undertook to say that his purpose in getting and bringing into local option territory this liquor was to use it as a medicine for a sick sister; but no sensible jury would believe that he got five quarts of whisky and two quarts of alcohol for this purpose.

The only difference between this case and the Galliton Case is that here the owner of the intoxicating liquors is prosecuted for delivering it to the accommodating friend, who thereafter unlawfully kept it for such owner by carrying away the suit case containing same, in order to prevent such owner from being caught with such intoxicants, while there the friend of the owner of the liquors was prosecuted for keeping such liquors for his friend for the same purpose. Since the statute in question expressly includes and makes criminal both the delivery to and keeping for another in local option territory any intoxicants, it must follow that, if the party who receives and keeps the liquors for another under a given state of facts is guilty of an offense, so the party who delivers it to him under the same facts and for the same purpose must likewise be guilty. There is certainly as much evil intent and bad motive present in him who delivers the liquor to be kept for him as in the one who accepts and keeps the same.

In my judgment the evidence is sufficient to sustain the conviction.

## STATE v. ESLICK. (No. 2598.)

(Springfield Court of Appeals. Missouri. Dec. 6, 1919.)

1. RAPE  $\S$ 16(1)—WHAT CONSTITUTES "ASSAULT OF LUST."

One who had sexual intercourse with prosecutrix with her consent could not be convicted of the assault of lust, because the phrase "assault of lust" means an assault, less than felonious, with intent to have an improper sexual connection, and does not extend to a condition or state of facts where the improper sexual relation is finally consummated with the consent of the prosecutrix.

2. RAPE  $\S$ 16(3)—ELEMENTS OF ASSAULT WITH INTENT TO RAPE.

In order to constitute assault with intent to ravish, the defendant must have intended at the time to use all the force necessary to overcome any resistance his victim might offer.

3. CRIMINAL LAW  $\S$ 814(1)—INSTRUCTION AS TO ISSUES UNSUPPORTED BY EVIDENCE.

When there is no substantial evidence to support a material issue of fact, such issue should not be submitted to the jury.

4. RAPE  $\S$ 59(20, 21)—INSTRUCTION AS TO ASSAULT WITH INTENT TO RAVISH NOT JUSTIFIED.

In a prosecution for rape held erroneous, in view of the evidence, to charge on the issue of assault with intent to rape.

5. CRIMINAL LAW  $\S$ 1172(8)—SUBMISSION OF ISSUE OF ASSAULT WITH INTENT TO RAVISH PREJUDICIAL ERROR.

In a prosecution for rape, held prejudicial error to submit to the jury the charge of assault with intent to rape, although defendant was only convicted of common assault.

Appeal from Circuit Court, Howell County; E. P. Dorris, Judge.

W. E. Esllick was convicted of assault, and appeals. Reversed, and defendant discharged.

Moore, Barrett & Moore, of Ozark, and W. N. Evans, of West Plains, for appellant.

B. L. Rinehart, of West Plains, for the State.

BRADLEY, J. Defendant was charged by information of the prosecuting attorney with the crime of rape alleged to have been committed upon Katie Crone, a young single girl just past 18 years of age. Defendant is a young man, and 25 years of age, and single. The trial resulted in a conviction of common assault, and the punishment fixed at a fine of \$50. From this conviction defendant appealed.

Defendant's home was in Ava, in Douglass county, and prosecutrix resided with her mother and stepfather in Mountain View in Howell county, where they conducted a room-

ing and boarding house. Defendant was engaged in writing life insurance in the community in and about Mountain View, and was boarding with the mother and stepfather of prosecutrix. The offense is alleged to have been committed on March 31, 1919, at which time defendant and prosecutrix had known each other only a short time. The version of prosecutrix is: That defendant had on several prior occasions importuned her to go out riding in his Ford runabout, and that she had refused to go. That on the evening of the alleged offense defendant asked her to go to a show, and that she refused, and that he then proposed a ride around town in his car, and that she accepted. It was dark when they started, and that they drove out about two miles, when defendant kissed her, and that she then told him to turn around and go back to town, and thought that he was going to do so; but that he turned the car a little to one side of the road and shut off the engine. That they sat there in the car and talked, and that she insisted on going back, but defendant would not do so. That she then told defendant that she was going to get out and go back, and that he said she must not do that. That defendant solicited sexual intercourse, and spoke about using a rubber, and that she did not know what a rubber was, and asked defendant to let her see it, and that he placed the rubber in her hand. That where they stopped there was an orchard on one side, and timber on the other, and not so very far to a house, and that she told defendant she would hollow for help at the house, and that he told her no, that she must be quiet, and must not hollow for help, and "kept on talking, and told me I must be quiet, and must not get out of the car." That whenever she would say anything that defendant would say that "he was going to have it without the rubber. I had to be still, and I was afraid not to. He said he would go ahead with or without the rubber. That was the only reason I was still, because I was afraid he would go ahead without the rubber." That he had his hands on her shoulders, and that one of her feet was under the steering wheel, and the other one on the door on the other side. "He pushed me down that way, and told me where to put my feet. Q. What did you do then? A. Well he had his hand under my coat up here, then later put it under my dress. Q. Did he have his clothes down at that time? A. Not at that time. Q. Did he at any time? A. Yes, sir. Q. Go ahead. A. Well, after he started, and he said he would use the rubber. It was dark. I couldn't see whether he did or not, but he said he did, and then I told him to quit, and he did. Q. Did you ever feel his private parts? A. Yes, sir. Q. Did he put

them against your private parts? A. Yes, sir. Q. Was there any penetration? A. No, sir." After the circumstances detailed prosecutrix says defendant asked her to kiss him, and that she told him she would if he would take her back to town, and that he said he would, and that she kissed him, and that she did so because she was afraid he would not take her back to town; that they got back to town about 9 o'clock; that the ride in the automobile was on Monday night, and that she told no one of her experience until Wednesday evening when she told her mother; that she told her mother because the defendant was staying there, and she was afraid he might try it again.

On cross-examination prosecutrix stated that she told defendant after they started that she knew the roads, and that they would "just drive around"; that defendant embraced her on the way out; that she did not try to get to any house, and made no outcry, but she says she told defendant she would make an outcry, and that defendant said it was best not to. "Q. And the threats he made against you was that he wouldn't use the rubber? A. Yes, sir. Q. And to keep him from going ahead without that you didn't scream; is that it? A. Yes, sir. Q. Now who suggested the rubber? A. He did. Q. And what did you say to that? A. I asked why it had to be either way. Q. And what did he say? A. He said it would be one way or the other. \* \* \* Q. Then in that discussion, and after you had talked awhile, then he asked you to put one of your feet under the steering wheel? A. Yes, sir. Q. And you did so? A. Yes, sir. Q. Then he asked you to put the other over the door, or on top of the door? A. Yes, sir. Q. And you did? A. Yes, sir. Q. Then he got between your legs? A. Yes, sir. \* \* \* Q. You knew he had put the rubber on his person? A. He said he did. Q. And you felt of the rubber before he did? A. Yes, sir. Q. It was after he had it on? A. Yes, sir. Q. You wanted him to use it? A. I didn't want him to do either way. Q. But if he did? A. Yes, sir; because he said there wasn't any harm. \* \* \* Q. It was in a Ford run-about? A. Yes, sir. Q. At that time he was on his knees, wasn't he? A. I don't know whether he was on his knees or not. He was in front of me. Q. And in between your legs? A. Yes, sir. Q. At that time he asked you to push your body toward him? A. He pulled me down with his hands. Q. Didn't he at that time ask you to push your body towards him, and you did? A. I was laying down in the seat. Q. And he asked you at the time he got in between your legs to move toward him, and you did. A. I don't think so."

Defendant's version is that he took the prosecutrix out driving and solicited sexual intercourse, and that she consented, and that

he had sexual intercourse with her, using a rubber.

[1] The court instructed on assault with intent to rape, and common assault. Defendant at the close of the state's case, and at the close of the whole case, interposed his demurrer to the evidence, and in his brief here challenges the sufficiency of the evidence and the correctness of the instructions. We have, in view of defendant's demurrer, been compelled to set out somewhat in detail the facts adduced by the state, and we might say here that there was nothing brought out by defendant which tended to strengthen the state's case. The assault of which defendant was convicted has been designated as the assault of lust as distinguished from the assault of violence. As to whether defendant is guilty of the assault of lust under the version of prosecutrix depends upon the question of her consent to his various acts in his importunities to her to yield her person to the gratification of his passion. The jury must have found that defendant did no more than detailed by the prosecutrix, and that he did not have sexual connection with her. If he had sexual intercourse with her, he could not be convicted of the assault of lust, because the phrase "assault of lust" means an assault, less than felonious, with the intent to have an improper sexual connection, and does not extend to a condition or state of facts where the improper sexual relation is consummated. *State v. White*, 52 Mo. App. loc. cit. 288. After the consummation it is some other offense or no offense, as the criminal law has defined offenses. In most of the cases where rape, or assault with intent to rape, has been charged, and where the result was a conviction of common assault, the injured person has been a mere child, who could not consent to an assault of any character. But in the case at bar the prosecutrix had arrived at the age of consent, and could, if she desired, consent to an act of sexual intercourse. It would be an anomaly indeed if she could consent to an act of sexual intercourse, yet could not consent to an assault of lust, that is the touching followed by solicitation for sexual indulgence.

In *State v. White*, *supra*, defendant was indicted for assault with intent to rape, and was convicted of the assault of lust. The court there said:

"There is enough in this testimony of defendant, unaided by the other evidence, to justify the jury, if properly instructed in inferring that he placed his hand upon the prosecutrix or that he retained his hold upon her, *against her will* [italics are ours], for a lustful and immoral purpose; and this, in our opinion, would amount to an assault."

It might be stated that defendant concedes that the only question involved in the de-

murrer is the question of consent on the part of the prosecutrix.

*Linville v. Green*, 125 Mo. App. 289, 102 S. W. 67, was an action for damages growing out of a forcible ravishment. The court there in the discussion of the case on page 300, 125 Mo. App., and page 70, 102 S. W., used this language, which we think applicable to the facts here:

"But wrongful as it was for defendant to attempt to have sexual relations with plaintiff, if at any time during the encounter she willingly or even passively surrendered to his embraces, there could be no assault, however strong may have been her resistance to his initial advances. And should we find that plaintiff failed at any stage of the struggle to do all that reasonably could be expected of a modest woman, zealous in the protection of her virginity, she cannot separate the lascivious conduct of defendant into different stages, and plead a cause of action upon one of them. Consent to the final act would condone all that had gone before."

[2-5] As stated above, the court instructed on assault with intent to rape and on common assault. It is a well-known principle of the criminal law that in order to constitute assault with intent to ravish the defendant must have intended at the time to use all the force necessary to overcome any resistance his victim may offer, and the trial court in the case at bar so instructed the jury. It is also a well-known principle of the law, civil or criminal, that when there is no substantial evidence to support a material issue of fact, such issue should not be submitted to the jury. *Champagne v. Hamey*, 189 Mo. 709, 88 S. W. 92. There is absolutely no evidence in this record to justify the submission of the charge of assault with intent to rape. Prosecutrix says that when defendant had gone to the extent of touching her private parts with his that she told him to quit, and he did. Notwithstanding this positive declaration on her part, the court submitted the issue of assault with intent to ravish. This was error, even though defendant was convicted of a lower grade of offense. This case is to be distinguished from that line of criminal cases in general, such as murder, etc., where it has been repeatedly held that a defendant may not complain of an instruction submitting a higher grade of an offense, when the jury found for a lower. In *State v. White*, supra, where the defendant was convicted of common assault under a charge of assault with intent to rape, it is said:

"It must be remembered that there is a wide difference between an assault with intent to commit rape and an assault with intent, merely, to have an improper sexual connection. \* \* \* It was therefore error in the court to give an instruction to the jury on the subject of rape, as its evident tendency was to prejudice defendant and prevent his having a fair trial, to which he is entitled."

No doubt but that the fact that the trial court submitted the issue of an assault with intent to rape to the jury in the case at bar added to the gravity of the situation to defendant's detriment.

Defendant's conduct is reprehensible, but not every reprehensible act transgressing the recognized standard of morality and good behavior amounts to a crime. The jury committed the error of allowing the heinousness of the charge to hurry them on to an erroneous conclusion. *State v. Burgdorf*, 53 Mo. 67. As stated in *Linville v. Green*, supra:

However wrongful "it was for defendant to attempt to have sexual relations with" prosecutrix, "if at any time during the proceedings she willingly or even passively surrendered to his embraces, there could be no assault."

The evidence on the part of prosecutrix to our mind is so convincing that she at least passively consented for the defendant to do all that she claims he did there is no room to justify the submission of the issue of her consent to the jury. Defendant's demurrer should have been sustained. Judgment below is reversed, and defendant discharged.

STURGIS, P. J., and FARRINGTON, J., concur.

#### STRATTON v. COLE et al. (No. 2516.)

(Springfield Court of Appeals. Missouri. Dec. 6, 1919.)

#### 1. PRINCIPAL AND AGENT §111(2)—AUTHORITY TO SELL LAND NOT APPARENT AUTHORITY TO RELEASE MORTGAGE.

The right of an agent to sell or assist in selling lots would not give him implied authority to release a mortgage which had been made to and was owned by his principal.

#### 2. PRINCIPAL AND AGENT §111(2) — EVIDENCE INSUFFICIENT TO SHOW APPARENT AUTHORITY TO RELEASE MORTGAGE.

The authority to collect money on the sale of certain lots did not given agent apparent authority to release from the records a mortgage of his principal which was not in agent's possession and was not given him for collection.

#### 3. PRINCIPAL AND AGENT §111(2) — EVIDENCE INSUFFICIENT TO SHOW APPARENT AUTHORITY TO RELEASE MORTGAGE.

That mortgagee sent paid note to mortgagor, who gave note to mortgagee's agent for purpose of having agent release mortgage securing note, was not sufficient to give agent apparent authority to procure release of another mortgage from mortgagor to mortgagee, where mortgagee had no knowledge that first note was ever in agent's possession or that agent had procured such release.

**4. VENDOR AND PURCHASER §239(4) — FRAUDULENT RELEASE OF MORTGAGE VOID AS TO SUBSEQUENT PURCHASERS FOR VALUE.**

Release of mortgage from the records secured by presentation of forged note by one who was not the legal owner or holder of note was fraudulent and void even as to subsequent purchasers for value and in good faith.

**5. WITNESSES §144(1) — TESTIMONY AS TO TRANSACTION WITH DECEASED NOT PARTY TO CONTROVERSY ADMISSIBLE.**

In action to establish validity of note and deed of trust which on the face of the records had become inoperative on account of fraudulent release procured by presentation of forged note, the death of person who procured release did not preclude plaintiff from testifying under Rev. St. 1909, § 6354, prohibiting party from testifying where other party to contract or cause of action is deceased, where such person was not a party to the note and deed of trust sought to be established and was not in contractual relationship to plaintiff.

**6. EQUITY §60 — WHERE EQUITIES ARE EQUAL THE FIRST IN TIME WILL PREVAIL.**

Where one of two innocent parties must suffer because of the fraud of a wrongdoer, the innocent party who has the first lien in point of time will be protected in his right, provided he has done nothing which ought to estop from asserting his right.

Appeal from Circuit Court, Jasper County; Joseph D. Perkins, Judge.

Action by H. T. Stratton against S. S. Cole and others. Judgment for plaintiff, and defendants appeal. Affirmed.

R. M. Sheppard, of Kansas City, and A. R. Dunn, of Neosho, for appellants.

C. E. Prettyman, of Neosho, and Owen & Davis, of Joplin, for respondent.

**FARRINGTON, J.** The plaintiff filed a bill in equity in the circuit court alleging that he was the owner of a note given by R. L. Hayes to him for \$1,300, secured by deed of trust on a certain tract of land in Newton county, Mo., which deed of trust was recorded in the recorder's office. The petition then alleges that Hayes conveyed the land, and through successive mesne conveyances the defendants became the owners of the land subject to the deed of trust before mentioned. The petition further states that plaintiff is still the owner and holder of said note, that ever since its execution it has been in his possession and control, and that it has never been paid nor satisfied in any manner whatever. It then alleges that on the 13th day of January, 1917, one Truman Elmore fraudulently undertook to release the deed of trust upon the records in the office of the recorder of deeds, and did on said date write upon the margin of the record that the note secured had been satisfied, and signed his name to the

release as assignee and legal holder of the note, and did thereby fraudulently procure and induce the recorder of deeds to attest the same and write an indorsement upon the margin of the record that said note so secured was produced and canceled. The release and satisfaction by the recorder is in the usual form, with the usual certificate that the note had been produced, having been properly assigned, and canceled.

The petition further alleges that the said Truman Elmore had never been the assignee, owner, or legal holder of said note, and that plaintiff's note had never been presented to the recorder of deeds nor canceled. The prayer of the petition is that the purported and pretended release be set aside and canceled and adjudged to be null and void, and that the court ascertain and determine the titles, rights, interest, and liens of the parties and adjudge that plaintiff's deed of trust is a lien upon the land unpaid and unsatisfied, coupled with a prayer for general relief.

The answer of S. S. Cole first is a general denial of plaintiff's petition, and further answering charges: That at the time of the release mentioned in plaintiff's petition the said Truman Elmore was the authorized and acting agent of the plaintiff, and had been continuously for a long time prior to that date acting as his agent, with full authority from plaintiff to make releases for him, sell land, and collect the purchase price therefor in connection with plaintiff's real estate business; that on numerous occasions prior to the making of the release which is the subject-matter of this suit the said Elmore had acted as agent for the plaintiff and those connected with him, with full authority from plaintiff to sell various tracts of land belonging to plaintiff and his copartners, collected the purchase price and delivered the deeds, made releases of record for the plaintiff, and had performed various other acts as the agent for plaintiff, all of which were fully acquiesced in and ratified by plaintiff, and of which the defendants had knowledge; that these acts were done with reference to land lying near and in the neighborhood of the land involved in this suit, and that by such course of dealing the defendants were led to believe, and did believe, that said Elmore was fully empowered and authorized by the plaintiff to do all things necessary toward a complete transfer of property belonging to plaintiff or in which he held an interest either as owner, mortgagee, or otherwise.

It is further alleged that more than two years has elapsed from the time of making the release of said deed of trust in controversy before the plaintiff commenced this suit, and that the suit was commenced about a month after the death of said Elmore by suicide.

The answer further alleges that defendants had placed valuable and lasting improvements upon said land since purchasing it; that the records of the recorder's office show that the note sued on had been released in the recorder's office January 13, 1917, and that, relying on such record, they had purchased the property, paying the sum of \$500, gone into possession, and made said improvements without any notice or knowledge that the release was wrongful, and prays that plaintiff be estopped from denying that said release was a regular binding release, and further prays that, if said deed of trust was not properly released and canceled, defendants are entitled to have the same released, canceled, and discharged, and further prays that defendants be found by decree of court to be the owners in fee simple, free and clear of any liens on the part of plaintiff, and further ask that, if the court should find said note was paid and discharged, and the release by Elmore was without authority, to now enter a decree releasing and discharging the defendants from the incumbrance of said deed of trust. The answer also prays for general relief and costs.

Daniel Stratton was the trustee in the deed of trust which was given to plaintiff. He answers by general denial, and, further answering, says, that, if the deed of trust described in plaintiff's petition conveyed the land to him as trustee, it was done without his knowledge or consent.

The court rendered a decree in plaintiff's favor, finding that on the 27th day of March, 1916, one R. L. Hayes was the owner of the land covered by the mortgage, and that he executed a note in the sum of \$1,300, together with interest payable to the plaintiff, and simultaneously executed and delivered a deed of trust on the land mentioned; that the deed of trust was duly recorded in the office of the recorder of deeds of Newton county; and that thereafter one Truman Elmore, pretending to be the owner and holder of said note, presented a note purporting to be the note described in said deed of trust, and acknowledged payment of said note described in said deed of trust, and caused the recorder of deeds of Newton county to certify a release of record. The court further finds that Elmore was not the owner of said note, and that the same was wrongfully and fraudulently released and discharged on the records of the recorder of deeds of Newton county, and further finds that Cole became the purchaser of the real estate after the fraudulent release was entered, and had made improvements thereon to the amount of \$35. The court then ordered, adjudged, and decreed that the release and cancellation of the deed of trust be set aside and for naught held, and that the deed of trust given to secure the note held by the plaintiff be adjudged and

decreed in full force and effect, and that the interest and title of defendants in and to said real estate aforesaid is subject to the deed of trust, and further decreed that S. S. Cole have a lien on the property for the amount of his \$35 improvements, said lien to be subject to the deed of trust. The defendants, being dissatisfied with this judgment, have brought their appeal to this court.

There are but two questions to be considered in determining the correctness of this judgment. Defendants contend, in the first place, that the course of dealing which had been carried on between the plaintiff and Truman Elmore was such as to establish the fact that there was an agency created that authorized Truman Elmore to enter the release in the recorder's office, and that such course of dealing and acts which were known to the defendants and relied upon by them in becoming the purchasers of the land estopped the plaintiff from denying the authority of Elmore to make the release.

The next question presented by appellant is that the court committed error in permitting the plaintiff and his witness Hayes to testify in this proceeding because of the death of Elmore, the man who caused the entry of the alleged fraudulent release. We will take these questions up in their order, and in disposing of them state the facts relative to each.

It appears from the evidence that the land covered by this deed of trust was owned by a company known as the MonArk Town-Site Company, which company was practically owned and entirely controlled by Truman Elmore; that the land was by such company deeded to R. L. Hayes, the maker of the note given to plaintiff. Hayes, while the owner of the land, executed the note held by plaintiff for \$1,300, and secured it by a deed of trust on the property. Thereafter Hayes conveyed the property to the MonArk Town-Site Company, which company, as before stated, was controlled entirely by Elmore. When this deed was made from Hayes to the MonArk Town-Site Company, the plaintiff's debt and deed of trust was a valid and subsisting record lien on the property. The MonArk Town-Site Company, through Elmore, its agent, conveyed it to defendants herein, and before doing so produced a note to the recorder of deeds of Newton county, which was apparently a fac simile of the note sued on and described in the deed of trust, with an indorsement making him the assignee, and, armed with such note, he procured the release and attestation of the recorder of deeds. The recorder of deeds testifies that the note presented to him for the purpose of canceling the deed of trust appeared in all respects to correspond with the note described in the deed of trust, and appeared to be in the hands of Elmore as assignee, and that the note pre-

sented by Elmore was marked canceled by him. It further appears that the note sued on by the plaintiff bears no sign of ever having been canceled, and it, too, corresponds in all respects to the note which was described in the deed of trust.

Hayes and the plaintiff were partners in a real estate sales company, which company had some dealings with Truman Elmore in the sale of lots of the MonArk Town-Site Company and at other places. During these sales Elmore, Hayes, and the plaintiff were present.

The evidence relied upon by defendants to show that an agency existed between Elmore and the plaintiff, and evidence which would estop the plaintiff from denying an agency, is that during the time of the sales of a number of lots, and in which from the record it appears all three had some interest, Elmore helped to sell the lots, sold some of the lots, delivered some of the deeds, and collected some of the money. In addition to this, one witness testified that in talking to Stratton about the purchase of some lots which were owned by the MonArk Town-Site Company, prior to the sale of those lots, he told Stratton he was thinking of making a deal with Elmore and getting some lots, and that he said to Stratton, "Is it all right?" and that Stratton answered him back and said, "Any kind of a deal you make with Elmore will be all right with the Hayes people." Elmore, plaintiff, and Hayes were seen a number of times riding together in an automobile. This practically covers the testimony to establish an agency between the plaintiff and Elmore so far as the purchase and sale of lots is concerned; it being remembered that the Hayes Real Estate & Sales Company was selling property for the MonArk Town-Site Company, which was owned by Elmore, and the Hayes Company was composed of the plaintiff and Hayes as partners. The testimony shows that the plaintiff and Hayes were residents of the state of Tennessee, and Elmore was a resident of Newton county, Mo.

An additional fact to prove that Elmore had authority to make releases of deeds of trust for the plaintiff was shown by the defendants, and it is the following transaction: Prior to the execution of the note in this suit, payable to and held by plaintiff, for \$1,800, Hayes had executed a note for about \$4,300 to plaintiff, secured by deed of trust on this and other properties, and in settling their own affairs it was agreed that Hayes should make various notes and secure them by deeds of trust to plaintiff, and this \$1,800 note is a part of the result of that settlement; in other words, the \$4,300 note was taken up by Hayes paying a certain amount of cash and executing several notes, one of which is the note in suit, which settlement paid off the \$4,300 note by the giving of new notes

and payment of cash, and required a release from the records of the mortgage securing this \$4,300 note. To accomplish this release the plaintiff indorsed the \$4,300 note without recourse and sent it to Hayes, the maker thereof, to be used in canceling the mortgage securing it. Hayes, the maker of the note, gave it to Elmore to have him release the records, which was done. There is no showing whatever that the plaintiff knew that Elmore had anything to do with the release of this \$4,300 note, and in fact he did the natural thing which any payee would do when a note is paid which is secured by a deed of trust; that is, he indorsed it without recourse and sent it back to the maker thereof.

[1-3] From this evidence the trial court found there was not sufficient ground to establish an agency between plaintiff and Elmore, nor did such conduct as shown amount to an estoppel against plaintiff in this suit. This finding is in thorough accord with our own views of the case. It will be unnecessary to quote authorities which would hold that the right of an agent to sell or assist in selling lots would not give him implied authority to release a mortgage which had been made to and owned by his principal. Neither would the authority to collect money on the sale of certain lots empower such agent to release from the records a mortgage of his principal on a note which was not in his possession and which was not given him for collection. Nor do we think that the circumstances relative to the release of the \$4,300 note is sufficient to show such agency, or amounts to enough to estop the plaintiff from denying an agency.

The evidence, as stated before, fails to show that the plaintiff knew when the \$4,300 note was paid and sent by him, indorsed without recourse, to Hayes, the maker, that it would ever fall into Elmore's hands. That was a transaction between Hayes and Elmore, in which plaintiff could have no material interest.

It is held in 31 Cyc. p. 1363, that the authority to sell land must be strictly pursued, and acts outside of the authority will not bind the principal. It must be remembered in this case that there is no showing that the note sued on by plaintiff, which was the original note given by Hayes, was ever in the possession of Elmore for any purpose. It would present a different case if it had been shown that plaintiff was in the habit of sending his secured notes to Elmore to collect and to release the records when paid, but no such showing is made in this case, and it is held in the case of Knoche v. Whiteman, 86 Mo. App. loc. cit. 573, that evidence that the attorney or agent was merely for collection of a mortgage debt, or that he was in possession of a mortgage and note, will not show author-

ity to release the property without a payment of the debt.

In the case of *Dawson v. Wombles*, 111 Mo. App. 532, 86 S. W. 271, it was held that, where it was shown that the owner of a note had left the note in her father's care, custody, and control, with authority to collect and credit payments thereon, and held him out to the maker as her agent for the purpose of collecting, crediting, and discharging the note, if the maker paid her father, she would be estopped from denying the right to make the release, and that his act would be absolutely binding upon her where third parties would be injured as the result. The facts, as we have related in the case at bar, however, fall short of bringing this case within that rule. We must therefore hold with the trial court that Elmore had no authority given him by plaintiff such as would impliedly endow him with the power of releasing this deed of trust, nor did the acts and conduct between the parties reach a stage that would preclude the plaintiff from denying such authority.

The next point raised by appellants is that the plaintiff Stratton, and witness Hayes, who testified for plaintiff, were incompetent to testify in the case at all, because of Elmore's death. We are cited to section 6354, R. S. 1909, and cases in which this section of law has been construed.

The real purpose of this petition is to establish the validity of plaintiff's note and deed of trust, which on the face of the records of Newton county had become inoperative on account of a release made by Elmore. The substance of the cause of action was to establish the validity of his note and mortgage, which incidentally led to the cancellation of the record of satisfaction or release. The suit, therefore, was between plaintiff and the present owners of the land. Elmore was not a party to the suit; he was not a party to the cause of action. His name was nowhere connected with the notes, and the only interest that he ever had in the notes was the ownership of land on which a mortgage had been given to secure the note. He had no contractual relation with plaintiff, and, as stated before, the suit is merely to establish the validity of a contract made between Hayes and the plaintiff. Without going into a long discussion of the authorities on this question, it will suffice, we think, to merely cite the very recent case of *Bajohr v. Bajohr*, 184 S. W. 76, where the Supreme Court, in an opinion rendered by Graves, P. J., had the identical question before us under consideration. In that case a married woman with her own money had purchased a piece of real estate and had received a deed from the grantor conveying the property to her. She then delivered the deed to her husband, who was to take it and have it recorded. He erased her

name and inserted his name in the deed and died. Her suit was brought to reform the deed and to correct the fraud which had been perpetrated upon her. The suit was against the heirs of her deceased husband. It was urged in that case, as in this, that under section 6354, R. S. 1909, her husband being dead, her testimony became incompetent. The court said:

"This is an old and familiar statute. The trouble with respondents' contention is that the statute does not apply to the facts in this case. Mrs. Bajohr was not a party to any contract with her husband concerning this land. She says the contract was between her and Katherine Katlander. She is not seeking redress under a contract, but is asking that her contract with another person be reinstated to where it was prior to the alleged tortious and felonious act of the husband. The contract which she is trying to establish is one between her and Katlander. She makes no claim against the husband or his estate owing to a contract with him. One might as well say that, had the husband stolen the wife's horses and sold them to a third party, and then died, she would be incompetent to identify her own stock and testify in a case against the parties holding it. It is true she is attacking an alleged deed to the husband, but she is no party to even that alleged contract."

See, also, *Freeland v. Williamson*, 220 Mo. loc. cit. 231, 119 S. W. 564.

[4] Applying the law of that case to the facts of the case at bar, we have here a plaintiff suing to establish the validity of a contract not made with Elmore, and in a suit not against Elmore. To establish the validity of this note and mortgage in this suit, the fraudulent act of Elmore in releasing the mortgage becomes a question of fact. Plaintiff's testimony, together with his production of the note showing that it had never been out of his possession or out from under his control from the time of its execution to the time of its suit, that it had never been given to Elmore for any purpose, together with the physical fact that it did not appear to be canceled, shows clearly that the note which Elmore produced to procure the fraudulent release was not plaintiff's note. There is no question but what his note was given for a valid subsisting debt, and that the mortgage was given to the same effect, and properly recorded. The testimony clearly shows that Elmore was never the legal owner or holder of the note secured by the deed of trust owned and held by plaintiff, and that the release made by him was fraudulent and void, and under the decisions will be held as a void release even to subsequent purchasers for value and in good faith, such as were defendants in this case. *Wilkins v. Fohrenbach*, 180 S. W. loc. cit. 23; *Lee v. Clark*, 89 Mo. 553, 1 S. W. 142; *Cooper v. Newell*, 283 Mo. 190, 172 S. W. 326; *Pouder v. Colvin*, 170 Mo. App. 55, 156 S. W. 483.



In passing, we may add that the statute under consideration has been the subject of much litigation and of many constructions brought about by the various phrases presented to the courts. There have from time to time been two lines of decision in the state, one going to a strict construction of the statute, now section 6354, R. S. 1909, holding that the statute is an enabling act, and that its intention was to qualify witnesses who under the common law were disqualified prior to the statute, except in the exceptions named in the statute, and that in no event was the statute to be used as a disabling statute; that is, to prohibit those who could have testified prior to the passage of the act. On the other hand, a line of decisions in the Supreme Court and appellate court have viewed the statute under a more liberal equitable rule, which construction held that the first part of the act was enabling and the exceptions were disabling, and that the broad purpose of the law, after the passage of the statute, was to qualify parties and those interested in litigation as witnesses, except in cases where one of the parties to the contract or cause of action was dead or insane, and that under the exceptions the equitable rule would be, where the mouth of one party is closed by death, the other will be closed by law.

These two constructions of this law have already led to inconsistent and conflicting opinions, as will be seen by turning to the last case we have been able to find, decided by the Supreme Court, where a great many of the cases are discussed, in an opinion by Woodson, J., it being the case of *Wagner v. Binder*, 187 S. W. 1128.

[5, 6] As we view the case under consideration, the death of Elmore did not bring it within the statute so as to preclude the plaintiff from testifying. This is a case where one of two innocent parties must suffer, brought about by the fraud of a wrongdoer, who, under the answer of defendants, came to his end by suicide. Such cases are always difficult to solve, because, whichever way the judgment goes, an innocent party must be hurt. The rule must govern, however, that the innocent party who has the first lien in point of time will be protected in his right provided he has done nothing which ought to estop him from asserting his right. The facts of this case disclose that plaintiff is entitled to a first mortgage on this piece of real estate, and that his conduct with reference thereto has not been such as would destroy it. The judgment of the trial court was rendered in accordance with the principles of law that govern such cases, and meets with our affirmance.

STURGIS, P. J., and BRADLEY, J., concur.

## STATE v. KITCHEN. (No. 247L)

(Springfield Court of Appeals. Missouri. Dec. 8, 1919.)

1. HIGHWAYS  $\S$ 79(1)—ABANDONMENT OF PUBLIC ROAD NOT SHOWN BY ORDER FOR NEW ROAD.

In prosecution for obstructing road in violation of Rev. St. 1909,  $\S$  10533, that county court had ordered the establishment of new road in close proximity to road defendant had obstructed, *held* not sufficient to show that old road had been abandoned at point of obstruction, especially where there was no order therefor, and where public continued to use, and overseers of district continued to work, old road.

2. HIGHWAYS  $\S$ 6(1)—WHAT CONSTITUTES "LEGALLY ESTABLISHED ROAD" "FOR SUCH PERIOD."

Under Rev. St. 1909,  $\S$  10446, as amended by Laws 1913, p. 658,  $\S$  15, and Laws 1917, p. 450,  $\S$  13, providing that roads "used as such by the public for ten years continuously and upon which there shall have been expended public money or labor for such period, shall be deemed legally established roads," road so used for such period and upon which sufficient public money or labor is expended "for such period" to keep it in substantial repair and condition for public use is a legally established road, though public money and labor have not been expended each and every year during such period.

Appeal from Circuit Court, Phelps County; L. B. Woodside, Judge.

James E. Kitchen was convicted of unlawfully, willfully, and knowingly obstructing a public road, and he appeals. Affirmed.

Frank H. Farris and J. J. Crites, both of Rolla, for appellant.

J. A. Watson and Holmes & Holmes, all of Rolla, for respondent.

BRADLEY, J. The prosecuting attorney of Phelps county proceeded by information against the defendant for the violation of section 10533, R. S. 1909. It is charged that the defendant did unlawfully, willfully, and knowingly obstruct a certain public road leading from Edgar Springs to Relfe, and known as the Edgar Springs and Newburg road, in the said county of Phelps, by fencing and building a fence of posts, wire, and a gate across and upon the right of way of said public road, to the great hindrance, annoyance, and inconvenience of the public.

The proceedings were instituted in a justice of the peace court, and after trial and conviction in that court defendant appealed to the circuit court. There the defendant was again convicted, and prosecutes his appeal to this court.

The state has filed a motion to dismiss this appeal on the ground that defendant did

not perfect the same within six months, as is provided in section 5313a (Laws of 1913, p. 226). Without setting out the different steps taken in perfecting this appeal, suffice it to say that there is no sufficient showing here to justify the dismissal of this appeal, and the motion to dismiss is overruled.

The record discloses that the portion of the road which the defendant is charged to have obstructed was cut out or opened up in 1878 or 1879, and has been used continuously since that time as a public highway. There is no claim that the road in question was ever established by the county court as a public highway, or was ever dedicated as such by the owner. If the road at the time defendant is alleged to have obstructed the same had the status of a public highway, it acquired such status by user by the general public and the expenditure of public money or labor thereon for the necessary period provided for by law to give such road the status of a public highway.

Prior to the year of 1879, in order to establish a public road by prescription, the same must have been traveled as a public highway and openly and notoriously used as such for the same period of time as was required to give title to land by open, notorious, and adverse possession under the statute of limitations. In 1879 (R. S. 1879, § 6987) an act was passed providing that all roads opened by order of the county court and a plat thereof made and filed with the clerk of the county court, and having been used as a public highway by the traveling public for the period of ten years or more, should be deemed legally established public roads, notwithstanding any irregularities in the proceedings had to establish and open the same. This act did not affect the road in question, because there is no contention that there was any attempt made by the county court to establish this road in 1879 or prior thereto. This section was carried into the revision of the road law in 1883 without change. Laws 1883, p. 170, § 58. In 1887 there was a proviso added to this section which provided that in all other cases no lapse of time would divest the owner of his title unless, in addition to the use of the road by the public for the period of ten consecutive years, there should have been public money or labor expended on such road for such period. Laws 1887, p. 257, § 57.

Ten years had not elapsed from the opening of the road in question until the enactment of 1887 went into force and effect. The statute of 1887 was carried into the revision of 1889 without change (section 7847, R. S. 1889), and so remained until 1909, when it was modified as to phraseology and made to read as follows:

"All roads in this state that have been opened by any order of the county court, and have been used as a public highway by the traveling

public for a period of ten years or more, and roads that have been used by the public for ten years consecutively and upon which there shall have been public money or labor expended for such period, shall be deemed legally opened and established county roads, notwithstanding there may have been irregularities in the proceedings had to establish and open such roads; and nonuser by the public for a period of ten years continuously of any public road shall be deemed an abandonment of the same." Laws 1909, p. 733, § 15; R. S. 1909, § 10446.

This section of the 1909 Statutes was carried into the revision of the road law in 1918 without change. Laws 1913, p. 658, § 15. In 1917 this section was again modified to read as follows:

"All roads in this state that have been established by any order of the county court, and have been used as public highways for a period of ten years or more, shall be deemed legally established public roads; and all roads that have been used as such by the public for ten years continuously, and upon which there shall have been expended public money or labor for such period, shall be deemed legally established roads; and nonuser by the public for ten years continuously of any public road shall be deemed an abandonment and vacation of the same." Laws 1917, p. 450, § 18.

There has been no substantial change in the law since the adding of the proviso in 1887. The proviso as such was dropped in 1909, but its substance was carried into the body of the section by requiring the road to have been used by the public for "ten years consecutively" and the expenditure of public money or labor thereon "for such period." The act of 1917, while it modified the phraseology of the section, did not affect the meaning. There the word "continuously" is used instead of "consecutively" and the phrase "for such period" is retained.

The defendant relies upon two grounds for reversal: First, that the evidence did not justify the submission to the jury of the question that there had been public money or labor expended upon the road in question for the period required by the statute; second, that the court erred in giving the instruction hereinafter set out.

[1] The record discloses that the road had been continuously used by the general public since it was cut out and opened up in 1878 or 1879. The only question raised by defendant's contention in view of the state of the law is whether there has been such expenditure of public money or labor on the road since 1887 as to meet the terms and conditions of the law relative thereto. We might say here that in 1907 there was a petition circulated in the neighborhood and signed by the requisite number of petitioners for a public road alongside of the road in question, and on the line where the road no doubt should be. It seems that when the road in question was first cut out it was located a

short distance west of the line. The petition mentioned did not seek to change the location of the public road, but sought to establish a new road. The county court subsequently in 1908 acted upon this petition, and ordered the road petitioned for established, and directed that the same be opened. For some reason the road petitioned for and ordered established was not in fact opened, especially where it crossed defendant's lands. The old road, wholly on defendant's land, was left unchanged across his lands, although the location of the new road along this particular stretch was some distance east of the old road and on the line. We might say in passing that a hedge fence marked the east line of defendant's land, and the new road petitioned for was to be on the line occupied by this hedge, 15 feet on the land now owned by defendant, and 15 feet on the land of his neighbor to the east. Defendant makes the contention that limitations should begin at the time the county court established the new road. If this contention were upheld, defendant could not be convicted, because the ten years had not expired from the time of the establishment of the new road until the defendant fenced the old road, where it crossed his land, in 1918. The road which defendant fenced is wholly on his land, and only a short distance from the line and from the place where the county court ordered the new road opened in 1908, and no doubt the road should be on the line as ordered; but the mere fact that the county court ordered established a new road in close proximity to the old one would not be sufficient to show that the old road was abandoned, especially in the absence of an order, and also the fact that the new road was not opened at this place, and the further fact that the public continued to use the old road, and the overseers of the district continued to work the same.

The defendant, in view of what we have said relative to the establishment of the new road in 1908 by the county court, must stand or fall by the use of the road obstructed and the expenditure of public money or labor thereon from 1887. There is no question about its use by the public for the requisite period, and the only question is as to the expenditure of public money or labor thereon for the requisite period. The record does not show conclusively that public money or labor had been expended each and every year for any consecutive ten years since 1887, but it is abundantly shown that public money and labor have been expended at such times and at such places along and on the road as a whole as was deemed necessary by the overseers in charge in order to keep the road as a whole in substantial repair for public use and travel. Defendant concedes that it is not necessary to show the expenditure of public money or labor upon the identical spot fenced for each year of the statutory period, but

contends that public money or labor should have been expended each year on the obstructed portion or in such proximity thereto that it could be designated and known as public work upon this public highway. The trial court instructed the jury on this point as follows:

"If the road in question had prior to the obstruction, if you find it was obstructed, been continuously used by the public for a period of more than ten consecutive years, and that there had been public money or labor expended thereon during all of such period, then the same thereby became a public road by prescription. It is not necessary in order for you to find that it was a public road by prescription that you must find that public money or labor was expended thereon every year during such time, but if it was regarded by the overseers as a public road, and at the point of the said obstruction, if any, public money or labor was expended thereon, from time to time, as the same might be required and necessary, and for the whole period above set forth, this would be sufficient to authorize a finding that public labor and money had been expended thereon during such period."

This instruction is in harmony with the law as written by the Kansas City Court of Appeals in *State v. Macy*, 72 Mo. App. loc. cit. 431, 432. In the construction of the expression "such period" lies the meat of the whole case. In *State v. Macy*, supra, it is said:

"While it is true that the expression is used in the text-books and decisions that the adverse user must be continuous and uninterrupted, yet that does not mean that some part of the public shall be in hourly or daily use of it. So, of course, neither does the legislative expression that there shall be money or labor expended for the period of limitation mean that the expenditure of labor or money shall be constant. The statute means that the expenditure must have been begun and continued from time to time for the period of limitation, as might be considered necessary or expedient by those in authority. The evidence in this case shows that the road was worked at different times, beginning back about 40 years, and was sufficient to satisfy the statute."

[2] This is the only case that we find in this state directly construing that feature of the statute with reference to the period of time public money or labor must be expended upon a road in order to give such road the status of a public highway. There are some decisions in other jurisdictions which are somewhat to the contrary, but the construction given in our own state is sound and reasonable. Any other construction would lead to confusion and uncertainty with reference to the public highways of the state that have been established by prescription. If it must be shown that public money or labor has been expended upon any particular highway for each and every year of the ten consecutive years, than a highway would never be established by user and the expenditure of public

money or labor thereon unless the expenditure was for each and every year whether the road needed it or not. The statute says that public money or labor should be expended on such road for such period. We are clearly of the opinion that all that is required by this statute with reference to the expenditure of public money or labor is that for the ten consecutive years of use sufficient public money or labor should be expended on the road to keep it in substantial repair and condition for the public use and public travel.

What we have said disposes of defendant's contentions. We find no error in this record. Judgment is therefore affirmed.

STURGIS, P. J., and FARRINGTON, J., concur.

### HOOVER v. ST. LOUIS ELECTRIC TERMINAL RY. CO. (No. 15419.)

(St. Louis Court of Appeals. Missouri. Dec. 2, 1919.)

#### 1. CARRIERS ⇨314(2)—GENERAL ALLEGATIONS OF NEGLIGENCE CAUSING COLLISION SUFFICIENT.

Second amended petition, alleging relation of passenger and carrier, and injury of plaintiff in collision caused by negligence of defendant, in general terms, sufficiently alleged defendant's negligence, in view of presumption arising from fact of collision.

#### 2. APPEAL AND ERROR ⇨1064(4)—INSTRUCTION "SUBJECT TO OTHER INSTRUCTIONS" NOT ERROR.

Plaintiff's instruction on assessment of damages, "subject to limitations of the other instructions given herein," where plaintiff requested no other instructions, was not reversible error, as other instructions were given, and each was subject to limitations of others.

#### 3. TRIAL ⇨191(11)—INSTRUCTION BAD AS ASSUMING CAUSE OF INJURIES.

In action for personal injuries alleged to have resulted from collision between trains, an instruction that damages be assessed at such sum as would compensate plaintiff for such injuries held erroneous, as assuming that such injuries were the result of the collision, in view of issue that plaintiff's principal bodily ailment was not caused by collision, on which the evidence was conflicting.

#### 4. DAMAGES ⇨101—EXPENSES FOR MEDICAL ATTENTION; MEASURE.

In personal injury action, measure of damages for medical and surgical expenses is the reasonable value of such medical and surgical attention as the plaintiff has paid for, and the reasonable value of such services, if any, which plaintiff is reasonably certain to incur in the future, directly caused by the injuries, resulting from defendant's negligence.

Allen, J., dissenting.

Appeal from St. Louis Circuit Court; Thomas C. Hennings, Judge.

"Not to be officially published."

Action for personal injuries by Thomas A. Hoover against the St. Louis Electric Terminal Railway Company and another. Judgment for plaintiff against the named defendant, from which it appeals. Reversed and remanded. On request of Allen, J., who deems the decision contrary to decisions of the Supreme Court, case certified to Supreme Court.

Burton & Hamilton, of Peoria, Ill., and Anderson, Gilbert & Hayden, of St. Louis, for appellant.

Holland, Rutledge & Lashly and Geo. E. Mix, all of St. Louis, for respondent.

BECKER, J. This is an appeal from a judgment in the sum of \$3,000, rendered in favor of plaintiff and against one of two defendants in a suit for damages for personal injuries. On November 23, 1912, plaintiff below was a passenger upon an interurban electric train running from St. Louis, Mo., to Carlinville, Ill. While thus a passenger for hire, and at about 20 minutes past 5 o'clock in the morning, and while seated within the body of the electric car of the appellant, the said electric car collided with a freight train as said electric car was crossing over an intersecting railroad track, and as a result of this collision plaintiff alleges he was injured.

Plaintiff's suit was against the St. Louis Merchants' Bridge Terminal Railway Company and the appellant, St. Louis Electric Terminal Railway Company. Plaintiff's second amended petition, after containing allegations with respect to the incorporation and business of the respective parties defendants, alleges, with considerable particularity, the negligence on the part of the defendant St. Louis Merchants' Bridge Terminal Railway Company, complaining and charging said company with having violated various statutes of the state of Illinois, all of which were set out in said amended petition. The allegations as to this appellant are in the following language:

"Plaintiff states that on said date, while the said electric trolley car upon which plaintiff was riding as a passenger was proceeding over said crossing, as aforesaid, there was a violent collision between said electric trolley car and an engine and train of cars operated on said tracks of said Terminal Railroad and railway companies over said crossing, and plaintiff states that as a direct result of said collision he sustained divers personal injuries as more particularly hereinafter set out, and plaintiff states that said collision was directly due to and directly caused by negligence on the part of said electric companies, which owned and operated said electric car."

The answer of appellant (defendant below) admits that it owned and operated the elec-

tric car in question, and denies each and every other allegation in said petition. The St. Louis Merchants' Bridge Terminal Railway Company filed a demurrer at the close of the plaintiff's case, which being overruled, said defendant stood upon its demurrer. At the close of the entire case, on being submitted to the jury, a verdict was returned in favor of the defendant St. Louis Merchants' Bridge Terminal Railway Company, and against the defendant St. Louis Electric Terminal Railway Company, in the sum of \$3,000. After unavailing motions for a new trial and in arrest of judgment, the defendant St. Louis Electric Terminal Railway Company brought this appeal.

[1] I. Appellant seriously contends that the second amended petition, upon which the case was tried below, is wholly lacking in any averment of negligence on its part which caused the trouble complained of; that the only time the word "negligence" is used in plaintiff's petition, as applied to this appellant, is in the following paragraph:

"That said collision was directly due to and directly caused by negligence on the part of said electric companies."

And defendant urges that this allegation is a mere conclusion and amounts to nothing. An examination of the second amended petition, however, shows that it alleges the relation of carrier and passenger for hire, and that plaintiff was injured during that relation, caused by a collision between the electric car of the defendant carrier with freight cars of another defendant carrier, and "that said collision was directly due to and directly caused by negligence on the part of" this particular defendant carrier. The act alleged, namely, the collision between this defendant's car and cars of another defendant, raised a presumption of negligence, and it is sufficient to follow the allegation of such facts with a charge of negligence in general terms. *Allen v. Transit Co.*, 183 Mo. 411, loc. cit. 433, 434, 81 S. W. 1142, and cases cited. We therefore rule plaintiff's petition states a cause of action against this appellant.

[2] II. The plaintiff requested but one instruction, and that upon the measure of damages, which the court gave. The practice of plaintiffs submitting a case to the jury without full instructions, but merely upon an instruction as to the measure of damages, should not be encouraged. This particular instruction, which is attacked on several grounds, reads as follows:

"If the jury find for the plaintiff, they should assess his damages at such sum as they believe from the evidence will be a fair compensation to him, subject to the limitations of the other instructions given herein:

"First. For pain of body or mind which the plaintiff has suffered or will suffer by reason of his injuries and directly caused thereby.

"Second. For any expenses for medical or

surgical attention which the plaintiff has necessarily incurred or will hereafter necessarily incur, directly caused by said injuries, in seeking relief therefrom.

"And you will assess his damages at such sum as will, in your judgment, under the evidence, reasonably compensate him for such injuries, not exceeding the sum of ten thousand (\$10,000.00) dollars."

A. Appellant directs attention to the fact that the first paragraph of the instruction closes with the words "subject to the limitations of the other instructions herein," while no other instructions were given on the part of the plaintiff.

While that phrase is not necessary to complete this instruction, it certainly cannot be viewed in a light of reversible error. Though it is true no other instructions were given at the request of plaintiff, an examination of the record discloses that there were nine other instructions submitted to the jury. Each and every instruction is subject to the limitations of every other instruction given, and all instructions must be read together, and must be harmonious with each other. We hold this point to be without merit.

[3] B. It is complained that this instruction assumes that plaintiff's "injuries" were the result of the collision; whereas, the question as to the nature, kind, character, and extent of any injuries that plaintiff may have received was a disputed question of fact, which should have been submitted to the jury. After a thorough consideration of the whole record, we are of the opinion that this point is well taken. Respondent admits that the instruction assumes that the plaintiff was injured in the collision, but, inasmuch as there was no dispute but that the plaintiff suffered some injury, argues that such assumption is not reversible error. To this, however, we cannot agree.

While a reading of the testimony shows that it was not disputed but that the plaintiff suffered some injury by reason of the collision, such admitted injuries, however, suffered by the plaintiff, were inconsequential, and not of a serious character; and it cannot be controverted but that the sole injury which plaintiff alleged that he had suffered by reason of the accident, which would support the verdict of \$3,000 in this case, was plaintiff's alleged double bubonocelo, referred to as an inguinal hernia, and that practically the defendant's whole defense was directed to combating the plaintiff's contention that such double bubonocelo was caused by or was the result of injuries sustained by him in the collision. And furthermore it is to be remembered that plaintiff offered no instruction setting forth the facts which it was necessary for the jury to find from the evidence in order to recover, and that plaintiff's sole instruction was on the measure of damages, and simply directed the jury that, if they find for plaintiff, they should assess his damages

"for any pain of body or mind which the plaintiff has suffered or will suffer *by reason of his injuries and directly caused thereby*," and that the jury thereunder returned a verdict for \$3,000. It is therefore in the light of such a record that we must scan the instruction complained of.

When all the evidence in this case is considered, even in the light most favorable to plaintiff, it is exceedingly doubtful as to whether his double bubonocoele was the result of the collision. According to plaintiff's own testimony, after the collision he proceeded upon another car of the defendant company to Carlinville, Ill., where he went to the office of Dr. Bell, one of the regular physicians for the company, who made an examination of him. The only thing about which plaintiff complained to Dr. Bell was that his chest felt a little sore. Plaintiff stayed in Carlinville several hours, attending to matters of business, and then returned to St. Louis. It was 48 hours after the accident before plaintiff noticed two small lumps in his groin. He testified that he did not know what they meant, and although a week after the accident he consulted Dr. Denby about the soreness in his chest, and continued under the treatment of the said Dr. Denby off and on until the 28th day of June, 1913, yet he at no time told Dr. Denby of these protuberances, nor during all of that time did it occur to him that they might have been caused by the collision. Again, it appears that a month after the accident plaintiff permitted an examination by Dr. Gundelach. To him plaintiff stated merely that he had a pain in his chest, but plaintiff did not make any statement concerning any "two lumps." It was only some 8 months after the accident that plaintiff consulted a Dr. Barto, who, according to plaintiff's own testimony, while making an examination of him, "discovered" the double bubonocoele, and it was not until that time that it occurred to plaintiff that the hernia might have resulted from the injuries he received in the collision. Furthermore, even according to the testimony of plaintiff's physicians, who testified on the question as to whether injuries such as plaintiff testified to as having been sustained by reason of the collision could have been the cause of the bubonocoele, it was at best a mere possibility that it could result therefrom.

After a careful reading of the record in this case we are constrained to the view that, in light of the fact that the real issue in the case was the question as to whether the double bubonocoele, from which plaintiff suffers, was the result of the accident, and having in mind the nature and character of the testimony, such as it was, that was adduced by plaintiff in support of this contention, when taken together with the fact that the jury returned a verdict for \$3,000, showing that they must have allowed plaintiff compensation for the double bubonocoele, convinces us

that the giving of the instruction in question was prejudicial to defendant, and constitutes error, for which the cause should be reversed and remanded.

[4] C. We take up next the error assigned that the instruction does not limit the medical expenditures to the reasonable value thereof. The question is no longer open to dispute but that the correct measure of damages for expenses is the reasonable value of such medical and surgical attention as the plaintiff has paid for such services, and the reasonable value of such medical and surgical attention, if any, which the jury find and believe from the evidence plaintiff is reasonably certain to incur in the future, directly caused by such injuries, as the jury may find from the evidence plaintiff suffered as a result of the collision. *York v. Everton*, 121 Mo. App. loc. cit. 645, 97 S. W. 604. Whether such criticism as this instruction may be subject to with reference to this point would be viewed as constituting reversible error we need not decide, inasmuch as, should there be a retrial of the case, this instruction can readily be redrafted to come clearly within the rule of law pertinent thereto.

For the error noted, the judgment is reversed, and the cause remanded.

REYNOLDS, P. J., concurs.

ALLEN, J., dissents, and, as he deems the decision herein contrary to the decisions of the Supreme Court in *State ex rel. United Rys. Co. v. Reynolds et al.*, 257 Mo. 19, 165 S. W. 729, *Powell v. Railroad*, 255 Mo. 420, 164 S. W. 628, *Sang v. City of St. Louis*, 262 Mo. 454, 171 S. W. 347, and to other decisions of that court as well, he requests that the case be certified to the Supreme Court, which is accordingly done.

ALLEN, J. (dissenting). I agree with the view expressed in the majority opinion, holding that the amended petition states a cause of action against this appellant; but I am unable to concur in the ruling therein that it was reversible error to give plaintiff's instruction on the measure of damages.

I. The first attack made by appellant upon this instruction—discussed at great length in appellant's brief—proceeds upon the theory that the instruction is fatally erroneous in assuming that plaintiff was injured in the collision in question. In the first place it may be noted that the instruction begins with the words "If the jury find for plaintiff"; and to assume that the jury would find in plaintiff's favor, if they found merely that he was a passenger upon a car which was in a collision, but sustained no injuries whatsoever as a result thereof, would appear to be a rather violent assumption. In this connection see *Powell v. Railroad*, 255 Mo. loc. cit. 453, 164 S. W. 628.

But, wholly disregarding this, and taking

the instruction as assuming the fact that plaintiff suffered some injury by reason of the collision, the giving thereof was not, on that account, reversible error under the circumstances of the case. Not only is there no dispute or contradiction in the evidence as to the fact that plaintiff was injured by reason of the collision (*Gayle v. Mo. Car & Foundry Co.*, 177 Mo. 427, loc. cit. 453, 78 S. W. 987; *O'Hara v. Lamb Const. Co.*, 200 Mo. App. 292, 206 S. W. 253, loc. cit. 256, and cases there cited), but in a stipulation entered into between counsel and filed in the cause this fact was admitted by appellant. This stipulation recites that appellant owned and operated the car in which plaintiff was riding as a passenger at the time of the collision, "in which said collision Thomas Hoover was injured." Furthermore, the record shows that appellant's counsel in argument to the jury conceded that plaintiff received some injury by reason of the collision. Under these circumstances it was not prejudicial error to assume, in the instruction on the measure of damages, that plaintiff received some injury by reason of the collision complained of.

II. The majority opinion, however, appears to condemn this instruction mainly upon the ground that plaintiff's recovery for "pain of body or mind" is not expressly confined to pain which plaintiff has suffered or will suffer by reason of the injuries received by him as a result of the collision. The portion of the instruction thus drawn in question allows a recovery "for pain of body or mind which the plaintiff has suffered or will suffer by reason of his injuries and directly caused thereby."

Instructions on the measure of damages in this form, or substantially in this form, have been given in a great many cases which appear in our Reports, and have frequently had the express approval of our courts. See *Klutts v. Railroad Co.*, 75 Mo. 642; *Prewitt v. M., K. & T. Ry. Co.*, 134 Mo. 615, 36 S. W. 667; *Cobb v. Lindell Ry. Co.*, 149 Mo. 135, 50 S. W. 310; *Gayle v. Mo. Car & Foundry Co.*, supra; *King v. City of St. Louis*, 250 Mo. 501, 157 S. W. 498; *Wentz v. Railroad*, 259 Mo. 450, 168 S. W. 1166, Ann. Cas. 1916B, 317; *McCarthy v. Transit Co.*, 108 Mo. App. 317, 83 S. W. 298; *Schultz v. Street Ry. Co.*, 161 Mo. App. 574, 144 S. W. 123. In *McCarthy v. Transit Co.*, supra, the instruction on the measure of damages allowed a recovery "for the pain of body and mind that plaintiff has suffered, or will suffer, by reason of his injuries, and directly caused thereby." Referring thereto, this court said:

"We see nothing wrong with that instruction.  
\* \* \* An instruction precisely like it was approved by the Supreme Court in *Cobb v. Railroad*, 149 Mo. 135, 50 S. W. 310. \* \* \* There is much profitless chaffering over instructions on the measure of damages."

While appellant sought to show that the inguinal hernia which developed shortly after

the collision did not result from injuries sustained in such collision, it cannot be assumed that the jury, in awarding plaintiff damages, allowed anything for pain or suffering not resulting from the injuries sustained by reason of the collision. Obviously, by the use of the term "his injuries," jurors of ordinary intelligence would understand that the injuries referred to were those for which plaintiff was suing, and which he charged to be due to defendant's negligence; and it cannot be assumed that the jury was composed of men so utterly ignorant as not to be able to understand what was meant by this instruction, or of men who would knowingly violate their oaths and award plaintiff damages for some injury or existing condition not due to the negligence charged to defendant. As to the apparent theory of the majority opinion that the instruction might have been construed by the jury to allow a recovery for injuries not sustained in the collision, the following language of an eminent jurist is directly in point, viz.:

"We will not speculate on what the jury might do, or airily conjecture this or that. We stand on the proposition that the jury are presumed, absent anything to the contrary appearing, to obey their oaths and bring in a verdict according to the evidence. Being men of sense and acting under an oath freshly taken, they are entitled to that presumption." *Shinn v. Railroad*, 248 Mo. 173, loc. cit. 182, 154 S. W. 103, 106.

And we may add that the closing paragraph of this instruction requires the jury to award plaintiff a reasonable compensation "under the evidence."

III. There is another compelling reason, however, for holding that it was not reversible error to give the instruction, because of the form of that paragraph thereof quoted above. The complaint as to this portion of the instruction must of necessity rest upon the ground that the words "his injuries" are too general or indefinite, and do not restrain the jury from making an award for injuries not resulting from the collision. But it is an established rule of decision in this state that mere generality or indefiniteness in an instruction of this character, where the defendant, as here, stands mute and offers none, does not constitute prejudicial error. *Browning v. Railway Co.*, 124 Mo. 55, loc. cit. 72, 27 S. W. 644; *King v. St. Louis*, 250 Mo. 501, loc. cit. 514, 157 S. W. 498; *Powell v. Railroad*, 255 Mo. 420, loc. cit. 454 et seq., 164 S. W. 628; *State ex rel. United Rys. Co. v. Reynolds et al.*, 257 Mo. 19, loc. cit. 38, 39, 165 S. W. 729; *Sang v. St. Louis*, 262 Mo. 454, loc. cit. 463, 171 S. W. 347; *Albert v. Terminal Ry. Co.*, 192 Mo. App. 665, loc. cit. 676, 179 S. W. 955; *O'Malley v. Musick*, 191 Mo. App. 405, 177 S. W. 749, loc. cit. 751; *Strotjost v. Terminal Ry. Co.*, 181 S. W. 1083, loc. cit. 1084; *Carter v. Wa-*

bash R. Co., 193 Mo. App. 223, 182 S. W. 1061, loc. cit. 1064; Winterman v. United Rys. Co., 203 S. W. 486, loc. cit. 487; O'Hara v. Lamb Const. Co., supra, 200 Mo. App. 292, 206 S. W. loc. cit. 256. In State ex rel. United Railways Co. v. Reynolds, supra, 257 Mo. loc. cit. 38, 165 S. W. 733, it is said:

"When the pleadings and evidence are sufficient to support an instruction on an issue, and the instruction submitting said issue is only objectionable on the ground that it is *too general in form*, it becomes the duty of the party who may wish to complain of said general instruction to request an instruction limiting the effect thereof so that it may not be misunderstood by the triers of the fact." (Italics ours.)

This is a sound and altogether wholesome doctrine, one which has become firmly implanted in our law, and which obviously finds ready application to the situation here presented. If appellant had any reason to fear that the jury, unmindful of their obvious duty in the premises, might, under this portion of the instruction, award plaintiff damages for pain and suffering not occasioned by appellant's negligence, unless hedged about by appropriate limitations, it was plainly appellant's duty to ask a limiting or qualifying instruction on the measure of damages. This it did not do. "It pitched its battle at other points. It exhausted its solicitude elsewhere and on other questions. It may not now, with its corporate heart bowed down with the woe of defeat, and its corporate eyes washed and brightened by the tears of affliction, elicit appellate interest in a matter it cared nothing about below." Powell v. Railroad, supra, 255 Mo. loc. cit. 454, 164 S. W. 638.

IV. It is next contended that the instruction is rendered fatally erroneous by the use of the words, "subject to the limitations of the other instructions given herein," appearing at the end of the first paragraph thereof. This contention is clearly without merit, as held in the majority opinion. This portion of the instruction does not leave something to be supplied or defined by other instructions, and which is not so supplied or defined. It refers merely to the "limitations" of other instructions, and it cannot matter that no limitations on the recovery of damages appear in other instructions.

V. The instruction allows a recovery "for any expenses for medical or surgical attention, which the plaintiff has necessarily incurred or will hereafter necessarily incur, directly caused by said injuries, in seeking relief therefrom." And it is argued that this portion of the instruction is fatally erroneous, in that it does not limit a recovery for such expenditures to "such sums as are reasonable for such service rendered on account of the injuries."

As to this it may be noted in the first place that a recovery is allowed only for expenses

of this character which have been or may be necessarily incurred—not for sums expended for necessary treatment. Expenses that are necessarily incurred could not well be other than reasonable expenditures. But, apart from this, the instruction should be upheld, as against this attack, for the reason that there was no dispute or controversy whatsoever respecting this matter at the trial. The testimony of plaintiff's physician tends to show the reasonable value of the services rendered plaintiff in the treatment of his injuries, and appellant neither cross-examined the witness as to this nor adduced any countervailing testimony. As to future expenditures of this character the only direct testimony is that of a physician who examined plaintiff for the purpose of testifying, and who stated that the double hernia could only be cured by an operation, the "normal fee" for which would be "four or five hundred dollars." This came in without objection, and there was no effort to contradict it. Plaintiff, therefore, showed the reasonable value of the services of this character previously rendered to him, and made such showing as to future expenditures of this sort as the nature of the case would admit (Sang v. St. Louis, 262 Mo. 454, loc. cit. 463, 171 S. W. 347), and appellant stood by and made not the slightest effort to question the showing thus made. Under these circumstances appellant has no just cause to complain of the instruction upon this ground.

In this connection it is argued for appellant that this portion of the instruction allows a recovery for future expenses of medical or surgical treatment without evidence to support it. As to the operation said to be necessary to effect a cure of the hernia, it is argued that "plaintiff does not testify that he is going to have the operation performed," and that, "in the absence of some indication that plaintiff is going to incur" future medical or surgical expense, a recovery therefor is unwarranted. But this argument proceeds upon a misconception of the effect of the evidence adduced, and likewise fails to reckon with appellant's duty to ask a limiting instruction. If the jury believed, as they had the right to believe, that the hernia resulted from the negligence of appellant complained of, then they were not warranted in concluding, upon all of the facts in evidence, that future medical or surgical attention would be necessary. In a case of this precise character our Supreme Court said:

"When some of the abdominal walls are ruptured, and the intestines have once protruded, \* \* \* it is common knowledge that the trouble will with reasonable certainty recur from lifting or the vicissitudes of ordinary labor. The medical testimony runs on all fours with that idea. We know, and the jury knew, medical attention in the future would be reasonably certain to guard the situation, or to reduce the recurring hernia, or prevent strangulation. To



the common sense, then, of the jury, guided by their conscience, their everyday experience, their sound judgment, their oaths, must be left the question; for there is no line of testimony by which the fact may be established to an absolute certainty. To leave it to the jury is the best the law can do, for no case calls for better testimony than the case admits of. *Sotabier v. Transit Co.*, 203 Mo. 702 [102 S. W. 651]; *Mabrey v. Road Co.*, 92 Mo. App. loc. cit. 603 [69 S. W. 394]; *Feen v. L. I. R. R. Co.*, 116 N. Y. loc. cit. 382 [22 N. E. 402, 5 L. R. A. 544]. The rule is that adequate compensation may be recovered in a single action for all the natural consequences of a negligent act. That principle controls here. Future expenses from physicians rest upon the same grounds as the probable loss of future earnings. *Turner v. Boston & Me. R. R. Co.*, 158 Mass. loc. cit. 267 [83 N. E. 520]. Moreover, if, in the state of the proof, defendant desired to limit the recovery for future medical services to a nominal amount, it should have tested out its right to do so by asking an instruction to that effect. *King v. St. Louis*, 250 Mo. loc. cit. 514 [157 S. W. 498]; *State ex rel. United Rys. Co. v. Reynolds*, 257 Mo. 19 [165 S. W. 729]. *Sang v. St. Louis*, supra, 262 Mo. loc. cit. 462, 463, 171 S. W. 350.

Finally, it may be said that the verdict is obviously for the right party, and, in view of the evidence adduced, it cannot be said to be at all excessive. Plaintiff's evidence shows that he received injuries to his side and chest, including broken or fractured ribs, as a result of the collision, and, as said, sufficed to warrant a finding that the hernia resulted from the injuries sustained at that time. It seems quite clear that no error appears in the record materially affecting the merits of the action (section 2082, Rev. Stat. 1909), or the substantial rights of appellant (section 1850, Rev. Stat. 1909), and that the judgment should accordingly be affirmed.

I deem the decision of the court herein, rendered by my Associates, contrary to the decision of the Supreme Court in *State ex rel. United Rys. Co. v. Reynolds et al.*, 257 Mo. 19, 165 S. W. 729, *Powell v. Railroad*, 255 Mo. 420, 164 S. W. 628, *Sang v. City of St. Louis*, 262 Mo. 454, 171 S. W. 347, and to many other decisions of that court as well. I therefore ask that the case be certified to the Supreme Court for final determination.

BUSH v. MILLER et al. (No. 2494.)

(Springfield Court of Appeals. Missouri. Dec. 6, 1919.)

1. CARRIERS  $\Leftarrow$  30—RATE BECOMES EFFECTIVE WHEN FILED WITH AND APPROVED BY INTERSTATE COMMERCE COMMISSION.

When a railroad's freight rate has been filed for the required length of time with the

Interstate Commerce Commission, and authorized and adopted by that commission, it becomes effective, though not filed with the station agents or posted in the different stations.

2. CARRIERS  $\Leftarrow$  30—FAILURE TO PUBLISH AND POST DULY ESTABLISHED RATE.

If a railroad violated the law with reference to publication and posting of a new tariff at stations affected, such violation did not nullify the rate or tariff as approved by the Interstate Commerce Commission after filing with it, but merely subjected the railroad to the penalty provided by the Interstate Commerce Act.

Appeal from Circuit Court, Lawrence County; I. V. McPherson, Special Judge.

Action by B. F. Bush, receiver of the St. Louis, Iron Mountain & Southern Railway Company, against T. A. Miller and C. B. Miller, partners doing business under the name of the T. A. Miller Lumber Company. From a judgment for defendants, plaintiff appeals. Reversed and remanded, with directions to enter judgment for plaintiff.

Barbour & McDavid, of Springfield, and J. F. Green, of St. Louis, for appellant.  
Carr McNatt, of Aurora, for respondents.

BRADLEY, J. This is a suit by the receiver of the St. Louis, Iron Mountain & Southern Railway Company to recover \$129.50, the alleged difference between the freight paid and the amount which plaintiff claims should have been paid on an interstate shipment, according to the rates alleged to be in force and effect at the time of the shipment, on 11 carloads of yellow pine lumber shipped from Boswell, Ark., to Hoberg, La Russell, and Aurora, Mo., on the Iron Mountain, and to nearby points on the Frisco. The cars for points on the Frisco were shipped on the Iron Mountain to Aurora, and from there by the Frisco to points of destination. It is only the Iron Mountain rate, however, that is involved here. A jury was waived, and the cause tried before the court, resulting in a finding and judgment for defendants. From this judgment, plaintiff appealed.

All of the shipments were between November 3, 1914, and February 4, 1915. Plaintiff alleges: That during this time the lawful rate as fixed by the St. Louis Iron Mountain & Southern Railway Company, and filed with and approved by the Interstate Commerce Commission, was 13 cents per 100 from Boswell, Ark., to the points of destination in Missouri. That the agents, by inadvertence and mistake, collected only 10½ cents per 100 on each of said shipments of lumber from Boswell, Ark., to Hoberg, La Russell, and Aurora, Mo. The lumber was shipped from Boswell by the Wideman Saw & Planing Mills, of Boswell, Ark., to T. A. Miller Lumber Company, a copartnership. Defend-

ants paid the freight as demanded, and according to the bills of lading, at the points of destination.

Defendants answered by a general denial, and set up a counterclaim. The court found against them on the counterclaim, and it is out of the case. Defendants further set up in their answer that, during the time of the shipments in question, the only tariff in possession of plaintiff's agent at Boswell, Ark., or about the station, was a tariff fixing the legal rate at 10½ cents per 100, and that no tariff schedule fixing a higher rate had ever been delivered to said agent, or posted in said station. That defendants bought the lumber, to be delivered to them at the several destinations at a specified price, and were to pay the freight at the points of destination and remit the balance to the shipper. They also alleged that the only tariff schedules in the hands of the agents at the several points of destination fixed the legal rate at 10½ cents, instead of 13 cents. Defendant further alleged that, if any other tariff schedules fixing the rates between Boswell, Ark., and the points in Missouri, were ever filed with the Interstate Commerce Commission, such was fraudulently and surreptitiously done in order to avoid protest from shippers.

The evidence was that the rate as filed with and approved by the Interstate Commerce Commission between Boswell, Ark., and the points in Missouri, was 13 cents from and after November 1, 1914. But defendants contend that notwithstanding that this higher rate had been made, and had been filed with and approved by the Interstate Commerce Commission, it was not in force and effect because it had not been published; that is, that it had not been posted and placed in the hands of the station agents and shippers over the line between Boswell, Ark., and Aurora, Mo., in accordance with the provisions of section 6 of the Interstate Commerce Act. Act Feb. 4, 1887, c. 104, 24 Stat. 380 (United States Compiled Statutes 1916, § 8569).

The court, at the request of plaintiff, made a finding of facts and conclusions of law. Among the facts found appear the following:

"Prior to any of the shipments in controversy being made the plaintiff filed with the Interstate Commerce Commission a notice of the increase of rate on the commodities mentioned in the petition between the station of Boswell, Ark., and Aurora, Hoberg, and La Russell, Mo., of 13 cents per 100 pounds. Neither of the defendants or any other shippers of such commodities between said stations knew of the filing of such new rate, or the effort to amend the rate, and for that reason filed no protest or took any action to prevent the rate. The plaintiff did nothing to put the new rate in effect, save and except to file a notice with the Interstate Commerce Commission the requisite number of days required by the act of Congress to put such new rate into effect; that is, the court finds that it did not publish the rate by

giving notice to its station agent at either of said stations from or to which said commodities were shipped as described in said petition, nor to shippers of such commodities."

Defendant T. A. Miller testified that he did not call on the agent at Boswell for the rates, but that he did call on plaintiff's agent at Aurora, after this controversy came up; that he asked this agent if he received any change in the rate from 10½ cents, and that he was advised that no change in rate had been received. Defendant also testified:

"That he, together with this agent, looked through the files; that he went through with them, and the tariff was not changed. 'I do not remember whether there were any tariffs from supplement 1 to tariff sheet 50-I, but none changing the 10½-cent rate.'"

Defendant also testified that he called on the agents at Hoberg and La Russell, and that these agents said that they had no higher rate than the 10½ cents, but the files in the stations at Hoberg and La Russell were not gone through.

A witness for defendant and the individual who looked after the shipping of these cars, as we understand the record, testified:

"That he called on the agent at Boswell for the tariff rate some time in the first part of the year 1915. That he heard about the rate being raised at Boswell and asked the agent about it. 'I told him [agent] I heard a report. I said: 'Jim Wood says they raised the rate on us to 13 cents.' 'No,' he says, 'I guess not.' Just a day or two after that I had a letter from Mr. Miller telling me they had raised the rate from 10½ cents to 13 cents and for me to inquire of the agent for his authority, and I just asked him—I says, 'T. A. wrote me they raised the rate to 13 cents.' He says, 'When?' I says, 'Some time back, they are claiming two or three months it has been changed.' He says, 'Ain't nothing to that; I haven't got any dope on it.' I said, 'Well, T. A. wrote me last night to come over after the rates—get the rates.' He said: 'I haven't raised any, and I haven't got any authority. He is just laboring under a mistake somewhere up there. They would have notified me if they had been raised.' \* \* \* After I commenced doing the shipping, and learned that 10½ cents was the rate, I did not make any more inquiry about it until I was over there along the first part of the year. I then asked him for the authority; that was the way I put it. He said, 'I haven't raised them.' And his copy, the way-bills copy book, still showed it was 10½ cents. We didn't know any better; didn't know any difference until in February or March; some time the first part of the year 1915. He didn't make any search for the tariff sheets."

This witness testified that Jim Wood, the individual who first advised that these rates had been raised, was a lumberman at Calico Rock, Ark., and shipped lumber to Joplin and different places in Missouri.

The purpose of the Interstate Commerce Act is to make as nearly certain as pos-

sible that no discrimination between shippers will be made. In *N. Y., N. H. & H. R. Co. v. Interstate Commerce Commission*, 200 U. S. loc. cit. 392, 26 Sup. Ct. loc. cit. 277, 50 L. Ed. 515, it is said:

"The all-embracing prohibition against either directly or indirectly charging less than the published rates shows that the purpose of the statute was to make the prohibition applicable to every method of dealing by a carrier by which the forbidden result could be brought about. If the public purpose which the statute was intended to accomplish be borne in mind, its meaning becomes, if possible, clearer."

It seems that *Hunter v. Railroad*, 167 Mo. App. 624, 150 S. W. 733, supports the contention of defendants that the 13-cent rate was not effective on these shipments if this rate had not been filed with the agent at Boswell and posted in the station. But it appears that the Supreme Court of the United States, as well as the other federal courts, if they ever held as in *Hunter v. Railroad*, supra, have later held and announced a different rule. In *Hunter v. Railroad* it was held that, in order to show that a rate had been established at a particular station, it must be shown that the printed schedule showing the alleged established rate had been furnished to that particular station, or the agent in charge thereof. If this rule be adhered to, then it would require no stretch of the imagination to conceive of likely cases where, by collusion between the agent and the shipper, a shipper might easily be favored and others discriminated against.

In *International & G. N. Ry. Co. v. Carter*, 180 S. W. 663, the Court of Civil Appeals of Texas in its original opinion held, following *Hunter v. Railroad*, supra, that it is not probable that the Congress contemplated that a rate should become effective by the mere filing with the Interstate Commerce Commission, and before the local agent knew of the same, or had a copy of the rate, so that he might be guided thereby. In support of this holding the court quoted from *Virginia Co. v. Railroad*, 166 N. C. 62, 82 S. E. 1, which, it seems, supports the conclusion reached. But on a rehearing in the *Carter* Case the court held that the publication referred to in section 6 of the Interstate Commerce Act is something that is to be done before the Interstate Commerce Commission approves the rate, and that it might fairly be assumed that the Interstate Commerce Commission ascertained that the publication had been made as required before the schedules were adopted.

In *St. Louis, Iron Mountain & Southern Railway Co. v. Wood*, 136 Ark. 585, 207 S. W. 32, the identical tariff in question here was in question. The railroad company in the *Wood* Case had sued to recover \$53.60, an alleged undercharge on a shipment of lumber from Calico Rock, Ark., to Springfield, Mo.

The agreed statement of facts showed that the old tariff fixed by the Interstate Commerce Commission was 10½ cents, and that the commission later raised the rate to 13 cents; that the station agent had received no notice of the raise in the rate, nor had he posted the 13-cent rate in the station; and that the station agent quoted the old rate of 10½ cents to the shipper, and showed him the old printed tariff. In the *Wood* Case the court below held that the railroad company was entitled to recover the amount sued for, and that defendant was entitled to recover the same amount set up in his counterclaim as damages, because the railroad company had failed to post the 13-cent rate, and because the agent had misquoted the rate. The Supreme Court of Arkansas reversed the lower court, and directed a verdict for the plaintiff.

The *Wood* Case was decided on the authority of *Illinois Central Railroad Co. v. Henderson Elevator Co.*, 226 U. S. 441, 33 Sup. Ct. 176, 57 L. Ed. 290. In that case the elevator company brought suit against the railroad company to recover damages on account of failure to post its tariff rates at its station, and the misquotation by the agent of the freight rate on corn shipments in interstate commerce from the station of the railroad company at Henderson, Ky. The suit was originally brought in the circuit court in Kentucky. The court instructed the jury that, if the loss sustained by the plaintiff was occasioned and brought about by defendant's failure to have posted or on file in its office in Henderson, Ky., its freight tariff rate in question, and by reason of any erroneous quotation of defendant of its freight rate from and to the points in question of which plaintiff complains, there should be a verdict for plaintiff. A verdict was returned for plaintiff and judgment entered thereon, and this judgment was subsequently affirmed by the Court of Appeals of Kentucky. *Illinois Central Railroad Co. v. Henderson Elevator Co.*, 138 Ky. 220, 127 S. W. 779. The cause reached the Supreme Court of the United States by writ of error, where the judgment was reversed. In disposing of the case the Supreme Court said:

"It is to us clear that the action of the court below in affirming the judgment of the trial court and the reasons upon which that action was based were in conflict with the rulings of this court, interpreting and applying the act to regulate commerce. *New York C. & H. R. Co. v. United States*, 212 U. S. 504, 53 L. Ed. 627, 29 Sup. Ct. 309; *Texas & P. R. Co. v. Mugg*, 202 U. S. 242, 50 L. Ed. 1011, 26 Sup. Ct. 628; *Gulf, C. & S. F. R. Co. v. Hefley*, 158 U. S. 98, 39 L. Ed. 910, 15 Sup. Ct. 802. That the failure to post does not prevent the case from being controlled by the settled rule established by the cases referred to is now beyond question. *Kansas City Southern R. Co. v. C. H. Albers Commission Co.*, 223 U. S. 594 (a), 56 L. Ed. 567, 32 Sup. Ct. 316."

[1] It is our conclusion and our holding that, when a freight rate has been filed for the required length of time with the Interstate Commerce Commission, and by that commission authorized and adopted, it then becomes effective, although not filed with the station agents or posted in the different stations. We agree with the Texas court in the Carter Case, *supra*, that the publication refers to an act on the part of the company proposing the rate before it is filed with or adopted by the Interstate Commerce Commission. If the railroad company fails to file a schedule of its rates with its station agents and post the same as required by the Interstate Commerce Act, a penalty is provided in the act for such failure.

In *Louisville & Nashville Railroad Co. v. Maxwell*, 237 U. S. 94, 35 Sup. Ct. 494, 59 L. Ed. 853, L. R. A. 1915E, 665, the Supreme Court said:

"Under the Interstate Commerce Act, the rate of the carrier duly filed is the only lawful charge. Deviation from it is not permitted upon any pretext. Shippers and travelers are charged with notice of it, and they as well as the carrier must abide by it, unless it is found by the commission to be unreasonable. Ignorance or misquotation of rates is not an excuse for paying or charging either less or more than the rate filed. This rule is undeniably strict, and it obviously may work hardship in some cases; but it embodies the policy which has been adopted by Congress in the regulation of interstate commerce, in order to prevent unjust discrimination."

In *Railroad Co. v. Feintuch*, 191 Fed. 485, 112 C. C. A. 129, this language is used:

"The principle is that the carrier has fixed its own rate by filing the required schedule. This then becomes the lawful rate. The rate thus fixed must be deemed to be reasonable, unless attacked on the ground that it is unjust and unreasonable. The acceptance of a greater or less rate of charge constitutes an unlawful act."

[2] We recognize that the Interstate Commerce Act provides that tariff schedules shall be published, etc., and that the object of publication is to give shippers information. On the other hand, the regulation of rates is given by the act to the Interstate Commerce Commission, and when the commission has ordered that a certain rate be effective from and after a certain date, the conclusive presumption is and ought to be, in order to lessen the chances for unfair discrimination, that publication was had as the law requires, or else the commission would not have put such rate into effect. When such is the case, it is our opinion that the rate approved by the commission is the lawful and only rate until another and different rate is adopted in accordance with the Interstate Commerce Act, and that, if the carrier has violated the

law with reference to publication and posting such does not nullify the rate, but only subjects the carrier to the penalty provided.

The evidence in the case at bar was that it was the custom of the plaintiff to file two copies of a proposed rate with the Interstate Commerce Commission, and to mail each of its agents by railroad mail a copy of its tariffs, and to mail by United States mail a copy to the shippers on its mailing list. There was no direct evidence that copies of the tariff sheets had been mailed to plaintiff's agent at Boswell, Ark., and the Missouri points mentioned; but there is evidence tending to show that oftentimes these tariff sheets are received by agents and thrown aside or stacked away, without knowledge on the part of the agent as to their importance; also it is shown that frequently agents do not understand how to interpret and arrive at a correct conclusion regarding rates when the proper tariff sheets are before them. It does appear in the record, however, that the local agents have access to the telegraph by which, if they do not know the lawful rates, or cannot interpret the tariff sheets, they may ascertain the lawful rate without any expense, and without much delay to the shipper.

The judgment below is reversed and remanded, with directions to enter judgment for the plaintiff for the sum of \$129.50.

STURGIS, P. J., and FARRINGTON, J., concur.

## KING v. OKLAHOMA GYPSUM CO. (No. 15478.)

(St. Louis Court of Appeals. Missouri. Dec. 2, 1919.)

### 1. APPEAL AND ERROR §1052(5)—ADMISSION OF EVIDENCE PREJUDICIAL WHERE JUDGMENT REFLECTS ERROR.

In an action for \$450 damages on account of lost earnings, and \$50 due as commission for goods sold, plaintiff's inadmissible testimony as to his earnings while employed as selling agent by a company in the same business as defendant *held* prejudicial; judgment having been given for plaintiff for \$500.

### 2. MASTER AND SERVANT §41(6)—EVIDENCE OF EARNINGS IN OTHER EMPLOYMENT INADMISSIBLE TO SHOW DAMAGES FOR DISCHARGE.

In an action by one employed to sell goods on commission to recover damages on account of lost earnings from the date of his discharge to the end of the term of employment, and a sum alleged to be due as commission, plaintiff's testimony as to his earnings while employed by another company in the same business as defendant was inadmissible, in the absence of showing that the terms of employment were identical.

Appeal from St. Louis Circuit Court; Thos. C. Hennings, Judge.

Action by Charles M. King against the Oklahoma Gypsum Company. From judgment for plaintiff, defendant appeals. Reversed and remanded.

Geo. V. Reynolds, of St. Louis, for appellant.

Samuel Levitt and Karl E. Lubke, both of St. Louis, for respondent.

NIPPER, C. This action was instituted before a justice of the peace in the city of St. Louis. On trial before the justice, judgment was rendered in favor of the appellant. Respondent appealed to the circuit court, and, after trial before the court without a jury, judgment was rendered in favor of respondent, for \$500. In the circuit court the respondent filed an amended petition, which was in two counts. Respondent alleged that he was employed by appellant, for a period of one year, beginning August 1, 1913, and ending August 1, 1914, to introduce and sell plaster in the city of St. Louis, Mo., and the vicinity thereof; that respondent was to be the exclusive agent of appellant in this territory, and was to receive a commission of \$1 a ton for every ton of plaster sold and shipped into this territory during the year; that respondent performed all the conditions of the contract, but that on the 10th day of October, 1913, the appellant, without cause, discharged respondent and contracted with others for the sale of its product in this territory.

The first count in the petition seeks to recover \$450 as damages on account of lost earnings respondent would have made from the date of his discharge until the 17th of March, 1914.

The second count in the petition is for \$50, which respondent claims is due him as commission for goods sold, between the date of his employment and the date of his discharge.

The evidence offered on the part of respondent tended to show that the \$50 was due him as a commission for goods sold, as alleged in the second count of his petition; also, that he had been instrumental in selling 2,000 tons of appellant's products to one Rowan, prior to the date of his discharge; and that prior to the time of his employment by appellant he was employed by the Roman Nose Gypsum Company, a company which handles similar products to those of appellant, and over the objections and exceptions of appellant he was permitted to testify as to his earnings while employed by the Roman Nose Gypsum Company. Appellant denied employing respondent for a year, but claimed that it only employed him for the purpose of making a few sales which had been completed, and for which respondent had been paid. Upon the trial, the court rendered judgment, as stated above, for the sum of \$500, the whole amount asked for in respondent's pe-

tition. From this judgment appellant brings this case to this court upon appeal.

[1, 2] Appellant urges only one assignment of error before this court, and that is that the trial court erred in permitting plaintiff-respondent to introduce, as a measure of his damages, evidence as to what salary he had earned while in the employment of the Roman Nose Gypsum Company. Respondent contends that there was sufficient evidence upon which to base this verdict, without the evidence complained of, and that therefore its admission was harmless; but we do not think so. Respondent cites the case of Sluder v. St. Louis Transit Co., 189 Mo. 107, 88 S. W. 648, 5 L. R. A. (N. S.) 186, in support of the contention that this evidence was competent. This case, however, is not in point, and does not support the theory of the respondent. In that case, a doctor who was suing the transit company for injuries sustained by him was permitted to testify as to what his earnings were for the corresponding months of the previous year. No objection was made when the question was asked, and no motion was made to strike out the answer; but, even as appearing in the record, it only tended to show his lost earnings for certain months by showing his actual earnings as a physician, under the same conditions, for the corresponding months of the previous year. In the case of Roth v. Spero, 48 Misc. Rep. 506, 96 N. Y. Supp. 211, a case almost identical with this one, it was held that the admission of such testimony was reversible error. It will be noted that the first count in petition seeks to recover on account of a breach of said contract for lost earnings which he might have earned if permitted to continue his employment with the appellant, and for such breach of contract he sought to recover the sum of \$450.

In the second count he sought to recover \$50 as commission due him for sales made between the date of his employment and his discharge. The court having found for the entire amount sued for, it cannot be said that there was sufficient testimony upon which to base this judgment, if the testimony complained of is eliminated. The court may have found from the evidence that respondent was entitled to commission on the 2,000 tons of appellant's products sold Rowan, but respondent only seeks \$50 as commission for goods sold. Therefore the court must have taken into consideration the testimony as to what respondent earned while employed by the other company, and especially in view of the fact that, when respondent was recalled, the court examined him upon this phase of the case again. That the action of the trial court, in permitting respondent to testify as to his earnings while employed by another company prior to his employment by appellant, was error, is clear. The terms of employment were not shown to have been identical or the commissions the same. It is also clear that

the court, sitting as a jury, considered this testimony in rendering the judgment below, and as said in *Roth v. Spero*, supra, 48 Misc. Rep. loc. cit. 507, 96 N. Y. Supp. loc. cit. 213, where the court was speaking upon an almost identical proposition:

"It scarcely needs anything further than the statement of the admission of this evidence to demonstrate its irrelevancy and impropriety."

Therefore the commissioner recommends that the judgment nisi be reversed, and the cause remanded.

**PER CURIAM.** The foregoing opinion of NIPPER, C., is adopted as the opinion of the court.

The judgment of the circuit court is, accordingly, reversed, and the cause remanded.

ALLEN and BECKER, JJ., concur.  
REYNOLDS, P. J., not sitting.

#### EMERSON-BRANTINGHAM IMPLEMENT CO. v. ROGERS et al. (No. 2563.)

(Springfield Court of Appeals. Missouri. Dec. 6, 1919.)

##### 1. CHATTEL MORTGAGES ⇨153 — PURCHASER FROM BONA FIDE PURCHASER SECURES TITLE.

If, by reason of defective recording, purchaser acquires title free from the mortgage lien, he could convey such unincumbered title, though at time of last conveyance the record of the mortgage was perfect, and imparted notice.

##### 2. CHATTEL MORTGAGES ⇨155—TITLE ACQUIRED BY PURCHASER WITH NOTICE OF UNRECORDED MORTGAGE.

Where chattel mortgage is void under Rev. St. 1909, § 2861, making chattel mortgages not recorded void as to third parties, where mortgagor retains possession, purchaser takes a clear title, though he has actual knowledge of the unrecorded mortgage, the parties being in pari delicto, since the statute regards the party failing to record mortgage as a wrongdoer, not to be protected against purchaser with actual notice.

##### 3. CHATTEL MORTGAGES ⇨90—FAILURE OF RECORDER TO MAKE PROPER INDEX.

Recorder's failure to make a proper index of chattel mortgage, as required by Rev. St. 1909, §§ 2861, 10384, 10387, did not affect validity of mortgage.

##### 4. CHATTEL MORTGAGES ⇨90 — MORTGAGE RECORDED IN WRONG BOOK NOT INVALID.

Recording of chattel mortgage in book for recording of miscellaneous conveyances affecting real estate, instead of in separate chattel mortgage book, as required by Rev. St. 1909, § 10383, through neglect or oversight of recorder, did not affect validity of mortgage or the imparting of notice under section 2861.

##### 5. CHATTEL MORTGAGES ⇨84 — UNRECORDED MORTGAGE VALID AS BETWEEN PARTIES.

Conveyances, including chattel mortgages, are good between the parties, regardless of any recording.

##### 6. CHATTEL MORTGAGES ⇨153 — PURCHASER UNDER AGREEMENT TO DEFEND AGAINST MORTGAGE NOT BONA FIDE PURCHASER.

Lawyer, who procured bill of sale from mortgagor for purpose of enabling him to defend against the collection of the notes and mortgage, under agreement to share equally with mortgagor whatever he could save out of the property, was not an innocent purchaser, or any kind of purchaser, but was merely the agent and attorney of mortgagor.

##### 7. CHATTEL MORTGAGES ⇨153 — RIGHT TO PROTECTION OF RECORDING ACT.

An alleged purchaser is not entitled to the protection of the recording act, unless he has parted with something of value.

##### 8. EQUITY ⇨56—MAXIM.

The law looks at substance, and not form.

##### 9. CHATTEL MORTGAGES ⇨155—VALIDITY OF DEFECTIVELY RECORDED MORTGAGE AS TO PURCHASER WITH NOTICE.

Chattel mortgage, recorded in wrong book, with no index, even if it should be considered void as against innocent purchaser, was valid as against purchaser with actual notice, who did not, until after purchase, discover defect in recordation, where mortgagee had done his duty in filing instrument for record and paying recording fee.

Appeal from Circuit Court, Texas County; L. B. Woodside, Judge.

Suit by the Emerson-Brantingham Implement Company against Frank V. Rogers and others. Judgment for plaintiff, and defendant James Spencer appeals. Affirmed.

Lamar, Lamar & Lamar, of Houston, for appellant.

Ellis, Cook & Dietrich, of Kansas City, for respondent Implement Co.

**STURGIS, P. J.** This is a suit to enforce the lien of a chattel mortgage against certain personal property—a traction engine and threshing separator. The defendant (appellant) Spencer claims the property free from any mortgage lien as mesne purchaser without valid notice under the recording act relating to chattel mortgages. Spencer claims to have purchased from one Carroll, also a defendant, who had purchased from the mortgagor at a time when it is claimed the chattel mortgage sued on was void as against purchasers, because not properly recorded. Section 2861, R. S. 1909.

The facts as to the recording are that the mortgagee, promptly after its execution, filed the mortgage for record in the recorder's office and paid the proper fee. The recorder

correctly recorded it in a book used to record miscellaneous conveyances affecting real estate, and not in the separate book used to record chattel mortgages, as required by section 10383, R. S. 1909. Nor was there any index made of such mortgage, as required by sections 10384 and 10387, R. S. 1909, which seem to be made applicable to chattel mortgages by section 2861, R. S. 1909, *supra*.

[1] This was the condition of the records when defendant Carroll purchased (if at all) the property from the mortgagor. The records were, however, corrected in this respect before defendant Spencer purchased from Carroll. There can be no doubt, however, that if, by reason of the then defective recording, the purchaser, Carroll, acquired title to this property free from the mortgage lien, then he could convey such unincumbered title to Spencer, though at the time of such last conveyance the record of the mortgage was perfect and imparted notice.

[2] The first question at issue, therefore, is as to Carroll taking title free from the mortgage by reason of the defective or erroneous record. We think appellant is correct in saying that it is immaterial whether Carroll had actual knowledge of this mortgage at the time of his purchase or not, if the same is void under the statute. The statute (section 2861) makes chattel mortgages not recorded, where the mortgagor retains possession, void as to third parties, and the purchaser of such mortgaged property takes a clear title, though he has actual knowledge of the unrecorded mortgage. *Rawlings v. Bean*, 80 Mo. 614; *Bevans v. Bolton*, 31 Mo. 437, 443; *Stewart v. Asbury*, 199 Mo. App. 126, 201 S. W. 949; *Pearson v. Lafferty*, 197 Mo. App. 123, 130, 193 S. W. 40; *Pew v. Price*, 251 Mo. 614, 623, 158 S. W. 338.

The defendant contends that this holds true where, as here, the mortgage is actually and correctly recorded, but such record is in a real estate book, instead of a chattel mortgage book. It is conceded that this recording in the wrong book is due solely to the dereliction of duty on the part of the recorder, as the mortgagee deposited it with him for proper record and paid the proper fees. In such a case it is claimed there is an irreconcilable conflict in the decisions in this state as to whether the damage due to the recorder's failure to do his duty in this respect must fall on the mortgagee, who has done his duty in filing the instrument for record and paying the proper fee, or on the purchaser, who has done his duty in searching the proper records. One line of cases springs from the ruling in *Terrell v. Andrew County*, 44 Mo. 309, where the recorder had erroneously recorded a mortgage for \$400, making it appear on the record to be one for \$200; and the court, speaking from the standpoint of the purchaser, held that the

record of a conveyance only imparts notice of what is in such record, and said:

"It never was intended to impose on the purchaser the burden of \* \* \* a long and laborious search to find out whether the recorder had faithfully performed his duty. The obligation of giving the notice rests upon the party holding the title. If he fails in his duty, he must suffer the consequences. If his duty is but imperfectly performed, he cannot claim all the advantages, and lay the fault at the door of an innocent purchaser."

The court there followed the literal reading of section 2810, which provided that the conveyances "recorded in the manner hereinbefore prescribed" shall impart notice of the contents. It is the record which imparts notice, and it devolves on the grantee to give such notice. This case is followed in *White v. Lumber Co.*, 240 Mo. 13, 23, 139 S. W. 553, 556 (42 L. R. A. [N. S.] 151), where the court, speaking of a deed incorrectly copied on the record, said:

"Obviously one cannot be required to learn from the record facts which are not in the record. When the statute says that the filing of a deed for record imparts notice of its contents from and after the time of filing, it must mean that the deed itself imparts notice until copied into the record, and that, after it is so copied, the record, and the record only, imparts notice."

The other line of cases has its origin in *Bishop v. Schneider*, 40 Mo. 472, 2 Am. Rep. 533, where the court refused to extend this doctrine to the failure of the recorder to properly index recorded conveyances, a duty imposed on him by section 10384, and held that a deed properly filed and copied in the records imparts notice of its contents notwithstanding the failure of the recorder to index it. The court there said:

"The grantee has no control over the official acts of the recorder, and when he has delivered to the officer his deed, he has performed all the duty within his power; and when the deed is copied on the record, the statute says it shall be considered as recorded from the time it was delivered. The subsequent sections are distinct and independent provisions respecting indexing, and do not form a part of the law as to recording. They impose a duty on the officer, and denounce a liability for a neglect or refusal to obey that duty, but they do not make what has previously been done void."

It is pointed out that the statute that makes a record of a conveyance impart notice requires that the instrument be copied on the record and that the indexing of such record is imposed by another section of the statute and is not essential to the validity of such notice. This is apparent from this language of the opinion:

"The statute states, without reserve or qualification, that when an instrument is filed with the recorder and transcribed on the record, it

shall be considered as recorded from the time it was delivered. From that time forth it is constructive notice of what was actually copied. A subsequent section, for the purpose of facilitating research, besides recording, devolves a separate, distinct, and independent duty upon the recorder, and in the event of noncompliance with that duty the party injured has his redress. The purchaser or grantee, when he has delivered his deed, and seen that it was correctly copied, has done all the law requires of him for his protection; and if any other person is injured by the fault of the recorder in not making the proper index, he must pursue his remedy against that officer for the injury."

So in *Long v. Gorman*, 100 Mo. App. 45, 79 S. W. 180, where a deed of trust conveying both land and chattels was recorded in the land book only, and no index as to the chattels was made, the court held same to impart notice and to be valid as to the chattels. When this court, in *Seymore v. Dabbs*, 170 Mo. App. 151, 156, 155 S. W. 493, 494, said that "he [the grantee] is not responsible for the mistakes of the recorder," it had just previously said that it was not incumbent upon him "that he stand by and see that it was properly indexed."

It would appear to be the rule, therefore, that in order to make the record of a conveyance impart notice of its contents it is essential that it be filed for record and correctly copied in the books of the recorder's office, and this much devolves on the beneficiary, but that this rule does not apply to such collateral matters as making an index of such conveyance, imposed by other sections of the statute, but not contained in the section prescribing the essentials of notice. The law is stated in 5 R. C. L. 412, as follows:

"While the opposite view is not without the support of respectable authority, the weight of authority seems to be to the effect that where a chattel mortgage has been duly deposited at the proper office, and with the proper officer, subsequent purchasers will be charged with constructive notice, notwithstanding the officer does not properly record or enter the instrument."

[3, 4] Applying this rule to the case in hand, it would appear that the failure to make a proper index of this chattel mortgage did not affect its validity. Nor do we think that imparting notice in the case of a real estate mortgage or the validity of a chattel mortgage is dependent, not only on its being filed and recorded, but recorded in the proper book. That is a collateral matter, imposed by another and subsequent section of the statute than the one declaring that unrecorded chattel mortgages are void as to third parties. The statute (section 2861) declaring when chattel mortgages shall not be valid declares that effect "unless the mortgage or deed of trust be acknowledged or proved and recorded in the county in

which the mortgagor or grantor resides, in such manner as conveyances of land are by law directed to be acknowledged or proved and recorded." This section, like the corresponding one relative to real estate (section 2810) is found under the subject of "conveyances," while the section requiring chattel mortgages to be recorded in separate books from real estate conveyances (section 10383), like that requiring a proper index (section 10384), is found under the subject of "Recorder of Deeds" and prescribing his duties. These are duties imposed on the recorder, for the violation of which he is responsible; but they do not go to the validity of the conveyance.

This was the ruling of the court in *Faxon v. Ridge*, 87 Mo. App. 299, 307, where it is held that, even if a mortgage conveying both real estate and chattels is required to be recorded in the chattel mortgage book, a wrongful recording in the real estate book would not render it invalid, for, says the court:

"While it is not true in all the states, yet in this state and some others it seems to be determined to be the policy of the law not to hold the grantee or mortgagee responsible for the mistake, or carelessness, or criminality of the recorder. Thus it is held that, if a grantee files his deed with the recorder, the latter's failure to index it will not affect the former. *Bishop v. Schneider*, 46 Mo. 472 [2 Am. Rep. 533]. And so the same was held where, through the misconduct of the recorder, the mortgage 'disappeared.' *Marlet v. Hinman*, 77 Wis. 136 [45 N. W. 953, 20 Am. St. Rep. 102]. And the same where the mortgage is delivered to the recorder for filing, and he omits to place it with other such mortgages in his office. *Appleton Mill Co. v. Warder*, 42 Minn. 117 [43 N. W. 791]. It does not appear distinctly how the instrument here was delivered to the recorder. But if the omission to also record it in the chattel record (conceding it to be necessary) was the oversight or neglect of the recorder, it should not affect the defendant."

See, also, *Hume Bank v. Hartsock*, 56 Mo. App. 291.

[5, 6] So far we have treated Carroll as a purchaser of the mortgaged property, and it should be noted that in those cases where the failure of the recorder to correctly copy the recorded instrument on the record is counted against the beneficiary therein, and in favor of the purchaser, this was done to protect an innocent purchaser for value. *Terrell v. Andrew County*, 44 Mo. 309; *White v. Lumber Co.*, 240 Mo. 13, 139 S. W. 553, 42 L. R. A. (N. S.) 151. Conveyances, including chattel mortgages, are good between the parties, regardless of any recording. The facts here show that Carroll was not an innocent purchaser, and in fact not a purchaser at all. He was, as he says, a retired lawyer, living in the neighborhood where the mortgagor and the mortgaged property were lo-



cated; but he was evidently actively looking for business. He first tried to get plaintiff, as holder of the notes and mortgage, to place same in his hands for collection. Failing in this, he induced the mortgagor to let him defend against the collection of same, the mortgagor being insolvent, on an agreement to divide whatever he could save out of the property on a 50 per cent. basis. He procured the bill of sale of this property from the mortgagor to himself for the purpose, as stated by him in a letter to the mortgagor, "In order that people will not be jumping on the machinery for debts," and with a promise to "burn out the machine company before I get through." There is no doubt but that Carroll was at all times merely the attorney and agent of the mortgagor, acting for him, and was not a purchaser, much less an innocent one.

[7, 8] An alleged purchaser "is not entitled to the protection of the recording act unless he has parted with something of value." *Fox v. Hall*, 74 Mo. 315, 317 (41 Am. Rep. 316). The bill of sale under which he was claiming title was a mere sham, and Carroll showed some knowledge of law when he wrote his client, "I have kept them [plaintiff] at a distance on a bluff; but I, knowing what I do, could beat myself." This he has now fully accomplished. The law, as he knows, looks at substance, and not form, and the substance is that the mortgagor, Frank V. Rogers, is and has been the real defendant, Carroll being his attorney, and appellant, Spencer, taking the property merely on a conditional sale, dependent on the result of this suit, and with notice, actual and constructive, of the mortgage in question. The mortgage is good against Rogers as a party thereto, and that is decisive of the case.

[8] Should we regard the chattel mortgage in question as void as against an innocent purchaser, because of the record not being in the right book, and regard Carroll as a

purchaser with actual notice of such mortgage, then we have what Judge Goode called "a nice point" in *Bauer v. Implement Co.*, 148 Mo. App. 652, 129 S. W. 59. The point is there stated thus:

"The rule is that a buyer is protected from the effect of an instrument if by some mistake in recording the instrument its true effect is not shown. *Terrell v. Andrew County*, 44 Mo. 204. Whether this rule would protect a buyer where a chattel mortgage on the property bought had been erroneously recorded, or an erroneous copy filed in the recorder's office, if the buyer knew of the mistake, and that thereby the copy failed to embrace the property he was purchasing, though the original embraced it, is a nice point, but need not be determined on this appeal."

It is quite certain that defendant Carroll did purchase, if at all, with such actual knowledge, and discovered that the mortgage was recorded in the wrong book some time later. In such case the equities are clearly with the mortgagee, who has done his duty in filing the instrument for record and paying the recording fee. The statute making unrecorded chattel mortgages void regards the party failing to record same as a wrongdoer, and in that respect not to be protected against one purchasing even with actual knowledge, each being in *pari delicto*; but it is quite different where the mortgagee has done his full duty as to recording and stands as an innocent party, while the purchaser is not innocent, in that he took the property with actual knowledge of the mortgage. Such a case is different, also, from the case presented in *Terrell v. Andrew County*, *supra*, where both parties were innocent.

From either point of view, the judgment for plaintiff is right, and is affirmed.

FARRINGTON and BRADLEY, JJ., concur.

**BALDWIN v. HANLEY & KINSELLA COFFEE CO.** (No. 15557.)

(St. Louis Court of Appeals. Missouri. Dec. 2, 1919.)

**1. MASTER AND SERVANT §107(6) — LIGHT FOR PLACE OF WORK REQUIRED.**

Where artificial light is necessary to render safe the place where servant is required to work, the failure of the master to exercise ordinary care to provide such light renders him liable for consequent injuries.

**2. TRIAL §156(8)—DEMURRER TO EVIDENCE ADMITS TRUTH OF PLAINTIFF'S EVIDENCE.**

On demurrer to evidence in personal injury action, evidence for plaintiff of master's failure to provide proper lights in place of work must be taken as true.

**3. MASTER AND SERVANT §289(19) — CONTRIBUTORY NEGLIGENCE JURY QUESTION.**

Evidence held to present jury question of servant's contributory negligence in walking into unlighted elevator shaft, the freight elevator having been removed from position in which plaintiff had left it shortly before.

**4. TRIAL §156(8)—PRESUMPTIONS ON DEMURRER TO EVIDENCE.**

In passing on demurrer to evidence, the evidence must be viewed in the light most favorable to plaintiff, giving him the benefit of every reasonable inference, and if to reasonable minds the evidence is susceptible of two inferences one supporting a right of recovery, the other fatal thereto, the case is for the jury.

**5. MASTER AND SERVANT §291(1)—INSTRUCTIONS ON NEGLIGENCE.**

Instruction on master's liability for negligence resulting in servant's injuries held not so lengthy and awkward as a whole as to be fatally confusing.

**6. MASTER AND SERVANT §291(13) — INSTRUCTION ON VIOLATION OF ORDINANCE AS PROXIMATE CAUSE.**

In action by servant for injuries caused by walking into elevator shaft, evidence of promiscuous operation of elevator by defendant's employés notwithstanding section 2097, c. 28, Rev. Code of St. Louis, Ordinance No. 28653, requiring employment of elevator operators with certain qualifications, held to warrant instruction submitting violation of ordinance as proximate cause of injury.

**7. MASTER AND SERVANT §270(10), 274(4)—EVIDENCE OF LIGHTING OF PLACE OF WORK.**

In servant's action for injuries caused by walking into elevator shaft evidence, as to light in basement usually burning and not being lighted at time of injury, was admissible to show lack of master's care to safely light place of work and to rebut charge of contributory negligence of servant.

**8. APPEAL AND ERROR §1078(4)—NECESSITY OF REFERRING TO RULINGS IN BRIEF.**

Alleged error in excluding testimony need not be noticed, where rulings complained of

are not shown nor referred to in appellant's points or authorities or argument in brief.

**9. DAMAGES §132(7)—\$5,000 NOT EXCESSIVE FOR INJURY TO THIGH WITH OTHER INJURIES.**

Verdict for \$5,000 held not excessive for injuries to plaintiff, 23 years old, in good physical condition, and earning \$9 per week, where his chin and lip were split, his nose and forehead cut open, a tooth knocked out, neck of right femur fractured, and he was left unconscious for several days, confined to hospital bed for more than six weeks and to crutches for eight months, his leg permanently shortened five-eighths inch, necessitating treatment nearly 2½ years after injury, and he was crippled for life.

Appeal from St. Louis Circuit Court; Wm. T. Jones, Judge.

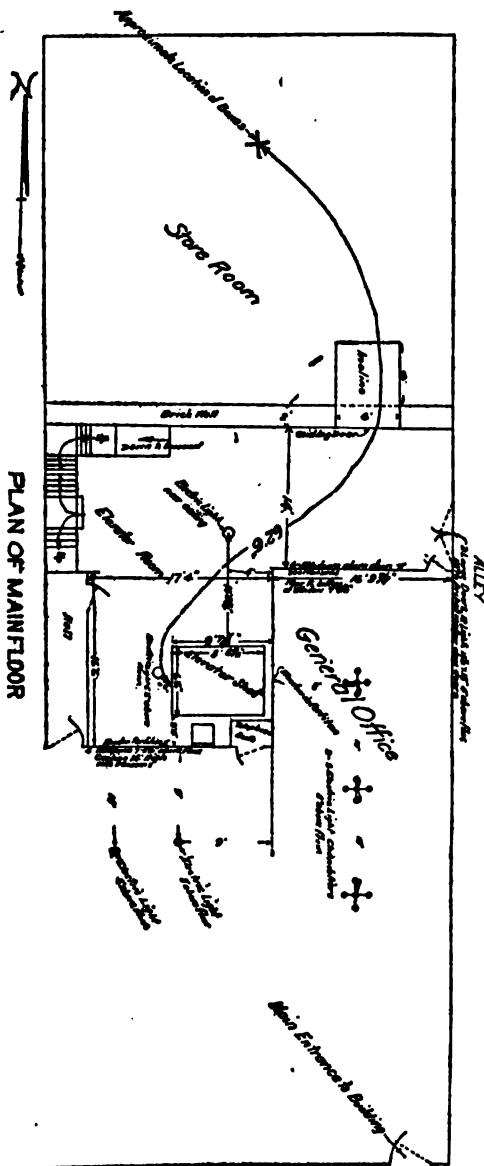
Action for personal injuries by Emmett Baldwin against the Hanley & Kinsella Coffee Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Clarence T. Case, of St. Louis, for appellant.

Wilfley, Wilfley, McIntire & Nardin, of St. Louis, for respondent.

**ALLEN, J.** This is an action for personal injuries sustained by plaintiff while in the employ of the defendant corporation as its servant. The trial below resulted in a verdict and judgment for plaintiff in the sum of \$5,000, and the defendant prosecutes the appeal.

At the time of plaintiff's injury, defendant conducted its business in a building situated on the north side of Spruce street in the city of St. Louis, facing to the south. The ground floor of this building contained a "general office," to which the main entrance to the building led. In the rear was an L-shaped "elevator room," separated from the general office by partitions and by an inclosed elevator shaft. This elevator shaft faced west and opened into that part of the elevator room which extended farthest south, the rear end of that room extending entirely across the building. Immediately north of this building was another building, containing, on the ground floor, defendant's warehouse which was separated from the elevator room by a brick wall common to the two buildings. Near the northeast corner of the elevator room a door led from that room into the storeroom. The arrangement of these rooms, and the location of the elevator shaft, etc., will more fully appear from the drawing appearing herewith. It seems that this drawing, prepared by appellant, was not the one introduced in evidence below, the latter having been lost; but it is conceded that it is substantially correct, and it suffices for our purposes:



SPRUCE ST.

The main building was at least four stories in height and the elevator was a freight elevator, operated by the various employes of defendant in the course of its business; no special operator being at any time in charge thereof. When an employe on any one of the floors desired to use the elevator, and did not find it at that floor, the custom was to reach into the shaft and shake or "jangle" one of the cables, which made a noise that could be heard by one at or near the elevator. There is some controversy in the testimony as to how loud this noise was, but the evidence for plaintiff is to the effect that it could be heard only 15 or 20 feet away. It is said that it could not be heard in the

wareroom mentioned. An employe, upon any floor, desiring to use the elevator when it was at another floor after shaking the cable and hearing no call or warning from any one, would pull the operating rope, thus bringing the elevator to the floor upon which he stood. It is said that when the rope was pulled downward the elevator was caused to ascend and vice versa. It appears that defendant had previously installed a system by means of which a bell would be rung when the elevator was to be used, but that this device was out of order at the time of plaintiff's injury and had been so for a long time prior thereto.

Shortly prior to plaintiff's injury, he was working upon the fourth floor of this building. He desired to get certain boxes from the storeroom north of the elevator room on the first floor, mentioned above. The evidence shows that he entered the elevator at the fourth floor and descended therewith to the first floor where he caused the elevator to stop; that he thereupon raised the elevator gate at this floor—a light wooden gate—and secured it in that position by means of a rope attached thereto which he fastened to a hook provided for that purpose. He thereupon proceeded across the elevator room to the door near the northeast corner thereof leading into the storeroom, and entered that room. The route which he took is approximately shown by the curved line on the annexed drawing. Having obtained two boxes, he retraced his steps to the entrance of the elevator shaft. The testimony for plaintiff shows that at that time no artificial light was burning in the elevator room, though electric lights were provided therein, one of which was situated near the entrance to the elevator shaft. Though perhaps some little light came through the glass portion of the partition between this room and the general office, the evidence shows that no light could enter the room from the outside of the building; that even upon bright days it was necessary to have artificial lights in order to discern objects with any clearness in this room; and that at the time of plaintiff's injury the room was dark. Plaintiff's evidence further tends to show that defendant had posted a sign not far from the elevator, in this elevator room, notifying employes to turn off the lights there upon leaving the room.

The evidence further shows that this elevator shaft extended below the first floor to the basement, a distance of about 20 feet; that in the basement near the shaft was situated an electric light; and that defendant's rules required that this light in the basement be kept burning at all times. And the evidence, when viewed in the light most favorable to plaintiff, shows that it was customary to keep this light burning at all times, and that when burning it cast light

upward through the elevator shaft, and that this illumination of the shaft was plainly discernable by any one on the first floor when the elevator was not at that floor, but that when the elevator was at the first floor it hid from view the light thus cast into the shaft from the basement. While plaintiff was making this trip into the storeroom and returning therefrom—he says that he was gone but a brief interval, perhaps about one minute—a boy in defendant's employ, one Drodhage, then a lad not quite 16 years of age, removed the elevator from the first floor. His testimony shows that he was upon an upper floor, and, desiring to use the elevator, he went to the elevator shaft, saw that the elevator was below him at the first floor, and shook or "jangled" the cable mentioned, as was the custom, and that, hearing no response or warning, he pulled the operating cable and caused the elevator to ascend. When plaintiff returned from the wareroom to the elevator shaft, not having heard the "jangling" of the cable—which, it may be inferred, occurred while he was in the wareroom—and being in ignorance of the fact that the elevator had been removed from the first floor, he walked into the shaft, supposing that he was stepping upon the elevator, and relying, in part at least upon the fact that in the absence of the elevator the shaft would be lighted by the basement light mentioned above, which would indicate that the elevator had been removed. Plaintiff fell to the bottom of the shaft, sustaining serious injuries.

The petition charges negligence on the part of defendant in failing to exercise ordinary care to provide lights "sufficient to render the said first floor a safe place to work."

The petition further sets up that there was in force and effect in the city of St. Louis a certain ordinance, being section 2097 of chapter 28 of the Revised Code of St. Louis, Ordinance No. 26653, requiring all users of power elevators to employ a competent person to operate and run the same who shall have a proper knowledge of all parts of the machinery and the working of the elevator of which he may have charge, and who shall not be less than 16 years of age, industrious, and of sober habits. And it is charged that defendant failed to comply with this ordinance, in that defendant failed to employ a competent person to operate the elevator in question, either on the first or any other floor of the building, but instructed all of its employes to operate the elevator whenever the same was necessary in the performance of their duties; that none of said employes were competent persons to operate the elevator; and that because of said violation of the ordinance by defendant the elevator was run and operated in a dangerous manner, which rendered the

first floor of the building an unsafe place to work.

And it is alleged that the method of operating the gates at the elevator shaft was dangerous and unsafe, and rendered the said first floor an unsafe place to work.

It is further charged that the manner of operating the elevator, by allowing any employe upon any floor to pull the operating cable, was a negligent method; that defendant was negligent in failing to exercise ordinary care to provide signals to indicate when the elevator was about to be used by an employe, and negligent in failing to instruct its servants to give any signal of the removal of the elevator sufficient to serve as a warning to such other servants of defendants as might then be at work upon the first floor; and that such method of operation of the elevator was unsafe and dangerous and rendered the first floor an unsafe place to work.

The answer is a general denial coupled with a plea of contributory negligence.

The ordinance pleaded in the petition was introduced in evidence.

Some further features of the evidence will be referred to in the course of the opinion.

I. It is insisted by learned counsel for appellant that the trial court erred in refusing to give a peremptory instruction, in the nature of a demurrer to the evidence, offered by the defendant at the close of plaintiff's case and again at the close of the entire case.

[1] The argument upon this assignment of error appears to proceed upon the theory that the evidence was such as to convict plaintiff of contributory negligence as a matter of law, barring a right of recovery. It does not appear to be seriously contended, if at all, that no negligence was shown on the part of defendant constituting a breach of the duty owing by defendant to plaintiff as its servant; and, indeed, there is no room for such contention. Apart from all other features of the case, we regard it as clear that a negligent breach of defendant's duty appears in failing to exercise ordinary care with respect to lighting the first floor, at or about the elevator shaft, in a manner such as to afford sufficient light to render this portion of the premises a reasonably safe place for the performance of plaintiff's said duties; particularly in view of the manner in which defendant conducted its business with respect to the operation of this elevator. Though it appears that electric lights were provided there, the evidence is that they were not kept burning and were not burning on the occasion here in question; but that, on the contrary, the room and the elevator shaft were both so dark that one could by no means readily discern that the elevator had been removed from the first floor.

In *Yost v. Atlas Portland Cement Co.*, 191 Mo. App. 422, 177 S. W. 690, we held that the master was liable for a failure to exercise ordinary care to see that the place where the plaintiff was required to work was so lighted at night as to make it a reasonably safe place for plaintiff to pass over in the performance of his duties. The authorities there cited, we think, amply support the conclusion that where, as here, artificial light is necessary to render safe the place where the servant is required to work, the failure of the master to exercise ordinary care to provide such light as will make the place a reasonably safe one is a breach of the master's duty for which liability may be cast upon him.

[2, 3] In the case before us, not only does it appear from plaintiff's evidence that no lights were burning in this elevator room, where, without the aid of such lights, darkness or semidarkness prevailed, but that the basement light which, according to plaintiff's evidence, was customarily kept burning at all times, and which, if burning, would cast light upward into the elevator shaft and thus enable one to tell whether or not the elevator had been removed from the first floor, was not lighted upon this occasion. This is abundantly supported by the evidence and must be taken as true for the purposes of the ruling on the demurrer.

We are also inclined to the view that the method adopted by defendant for operating this elevator, including therewith the method of signalling, was, upon the whole, a negligent method; and further that there was a violation of the ordinance pleaded. The latter, i. e., the question as to the violation of the ordinance, will be considered in passing upon the assignment of error relating to the giving of plaintiff's main instruction.

And a careful perusal of all of the testimony contained in the record touching the matter has convinced us that the question of plaintiff's contributory negligence was one for the jury. It is true that plaintiff left this elevator at the first floor with the gate up, i. e., suspended by a rope fastened to a hook provided for that purpose, and went across the elevator room and into the storeroom and returned within a brief interval, during which the elevator had been removed, and walked into the open elevator shaft. But, under all of the circumstances present, we think that it cannot be held, as a conclusion of law, that plaintiff failed to exercise ordinary care for his own safety. It is argued that plaintiff knew the custom with respect to the operation of this elevator, and that another employé upon an upper floor might remove the elevator, after jangling the cable, which plaintiff could not or might not hear in the wareroom, and that therefore plaintiff was negligent, as a matter of

law, in not taking further precautions to ascertain that the elevator had not been so removed before stepping into the elevator shaft. But though it be true that plaintiff had knowledge of this method of operating the elevator, his failure to discern that the elevator had been removed, under the circumstances present, ought not to operate to convict him of negligence, as a conclusion of law, especially in view of the fact that it appears that he had been led to rely, in some measure at least, upon the basement light to indicate the absence of the elevator from that floor. We think that the question as to whether a reasonably prudent man would have acted otherwise than did plaintiff was one for the determination of the jury. The evidence is that one descending from any upper floor to the first floor in the elevator would not see any illumination from this basement light, if lighted, by reason of the fact that the elevator shut off the light coming therefrom. Consequently, when plaintiff descended in the elevator and stopped the same at the first floor, the fact that the light in the basement was not burning could not be observed by him. Touching the effect of the basement light, when burning, plaintiff, on cross-examination of appellant's counsel, said:

"But I will tell you about it being a careless thing to do. I didn't tell I was only to be gone a minute and even if the elevator was gone there was supposed to be a light coming out of the basement, and you could see the elevator was gone."

And as to the electric lights on the first floor, plaintiff testified that he did not know where the "switch" was for turning them on.

An argument by appellant is predicated upon the fact that the evidence shows that plaintiff was blind in his left eye; it being argued that the lack of sight in that eye had much to do with bringing about plaintiff's injury, and that plaintiff was required to exercise a higher degree of care because of this fact than he otherwise would. Upon cross-examination of plaintiff, it was sought to make it appear that he turned the corner of the elevator shaft, at his left, and stepped into the door thereof without turning so as to be able to see into the shaft with his right eye; but this cross-examination failed to disclose that accident happened in such manner. Upon the facts as testified to by plaintiff, we think that the fact that plaintiff had not the use of his left eye is not a material factor in determining the question of his contributory negligence in passing upon the demurrer.

[4] It is a familiar rule of law that, in passing upon a demurrer to the evidence, the evidence must be viewed in the light most favorable to the plaintiff, giving him the benefit of every inference favorable to him which may be fairly and reasonably drawn there-

from; and that if the evidence is reasonably susceptible of two inferences, one supporting a right of recovery and the other fatal thereto, leaving room for reasonable minds to differ with respect to the effect of the evidence in that regard, the case is one for the jury. See *Beckermann v. Jewelry Co.*, 175 Mo. App. 279, 157 S. W. 855, and cases cited; *Yost v. Atlas Portland Cement Co.*, supra, and cases cited. So viewing the evidence in the record before us, we think that the demurrer was well ruled.

II. Plaintiff's first and main instruction is assailed. Because of the attacks made upon it, we here set out the instruction in full, as follows:

"The court instructs the jury that if you find and believe from the evidence that on or about the 10th day of October, A. D. 1913, the defendant was engaged in business in St. Louis, Mo., and maintained and carried on its business in a certain warehouse building at 715 Spruce street in said city and state; that plaintiff was engaged in said building as the employé of defendant; that defendant used, operated, and controlled in its business in the building above referred to a certain electric power elevator in a certain elevator shaft; that said shaft extended from the basement of said building up through the first floor to the upper floors of said building; that defendant failed to exercise ordinary care to provide light for said first floor sufficient to render the same a reasonably safe place in which to work, and failed to employ and maintain in charge of the operation of said elevator on said first floor a competent person who had the proper knowledge of all the parts of the machinery for the working of said elevator, but instructed its various servants and agents in said building to operate and run said elevator in the course of their work in and about said building; and that these servants were not competent persons for operating said elevator, as above set out, and did not have a proper knowledge of the machinery for the working of the same; and that defendant was aware thereof.

"And if you further find that defendant provided for said elevator shaft on said first floor a certain gate and provided also a rope and hook whereby said gate might be raised and left suspended, and instructed its servants and agents that, when they were upon the upper floors of said building and desired to use said elevator in the course of their work and found said elevator then at some lower floor, they should pull the cable of said elevator and thus draw the same up to the floor where they then stood, and that defendant negligently and carelessly failed to provide any signal reasonably sufficient to give warning of the removal of said elevator to other servants of defendant who might be using said elevator on some other floor.

"And if you further find and believe from the evidence that on the 10th day of October, A. D. 1913, plaintiff in due course of his employment ran said elevator from the fourth floor to the first floor of said building, raised and suspended said gate on said hook, and walked from the elevator into the north room of said first floor for the purpose of carrying certain

freight from said first floor to said fourth floor by means of said elevator, that while he was so engaged, if you so believe, the said servants and agents of defendant, in accordance with defendant's directions, as aforesaid, if you find they were so directed, raised said elevator from said first floor to one of said upper floors, that on account thereof the said elevator shaft at said first floor remained open and unguarded, and that by reason of the failure of defendant to exercise ordinary care to provide a signal (if you find such to be the fact) or to instruct its servants and agents in such cases to give a signal sufficient to warn plaintiff of the removal of said elevator, if you so find, defendant's servants and agents failed to give plaintiff a sufficient warning of the removal of said elevator; that plaintiff thereafter returned to said elevator shaft and because of the aforesaid carelessness and negligence of defendant, if you find it was careless and negligent in the respects aforesaid, and as a direct result thereof plaintiff was caused to fall from said first floor into said elevator shaft and to strike the floor of said basement, and that as a direct result thereof and while he was in the exercise of ordinary care for his own safety, he was injured.

"Then your verdict will be for the plaintiff."

[5] It is said that the instruction, as a whole, is "so lengthy and awkward that it is exceedingly confusing." We do not think that the instruction could properly be condemned on this score—certainly not as being fatally bad.

It is said that there was no evidence of a violation of the ordinance, and that hence it was reversible error to submit that question by this instruction. It is argued that to comply with the ordinance it was not necessary to have an operator constantly in charge of the elevator, but that any number of competent persons might lawfully operate it, citing *Purcell v. Tennent Shoe Co.*, 187 Mo. 276, 86 S. W. 121; and that it was not shown that any of defendant's employés who operated the elevator were incompetent, or that the incompetency of any operator was the proximate cause of plaintiff's injury.

It is true that in the *Purcell Case*, supra, it was held that the defendant had there sufficiently complied with the ordinance by having a "stockman" on each floor, of the prescribed age and competent therefor (there being no showing of incompetency), specially charged with the duty of operating the elevator. But in *Dunlap v. Chemical Works*, 159 Mo. App. 49, loc. cit. 58, 59, 139 S. W. 828, 830, this court, in construing the opinion in the *Purcell Case*, held, and properly so we think, that the decision in the *Purcell Case* did not determine that a defendant proprietor was not required by the ordinance to "keep a competent person specially charged with operating the elevator on the first and every floor of the building so as to be available to one desiring to employ the elevator." Further speaking of that subject, this court

in the Dunlap Case, through Norton, J., said:

"Here, defendant made an effort whatever to comply with the ordinance, for it did not keep a competent man specially charged with the duty of operating the elevator on different floors as in the case relied upon. Indeed, no one whatever was given charge of the elevator by defendant, but instead every employé in the two buildings, the one occupied in manufacturing morphine and the other in manufacturing cocaine, was permitted to operate it as he chose to do. Though Mr. Tompkins, the employé who started the elevator on the third floor and occasioned the injury and subsequent death of plaintiff's husband, acted with due care on his part, it may be that, had defendant kept a competent operator on the third floor and another on the first floor, the one available to Mr. Tompkins at his invitation and the other available to plaintiff's husband at his invitation, the tragedy would not have occurred, for the conflict in the use of the elevator which resulted in crushing Mr. Dunlap so that his death ensued might have been avoided by trained and experienced operators. As said by the Supreme Court of Illinois, among other duties of one competent to be given in charge of an elevator is that of taking proper precaution for the safety of those known to be near the elevator opening, before moving it. In this view, it is a question for the jury as to whether or not defendant's failure to observe the ordinance as suggested operated proximately to occasion the death of plaintiff's husband. *Channon Co. v. Hahn*, 189 Ill. 28 [59 N. E. 522]."

[6] We are of the opinion that there was here evidence of a violation of the ordinance, operating proximately to cause plaintiff's injury, and that the matter was properly submitted by this instruction.

[7] III. There was no error in admitting, over defendant's objections, testimony as to the light in the basement and the effect thereof. Appellant says that the petition specifically charged that the first floor was the place that was unsafe, and that the testimony was foreign to the issues. The point is not well taken. The petition charged:

"That the defendant failed to exercise ordinary care to provide lights sufficient to render the said first floor a safe place in which to work."

The testimony as to the basement light was, under the circumstances appearing in evidence, admissible under this allegation of the petition. Furthermore, defendant made the question of plaintiff's contributory negligence an issue in the case, and upon that issue the testimony as to the light in the basement had an important bearing.

[8] IV. In its assignments of error appellant assigns error, in a general way, to the action of the court in excluding testimony offered by it. The particular rulings complained of are not shown, nor is the matter touched upon in appellant's points and authorities or argument in its brief. It need not, therefore, be further noticed.

[9] V. Finally, it is argued that the verdict of \$5,000 is excessive.

At the time of plaintiff's injury, to wit, October 10, 1913, he was 23 years of age and was earning about \$9 per week, and the evidence is that prior thereto he was in good physical condition. The evidence shows that, as a result of falling into this shaft, plaintiff's chin and lip were split, his nose and forehead cut open; that one tooth was knocked out, and that he sustained a fracture of the neck of the right femur. The evidence further shows that he was unconscious for several days, and was confined in bed at a hospital for more than six weeks; that about a week after his removal from the hospital he was able to get about upon crutches; that he was compelled to use crutches for about eighth months, after which time he used a cane. At the time of the trial, nearly 2½ years after the time of his injury, he was still using a cane, and testified that if he undertook to walk during the day he was unable to sleep at night because of the pain in his back and leg. His right leg had become permanently shortened five-eighths of an inch. Subsequent to his injury and prior to the trial below he had been able to work, according to his testimony, but a few hours a day at intervals and had earned not to exceed \$150 in that time. At the time of the trial he was still under the treatment of a physician whose bill for services then amounted to \$150, and who was then treating plaintiff three times a week. The evidence for plaintiff tended to show that the use of his right leg was permanently impaired, and that he would be a cripple for life.

Under these circumstances, we could not with any degree of propriety hold that the verdict is excessive, warranting interference at our hands. In this connection, see *Dean v. Wabash Ry. Co.*, 229 Mo. 425, 129 S. W. 953.

We perceive no reversible error in the record, and it follows that the judgment should be affirmed. It is so ordered.

REYNOLDS, P. J., and BECKER, J., concur.

## STATE v. LADD et al. (No. 2575.)

(Springfield Court of Appeals. Missouri.  
Dec. 6, 1919.)

1. INDICTMENT AND INFORMATION §=110(3)—  
CHARGING OFFENSE IN WORDS OF STATUTE.

Where the statute describes and defines the offense, an indictment charging the offense in the language of the statute is sufficient. (Per Sturgis, P. J.)

2. INDICTMENT AND INFORMATION §=59—  
MISDEMEANORS.

The same strictness of pleadings is not required in misdemeanors as in felonies. (Per Farrington, J.)

3. INDICTMENT AND INFORMATION §=202(5)—  
SUFFICIENCY OF INFORMATION AFTER VERDICT.

Information charging unlawful disturbance of religious congregation, in words of Rev. St. 1909, § 4713, defining such crime, was sufficient to sustain conviction, where no objection to sufficiency was made until after verdict, though it did not charge that the disturbance occurred at place set apart for religious purpose or in church or building used for such purpose.

Bradley, J., dissenting.

Appeal from Circuit Court, Christian County; Fred Stewart, Judge.

Dewey Ladd and others were convicted of unlawfully disturbing a congregation met for religious worship, and they appeal. Affirmed, and certified to Supreme Court.

G. Purd Hays, of Ozark, for appellants.

William L. Vandeventer, of Ozark, for the State.

FARRINGTON, J. This case is brought here on the record proper by defendants, who were convicted in the Christian county circuit court.

The only error alleged by the appellants in this proceeding goes to the sufficiency of the information upon which a conviction was based. The information is in the following language, omitting caption:

"William L. Vandeventer, prosecuting attorney within and for the county of Christian, in the state of Missouri, informs the court upon his official oath hereto attached that Dewey Ladd, Clarence Smith, Edd Nash, and Dutch Forgey, on or about the 16th day of March, 1919, in the said county of Christian, in the state of Missouri, did then and there unlawfully, willfully, maliciously, and contemptuously disturb and disquiet a congregation of people then and there met for religious worship, by then and there making a noise and by rude and indecent behavior within their place of worship and so near the same as to disturb the order and solemnity of the meeting, contrary to the form of the statute in such cases made and provided and against the peace and dignity of the state.

"William L. Vandeventer,

"Prosecuting Attorney."

—the specific ground of objection being that this information fails to allege that the congregation of people met for religious worship at a place set apart for religious worship or in a church. It will be observed that the information quoted is in the exact letter of the statute (section 4713, R. S. 1909).

In upholding the contention that this was a fatal defect, appellants cite us to the case of the State of Missouri v. Schieneman, 64 Mo. 386, in which case the court held that the indictment charging that a congregation had been disturbed which "met for religious worship, at the southeast corner of the public square in the city of Hannibal," was not a sufficient allegation in the indictment, as this act was intended to protect camp meetings held on a piece of ground set apart for that purpose, and assemblages gathered within a house or place of worship, and not public squares and streets, and in the course of the opinion stated that, if a portion of the public square were a place of worship, that fact should be made to distinctly appear in the indictment. The force of that opinion, as we interpret it, is that, where the indictment charges that the offense was committed on the public square or street, it indirectly charges that it did not occur at a place set apart for religious worship or in a church or building used for religious worship, and for that reason the indictment was held bad.

Based on the holding in this case, the St. Louis Court of Appeals, in the case of State of Missouri v. Kindrick, 21 Mo. App. 507, reversed a judgment for conviction on an indictment which is practically the same as the information presented to us in the case at bar, and condemned such indictment because it did not allege that the disturbance took place at a place set apart for religious worship or a church or building used for such purpose. Following this decision, the same ruling has been made in State v. Ellis, 71 Mo. App. 269; State v. Stegall, 65 Mo. App. 243.

We are unable to agree with the decision of the St. Louis and Kansas City Courts of Appeal in the above cases cited, and do not believe that our decision is in conflict with the last ruling of the Supreme Court on the question in State v. Schieneman, 64 Mo. 386.

In the case at bar the information is drawn in the words of the statute, and, while it does not charge that the disturbance occurred at a place set apart for religious worship or in a church or building used for such purpose, it does not contain the charge that was contained in the Schieneman Case, which on its face would show that it was not at a place protected by the statute. In other words, we do not draw the deduction that the other Courts of Appeals have from the Schieneman Case; that



is, that where on the face of the indictment the inference would be that it was not at a place set apart for religious worship, it must follow that, where an information fails to mention any specific place, it is fatally bad after verdict, and we hold that there is a sufficient averment or charge in this information such as would permit evidence on the trial to be introduced and to fix the disturbance as having happened at one of the protected places under the statute, where such evidence was received without objection and no point was raised on the sufficiency of the information until after verdict. The closing lines of the Schleneman Case, found on page 888, are:

"When the statute creates an offense, it is always safe for the pleader to charge it in the language of the statute."

Now, that is exactly what the prosecuting attorney did in this case. He followed the wording of the statute, and there is nowhere to be found in the statute any requirement, other than by inference, that it must have taken place at a place set apart, etc., and if that inference can be drawn from the wording of the statute, then the same inference can be drawn from the same wording in the information.

[2] The rule is well settled in this state that the same strictness of pleading is not required in misdemeanors as in felonies. *State v. Robertson*, 262 Mo. loc. cit. 621, 172 S. W. 6; *State v. Lynes*, 194 Mo. App. 184, 185 S. W. 535.

It is held an information that follows the words of the statute is sufficient, in the case of *State v. Taylor*, 167 Mo. App. loc. cit. 108, 150 S. W. 1126; *State v. Merget*, 129 Mo. App. loc. cit. 48, 107 S. W. 1015; *City of Eldorado v. Highfill*, 268 Mo. 501, 188 S. W. 68.

[3] We therefore hold that the information in this case is sufficient to sustain a conviction where no question is raised as to its sufficiency until after verdict. This ruling, being in conflict with the St. Louis Court of Appeals in its opinion as shown in *State v. Kindrick*, 21 Mo. App. 507, and with the Kansas City Court of Appeals in *State v. Ellis*, 71 Mo. App. 269, requires us under the Constitution to certify this cause to the Supreme Court for its final determination.

STURGIS, P. J. [1] I fully concur with the opinion of FARRINGTON, J., in this case. It is apparent that an indictment under section 4713, R. S. 1909, for disturbing a congregation met for religious worship is analogous to an indictment under section 4709 for disturbing the peace of a person or family. Each of said sections describes and defines the offense, and in such case an indictment is sufficient which charges the offense in the language of the statute. *State*

*v. Fare*, 39 Mo. App. 110; *State v. Parker*, 39 Mo. App. 116, 120; *State v. Fogerson*, 29 Mo. 416. The St. Louis Court of Appeals held in *State v. Bach*, 25 Mo. App. 554, that an indictment under section 4709 which followed the language of the statute was not sufficient, but later overruled this case; and the Supreme Court, in *State v. Davis*, 106 Mo. 230, 17 S. W. 295, held the latter ruling correct. This, I think, is the last ruling of the Supreme Court on this subject and should be followed. It is certainly not in conflict with the ruling in *State v. Schieneman*, 64 Mo. 386, since the court there distinctly ruled that an indictment for disturbing a religious congregation is sufficient if the indictment is "in the language of the statute." The court, in *State v. Hynes*, 39 Mo. App. 569, 571, speaking of an indictment under section 4713, for disturbing "an assembly of people met for a lawful purpose," held it good when charging the offense "in substantially the words of the statute, and this in general is sufficient"—citing *State v. Fare*, 39 Mo. App. 110, where the court made the same ruling as to an indictment under section 4709. To hold the information in the present case, which follows the language of the statute, bad, is in direct conflict with the above-cited cases.

Carrying the analogy between a good indictment under sections 4709 and 4713 a little further, it has been held that, to constitute the offense of disturbing the peace of a person, the person whose peace is disturbed must be in a place where he has a right to be (or at least not where he knows he has no right) and must be himself in the peace of the state, just as a religious congregation must be in order for it to be disturbed. *State v. Brumley*, 53 Mo. App. 126, 130; *State v. Lunn*, 49 Mo. 90. The court said in the case last cited that—

"As applied to disturbing the peace of a person, this is a new statute, and ordinarily would imply that the person whose peace was disturbed was upon his own premises, or in some public place, or where he had a right to be."

This ruling is very much like the ruling made in *State v. Schieneman*, 64 Mo. 386, as to disturbing a religious congregation; yet it has not been ruled that, to constitute a good information for disturbing the peace of a person, it must be charged that the person whose peace is disturbed was himself in the peace of the state. There can be no doubt that, if an information for disturbing the peace of a person should allege that the person whose peace was disturbed was himself a willful trespasser and was making a loud noise or was using profane and indecent language—that is, was not himself in the peace of the state—such information would be held insufficient. That is all that the court ruled in the Schieneman Case, su-

pra, with reference to an indictment for disturbing a religious congregation, for that indictment alleged that the congregation was met "at the southeast corner of the public square in the city of Hannibal," and that the act of disturbance consisted, in part at least, of driving a horse and wagon through the congregation—a very likely thing in a public square. Thus the allegations of the indictment tended to negative any offense and did not follow the language of the statute. To my mind this affords no basis for holding insufficient an information which does charge the offense in the language of the statute, and requiring the pleader to incorporate therein allegations not required by the statute creating the offense by way of negating a possible defense.

BRADLEY, J. (dissenting). I do not agree with my learned Associates that the information in this cause is sufficient. It is true that it follows the language of the statute, but, as I understand the meaning of the phrase in the language of the statute, it means that an indictment or information in the language of the statute is sufficient only where all the facts which constitute the offense are set forth in the statute. *State v. Krueger*, 134 Mo. 262, 35 S. W. 604; *State v. Davis*, 70 Mo. 467; *State v. Hayward*, 83 Mo. 304.

I think that *State v. Schleneman*, 64 Mo. 386, is authority for holding this information bad. The court held, as I understand, in the *Schleneman* Case, that the information was bad, not because it charged that the congregation had met for religious worship at and near the southeast corner of the public square, but because it was not alleged that the southeast corner of the public square was the proper place for worship. All that language in the indictment in the *Schleneman* Case, referring to the public square could have been eliminated as surplusage, and still the indictment would have been as complete as is the indictment in the instant case. Had such language been eliminated, the indictment would still have charged a disturbance at and in the proper county and state of "a congregation and assembly of people then and there being met for religious worship."

All that the information in the case at bar charges with reference to the point in question is the disturbance "in the said county of Christian in the state of Missouri" of "a congregation of people then and there met for religious worship." If the indictment in the *Schleneman* Case was insufficient, certainly is the information in the case at bar insufficient; and on the authority of the *Schleneman* Case, together with the cases above cited, I am of the opinion that the information here is fatally defective.

LOCKE et al. v. WOODMAN et al. (SAUNDERS et al., Garnishees). (No. 15359.)

(St. Louis Court of Appeals. Missouri. Dec. 2, 1919. Rehearing Denied Jan. 6, 1920.)

1. ACCOUNT STATED ⇨20(1) — EXISTENCE A JURY QUESTION.

Whether there was an account stated between the garnishees, attorneys at law, and defendants, their clients, *held* for the jury under proper instructions.

2. ACCOUNT STATED ⇨4, 5—AGREEMENT BY DEBTOR TO FIXED CHARGE NECESSARY.

To constitute an account stated, the statement rendered by the creditor must be agreed to by the debtor, and the amount must be fixed.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Account Stated.]

3. ACCOUNT STATED ⇨20(2) — INSTRUCTION AS TO NECESSITY FOR AGREEMENT ERRONEOUS AS TO BURDEN OF PROOF.

In an action wherein the attorneys for defendants were garnisheed, and set up an account stated between them and their clients for their fees, instruction that the garnisheed attorneys had no right to apply any part of the money in their hands to the payment of their fees as attorneys, unless there was an "agreement made and entered into" by them and their clients, *held* erroneous in the particular case, as placing an unjust burden on the garnishees, and implying the agreement must have been in writing, particularly in view of a qualifying portion of the instruction.

4. ACCOUNT STATED ⇨20(2) — INSTRUCTION THAT RECOGNITION OF CHARGE AS PROPER MADE ACCOUNT STATED ERRONEOUS.

In an action wherein the attorneys for defendants were garnisheed, and set up an account stated between them and their clients for their fees, instruction that agreement between the garnishees and their clients for the fees might be shown if the circumstances convinced the jury that defendant clients in fact recognized the charge as "proper" *held* erroneous.

5. ACCOUNT STATED ⇨6(1)—CREATED BY ASSENT TO CHARGE BY ACQUIESCENCE OR SILENCE.

If clients by acquiescence or silence assented for a reasonable time to their attorneys' charge for services, the charge became an account stated, even though when rendered the clients considered it improper.

Appeal from Circuit Court, Audrain County; James D. Barnett, Judge.

"Not to be officially published."

Action by Samuel M. Locke and another against Alfred H. Woodman and others, wherein Walter H. Saunders and others were garnisheed. From judgment for plaintiffs against the garnishees, the latter appeal. Reversed, and cause remanded for new trial.

C. A. Barnes, of St. Louis, for appellants.  
C. C. Madison, of Kansas City, for respondents.

NIPPER, C. Plaintiffs are residents of Audrain county, Mo. The defendants are all residents of the Dominion of Canada. The garnishees, who are here as appellants, are residents of St. Louis, Mo.

This is a proceeding by way of garnishment and attachment. The plaintiffs proceeded against the defendants for breach of contract, upon which judgment was later obtained. The writ of attachment was delivered to the sheriff of the city of St. Louis, August 3, 1915, and notices issued to Walter H. Saunders, John S. Leahy, and Irvin V. Barth, garnishees, in which it was sought to recover from said garnishees certain sums of money which were in their possession, and which plaintiffs claimed belonged to the defendants. The notice was served upon garnishee Leahy on the 2d day of September, 1915, and upon garnishees Barth and Saunders on the 4th day of August, 1915. Interrogatories were addressed to the garnishees, to which they filed their answer, stating, among other things, that for a period of two years they had represented, as counsel, the defendants named in the petition, in various matters in Missouri, including receivership proceedings in the District Court of the United States, and that they had filed and proved through Irvin V. Barth, one of the members of the said law firm, certain bonds and coupons of the Williams-ville, Greenville & St. Louis Railway Company, belonging to the defendants, and that the garnishees held in trust, for the use and benefit of the defendants, the sum of \$1,805.59; and further stating that prior to the institution of the proceedings herein, they were notified in writing of a claim of assignment from the defendants to the Concrete Investment Company of St. Louis, Mo., and that they were ready and willing to make payment of the aforesaid sum in such manner as the court may direct.

Plaintiffs, at the November term, 1915, of the circuit court of Audrain county, filed their denial of garnishees' answer, admitting that the garnishee Barth, as the agent of the defendants, filed for allowance the bonds mentioned in the answer, and that the garnishees composed a partnership under the name of Leahy, Saunders & Barth, and denied each and every other allegation, and, as a cause of action against the garnishees, alleged, among other things, that the garnishee Barth had in his possession and control money of the defendant Adam, received from the United States court, in the sum of \$3,934 on account of dividends on said bonds, and \$1,465.62 as the property of the defendant Woodman, and \$1,575 belonging to defendant Sanderson, and that he had failed to account for any of this money; that said

garnishees, after the service of process of garnishment upon them, and prior to the time of filing their answer, had become indebted to the defendants in the sum of \$7,000 on account of money had and received.

On December 20, 1915, the garnishees (appellants herein) filed their reply to plaintiffs' denial, denying each and every allegation, and further replying that they, the garnishees, rendered professional services to the defendants, and that for and on account of said services the defendants had become indebted to them in the sum of \$5,000, and \$109.03 for costs incurred in said employment; that they, the said garnishees, had collected from the proceeds of the bonds proved up in said proceedings referred to in the amended answer the sum of \$6,974.62; the sum of \$1,494.56 having been collected on the 10th day of July, 1915, and \$5,480.06 on the 4th day of August, 1915; that they applied the sum of \$1,494.56 to the payment of their fee, at the time they collected it, and the sum of \$3,074.47, on the 4th of August, 1915, leaving in their hands the sum of \$1,805.59; and further that the services were rendered as attorneys at law, and that prior to the time of the collection of said money said fee had become due and owing; that the said fee had become an account stated, and no demand had been made therefor by said defendants.

On the 28th of December, 1915, plaintiffs filed their answer to said reply, which was afterwards withdrawn. The cause was heard on the 6th day of January, 1916, before a jury, and resulted in a verdict in favor of the plaintiffs and against the garnishees, for the sum of \$6,974.62.

At the close of all the evidence, and before instructions were read to the jury, the garnishees asked an instruction in the nature of a demurrer, which the court overruled. Motions for a new trial and in arrest of judgment were filed and overruled, and judgment was entered upon the verdict for the sum found due and set out in the verdict of the jury. Garnishees then perfected their appeal to this court.

[1] There are a number of assignments of error set out in appellants' motion for new trial. We will consider such of them as is necessary for a proper determination of this case. It is contended by appellants that there was an account stated between garnishees and defendants, and that the court should have so found as a matter of law, instead of submitting this phase of the case to the jury. Had this question depended solely upon documentary evidence and undisputed testimony, we would be inclined to so hold. The letter of Barth to Adam, dated May 6, 1914, and introduced in evidence, states:

"In your letter of the 1st ult. you refer to the matter of my compensation and suggest

that I advise you concerning same. I have given the matter careful consideration and I have concluded that our minimum fee should be \$5,000 for services which have been rendered or will be rendered in the immediate future."

This letter was not replied to by Adam until the 28th of May, 1914. However, subsequent to Barth's letter of May 6th, he sent a telegram to defendant Adam, expressing surprise at his failure to answer this letter, to which Adam replied as follows:

"Your position simply a question of our ability to pay fees charged. Will write explaining at length"

—and further directing Barth to proceed to perform other professional services mentioned in the telegram. Inasmuch as the telegram of Adam to Barth, dated May 28, 1914, referred to a letter which was to follow, and to be a letter of explanation, and in view of all the facts and circumstances in evidence in this case, which show there were some disputed facts, we think the question of whether there was an account stated should be submitted to the jury under proper instructions.

We shall next proceed to a consideration of the instructions given in this case. We deem it necessary to a proper understanding of these instructions that instructions Nos. 1 and 2, given at the request of plaintiffs, and which are as follows, be set out in this opinion:

"(1) The court instructs the jury that before you can find that there was an account stated between the garnishees and the defendants, you must believe from the evidence that the garnishees rendered to the defendants a bill for their services as attorneys for them, in the sum of \$5,000, and that defendants agreed that said fee was satisfactory to them.

"But such agreement on the part of defendants need not be proven by a direct, explicit assent, but may be inferred from the facts and circumstances in evidence, including a failure on the part of defendants to object to the bill.

"(2) The jury is instructed that it is admitted that the garnishees, John S. Leahy, Walter H. Saunders, and Irvin V. Barth, received into their possession the sum of \$6,974.62, money of the defendants Adam, Sanderson, and Woodman, and the jury is instructed that the said garnishees had no right to apply any part of said money to the payment of attorney's fees that might be due said garnishees from said defendants, or any of them, unless you find from the evidence that there was an agreement made and entered into by said garnishees and said defendants, fixing the amount said garnishees were entitled to receive for their services rendered, and to be rendered, if any, by said garnishees to said defendants.

"Such agreement on the part of defendants does not require specific direct proof of an absolute acceptance of a statement of charge rendered by garnishees, but may be shown by the facts and circumstances in evidence if the facts and circumstances in evidence convince the jury

that defendants in fact recognized the charge made by garnishees as a proper charge."

[2-5] We think instruction No. 2, submitting that phase of the case to the jury, does not submit the matter upon the correct hypothesis. We do not think the words, "made and entered into," should be used in this instruction. It is true that to constitute an account stated the statement rendered by the creditor must be agreed to by the debtor, and the amount must be a fixed one; but we do not think that it is necessary to use the words, "made and entered into," because it places an unjust burden upon the garnishees in this case, and implies that the agreement must be in writing, especially in view of the qualifying portion of this instruction. The jury are further told in this instruction that this agreement may be shown "if the facts and circumstances in evidence convince the jury that the defendants in fact recognized the charge made by garnishees as a 'proper charge.'" This part of the instruction we think was error. This account may have become an account stated, whether defendants recognized it as a "proper charge" or an improper one. Defendants may have thought it improper by reason of its being too much, or by reason of its not being enough, or by reason of its being rendered at an inopportune time, and we do not think the jury should be required to find that defendants recognized it as a "proper charge," before they could find that it had become an account stated. The defendants may have considered that the account rendered by the garnishees in this case was not proper because the services were not worth that much, and yet the jury are told in another instruction that there is no issue as to the value of the services rendered in this case. Instruction No. 2, given at the request of plaintiffs, with the qualifications above noted required the jury to find that which was unnecessary to make the account rendered become an account stated, for if defendants assented by acquiescence or silence for a reasonable time, it became an account stated, even though at the time it was rendered defendants may have considered it an improper charge. In *Powell v. Pacific Railroad*, 65 Mo. loc. cit. 661, the court in discussing the question as to what constitutes an account stated, uses the following language:

"There must be a fixed and certain sum admitted to be due; the admission must be voluntary, but it need not be express and in terms, for if the account be sent to the debtor in a letter, which is received but not replied to in a reasonable time, the acquiescence of the party is taken as admission that the account is truly stated."

The court has this to say also in the same opinion:

"Between merchants at home, an account which has been presented and no objection made

thereto, after the lapse of several posts, is treated, under ordinary circumstances, as being, by acquiescence, a stated account."

If services were rendered for the defendants for which the defendants had not been paid, and a bill was rendered to which defendants made no objections or no reply, then the account may be an account stated, whether defendants considered it a "proper charge" or not. *Powell v. Pacific Railroad*, supra, 65 Mo. 658; *Adam Roth Grocery Co. v. Hotel Monticello Co.*, 183 Mo. App. 429, 166 S. W. 1125; *Spellman v. Muehlfield*, 166 N. Y. 245, 59 N. E. 817; *Cyc.* vol. 1, p. 375; *Standard Oil Co. v. Van Etten*, 107 U. S. 327, 1 Sup. Ct. 178, 27 L. Ed. 319. Therefore the commissioner recommends that the judgment of the trial court be reversed, and the cause remanded for a new trial.

**PER CURIAM.** The foregoing opinion of NIPPER, C., is adopted as the opinion of the court.

The judgment of the circuit court is accordingly reversed, and the cause remanded for a new trial.

REYNOLDS, P. J., and ALLEN and BECKER, JJ., concur.

#### TRAW v. HEYDT. (No. 15628.)

(St. Louis Court of Appeals. Missouri. Argued and Submitted Nov. 11, 1919.  
Opinion Filed Dec. 2, 1919.)

#### 1. HUSBAND AND WIFE §14(2)—ESTATE IN ENTIRETY CREATED BY DEED.

Both at common law and under statute, a deed to husband and wife creates an estate in entirety in them, and the interest of neither is liable for debts of the other.

#### 2. ASSAULT AND BATTERY §33 — EVIDENCE OF FINANCIAL STATUS OF DEFENDANT, A MARRIED WOMAN.

In action for damages for assault against a married woman, deed to defendant and her husband was inadmissible to show financial status of defendant in assessing damages, since defendant's interest in the property conveyed is not subject to judgment.

#### 3. APPEAL AND ERROR §1052(5)—ERROR IN RECEIVING EVIDENCE NOT CURED BY VERDICT UNDER MISLEADING INSTRUCTION.

In an action for assault, error in admitting deed to defendant and her husband, to show defendant's financial status, was not rendered harmless by failure of jury to assess punitive damages, where instruction was liable to mislead jury to consider financial status in assessing actual damages.

#### 4. ASSAULT AND BATTERY §43(5)—INSTRUCTION MISLEADING ON ELEMENTS OF PUNITIVE DAMAGES.

An instruction on punitive damages in action for assault and battery, which authorized jury to consider defendant's financial status "in assessing plaintiff's damages," was misleading, in not distinguishing between actual and punitive damages; the financial element entering only into the latter.

#### 5. APPEAL AND ERROR §1053(3) — ERROR IN RECEIVING EVIDENCE NOT CURED BY INSTRUCTION.

In action against defendant, a married woman, for assault, error in admitting in evidence deed of realty to her and her husband to show financial condition, held not cured by instruction, at request of defendant, correctly defining defendant's interest in the realty.

#### 6. TRIAL §250—INSTRUCTIONS ON HUMILIATION AND DISGRACE, OUTSIDE THE ISSUES, ERROR.

Instruction authorizing jury to consider humiliation and disgrace suffered by plaintiff, in assessing damages for assault, was error, where there was no allegation of such element, and no evidence thereof.

#### 7. TRIAL §252(6)—INSTRUCTION ON FINANCIAL CONDITION OF DEFENDANT IN ASSAULT CASE ERRONEOUS, WHERE NOT BASED ON EVIDENCE.

Instruction authorizing jury to consider defendant's financial condition, business, or station in society, in assessing plaintiff's damages for assault, was unwarranted, where there was no competent evidence as to such facts.

#### 8. ASSAULT AND BATTERY §33 — STANDING OR FINANCIAL ABILITY OF DEFENDANT TO PAY ACTUAL DAMAGES.

In estimating actual damages in an assault and battery case, the ability of the party to pay, his situation in life, or his social standing are not to be considered.

#### 9. APPEAL AND ERROR §999(2) — VERDICT WHICH SHOCKS JUDICIAL SENSE MUST BE REVERSED.

Where, taking all the facts and circumstances into consideration, the verdict shocks the judicial sense, and creates a firm conviction in the mind of the court that justice will be best subserved by a retrial before another jury, reversal will be ordered.

#### 10. APPEAL AND ERROR §1140(4)—REMITTITUR CANNOT BE MADE WITHOUT FACTS.

On appeal a remittitur will be ordered, instead of reversal, only where the court has facts on which to base such order.

#### 11. APPEAL AND ERROR §1004(1)—AMOUNT OF DAMAGES FOR ASSAULT NOT DISTURBED ON APPEAL.

The amount of actual damages for assault is not for appellate court to say, but purely and primarily for the jury and trial court, subject, of course, to appellate supervision.

**12. MASTER AND SERVANT — 31—PAYMENT OF WAGES ON DISCHARGE UNNECESSARY.**

In action by a discharged servant for assault, it is error to charge that defendant had right to discharge plaintiff "without cause and paying plaintiff her wages," and to refuse an instruction that defendant had right to discharge servant "without cause and without payment of wages."

Appeal from St. Louis Circuit Court; James E. Withrow, Judge.

"Not to be officially published."

Action for assault and battery by Addie P. Traw against Helen B. Heydt and husband. Judgment for plaintiff against defendant wife, who appeals. Reversed and remanded.

Anderson, Gilbert & Hayden and M. U. Hayden, all of St. Louis, for appellant.

John K. Lord, Jr., and W. O. Mayfield, both of St. Louis, for respondent.

REYNOLDS, P. J. Plaintiff commenced this action against John B. Heydt and Helen Heydt, his wife, for damages for an alleged assault on her by the latter. She dismissed as to John B. Heydt and filed an amended petition against Helen B. Heydt, in which she averred that on March 29th, 1916, she was in the employ of defendant as a cook; that on that date defendant wantonly and maliciously, and without just cause, assaulted her and struck and beat her with her hands and with a revolver or other hard object,

"whereby plaintiff was severely bruised and injured; that such assault and beating severely bruised plaintiff's back and caused her great pain and suffering therein; that ever since said assault and beating plaintiff's back has been lame and sore, and she had had almost constant pains in her chest and neck and head; that plaintiff suffered a severe nervous shock from said assault and beating; that as a result of the aforesaid injuries, and the lameness, soreness, pain and nervousness resulting therefrom, plaintiff was wholly unable to perform the work of one engaged as a cook, or in other house service, which is the employment to which plaintiff is accustomed, and in which she is skilled, for a period of over six weeks, and is still unable to perform the full amount of work ordinarily required of one in such employment; that said lameness, soreness, pain and nervousness will continue for a long time to come, and will make it impossible for plaintiff to obtain or accept such, or any other steady employment; that plaintiff has been damaged thereby in the sum of \$10,000 actual damages, for which sum, and for \$10,000 punitive damages, and for costs of this suit, plaintiff prays for judgment."

The answer, after a general denial, avers that plaintiff had been discharged from the employ of defendant, her service to end on the last of March, 1916; that on March 29th, defendant overheard plaintiff and defendant's husband in a secret conversation,

in which they made an agreement to meet on the afternoon of the following day, whereupon defendant ordered plaintiff to leave the room and the house immediately, which she had a right to do, as it is averred; that she gave plaintiff reasonable time to leave, which plaintiff would not and did not do, but instead grabbed defendant by the wrist, sinking her nails into defendant's forearm, leaving a mark which lasted several days; that thereupon defendant, after again ordering plaintiff to leave the room and the house pushed her out of the door and into a stairway, using only such force as would make plaintiff comply with defendant's orders and requests.

There was a reply, generally denying these allegations.

On a trial before the court and a jury, a verdict of \$5,000 for actual damages was returned against defendant. No punitive damages were allowed, but as a condition to overruling defendant's motion for a new trial, the court ordered a remittitur of \$1,000, which was made, and judgment rendered against plaintiff for \$4,000, from which she has duly appealed.

The evidence connected with the assault, as usual, was conflicting, but the verdict of the jury settles the question that the assault was made by defendant. Plaintiff's injuries consisted of bruises, which had disappeared by the time of the trial, and there was evidence that for a while after the assault she exhibited some nervousness, lost some sleep and some weight; but according to the testimony of her own physician, at the time of the trial, she looked about as before; and while she had been out of employment for about seven weeks, losing wages, which had been about \$25 a month, she had again gone to work at her avocation of cook and at about her former wages. There is some evidence, but contradicted, that defendant struck plaintiff with a revolver or other hard instrument.

During the course of the trial plaintiff introduced in evidence, over the objection and exception of defendant, a deed conveying certain realty in the city of St. Louis to defendant and her husband, for a consideration of \$12,000, the deed made March 7th, 1907; and over the objection of defendant, evidence was introduced tending to prove that the realty was of the value of about \$12,000, and was still owned by Mr. and Mrs. Heydt. There was also evidence to the effect that at one time defendant was the owner of 100 shares of stock in some company, on which she had been paid semi-annual dividends of \$100; and also that she had some personal property, jewelry, etc. Defendant's testimony was to the effect that she had transferred this stock in trust to a nephew, a minor, but was still receiving the dividends on it, and

that money which she had received from the sale of some other stock had long since been spent by her.

At the instance of plaintiff the court gave a number of instructions, among others, instruction No. 2, which told the jury that if they found for plaintiff they should assess her actual damages at such sum as they believed from the evidence will compensate her for the injuries, if any, sustained by her, as shown by the evidence,

"and in estimating such damages you will take into consideration not only the physical injury inflicted, *the humiliation and disgrace suffered by plaintiff, the bodily pain and mental anguish* endured and suffered by plaintiff, if any, and her inability, by reason of said injuries, if any, to perform her ordinary avocations and work, but you may also allow for such damages as it appears from the evidence, as to the nature and extent of her injuries, will actually and reasonably result to her therefrom in the future, not to exceed, in all, the sum of \$10,000."

By instruction No. 4, given at the instance of plaintiff, the court told the jury that if they found and believed from the evidence, that the defendant had wantonly, maliciously and without just cause struck, beat or wounded plaintiff, then in such case, the jury are at liberty,

"in addition to the actual damages sustained by plaintiff, if you find she has sustained actual damages, to assess against defendant additional damages in such sum, not exceeding \$10,000, as you may find and believe from the evidence, will serve as an example to prevent the repetition of such conduct of defendant. *In assessing plaintiff's damages, if any, you are authorized to take into consideration the condition in life of both parties and the nature of their business, their financial condition and their position in society.* You will state the amount of actual and exemplary damages awarded separately in your verdict, if you so find."

The court of its own motion instructed the jury

"that the defendant had the right to discharge the plaintiff with or without cause *and paying plaintiff her wages*, and it was the duty of the plaintiff, upon defendant's request, to leave the house of defendant within a reasonable time and in a peaceable manner."

The court refused an instruction (No. 2), asked by defendant, to the effect that defendant had the right to discharge the plaintiff with or without cause

"*and without paying the plaintiff her wages*, and that it was the duty of the plaintiff, upon defendant's request, to leave the house of defendant at once in a peaceable manner."

We have italicized the portion of the several instructions criticized.

The errors assigned by learned counsel for appellant are to the admission in evidence of the deed referred to above, and evidence as

to the value of the property conveyed by the deed; evidence of a broker tending to establish that more than three months prior to the trial his firm had purchased for appellant certain stock in a corporation; the giving of the instructions numbered 1, 2, 3 and 4; that the verdict of the jury as first rendered was so excessive as to indicate that it was the result of passion and prejudice; and that the court erred in rendering judgment for an excessive amount, even after requiring a remittitur of only \$1,000.

[1, 2] There can be no doubt that the learned trial court erred in admitting in evidence the deed conveying the real estate to defendant and her husband. At common law as well as under the law of our state, a deed to husband and wife creates an estate in entirety in them. The interest of neither is liable for, nor can it be sold to satisfy the debt of one of them. So far as enabling appellant to respond to any judgment obtained against her is concerned, that deed conveyed nothing of value. That was long ago decided by our courts, it being held that the legal effect of such a conveyance is not changed by our statute but stands as at common law. See *Bains v. Bullock*, 129 Mo. 117, 31 S. W. 342; *First National Bank of Plattsburg v. Fry*, 168 Mo. 492, 68 S. W. 348; *Wilson v. Frost*, 186 Mo. 311, 85 S. W. 375, 105 Am. St. Rep. 619, 2 Ann. Cas. 557; *Frost v. Frost*, 200 Mo. 474, 98 S. W. 527, 118 Am. St. Rep. 689.

[3] Learned counsel for respondent argue that as the jury returned no verdict for punitive damages, the error in admitting this deed and any proof of the value of the property conveyed by it, as well as the value of other property said to be owned by defendant, was harmless error, citing *Byrd v. Vanderburgh*, 168 Mo. App. 112, 151 S. W. 184; *Dorris v. Dorris*, 188 Mo. App. 496, 174 S. W. 171.

While it is true that the jury returned no verdict finding exemplary damages, that learned counsel overlook the fact that instruction No. 4, which we have quoted, while starting out with a direction applicable to the award of penal damages, proceeds:

"In assessing plaintiff's damages, if any, you are authorized to take into consideration the condition in life of both parties and the nature of their business, their financial condition and their position in society."

And following this the jury are told to

"state the amount of actual and exemplary damages awarded separately in their verdict."

[4] It will be noted that this does not confine the measure of damage to punitive damages, but instructs generally as to "damages"; does not distinguish between actual and punitive damages. Such an instruction here would mislead a jury; that is to say, while starting out as to the elements warranting

punitive damages, it concludes with a general direction as to the assessment of damages generally, not confining them to penal damages, as to which alone the financial element enters.

At the instance of the defendant the court told the jury that the deed to defendant Helen B. Heydt and John B. Heydt, her husband, for real estate in the city of St. Louis, offered in evidence by plaintiff,

"does not of itself show that the defendant has any exclusive interest therein, and defendant may never have any such interest therein, and the only way which the defendant would ever have an exclusive interest in said property would depend upon her surviving John B. Heydt."

[5] Learned counsel for respondent claim that this instruction properly declared the law and was a correct direction to the jury as to what rights appellant had in the property and cured the error, if any, in admitting the deed in evidence. We do not think this is correct. As will be seen by instruction No. 4, which we have set out, that the court submitted to the jury the question of the financial condition as well as the social position, referring to both parties defendant, using the plural, although the husband was out of the case, and the nature of their business, as elements to be considered in fixing the amount of the verdict. Necessarily, under such an instruction, even with this definition of an estate in entirety, the jury would be led to take into consideration the value of the property covered by the deed, for that was the property of both husband and wife.

The cases cited by counsel for respondent on the proposition that the error in admitting this deed and evidence of value was harmless error, do not support their claim. In view of the size of the verdict, we have no doubt but that the jury took into consideration the value of this property. The admission of this deed and testimony as to the value of the property conveyed, was harmful and reversible error.

[6] We have set out the second instruction, italicizing the words objected to therein by counsel for defendant, namely, that in estimating damage the jury are to take into consideration not only the physical injuries inflicted but the "humiliation and disgrace suffered by plaintiff." No such element was stated in the petition in the case and there is not a word of testimony tending to sustain them. The alleged assault was made when no one was present but plaintiff and this defendant, and there is no evidence whatever of either humiliation or disgrace.

[7-9] Instruction No. 4, given at the instance of plaintiff and which we have set out, is fatally erroneous. There was no evidence whatever in the case tending to show the condition in life of the parties or the nature of their business, beyond the fact that plaintiff

was a cook and general house servant; nor any evidence whatever of the financial condition or position in society of the parties, unless the jury were to consider the value of the property, embraced in the deed as evidence of the financial condition of the defendant. Although the instruction is not clear as to whether by the use of "their" in this instruction is meant the defendant and her husband, or plaintiff and defendant, obviously it refers to the financial condition of defendant and her husband as there is not a particle of testimony as to the financial condition of the plaintiff. It goes without saying that in estimating actual damages the ability of the party to pay, their situation in life, their social standing, are not elements to be considered. Yet, as we have seen, the tendency of instruction No. 4 was to direct the attention of the jury to these very elements. That same thought runs through both instructions 2 and 4. When we consider this assault, which arose out of suspicion of the wife as to the relations between her husband and plaintiff, the injuries from it were not very serious. A few bruises were inflicted on her body and they lasted but a short time. Naturally, there was some mental shock and excitement attendant on a circumstance of this kind, but that disappeared before the trial. There is no evidence of any permanent disability of any kind—mental or physical. Her own physician, testifying as a witness, said that plaintiff appeared just as well at the day of the trial as she had before this occurrence. At most, she lost seven weeks' wages, her compensation being \$25 a month, and when she went to work she appears to have received about the same wages. So that to allow the sum of \$5,000 for such injuries is evidence of either prejudice and passion on the part of the jury, or that they were confused into allowing so large a verdict as \$5,000 by considering the financial condition and social position and business of both defendant and her husband. This verdict can be explained on no other hypothesis. As was said by Judge Marshall, speaking for our Supreme Court, in *Norris v. Whyte*, 158 Mo. 20, loc. cit. 36, 57 S. W. 1037, 1042:

"Taking all the facts and circumstances into consideration the verdict in this case shocks the judicial sense of right and creates a firm conviction in the mind of the court that the ends of justice will be best subserved by reversing the judgment and remanding the case to be tried again before another jury."

[10, 11] Learned counsel for respondent, in their oral argument, intimated that if the court found the verdict too large, we would order a remittitur. We have no facts on which to base any such order. The amount of the actual damage in a like case is primarily and purely for the consideration of the jury and of the trial court, subject, of course, to our supervision.



[12] While there is no error assigned to the action of the court in giving the instruction which it gave of its own motion, and in refusing that asked by defendant, both of which we have set out, in view of a new trial it is as well to say that that instruction as given by the court is error, and the one assigned by appellant is correct. It is not the law that in discharging a servant from employment, payment of wages is necessary. That is a matter to be reached in another way.

Our conclusion on the whole case is that the judgment of the circuit court should be and is reversed and the cause remanded.

ALLEN and BECKER, JJ., concur.

### STATE v. ASHER. (No. 16610.)

(St. Louis Court of Appeals. Missouri. Dec. 2, 1919.)

#### 1. CRIMINAL LAW §1129(1)—ASSIGNMENTS OF ERROR UNNECESSARY ON APPEAL.

Under Rev. St. 1909, § 5312, no assignment of error is necessary in a criminal case, and it is the duty of the appellate court to proceed upon the return and render judgment upon the record before it.

#### 2. INFANTS §16—INFORMATION AGAINST DELINQUENT CHILD INSUFFICIENT.

An information, under Sess. Acts 1911, p. 177, charging defendant to be a delinquent child, in that she knowingly associated with vicious and immoral persons, was insufficient to sustain a conviction, where it did not name the persons with whom she was accused of associating, in view of Const. art. 2, § 22.

#### 3. INDICTMENT AND INFORMATION §110(4)—CHARGING STATUTORY OFFENSES.

Generally speaking, an indictment and information charging the commission of an offense that is crime by statute is good, if it follows the language of the statute; but this is not true if the statute creating the offense uses generic terms in defining the offense, and does not individuate the offense with such particularity as to notify the defendant of what he or she is to defend against.

#### 4. CRIMINAL LAW §1186(1)—WHERE ON APPEAL INDICTMENT IS HELD INSUFFICIENT, CONVICTION REVERSED AND ACCUSED DISCHARGED.

Where the evidence is before the appellate court, which holds the information insufficient, and such court believes that there is reasonable ground that defendant can be convicted upon the filing of a new and proper information, the court will, under Rev. St. 1909, § 5290, remand the cause; but where the clerk has not made out a transcript of the testimony, as required by section 5308, the accused must be given the benefit of the doubt, and the conviction must be reversed, and the accused discharged.

Becker, J., dissenting.

Appeal from St. Louis Circuit Court; John W. Calhoun, Judge.

"Not to be officially published."

Della Asher was convicted of being a delinquent child, and appealed to the Supreme Court, from which court the cause was transferred on her motion. Judgment of conviction reversed, and defendant discharged.

Fish & Fish, of St. Louis, for appellant.

Lawrence McDaniel, of St. Louis, for the State.

BIGGS, C. The defendant was convicted in the juvenile court, being a division of the circuit court of the city of St. Louis, on a charge of being a delinquent child, and was ordered and adjudged by the court to be committed to the State Industrial Home for Girls until she arrived at the age of 21 years, being a period of 7 years; defendant being at the time of conviction 14 years of age. From this conviction she appealed to the Supreme Court, where the cause on her motion was transferred to this court; the Supreme Court being without jurisdiction, the offense constituting a misdemeanor.

[1] There is nothing before us but the record proper, and appellant has filed no brief or assignments of error in this court. However, under section 5312 of the revision of 1909, no assignment of error is necessary in a criminal cause, and it is our duty to proceed upon the return and render judgment upon the record before us. *State v. Wilson*, 223 Mo. loc. cit. 182, 122 S. W. 671; *State v. Wurdack*, 203 S. W. 502.

The information under which defendant was convicted charges that the defendant is a delinquent child within the meaning of the statutes in such case made and provided in this, to wit: That at the city of St. Louis aforesaid, on or about the 25th day of February, 1919, she did knowingly associate with vicious and immoral persons.

In section 2 of the statute creating the juvenile courts (Session Acts 1911, page 177) it is provided that the practice and procedure prescribed by law for the conduct of criminal cases shall govern all proceedings under this article in which the child stands charged with the violation of the criminal statutes of the state. By section 7 of the act it is provided that "all proceedings under this act shall be by information or sworn complaint, \* \* \* as in other cases under the general laws of this state," and that "the information shall in a general way state that the act or acts claimed to have been committed by any child shall constitute such a child a 'delinquent child' within the meaning of this act." Section 1 provides that the words "delinquent child" shall include any child under the age of 17 years who knowingly associates with vicious or immoral persons.

[2] We are of the opinion that the information in the present case is wholly insufficient, in that it does not appear anywhere with whom the defendant associated. The defendant was entitled to this information, in order to be able to disprove same at the trial, and to show that the persons with whom she was accused of associating were not vicious or immoral. Section 22 of article 2 of our state Constitution gives to the defendant in a criminal prosecution the right to demand the nature and cause of the accusation.

[3] Generally speaking, an indictment or information charging the commission of an offense that is created by statute is good, if it follows the language of the statute; but this is not true if the statute creating the offense uses generic terms in defining the offense, and does not individuate the offense with such particularity as to notify the defendant of what he or she is to defend against. Under these latter conditions the indictment in the language of the statute is not sufficient.

In *State v. Hogan*, 31 Mo. 340, the defendant was charged with shooting at a mark or at random across a public highway. The indictment was drawn in the language of the statute, but the particular highway upon which the shooting occurred was not named. The Supreme Court held this indictment to be bad, and that it should have alleged the particular highway upon which the shooting occurred, in order that the defendant might properly make his defense.

In the case of *State v. Terry*, 109 Mo. 601, loc. cit. 615, 19 S. W. 206, 210, the Supreme Court approves the rule as laid down in *Wharton on Criminal Pleading & Practice*, § 220, as follows:

"On the general principles of common-law pleading, it may be said that it is sufficient to frame the indictment in the words of the statute, in all cases where the statute so far individuates the offense that the offender has proper notice, from the mere adoption of the statutory terms, what the offense he is to be tried for really is. But in no other case is it sufficient to follow the words of the statute. It is no more allowable under a statutory charge to put the defendant on trial without specification of the offense than it would be under a common-law charge."

In *Commonwealth v. Phillips*, 16 Pick. (Mass.) 211, Shaw, C. J., says:

"Whilst it is important to the administration of public justice, and the reasonable execution of the laws, that indulgence should not be too readily yielded to mere technical niceties and subtleties, it is also important that every man accused of crime should have a reasonable opportunity to know what the charge is, that he may not be called to meet evidence at the trial that he could not have anticipated from the charge, that the court may know what judgment to render, and that the party tried, and either acquitted or convicted, may be enabled by reference to the record to shield himself from any future prosecution for the same offense."

In view of this rule of law, we think in the present case that the accused had the right to know the names of the vicious and immoral persons, so that she could have an opportunity of presenting evidence to the effect that such persons were not vicious and immoral.

[4] In making up the record in the cause the clerk did not make out a transcript of the testimony, as required by section 5308, R. S. 1909; hence we are unable to say whether or not there is reasonable ground under the evidence to believe that the defendant can be convicted of an offense, if properly charged. If the evidence was before us, and we believed that there was reasonable ground that the defendant could be convicted upon the filing of a new and proper information, it would be our duty to remand the cause. Section 5290, R. S. 1909. In the present state of this record we cannot determine that question, and therefore give to the defendant the benefit of the presumption that she is innocent.

The Commissioner recommends that the judgment of the circuit court be reversed, and the defendant discharged.

PER CURIAM. The foregoing opinion of BIGGS, C., is adopted as the opinion of the court. The judgment of the Circuit Court is accordingly reversed, and the defendant discharged.

REYNOLDS, P. J., and ALLEN, J., concur.  
BECKER, J., dissents.

## WILKINSON v. WILKINSON. (No. 16255.)

(St. Louis Court of Appeals. Missouri. Dec. 2, 1919)

1. EXECUTION  $\S$  327—SURPLUS FUND NOT IN CUSTODIA LEGIS.

In view of Rev. St. 1909, § 2173, describing the form of execution issued by the court to the sheriff, a surplus fund in the hands of the sheriff after satisfying execution is not in custodia legis, so as to be subject to the court's order to the sheriff to pay it into court, despite interposed claims to the fund and the pendency of an interpleader proceeding elsewhere.

2. EXECUTION  $\S$  327 — JURISDICTION OVER SHERIFF AS TO SURPLUS WHERE ALL CLAIMANT'S NOT BEFORE COURT.

The circuit court of St. Louis, which tried a divorce suit, had no jurisdiction over the sheriff of Perry county to make an order on him to pay a surplus fund, arising from sale of defendant husband's land under execution, into the St. Louis court, where there were several claimants to the fund, one of whom was not before the St. Louis court, and an interpleader proceeding instituted by the sheriff was pending in Perry county, wherein the rights of all claimants could be determined.

Appeal from St. Louis Circuit Court;  
Kent K. Koerner, Judge.

"Not to be officially published."

Action for divorce by Jennie Wilkinson against William R. Wilkinson, resulting in decree for alimony for plaintiff. From an order overruling plaintiff's and defendant's motion for modification of the alimony decree, and for an order on the sheriff to bring into court a surplus after sale of defendant's land on execution, plaintiff appeals. Affirmed.

Taylor R. Young, of St. Louis, and T. T. Hinde, of Madison, Ill., for appellant.

J. E. Turner, of St. Louis, for respondent.

**BIGGS, C.** This is an appeal from the refusal of the circuit court of the city of St. Louis to modify a judgment for alimony rendered in a divorce proceeding and to order the sheriff of Perry county, Mo., to pay certain funds in his hands into court.

On January 15, 1915, Jennie Wilkinson was granted a divorce from William R. Wilkinson by the circuit court, and it was decreed that she should be paid by the defendant alimony at the rate of \$35 per month until further order of the court, the first payment to be made forthwith, and the subsequent monthly installments to be payable on the 25th day of each month thereafter. Upon failure of William R. Wilkinson to give security for the payment of the installments as provided in the decree, the same became a lien on his land in Perry county,

Mo., a certified copy of said decree being duly filed in the records of said county.

On February 25, 1917, five of said monthly installments of alimony were due and unpaid, and thereupon Jennie Wilkinson caused an execution to be issued out of the circuit court of the city of St. Louis and placed the same in the hands of John J. Endres, sheriff of Perry county, to be executed as required by law. The said sheriff levied on the interest of William R. Wilkinson in 812 acres of land in his county, and after taking the proper steps as required by law sold same for cash on April 13, 1917, to Louis Fusz for the sum of \$4,800; said land being sold subject, however, to two deeds of trust on the land. From the proceeds of said sale the sheriff satisfied the execution, leaving in his hands a surplus of \$4,008.44.

Prior to said sale, and on March 13, 1916, William R. Wilkinson and his second wife, Albertine C. Wilkinson, conveyed said land in Perry county to John H. Haderer for a consideration of \$1,000, subject to one deed of trust for \$3,000 and another for \$1,100, and the lien of the judgment for alimony in the suit of Wilkinson v. Wilkinson. On the same day John H. Haderer and wife conveyed a one-half interest in the land to the said Albertine C. Wilkinson for \$500, subject to one-half of the two deeds of trust and the lien of the judgment for alimony. On October 16, 1916, John H. Haderer filed suit for partition of the land, making Albertine and William R. Wilkinson and the beneficiary of the \$6,000 mortgage defendants; said suit being filed in Perry county, Mo.

Prior to the sale under the execution above referred to, Jennie Wilkinson and William R. Wilkinson, the defendant in the execution, ordered the sheriff to sell all of the land in one body, and Haderer, who had purchased an interest in the land, demanded that it be sold in parcels. The sheriff, however, sold it in a body and had the surplus over as heretofore stated. Shortly after the sale the sheriff received notices of claims to said balance in his hands, viz.: (1) That the said John H. Haderer claimed the entire balance; (2) that the said Albertine C. Wilkinson claimed one-half of said balance; and (3) the said appellant, Jennie Wilkinson, claimed to have a lien on the entire amount in the sheriff's hands to satisfy the alimony awarded to her by the said judgment and decree. Whereupon, on the 14th day of April, 1917, the said sheriff filed an interpleader suit in Perry county, Mo., naming as defendants the various claimants to the fund, including appellant.

Thereafter, on the 20th day of April, 1917, the appellant filed in the circuit court of the city of St. Louis a motion to modify the decree for alimony, and for an order on the sheriff to pay into the St. Louis court the

surplus in his hands, and after a hearing on said motion the circuit court entered an order giving to the sheriff of Perry county the right to deposit said fund into the St. Louis court, if he so desired, in which event he should stand discharged from any and all liability, and by said order required, in the event the money was so paid, the various parties should interplead for said fund. This order was entered on the 18th day of June, 1917. Afterwards, on the 25th day of June, 1917, the sheriff having declined to pay the fund into court, the circuit court set aside its said order.

No appeal was taken from these orders, but it appears that thereafter, on December 15, 1917, the appellant and the defendant, William R. Wilkinson, filed a stipulation and motion for the modification of said alimony decree, and moved the court for an order on said sheriff to bring said surplus into the St. Louis court. Subsequent to the orders made pertaining to the first motion to modify the decree, and prior to the filing of the so-called stipulation and motion referred to, the appellant had applied to this court for a writ of mandamus against Hon. Kent K. Koerner, judge of the circuit court, requiring him to take jurisdiction of the fund and issue an order on the sheriff. This court denied the application for the writ.

While the sheriff of Perry county was not a party to the St. Louis suit, it appeared that notice was given to his attorney of the said stipulation and motion to modify, and he thereupon filed an answer in the St. Louis court, challenging the jurisdiction of the court to make an order upon him to pay said fund into the St. Louis court, and setting up the pendency of the interpleader suit in Perry county, Mo., in which suit all of the parties interested in the fund were defendants, and where the respective rights of each could be determined, and that the court in Perry county has full jurisdiction of said moneys and all the parties to the motion.

A hearing was had on this motion to modify the decree and for an order on the sheriff, and at said hearing it appeared that the appellant did not desire that the decree be modified in any particular, unless at the same time an order was made on the sheriff to turn the surplus into the St. Louis court. On April 21, 1918, the circuit court overruled the motion, and after proper steps the appellant has brought the case here for review.

[1] The sole question presented is whether, under the evidence and the law, the circuit court of the city of St. Louis had jurisdiction over the sheriff of Perry county, Mo., and had a right to make an order on said sheriff to pay this surplus fund in his hands, arising from the sale under the execution, into the St. Louis court, notwithstanding the fact that there were several claimants

to the said fund and a proceeding was then pending in Perry county, Mo., wherein the rights of all the claimants could be determined.

Appellant contends that this surplus fund in the hands of the sheriff was in custodia legis and subject to the jurisdiction of the circuit court of the city of St. Louis. Appellant cites in support of such proposition two Missouri cases, being the cases of *State ex rel. Wilson v. Taylor*, 56 Mo. 492, and *State ex rel. Bank v. Boothe*, 68 Mo. 546. In the *Wilson-Taylor Case*, 56 Mo. 492, the court was not dealing with a surplus in the hands of the sheriff, but was dealing with the amount collected by the sheriff to satisfy the execution. As to such amount the court held that the same was in the custody of the law, and before it was paid over or appropriated by the sheriff it could not be attached or levied upon on a writ issued against the execution creditor. The court held that in such a case the sheriff was not bound to make the appropriation, but might return the executions and money to the court for its disposition.

In the case of *State ex rel. Kansas City National Bank v. Boothe*, 68 Mo. 546, it is held that money in the hands of a sheriff collected on execution is in custodia legis, and is not subject to levy on a subsequent execution against the plaintiff in the first. It appeared that this was an attachment suit, and prior to the trial the property was ordered sold by the sheriff as perishable property, and the fund arising from the sale was in the hands of the sheriff. Afterwards the attachment was dissolved, but in the trial on the merits the bank obtained a judgment for \$2,118.24. Whereupon an execution was issued and delivered to the sheriff, with directions to levy upon the money in his hands, being the proceeds of the sale. This the sheriff refused to do, and the bank filed a motion asking the court for an order on the sheriff to levy upon and apply the money to its judgment. This motion was overruled by the court; it appearing that in the meantime the sheriff had been garnished on an execution issued from the circuit court of Jackson county on another judgment rendered against the defendants. Afterwards the bank brought suit upon the sheriff's bond, and the Supreme Court held that this fund in the hands of the sheriff could not be levied upon, but was in the custody of the law until finally and properly disposed of by the court. In that case (68 Mo. loc. cit. 551) the Supreme Court says:

"It is said that the money in the defendant sheriff's hands bears some analogy to surplus money in an officer's hands after satisfying an execution. This may be admitted, and if the identical money could be reached, it might be attached or levied upon; but if, in the case of a surplus after satisfying an execution, the sheriff has converted it to his own use, there

could be no levy upon it. It does not follow, because the court might make an order requiring the sheriff to pay such surplus to the defendant in the execution, that his liability in such a case could be seized under an execution. The execution might be placed in the hands of another officer who could serve a garnishment on the sheriff, and thus secure the appropriation of the surplus to the execution against the defendant entitled to such surplus."

We do not think that these cases hold, as contended by appellant, that a surplus fund in the hands of the sheriff after satisfying an execution is in custodia legis. Under section 2173, R. S. 1909, the form of the execution issued by the court to the sheriff commands him to make the debt, damages, and costs out of the property of the defendant, and to have same before the judge of the court. The statute says nothing about the surplus. In the case of Warner v. Veitch, 2 Mo. App. 459, this court held, as per the syllabus:

"Where one having a judgment which is a lien on real estate suffers the property to be sold under a deed of trust which was a prior lien, without getting out execution on his judgment, and the trustee under the deed of trust pays the surplus in his hands, after satisfying the notes, to the grantor in the deed of trust, the judgment creditor cannot recover in an action against the trustee, though he had notice of the judgment."

The court in that case (2 Mo. App. loc. cit. 463) says:

"To make her lien available, Mrs. Warner should have enforced it by a levy and sale of the equity of redemption. But she suffered it to be sold to satisfy a prior incumbrance. The sale converted the land into money. Had she summoned the trustee as garnishee, she might have had the benefit of her lien and have held the fund; but, not having done so, he acted in accordance with law in obeying the written instructions of Everett, and paying over the money to the holder of the second mortgage."

In 10 Ruling Case Law, par. 154, p. 1365, the rule is stated thus:

"The reasons why money in the hands of an officer is, as a general rule, not subject to an execution are that the process of the court would be obstructed and its judgment rendered ineffective, and that the money is in the custody of the law, and is not goods and effects of the judgment creditor in case of execution against

him. But these reasons are held to have no application to a surplus remaining in the hands of an officer after the demands of the execution plaintiff have been satisfied. The money in the hands of the sheriff is the money of the debtor, of whom the sheriff is the agent, as in any other case of agency. Hence it would seem that the surplus should be subject to execution in the same manner as any other property of the debtor similarly situated."

[2] Outside of this question it appeared that at the time the court below was asked to make the rule on the sheriff the officer had already filed an interpleader suit in the Perry county court, which court had full jurisdiction of the fund, and all adverse claimants thereto were parties and had filed answers. It was admitted that there was a separate suit pending in Perry county between the same parties involving the rights of the various parties to the fund. In the case of Kring et al. v. Green's Executors, 10 Mo. 195, loc. cit. 199, the Supreme Court held that a bill of interpleader would lie by an officer where there were adverse claimants to the fund in his hands.

In the St. Louis court the only parties before the court were the appellant and the defendant, William R. Wilkinson, and while it is true that Albertine C. Wilkinson entered her appearance and consented to the motion, and while it is further true the sheriff was in court, through his counsel, but, however, challenging the jurisdiction of the court, it appeared that one John H. Haderer claimed a part of this fund and was not before the court.

For these reasons alone the trial court would be justified in refusing the order on the sheriff, even though it had full jurisdiction to make such order. The commissioner recommends that the action of the trial court in refusing to modify the decree and make an order on the sheriff to pay the fund into court be affirmed.

PER CURIAM. The foregoing opinion of BIGGS, C., is adopted as the opinion of the court.

The judgment of the circuit court is accordingly affirmed.

REYNOLDS, P. J., and ALLEN and BECKER, JJ., concur.

**McCLURE v. BAKER et al.** (No. 13387.)  
(Kansas City Court of Appeals. Missouri.  
Dec. 1, 1919.)

**1. WILLS**  $\S$ 634(12) — **CONTINGENT REMAINDER.**

Where testator created life estate, with remainder to his two sisters, to be divided equally, and if either died the survivor should receive the whole, the sisters had an estate which both or either could transfer.

**2. REMAINDERS**  $\S$ 14 — **TRANSFERABILITY.**

A remainder, whether vested or contingent, is alienable.

**3. WILLS**  $\S$ 740(3) — **MUTUAL PROMISES SUPPORT CONTRACT BETWEEN BENEFICIARIES.**

An agreement between two beneficiaries under a will and their husbands, whereby on death of either beneficiary before coming into possession her share of the proceeds of the sale of land devised should go to her husband, was based upon a good consideration; the mutuality of the promises being sufficient.

**4. WILLS**  $\S$ 740(3) — **AGREEMENT BETWEEN BENEFICIARIES AS TO SHARING OF PROCEEDS OF SALE OF LAND VALID.**

Where testator created life estate in land, to be sold on death of life tenant, with remainder in one-half of proceeds to his two sisters, an agreement between them and their husbands that on death of either sister before coming into possession her share should go to her husband, was not violative of statute requiring conveyance of interest in land to be by acknowledged deed, being a contract with reference to personal property.

**5. JUDGMENT**  $\S$ 475, 735 — **JUDGMENTS OF PROBATE COURT CONCLUSIVE OF ISSUES.**

Judgments of probate courts are as binding and impervious to collateral attack as those of any other court of record; but, in order for such a judgment to be res judicata, the point decided in the action in which it is rendered must be in substance and effect within the issue.

**6. COURTS**  $\S$ 201 — **PROBATE COURT HAS NO JURISDICTION OVER CONTESTS OF HEIRS.**

The probate court has no jurisdiction over contests of heirs, after the decease of the intestate, not relating to acts of the deceased.

**7. EXECUTORS AND ADMINISTRATORS**  $\S$ 315(6) — **CONCLUSIVENESS OF PROBATE COURT'S ORDER OF DISTRIBUTION AS TO DISTRIBUTEES' PROPERTY RIGHTS.**

Where testator gave wife life estate in land, with right to dispose of one-half of proceeds of sale thereof by will, and gave remainder in other half to his sisters, probate court's order of distribution in administration of wife's estate directing distribution of sisters' as well as wife's half of proceeds of sale of the land, was not res judicata as to rights in sisters' share of proceeds; probate court having no jurisdiction to determine such rights.

Appeal from Circuit Court, Callaway County; David H. Harris, Judge.

"Not to be officially published."

Suit by Bettie K. McClure against Frank T. Baker, executor of the estate of William Ellis, deceased, and another. Judgment for plaintiff, and defendants appeal. **Affirmed.**

J. R. Baker, of Fulton, for appellants.  
N. T. Cave, of Fulton, for respondent.

**BLAND, J.** William Ellis, Barbara E. Jamison, and Amanda R. Bedsworth were brother and sisters; each residing on a separate and adjoining farm in Callaway county, Mo. All were married, but had no children. William Ellis died September 1, 1902, seized of 160 acres of land, upon which he lived. By his will he bequeathed the land to his wife for life, or while she remained a widow; at her death the farm was to be sold, and one-half of the proceeds "shall be subject to her will, to give, devise and bequeath as she desires;" the other half (less \$100) was to be divided equally between his two sisters, Barbara E. Jamison and Amanda R. Bedsworth, and "if either of said sisters be not living, the surviving sister shall receive what is bequeathed to both." Upon his decease Frank T. Baker was appointed executor of the will. On February 1, 1910, the two sisters, together with their husbands, entered into a contract reciting that one-half of the proceeds of the sale of deceased's real estate, less \$100 was bequeathed to Amanda R. Bedsworth and Barbara E. Jamison, and provided:

"Now be agreed by said parties that if the said Amanda R. Bedsworth should die before she comes into possession of described property, that her part shall go to and become a part of her husband's, Thomas B. Bedsworth, estate or in case the said Barbara E. Jamison should die before she comes into possession of said property, that her part shall go to and become a part of her husband J. Lee Jamison's estate."

On July 22, 1911, Barbara E. Jamison died testate leaving practically all her property to her husband. Her estate was administered upon, and the administrator discharged in due time. On July 23, 1912, J. Lee Jamison, her husband, died testate. Under his will his niece, the plaintiff, Bettie K. McClure, was given all of his property after the payment of certain legacies mentioned in the will. J. Lee Jamison's estate was administered upon, and final settlement made, and the executor discharged prior to the filing of this suit. In 1918 Susan Ellis, the widow of William Ellis died, leaving a will in which defendant Frank T. Baker was appointed her executor. Baker, as executor of William Ellis' estate, upon Mrs. Ellis' death, sold the land, and on November 23, 1918, made his final settlement as such executor in the probate court of Callaway county. This settlement showed that he had on hand the sum of \$5,338.45, being the proceeds of the sale of the land. The probate court ordered that the money be distributed as follows: To

Frank T. Baker, executor of the estate of Susan Ellis, \$2,669.22; to J. V. E. Humphries, \$100; and to Amanda R. Bedsworth \$2,569.22. No objections were filed in the probate court to this order of distribution by any one, nor was any appeal taken. However, on the day prior to the one on which the order of distribution was made, plaintiff filed this suit in the circuit court of Callaway county. On the day suit was filed summons was served upon defendant Frank T. Baker in his capacity as executor of the will of William Ellis. The petition alleged that plaintiff was entitled to a one-fourth interest in the proceeds of the sale of the real estate, and asked judgment in the sum of \$1,400, which plaintiff alleged to be the amount due her. Defendant filed his answer, stating that he had the sum of \$5,338.45 in his possession, derived from the sale of the land; that the probate court had ordered him to pay out said money in the manner described above; that no appeal was taken from the judgment of the probate court approving the settlement, or from the order of distribution, and that said order had become binding on all persons interested in said estate; that upon the day upon which summons was served upon him it came to his knowledge that plaintiff was claiming a one-fourth interest in the proceeds of the farm, and that in consequence he was continuing to hold in his possession an undivided one-fourth of the sum, being one-half the amount he was ordered to pay Amanda R. Bedsworth. He further stated that he was not interested in the controversy; that Amanda R. Bedsworth was also claiming the amount in his hands, which he had deposited with the clerk of the court; and asked that she and plaintiff be required to interplead. Amanda R. Bedsworth filed her answer, alleging that the judgment or order of distribution in the probate court was *res adjudicata*, and that the agreement of February 1, 1910, between Barbara E. Jamison and her husband and Amanda R. Bedsworth and her husband, was void, and claimed that under the provisions of the will of William Ellis, deceased, she was entitled to the fund. The court found in favor of plaintiff, and defendant has appealed.

[1, 2] Defendant's first point is that the estate created by the will of William Ellis in favor of Amanda R. Bedsworth and Barbara E. Jamison was a contingent remainder, and not such an estate as could be transferred, conveyed, or assigned by them, or either of them. We think there is nothing in this contention. It is well settled that an estate of this kind, whether it be a vested or contingent remainder, is alienable. *White v. McPheeters*, 75 Mo. 286; *Lackland v. Nevins*, 3 Mo. App. 335, 338, 339; *Ham v. Van Orden*, 84 N. Y. 257.

[3] It is urged that there was no consider-

ation for the contract entered into on February 1, 1910, between Amanda R. Bedsworth and her husband and Barbara E. Jamison and her husband. We think that plainly there was a consideration. The consideration flowing to Amanda R. Bedsworth was the agreement that, in case of her death before that of Susan Ellis, she was to obtain her interest in the estate of William Ellis for her husband and his heirs, and, there being mutuality of promises between the parties, there was a sufficient consideration to support the contract. *Chenoweth v. Pac. Express Co.*, 93 Mo. App. 185; *Steele v. Johnson*, 96 Mo. App. 147, 69 S. W. 1065; *Ham v. Van Orden*, *supra*.

[4] It is next contended that the last-named instrument was void because, under the statutes of Missouri, "an interest in land can only be sold, conveyed, transferred, or assigned by a deed properly signed and acknowledged." The contract was not intended to convey any legal title to or interest in real estate, but was one agreeing as to how the proceeds of the sale of the land should be divided, and clearly was a contract with reference to personal property. *Rumsey v. Durham*, 5 Ind. 71, and authorities therein cited.

[5] It is contended that—

"The judgment of the probate court of Callaway county, Mo., directing and ordering a distribution of the estate of William Ellis, deceased, was a final judgment, absolutely binding on the executor, and the circuit court had no power or authority to direct or order a distribution of the estate of William Ellis by the executor contrary to this final order of the probate court in this a collateral proceeding."

There can be no denial of the contention that judgments of probate courts are as binding and impervious to collateral attack as those of any other court of record. However, in order for such a judgment to be *res adjudicata*, the point decided in the action in which it is rendered must be in substance and effect within the issue. *Smith v. Black et al.*, 231 Mo. 681, 690, 132 S. W. 1129. It is held in *Estate of Garver v. Richardson*, 77 Mo. App. 459, 463:

"Probate courts in this state have no power to pass upon the rights or claims of one heir or legatee to the portion coming to another either by law or devise, and cannot, without consent, substitute another in the place of a lawful distributee. This is so, for the reason that no jurisdiction to determine adverse claims to the property in charge of the administrator has been given to the probate courts of Missouri."

See, also, cases of *State ex rel. Jones v. Jones*, 53 Mo. App. 207, 217; *State ex rel. Jones v. Jones*, 131 Mo. 194, 207, 33 S. W. 23; *In re Winnegar's Estate*, 118 Mo. App. 445, 94 S. W. 833.

[6] The probate court has no jurisdiction over contests of the heirs, after the decease

of the intestate, not relating to acts of the deceased. *Johnson v. Jones*, 47 Mo. App. 237, 241. It is stated in the latter (47 Mo. App. loc. cit. 242) that if the probate court makes an order of distribution, and a demand is made upon the executor, such as was made by plaintiff's petition in this case, that—

"If facts existed which might put the executor in jeopardy by paying to her [that is, the distributee], he might have had her share impounded until it was judicially determined by a competent tribunal to whom such share belonged, or may now, if such facts exist, have the collection of the execution enjoined by a tribunal competent to deal with the facts; but he cannot accomplish this by an appeal, because the court retrying the cause on appeal can try only a question which the probate court itself could have tried."

[7] We think there is no question but that under the authorities the probate court could have had no jurisdiction to determine whether the money involved in this litigation was or was not the property of this plaintiff, as that issue could only be determined by the circuit court. The order of distribution of the probate court could not affect plaintiff's right to the fund, for that right could not have been within the issue found by the probate court in making such order. Therefore we conclude that the order of distribution was not *res adjudicata* in this suit.

The judgment is affirmed. All concur.

WINDLE et al. v. CITIZENS' NAT. BANK  
et al. (No. 2585.)

(Springfield Court of Appeals. Missouri. Dec. 6, 1919.)

1. CHATTEL MORTGAGES  $\S$ 150(1)—RECORD OF MORTGAGE IN FICTITIOUS NAME NOT NOTICE.

A mortgage of personalty made by the owner in a fictitious name and placed on record is not constructive notice to one dealing with the owner in his true name.

2. MORTGAGES  $\S$ 43—DEEDS  $\S$ 31—MORTGAGE OR CONVEYANCE IN FICTITIOUS NAME VALID.

If real estate is purchased by a person under a fictitious name, the recorded deed being in such name, a mortgage or other conveyance in such name is good.

3. CHATTEL MORTGAGES  $\S$ 150(1)—RECORD OF MORTGAGE IN FALSE NAME AS CONSTRUCTIVE NOTICE.

Where horses and harnesses were sold to a person under a false name, and mortgages taken back by the sellers in the same name, such a mortgage on record is constructive notice to a person dealing with the buyer under such name.

4. SALES  $\S$ 234(5)—PURCHASE UNDER FALSE NAME PASSES NO TITLE EVEN AGAINST INNOCENT PURCHASER.

If a purchaser of chattels misrepresents his identity, passing under a false name, and induces a pretended sale to himself under the belief that such sale is to another, no title passes to him from the sellers which he can pass on to another, even an innocent purchaser, the sellers not suffering the loss on any ground that they conferred on the fraudulent buyer the apparent right of ownership.

5. SALES  $\S$ 318—NO WAIVER OF RIGHT TO RECLAIM FROM FRAUDULENT BUYER.

Sellers of personalty to a buyer who passed under a false name and gave back mortgages as security in such name held not to have waived their right to reclaim the property from transferees of the fraudulent buyer, though, after they asserted their right and obtained possession of the property, they foreclosed their mortgage, believing it to be valid; waiver implying knowledge and intention, neither of which was present.

Appeal from Circuit Court, Barton County; B. G. Thurman, Judge.

Action by Tom Windle and others, doing business as the Windle Bros. Horse & Mule Company, against the Citizens' National Bank and another. From judgment for defendants, plaintiffs appeal. Reversed and remanded.

Owen & Davis, of Joplin, for appellants.

J. H. Bailey, of Carthage, and Martin & Martin, of Lamar, for respondents.

STURGIS, P. J. The plaintiff was denied any recovery in this suit in replevin for four horses and a set of harness, and appeals. The pleadings are conventional; the plaintiffs claiming ownership and right of possession, and the defendants doing the same. The material facts are not disputed. The plaintiffs in their firm name are engaged in buying and selling horses and mules at Joplin, Mo., and are the original owners of two of the horses and the set of harness in controversy. In April, 1917, a man, representing himself to be J. W. Hughes, offered to buy of plaintiffs the two horses and the set of harness. The price was agreed upon and a note for that amount, secured by a chattel mortgage on the horses and harness so purchased and two other horses which said J. W. Hughes claimed to own, was signed and executed in the name of J. W. Hughes. The two horses and harness were then delivered to him by plaintiffs.

A short time thereafter, the plaintiffs learned that the property mortgaged was being sold and dissipated, and brought this suit. It developed at the trial that Hughes' real name was W. L. Hughes, and not J. W. Hughes, who was a farmer living in the country near by. This same W. L. Hughes



had previously become indebted to the defendant bank in the name of and representing himself to be G. H. Bell, another farmer of that county. For some other crimes said W. L. Hughes was arrested and held in jail at Pittsburg, Kan. Defendant's cashier went there May 31, 1917, and by paying another debt of W. L. Hughes induced him, in payment of its debt contracted in the name of G. H. Bell, to give defendant a bill of sale and possession of all the property in controversy; the defendant not knowing of plaintiffs' mortgage or the means by which he got possession of the two horses and harness from plaintiffs. Both plaintiffs and defendants acted in good faith, and each innocently dealt with W. L. Hughes under a false name assumed by him. When defendant attempted to secure payment of its debt, contracted by W. L. Hughes under the name of G. H. Bell, by taking the property in controversy, it caused the records to be searched and found no mortgage against this property given by W. L. Hughes, because plaintiffs' mortgage then on record appeared to be from J. W. Hughes.

The defendant bank insists that when it took the bill of sale it was dealing with W. L. Hughes in his right name, that plaintiffs' mortgage given in the name of J. W. Hughes was not binding on or notice to it of any incumbrance against this property, that J. W. Hughes and W. L. Hughes are entirely distinct grantors, and that in dealing with W. L. Hughes and his property defendant was not bound to look for or take notice of a mortgage from J. W. Hughes. On the other hand, plaintiffs insist that as they owned part of this property and sold it to J. W. Hughes, or a man representing that to be his name, and that as this man by and in the same name mortgaged the property back to them to secure the purchase price, then any one dealing with them did so with constructive notice of their mortgage. It must be remembered, however, that only part of the mortgaged property was sold by plaintiffs to J. W. Hughes.

[1] Not inquiring into the source of W. L. Hughes' title, but considering him merely as owner, we think defendants' contention correct that a mortgage of personal property made by the owner in a fictitious name and placed on record is not constructive notice to one dealing with the owner in his true name. The defendant cites in support of this rule of law *Mackey v. Cole*, 79 Wis. 426, 48 N. W. 520, 24 Am. St. Rep. 728, and two Missouri cases, *New Eng. Nat. Bank v. Northwestern Nat. Bank*, 171 Mo. 307, 327, 71 S. W. 191, 60 L. R. A. 256, and *Crawford v. Benoit*, 97 Mo. App. 219, 70 S. W. 1098, both of which follow *Mackey v. Cole*, supra. Plaintiffs contend that this point was not necessary to a decision in the Missouri cases, and that the court's remarks on this point were obiter. A reading of these cases, however, leaves no doubt as to the views of the court on this

question. Such, too, is the great weight of authority. In 5 R. C. L. pp. 413, 414, this is stated:

"The weight of authority is that a mortgage on personal property made by one who was not the owner of the property, or executed by the owner in a fictitious name, although placed on record, is not constructive notice to any one dealing with the owner in his true name. The reason of this rule is that such conveyances in fictitious names lie outside of the chain of title and therefore impart no notice. So where a mortgagee advances money to the person in possession of the property he is not obliged to look for the mortgages on his interest in the property in any fictitious name nor in the name of anyone acting for him."

See 11 C. J. 540, § 228.

In *Johnson v. Willson & Co.*, 137 Ala. 468, 34 South. 392, 97 Am. St. Rep. 52, the law is stated thus:

"In other words, the record of a mortgage executed in the name of A. W. Dixon is not notice that J. W. Dixon executed it. The names are as entirely different as are the names of J. W. Dixon and J. W. Smith. Had Dixon assumed the name of J. W. Smith, and executed the mortgage, signing that name instead of his true name, it could hardly be doubted, although he bound himself, that the record of it would not have operated as notice to the plaintiffs."

See, also, *Wunschel v. Farmers' State Bank* (Tex. Civ. App.) 203 S. W. 924; and *Lembeck & Betz Eagle Brewing Co. v. Barbi* (N. J. Ch.) 106 Atl. 552.

As to the horses owned by W. L. Hughes other than those purchased by him in the name of J. W. Hughes and mortgaged back in the same name for the purchase price, the law clearly is that the plaintiffs' mortgage given in such name was not notice to defendants and plaintiffs cannot recover same.

[2, 3] As to the two horses and harness which plaintiffs sold, in form at least, to J. W. Hughes and took back this mortgage in the same name, there is much reason for holding that such mortgage is constructive notice. The Supreme Court of Nebraska, in *Alexander v. Graves*, 25 Neb. 453, 41 N. W. 290, 13 Am. St. Rep. 501, decided this very question in favor of the mortgagee as against an innocent purchaser on the same facts here presented. The court said:

"It would seem that the sale and delivery of the property to Davis, under the assumed name of McCoy, transferred the title of the property to him, which was immediately transferred back by the mortgage. The mortgage was valid. By it the title was transferred to plaintiffs as fully as it had been received by the purchaser from them. Plaintiffs acted in good faith, and immediately thereafter, and before the purchase by defendant, placed the mortgage on record in the proper county."

This case finds support in *Wogan v. Citizens' Bank*, 95 Kan. 774, 149 Pac. 411. In

Jones on Chattel Mortgages (5th Ed.) § 247A, the general rule as to recorded mortgages given in a fictitious name not being constructive notice, as held in the leading case of *Mackey v. Cole*, supra, is recognized, but the Nebraska case of *Alexander v. Graves*, supra, is also treated as being good law to the effect that where a man purchases property in an assumed or fictitious name, and at once mortgages same to secure the purchase price, then such recorded mortgage does give constructive notice. The mortgage conveys the same title the mortgagor got by his purchase and by the same name. It is said in the quotation from 5 R. C. L. 414, supra, that—

"The reason for the (general) rule is that such conveyances in fictitious names lie outside the chain of title and therefore impart no notice."

But if there had been any record, such as a bill of sale, of the transfer of the property to the mortgagor, it would have run in the same fictitious name and the mortgage would have been in the same name. There can be no doubt that if a person purchased real estate in a fictitious name, the recorded deed being in such name, then a mortgage or other conveyance in such name would be good. *Wilson v. White*, 84 Cal. 239, 24 Pac. 114; *Glenovich v. Zurich*, 19 S. D. 37, 101 N. W. 1103. We are constrained to hold, therefore, that plaintiffs' mortgage gave constructive notice and is valid as to the two horses and harness originally owned by plaintiffs.

[4] Another view of this case leads to the same result, to wit, that, by reason of the fraud of W. L. Hughes in representing himself to be J. W. Hughes and his purchasing and mortgaging the property in an assumed name, no title passed to W. L. Hughes and none passed from him to defendant. The vendor of property has the right to contract with whom he pleases and to know to whom he is selling. It follows that, if a purchaser misrepresents who he is and induces a pretended sale to himself under the belief that such sale is to another, then no title passes. In such a case there is no real purchaser, for the person misrepresented is not buying and the person who obtains possession and afterwards claims title is not himself the purchaser. *Smith Typewriter Co. v. Stidger*, 18 Colo. App. 261, 71 Pac. 400; *Rodliff v. Dallinger*, 141 Mass. 1, 4 N. E. 805, 55 Am. Rep. 439. In *Loeffel v. Pohlman*, 47 Mo. App. 574, the court held that (syllabus)—

"If the owner of goods is induced by fraud to part with the possession of them without intending to transfer the title to the party thus obtaining them, as where such party falsely impersonates a third person, and thus induces the owner to sell the goods to him in the belief that he is such third person, no sale or transfer of title is effected, and no act of rescission is necessary in order to entitle such owner to reclaim the goods."

"The cases there cited and quoted from show that this rule of law applies though the property has passed into the hands of an innocent purchaser. Where a person falsely represented himself to be another person, a member of a certain partnership, and thereby induced a sale and delivery of the property, it was held that no title passed. *Alexander v. Swackhamer*, 105 Ind. 81, 4 N. E. 433, 5 N. E. 908, 55 Am. Rep. 180, where the court said:

"In the case before us, both upon the facts assumed in the instruction and as they appear in the evidence, there was no contract of sale to the spurious representative of the firm, one of whose members he falsely personated. He did not propose to buy on his own account, nor did the plaintiff contemplate a sale to him. The plaintiff contracted upon the supposition that he was selling to Fort, Johnson & Co., through the agency of a member of that firm. He did not agree to sell or contemplate a sale to any other person, nor did the person with whom he negotiated propose to purchase for himself or any other than Fort, Johnson & Co. The transaction resulted in a misadventure. No sale was made to Fort, Johnson & Co., and, as no other was proposed or contemplated, none was made. In the language of the instruction given, the contract was wholly void. By means of a trick the naked possession of his property had been delivered to another by the plaintiff, while the title and ownership remained in him after the delivering, the same as before. No one can transfer a greater right or better title to property than he possesses himself."

It is pointed out in *Wyckoff v. Vicary*, 75 Hun, 409, 27 N. Y. Supp. 103, that, while the seller might affirm the sale and hold the fraudulent purchaser "it was optional with them to either hold him or reclaim their property." The same reason applies for holding that no title passes in a case like this as where the purchaser of chattels for cash wrongfully obtains possession without making payment. In such case no title passes even against an innocent purchaser. *Johnson-Brinkman Com. Co. v. Central Bank*, 116 Mo. 558, 22 S. W. 813, 38 Am. St. Rep. 615; *Cass County Bank v. Hulen*, 195 S. W. 74.

The contention of defendants that, because plaintiffs conferred upon Hughes the apparent right of ownership, they must suffer the loss as against defendants, is untenable. Hughes was guilty of obtaining this property under false pretenses, and the rule governing the facts in a case like this is stated in 15 Cyc. 773, in the following language:

"Whenever one of two innocent persons must suffer by the acts of a third, he who has enabled such third person to occasion the loss must sustain it. This rule does not apply, however, in cases where the wrong was accomplished through the instrumentality of a criminal act; it being held in such cases the crime, and not the negligent act, is the proximate cause of the injury."

[5] We find no facts in this case showing a waiver by plaintiffs of their right to reclaim this property. They instituted this suit as soon as they learned that Hughes was disposing of his property including that covered by the mortgage. They doubtless relied upon the validity of their mortgage and so claimed all the property covered by it and did not yet know that Hughes had contracted with them in purchasing and mortgaging this property in a false name, thereby rendering the mortgage void as against third parties. The fact that, after they had asserted their right and obtained possession of the property, they foreclosed the mortgage believing it to be valid, cannot be construed as a waiver. Waiver involves knowledge and intention, and neither is present here. 24 Cyc. 259 and 261.

It follows therefore that judgment should have been rendered for plaintiffs for the two horses and harness originally belonging to them and claimed to have been sold by them to W. L. Hughes, defendants' vendor, and in defendants' favor for the other two horses as to which the mortgage is void. The case is reversed and remanded to be proceeded with accordingly.

FARRINGTON and BRADLEY, JJ., concur.

WINDLE v. CITIZENS' NAT. BANK et al.  
(No. 2584.)

(Springfield Court of Appeals. Missouri. Dec. 6, 1919.)

1. CHATTEL MORTGAGES  $\S$  139—SALES  $\S$  234  
(5)—NO TITLE PASSES ON MISREPRESENTATION OF IDENTITY.

Where the purchaser of chattels bought under a false name, giving a note and mortgage, and after obtaining possession transferred the property by chattel mortgage to innocent persons, the seller was entitled to judgment in replevin against such transferees of the fraudulent buyer, for, in case of a misrepresentation of identity, no title passes which is available even to a bona fide purchaser for value.

2. ESTOPPEL  $\S$  110—NECESSITY OF PLEADING WAIVER OR ESTOPPEL AS TO FRAUD.

In order for persons claiming under a fraudulent buyer of chattels to urge that the seller had waived his right to complain of the fraud, which consisted of misrepresentation of the buyer's identity, so that no title passed, or that the seller was estopped from complaining of it, they should have pleaded such estoppel, waiver, or ratification.

Error to Circuit Court, Barton County; B. G. Thurman, Judge.

Action by N. E. Windle against the Citizens' National Bank and another. From judgment for defendants, plaintiff appeals. Reversed, and cause remanded.

Owen & Davis, of Joplin, for appellant.  
J. H. Bailey, of Carthage, and Martin & Martin, of Lamar, for respondents.

FARRINGTON, J. The plaintiff, appellant, appeals from a judgment rendered in the circuit court of Barton county in an action instituted by him in replevin. The suit is to recover of defendants the possession of one dapple gray horse, one white gray horse, a set of harness, and a farm wagon. The cause was tried by the court sitting as a jury. After an instruction in the nature of a demurrer to the evidence was overruled, the court refused several declarations of law asked by the plaintiff. There were no declarations of law, as shown by the record, given at the instance of defendants.

It appears from the evidence that in May, 1917, the plaintiff was engaged in buying and selling horses at Joplin, Mo., and that on the 25th of that month one W. L. Hughes, who was a stranger to plaintiff, presented himself and offered to purchase the property herein sued for.

The facts in this case are somewhat similar to the case of Tom Windle et al. against the same defendants, 216 S. W. 1020, submitted at the same time this case was submitted and decided at this term of court.

When W. L. Hughes offered to purchase the team from plaintiff, he represented his name as that of G. H. Bell, a son of John R. Bell, a farmer living in Jasper county. Plaintiff inquired of a man who knew of the Bell family and ascertained that they were good and responsible people. He then sold to the purchaser representing himself to be G. H. Bell the property here sued for, for the sum of \$350, taking therefor a note for the full amount, and secured the same by a chattel mortgage on this and other property.

Prior to the purchase of the property from the plaintiff, Hughes, working under the name of G. H. Bell, borrowed of defendant bank the sum of \$565, securing a note by certain personal property, and represented to Mr. Kolterman, cashier of defendant bank and the man who made the loan, that he was living on the farm of J. W. Williams, in Barton county, Mo. In April, 1917, Kolterman, acting for the bank, discovered that he had been defrauded and that it was W. L. Hughes that he had actually transacted business with and not Bell. Hughes in the meantime was in jail at Pittsburg, Kan., for some offense, and on May 30, 1917, Kolterman saw Hughes, who was in jail, and was told by him that he had some property in Jasper county free and clear of incumbrance with which he could secure him. Defendants, before taking any mortgage from Hughes, had their attorney examine the records of Jasper county for chattel mortgages and found none given by W. L. Hughes or G. H. Bell. They then took a chattel mortgage on the property,

and also purchased from the First National Bank of Pittsburg a note which had been given by Hughes and secured by certain personal property. It is not exactly clear from the record whether the property sued for by plaintiff was covered by the mortgage that defendants bought from the Pittsburg bank, or whether it was in the other property which they took. At any rate, the property which plaintiff sold to W. L. Hughes, representing himself to be G. H. Bell, was taken by defendants to secure their indebtedness, and the defendants were acting in utmost good faith and without any knowledge of the transaction between Bell-Hughes and the plaintiff, and also after they had found from examining the records that neither Bell nor Hughes had given a chattel mortgage on the property they were taking to secure themselves.

Plaintiff replevined the property from defendants, and after obtaining possession of it sold it at private sale, but did not sell under his mortgage, nor did he exercise any right or rights which he had under the mortgage which he had taken from G. H. Bell when he sold him this property. It appears from the record that about June 2, 1917, plaintiff ascertained that Bell was a fictitious name and that Hughes was the man who bought his property, and on that date plaintiff put his mortgage of record, which, of course, was subsequent to defendants' transaction with Hughes, and on June 7, 1917, he instituted this suit in replevin.

[1] We are of the opinion that appellant is correct in his assignment of error pertaining to the refusal of the court to give a peremptory instruction to find for plaintiff. The facts are undisputed, and summed up amount to this: One W. L. Hughes, representing himself to be G. H. Bell, bought this property from plaintiff, giving his note and mortgage for it. After obtaining possession of it, he transferred it by chattel mortgage to the defendants who were innocent of any lien or fraud that Bell or Hughes had perpetrated. Under these facts and under the law as we find it, the plaintiff was entitled to a judgment.

The rule, as announced in *Mecham on Sales*, vol. 2, § 887, is that if a seller, through a fraud or misrepresentation, is induced to part with his goods in the belief that he is selling to one man when in fact he is selling to another, there is no sale that has taken place, and he can recover his goods even in the hands of an innocent third person. "No title passes out of the owner, and the person who so fraudulently obtains the goods can therefore convey none to any person, however innocent, and the owner may recover his goods not only from the wrongdoer himself, but even from a bona fide purchaser for value and without notice. There is no occasion for rescission of the sale, for there is no sale to rescind; the whole transaction is

void ab initio." See 35 Cyc. pp. 360, 361. Also, 16 Cyc. p. 773.

The rule stated in 24 Am. & Eng. Encyc. of Law, 1166, is that the fraud consists of a misrepresentation by the vendee as to his identity, and the intention of the vendor is to sell to the person who the vendee represents himself to be, no title passes to the fraudulent vendee, due to the mistake as to his identity, and the vendor in a suit against a bona fide purchaser will prevail. The justice of this rule will be seen when applied to the facts of this case. The plaintiff, on Hughes' representation to him that he was G. H. Bell, the son of John Bell, a farmer in Jasper county, inquired of a man who knew the Bell family as to their standing, and was informed that they were substantial and responsible people. Plaintiff thought that he was selling to John Bell's boy, when in fact he was selling to an entirely different individual, representing himself to be John Bell's boy. Plaintiff did not make a sale to Hughes, and Hughes did not purchase as Hughes. There was therefore no sale at all between the parties actually negotiated.

It has been held in the very recent case of *Keltner v. Harris* (Sup.) 196 S. W. 1, that a seller has the right to cancel his sale when he thinks he is selling his property to one person and discovers afterwards that through a fraud he has sold it to another. It is one of the rights of property; that is, the right to designate the person to whom disposition is made.

That a seller can follow his property and recover it, even though in the hands of innocent purchasers, is held in the following cases: *Loeffel v. Pohlman*, 47 Mo. App. 574; *Kemper, Hundley & McDonald v. Kidder Savings Bank*, 72 Mo. App. 226; *Alexander v. Swackhamer*, 105 Ind. 81, 4 N. E. 433, 5 N. E. 908, 55 Am. Rep. 180; *Smith-Premier Typewriter Co. v. Stidger*, 18 Colo. App. 261, 71 Pac. 400; *Hamet v. Letcher*, 37 Ohio St. 356, 41 Am. Rep. 519; *Gulf, O. & S. F. Ry. Co. v. Taylor*, 18 Tex. Civ. App. 571, 45 S. W. 749; *Wyckoff et al. v. Vicary*, 75 Hun, 409, 27 N. Y. Supp. 103; *Nash v. Moore*, 165 App. Div. 67, 151 N. Y. Supp. 96.

The cases relied on by respondents are those where there had been a fraud perpetrated which does not fall within the exceptions making the transaction no sale or contract at all. They are breach of warranty, or they are contracts entered into between two parties which have been brought about by a fraud or fraudulent statement as to some fact that induced one party to contract with the other. Such contracts are voidable only, and are not such cases as the one presented here, where there never was any sale or contract that took place between the plaintiff and Hughes. The identical person with whom plaintiff was dealing was a man named Hughes assuming the name of Bell, who the plaintiff before selling him ascertain-

ed belonged to a responsible and substantial family.

[2] There is an intimation in respondents' brief that, the plaintiff had adopted or ratified the contract after learning of the fraud that had been practiced upon him by placing his mortgage on record. That is, the facts show that the plaintiff learned that Hughes was not in fact Bell on June 2d, and immediately placed his mortgage on record. The plaintiff did not rely, in this cause, on his mortgage, nor did he make any sale under his mortgage; so far as the record appears, his mortgage was wholly abandoned by him after he had recorded it. In order for defendants to claim that plaintiff has waived his right to complain of the fraud, or was estopped from complaining of fraud, they should have pleaded such estoppel, waiver, or ratification. There was no such plea entered in the case, and from the record the case does not seem to have proceeded on the theory that the plaintiff had estopped himself by recording his mortgage. It is held in many cases in Missouri that facts relied upon as an estoppel in pais must be specially pleaded. *Bray v. Marshall*, 75 Mo. 327; *Noble v. Blount*, 77 Mo. 235; *Avery v. K. C. & S. Ry. Co.*, 113 Mo. 561, 21 S. W. 90.

We must therefore hold that, under the undisputed facts of this case, the plaintiff never entered into any sale and delivery of his property to the person from whom defendants acquired it. Hughes never acquired title to plaintiff's property, and his assignee could acquire no greater rights than he himself had.

The judgment will therefore be reversed, and the cause remanded.

STURGIS, P. J., and BRADLEY, J.,  
concur.

# WAMSGANZ v. BLANKE-WENNEKER CANDY CO. (No. 15629.)

(St. Louis Court of Appeals. Missouri. Argued and Submitted Nov. 11, 1919. Opinion Filed Dec. 2, 1919. Rehearing Denied Dec. 18, 1919.)

## 1. PLEADING $\S$ 64(2)—JOINDER OF COUNT ON CONTRACT WITH COUNT ON QUANTUM MERUIT DEMURRABLE.

A petition containing two counts, one on contract and the other on quantum meruit, held bad pleading.

## 2. PLEADING $\S$ 369(6)—MOTION TO REQUIRE ELECTION BETWEEN COUNTS MUST BE MADE IN APT TIME.

Defendant's motion to require plaintiff to elect between count on contract and count on quantum meruit, after it had answered by general denial and by counterclaim and had announced itself ready for trial, and after the

jury had been impaneled, was made too late to be considered.

## 3. JUDGMENT $\S$ 250—CONFORMITY TO PLEADING.

A petitioner must recover on the cause of action pleaded.

## 4. CONTRACTS $\S$ 346(1)—VARIANCE.

Plaintiff cannot plead one contract and recover on another, and cannot recover on a contract, an essential part of which is omitted in pleading.

## 5. PLEADING $\S$ 428(7)—OBJECTION TO VARIANCE AFTER VERDICT TOO LATE.

In action on contract, defendant, having failed to object to evidence as to waiver of contract, and having cross-examined adverse witnesses and examined his own witnesses in relation thereto, cannot, after verdict has been rendered, complain of such evidence, on ground that waiver was not pleaded.

## 6. NEW TRIAL $\S$ 26—OBJECTION URGED FOR FIRST TIME ON MOTION FOR NEW TRIAL TOO LATE.

Under Rev. St. 1909,  $\S$  1846, a party cannot take the chance of a verdict, and then avail himself, on motion for new trial, of error that he might have urged before the cause went to the jury.

## 7. TRIAL $\S$ 296(12)—OMISSION IN INSTRUCTION CURED BY ANOTHER INSTRUCTION.

Failure to define certain words in the giving of an instruction, if error, was cured by instruction, given at instance of complaining party, defining such words.

## 8. EVIDENCE $\S$ 487—EVIDENCE OF EXPERIENCE FOUNDATION FOR TESTIMONY AS TO PROBABLE EARNINGS.

In salesman's action for wrongful discharge, to recover commissions he would have earned during term of employment, evidence of salesman's experience held to establish a sufficient foundation for testimony by him as to what his commissions would have been during such period.

## 9. MASTER AND SERVANT $\S$ 40(1)—TESTIMONY IN ACTION FOR WRONGFUL DISCHARGE AS TO PROBABLE SALES CONFINED TO PERIOD OF CONTRACT.

In a salesman's action for loss of commissions by wrongful discharge before termination of the term for which he had been hired, testimony by a witness for defendant as to a conversation with salesman regarding an article he had been selling was properly excluded, where the testimony was not confined to the period covered by the contract.

## 10. MASTER AND SERVANT $\S$ 40(2)—EXCLUSION OF TESTIMONY FOR DEFENSE IN ACTION FOR WRONGFUL DISCHARGE NOT ERROR.

In a salesman's action for loss of commissions by wrongful discharge, the exclusion of testimony of a witness for defendant as to salesman's statements regarding profits from a side line was not reversible error.

Appeal from St. Louis Circuit Court; Leo S. Rassieur, Judge.

"Not to be officially published."

Action by Emil J. Wamsganz against the Blanke-Wenneker Candy Company. Judgment for plaintiff, and defendant appeals. Affirmed.

O. F. Karbe and S. C. Rogers, both of St. Louis, for appellant.

E. T. & C. B. Allen and A. H. Morris, all of St. Louis, for respondent.

REYNOLDS, P. J. The petition in this case is in two counts: the first on contract between plaintiff and defendant for six months' employment, plaintiff agreeing with defendant to enter its employ "as a salesman to sell its merchandise for a period from July 1st, 1915, to January 1st, 1916, plaintiff agreeing to subject himself to defendant's orders and devote his whole time and energy to its business," and to receive commissions named on sales. Alleging performance of the contract and that he continued therein until September 15th, 1915, plaintiff avers that defendant wrongfully and without cause discharged him and refused to permit him to serve, although plaintiff offered to continue in the service and perform the agreement on his part. Damages are claimed in the sum of \$1,745, that being averred to be his loss of commissions, on which a credit of \$255 is allowed.

The second count is on quantum meruit, under which the sum of \$750, less \$255 paid, a total of \$495, is claimed. Plaintiff dismissed as to this at the trial, the case going to the jury on the first count.

The answer, after a general denial, set up a counterclaim, averring the amount of commissions earned by plaintiff and the amount paid, claiming an overdraft of \$72.56, for which defendant asks judgment. As the jury found for plaintiff on the counterclaim, it is unnecessary to notice it more fully.

The verdict was originally for plaintiff in the sum of \$750, but as a condition for overruling the motion for new trial, the court required a remittitur of \$255, which was made, judgment going for \$494. From this defendant has appealed.

There are nine assignments of error which we will consider in their order.

[1, 2] It is argued that the court committed error in overruling defendant's motion to elect between the two causes of action.

The court committed no error in so ruling. It is true that when a petition contains two counts, one on contract and the other on quantum meruit, this is bad pleading, and can be reached by motion requiring plaintiff to elect. But the motion must be filed in apt time. Here, after the original petition, which is not before us, but evidently with two counts, and an amended petition also with two counts being filed, defendant answered by general denial and by setting up a counterclaim. It then announced ready for trial; the jury was impaneled and the taking of

testimony commenced. Then and not until then, defendant interposed its motion to elect. That was too late. So our Supreme Court held in *White v. St. Louis & Meramec River Railroad Co.*, 202 Mo. 539, 101 S. W. 14, beginning at page 561.

[3, 4] The action of the court in refusing to sustain the demurrer at the close of the evidence and in submitting the case to the jury, is assigned as error. It is argued that the evidence showed a modification or waiver of the terms of the original contract, which modification was not pleaded; that after proving the contract alleged and a breach thereof by plaintiff, plaintiff endeavored to justify the breach by proving a waiver without pleading it, so it is urged that the court erred in overruling the demurrer and permitting the case to go to the jury. It is our settled law that a petitioner must recover on the cause of action pleaded; cannot plead one contract and recover on another, and that if an essential part of a contract is omitted in pleading it is fatal. But in the case at bar, the evidence as to the alleged waiver was admitted without any objection whatever on the part of the defendant. With this evidence before them, by the instructions given at the instance of plaintiff and defendant, the jury were distinctly confined to the contract pleaded; they were told that before they could find for the plaintiff, they must find that he performed the contract as that contract is pleaded. Even in instruction No. 5, given at the instance of defendant, the court distinctly told the jury that if they believed from the evidence that plaintiff

"continued to work for defendant without any new contract and continued to receive the same commissions and payments thereof as theretofore, and that such arrangement continued until plaintiff's employment with defendant was severed, then plaintiff is not entitled to recover, and your verdict will be for the defendant on plaintiff's cause of action."

Under these instructions the jury could not find that there was any waiver. The fact that some evidence, tending to show waiver got into the case without objection, in no manner disturbs the finding of the jury under the instructions. They must have found that plaintiff discharged his duties under the contract he pleaded.

[5, 6] But defendant, by affidavit, made by one of its counsel and filed after verdict and accompanying the motion for a new trial, alleges surprise in that that counsel had had charge of the case for defendant; had prepared the pleadings and had gone to trial and had conducted the case through the trial without knowledge that a waiver was to be relied on, and that he was surprised by the introduction of that element. Yet that counsel sat by and heard the alleged evidence of waiver, cross-examined very vigorously and rigorously on it; examined his own wit-

nesses on it. He surely then knew that this evidence of a so-called waiver was in the case. Then was his time to have made his objection to variance. It came too late after verdict. A party cannot take the chance of a verdict and then avail himself of error that he might have urged before the cause went to the jury. Such is our law under section 1846, Revised Statutes 1909. The reason for this rule is very fully and elaborately expounded in *Mellor v. Missouri Pacific Ry. Co.*, 105 Mo. 455, 16 S. W. 849, 10 L. R. A. 36. That case is followed and quoted from approvingly by our Supreme Court in *Chouquette v. Southern Electric Ry. Co.*, 152 Mo. 257, loc. cit. 264, 53 S. W. 897. It is true that in the *Mellor* Case it appears that the appellant filed no affidavit of surprise, either before or after verdict, and that it did not theretofore regard the defect in the petition there under review as prejudicial to its defense, or as affecting its substantial rights until on appeal. Says our Supreme Court in the *Mellor* Case, 105 Mo. loc. cit. 471, 16 S. W. 853, 10 L. R. A. 36:

"Defeat under such circumstances must be borne. Litigants must learn to be diligent. Objections must be timely and specific. Any other course would be unjust to the trial courts, would not 'discourage \* \* \* negligence and deceit,' and would not 'prevent delays.'"

That is very obvious. Beyond doubt, if plaintiff was relying on a waiver, which, in passing, we do not think he was, the jury, by its verdict, found no waiver, but found that the contract was as pleaded. The slightest suggestion by the way of objection to the testimony when that line of waiver was entered into, would have enabled the plaintiff, under leave of court, to have amended, if necessary. As said by our Supreme Court in *Fisher & Co. Real Estate Co. v. Stated Realty Co.*, 159 Mo. 562, loc. cit. 567, 62 S. W. 443, 444:

"It has always been the law that the allegata and probata must correspond. \* \* \* That a party cannot declare upon one cause of action and recover upon another is axiomatic in our law. \* \* \* But it is also equally well settled in our state that timely and appropriate objection must be made to the introduction of the evidence offered on the distinct ground of a variance between the allegata and probata, and that the objecting party must proceed in the manner provided by section 2090, Revised Statutes 1889 [section 1846, Revised Statutes 1909], otherwise his objection will not be considered."

The most substantial evidence claimed to show a violation of the contract as pleaded, was that as to some minor articles, such as "punch boards," etc., plaintiff had procured from a party other than the defendant, which articles he had sold or used while in the employ of defendant; but plaintiff testified that he had turned his contract for the purchase

of these boards over to defendant or at least given it the benefit of the discount allowed. There was also evidence given for defendant tending to show that plaintiff had carried on several small "side lines." But we repeat, the jury evidently did not consider this as any violation of his contract. Under the instructions it could not have done so; to the contrary, it did find that plaintiff had performed his contract as pleaded. So the question of waiver disappeared.

[7] Instruction No. 1, the only instruction given at the instance of plaintiff, is attacked because of the use of the words "wrongfully discharged," without defining those words. We find no error in this. If it was error for lack of definition of the words, defendant cured that by an instruction, given at its instance, which told the jury, in effect, what would constitute a wrongful discharge.

It is next urged that the court erred in refusing to give an instruction No. 6, requested by appellant and heretofore referred to, as asked, and inserting in it the words "without any new contract," and also "such arrangement." We see no error in this alteration of the instruction. In point of fact, it did just what defendant now insists on, namely, told the jury it was to pass on the contract as pleaded and was not to consider any alteration in it, such as a waiver of one of its terms.

The sixth assignment is to the effect that the court admitted incompetent, immaterial and improper evidence. The evidence referred to is this (plaintiff being under examination in chief):

"Q. What in your opinion would have been the commissions for the six months of 1915 accruing from placing 125 sample cases with the jobbing trade in St. Louis on a three and five per cent. basis?

"Mr. Rogers: May I ask the witness a question or two?

"The Court: You may.

"Mr. Rogers: Mr. Wamsganz, in placing these orders after the samples are put there they are ordered ahead, aren't they? A. Some, and some not.

"Q. What is the general run? A. They order the staples any time, and the others they order as they get orders for them, as the orders come in.

"Q. Any particular time, thirty days, or sixty days, or ninety days? A. On certain classes of goods they give you an order for goods thirty days' delivery; they contract for them.

"The Court: He may answer the original question now.

"Mr. Rogers: That is the one I objected to.

"The Court: State the ground for your objection.

"Mr. Rogers: The objection is because they have not laid any foundation. The witness was working there from June until the latter part of September, and he stated the best months were the months immediately following. He has not shown any orders that he took, and I

don't think he has shown sufficient foundation upon which to base the question.

"The Court: As I understand the question, you are trying to find out from the witness what in his opinion his income would have been during the six months ensuing from July 1st on a commission basis, of three and five per cent., as he has stated, assuming that 125 sample cases had been placed?

"Mr. Allen: Yes.

"The Court: I will overrule the objection.

"To which ruling of the court the defendant, by its counsel, then and there duly excepted.

"A. I figured that I ought to make about twenty-two hundred dollars on the six months, from the amount of cases out."

Learned counsel for appellant cite no authority in support of this objection.

The rule to be applied here is somewhat in doubt under our decisions. We do find, in *Puller v. Royal Casualty Co.*, 271 Mo. 369, loc. cit. 392, 196 S. W. 755, 762, where, after stating the confusion as to the rule to be applied to the estimation of damages when a servant on a salary is unlawfully discharged, the rule to be thus stated:

"In order to remedy those evils, the courts, by degrees, evolved the rule permitting the employé to sue upon his unlawful discharge for the amount of wages he would have earned under the contract had he been permitted to fully perform it, and fixed the damages *prima facie*, at the amount provided for in the contract, and cast the burden upon the employer to show by evidence, if he could, that the former was not entitled to recover the full amount; for instance, if the employé had earned any sum of money after his discharge and before the trial, the employer would be entitled to a credit therefor; but if he failed to make such proof, then the employé would be entitled to recover the full amount stated in the contract."

That was a case where the employé was under a fixed salary, contingent somewhat on commissions.

A case directly in point, however, is that of *Wakeman, Jr., et al. v. Wheeler & Wilson Manufacturing Co.*, 101 N. Y. 205, 4 N. E. 264, 54 Am. Rep. 676. In that case it was held that plaintiffs, who were suing on a contract by which they were selling certain sewing machines in Mexico, were not confined to the damages sustained by reason of the refusal of the defendant to fill the orders actually given, but were entitled to recover such damages as they could show they had sustained by a total breach of the contract; that is, the value of the contract, not merely imaginary or speculative damages, but such as were reasonably certain, and such only as actually followed or might follow from such breach; such as a jury could determine approximately upon reasonable conjecture and probable estimates.

This is followed by the case of *Roth v. Spero et al.*, 48 Misc. Rep. 506, 96 N. Y. Supp. 211. There it was held that a person employed as salesman and discharged during

the period for which he was employed without cause, may recover prospective profits which it is reasonably certain he would have realized, although the amount is necessarily uncertain, citing in support of it *Wakeman, Jr., et al. v. Wheeler & Wilson Manufacturing Co.*, supra.

[8] Part of the same objection made to the question above quoted, was that no foundation had been laid for it. We do not clearly understand what learned counsel means by that. If they mean that plaintiff had not been shown to be qualified by experience to answer, there is nothing to it. There was testimony of plaintiff tending to show that he had been in business as a candy salesman for a number of years; even before this contract, had handled business as a salesman not only for the defendant but for others; that he had put out in the beginning of the term, along in July or August, something like 125 sample cases to different parties with the view of afterwards receiving orders for candies; that the actual selling months for candies were not in June, July and August but commenced towards the end of September and were best in that month as also in October, November and in the holiday seasons, and that as the result of placing these samples, his experience was that he would receive returns during the latter part of the term of his employment that justified him in estimating his probable earnings at the amount stated. We see no error in allowing this question and answer to stand.

[9] The evidence claimed to have been improperly rejected was that of a witness, testifying for defendant, who stated that he had talked with plaintiff regarding "punch boards," the articles plaintiff had been selling over a period of a year or so, and part of the time before and also while plaintiff was working for defendant; that to the best of his recollection this conversation was between May and September, 1915. The court refused to permit this testimony unless it was confined to the period between July 1st and December 31st, 1915. There was no error in this ruling.

[10] Defendant further proposed to show by this witness that plaintiff had said that his side line of punch boards was a good money maker for him. There was no reversible error in this ruling.

It is said that plaintiff had not been discharged, but that the evidence showed he had voluntarily quit his employment. The verdict settles that against defendant.

There was no error of the trial court in overruling the motion for new trial and in arrest.

The judgment of the circuit court is affirmed.

ALLEN, J., concurs.

BECKER, J., concurs in result.



## CLARKSON v. LAIBLAN et al. (No. 16631.)

(St. Louis Court of Appeals. Missouri. Dec. 2, 1919.)

**1. MASTER AND SERVANT §341 — LABOR UNION'S INTERFERENCE WITH EMPLOYMENT OF FORMER MEMBER CREATING CAUSE OF ACTION.**

Where officers of labor union through business agent resorted to threats of strikes, etc., which deprived a company of its free will in the matter of carrying out its contract with a former member of the union who had gone into business for himself and then sold out to the company on condition that it should employ him, the acts of the officers of the union were the proximate cause of damage to the former member thus deprived of employment, and gave him a cause of action against them.

**2. MASTER AND SERVANT §341—EVIDENCE OF UNLAWFUL INTERFERENCE BY LABOR UNION WITH EMPLOYMENT OF FORMER MEMBER.**

In an action by a former member of a labor union against its officers for damages through having procured the member's employing company to discharge him under threats of strikes, etc., evidence as to the rules, customs, and usages of the union, and as to the authority of its business agent, held sufficient to sustain the allegations of the petition.

**3. TRADE UNIONS §5 — ACTS OF BUSINESS AGENT BIND UNION.**

The officers and members of a labor union were bound by the acts of its business agent within the scope of his authority as such.

**4. TRADE UNIONS §5 — UNION LIABLE FOR ACTS OF BUSINESS AGENT IN THREATENING TO CALL STRIKE TO PROCURE DISCHARGE OF EMPLOYÉ.**

Where a labor union's business agent had authority to enforce its rules, if, in exercising such authority, he threatened to call a strike in the event the company employing a former member of the union did not cancel and annul the member's contracts, the officers and members of the union were liable for his acts, though they did not specifically give him authority to threaten any one.

**5. TRADE UNIONS §9—INSTRUCTION ON RATIFICATION OF ACTS OF BUSINESS AGENT SUSTAINED BY EVIDENCE.**

In an action against the officers and members of a labor union by its former member for damages to him when the business agent of the union by threats of strikes forced the company which employed the member and had contracted with him to discharge him and annul his contracts, instruction that, if defendant officers and members ratified the acts of the business agent of the union, verdict must be for plaintiff member, held sustained by evidence.

**6. TRADE UNIONS §5—UNION LIABLE FOR ACTS OF BUSINESS AGENT APART FROM MALICE.**

If the business agent of a labor union had authority to act for it in threatening strikes

against an employing company unless it discharged a former member of the union, the officers and members of the union were liable for the acts of the business agent and the manner in which he performed them, irrespective of malice toward plaintiff on their part.

**7. TRADE UNIONS §5 — UNION LIABLE FOR WRONGFUL ACTS OF AGENT REGARDLESS OF KNOWLEDGE.**

The members of a voluntary association, such as a labor union, are liable for the wrongful acts of the agent of the association within the scope of his authority, though they have no knowledge of such acts, and do not direct him in performing them or approve of their commission.

**8. MASTER AND SERVANT §341 — VERDICT AGAINST LABOR UNION OFFICIALS FOR PROCURING BREACH OF CONTRACT NOT EXCESSIVE.**

Verdict for \$1,200 punitive and \$55 compensatory damages rendered against officers and members of a labor union in favor of a former member on account of the union's wrongful acts in inducing his employing company to discharge him and breach its contracts with him held not excessive.

Appeal from St. Louis Circuit Court; J. Hugo Grimm, Judge.

Action by James L. Clarkson against Frederick Laiblan, or Frederick Laibly, and others. From judgment for plaintiff, defendants appeal. Affirmed.

See, also, 178 Mo. App. 708, 161 S. W. 660; Clarkson v. Garvey, 179 Mo. App. 9, 161 S. W. 664.

T. J. Rowe, of St. Louis, for appellants.  
Albert E. Hausman, of St. Louis, for respondent.

**BIGGS, C.** This is a damage action originally filed by James L. Clarkson against the defendants-appellants, and Patrick Garvey, John Lyons, and John F. Scarry, officers and members of a labor organization known as Local Union No. 1 of the International Brotherhood of Composition Roofers, Damp & Waterproof Workers of St. Louis and Vicinity. By reason of the death of Garvey, Lyons, and Scarry the suit against them was dismissed.

Plaintiff is a journeyman roofer by occupation, and the defendants are officers of the said roofers' union, which organization is affiliated with the central organization known as the Building Trades Council of the City of St. Louis.

At the time complained of the defendant Frederick Laiblan was the president of the said roofers' union, defendant Eugene Moriarity was vice president, defendant Michael McCarthy was recording secretary, Michael Shannon, financial secretary, Edward J. McCarthy, treasurer, William Holstein, doorkeeper, and Patrick F. Garvey was its bur-

ness agent. The other defendants, Ora Monday, Joseph P. Kelley, and Jerry Hurley, were members of the executive committee.

Upon a trial below there was a verdict in favor of plaintiff against all of the defendants upon the second count of plaintiff's petition in the sum of \$55 compensatory damages and \$1,200 punitive damages.

The said second count of the petition, after setting up the relations of the various parties to the suit, alleges, in substance, that the said local union at the times mentioned embraced within its membership 90 per cent. of the roofers of St. Louis and vicinity, and that under its rules, usages, and customs the members thereof are not permitted to work for any contracting roofer who does not refuse employment to all roofers not members of said union and who does not comply with the rules, usages, and customs thereof, and under said rules and customs no contracting roofer is permitted to employ any person who is not a member of said union under penalty of having a strike declared upon him by said union and a fine imposed upon him; that, by reason of embracing within its membership 90 per cent. of said roofers, said local union and its officers and agents controlled the employment of composition roofers by all of the larger and more important employers; that there is in St. Louis an unincorporated organization known as St. Louis Building Trades Council, and that there are in St. Louis voluntary associations of carpenters, painters, plumbers, tinnerns, plasterers, and other mechanics employed in the various trades connected with the erection of buildings in St. Louis and vicinity, which organizations are known as labor unions, and that said labor unions embrace within their membership about 90 per cent. of all mechanics employed in the building trades; that the said Building Trades Council is composed of representatives from the above-mentioned labor unions, and that the said roofers' union is represented and affiliated with said Building Trades Council; that, under the said rules and customs of the said Building Trades Council and of the other organizations therein represented, no members of any of said labor unions are permitted to work on any job in St. Louis if any workman who does not belong to said unions is found at work on said job or is permitted to work thereon, and that, if a mechanic who does not belong to said unions is found at work with mechanics who are members of said unions, the employer is required by the business agent of the organization to discharge said nonunion mechanic, and that, if said nonunion mechanic is not discharged, then, under the rules and customs of said unions and the said Building Trades Council, all the union men employed on the job are required to strike, and all union men employed by the employer are required to refrain from employ-

ment by said employer on any job until all nonunion men are discharged; that all union men engaged in work at the various building trades are required by their agreement with one another and with the various other unions to which they belong to refuse employment on any job whereon is engaged the employer of nonunion labor, and the said job in that event is designated an "unfair" job, and the employer of nonunion labor is fined by the said labor unions and the said Building Trades Council and compelled to pay said fine before he is permitted to employ any members of said labor unions, or work on any job whereon are employed any members of said above labor unions; that by reason of the rules and customs as stated the said roofers' union and the defendants, as agents and officers thereof, are enabled to prevent any employer of roofers in the city of St. Louis from employing plaintiff or contracting with plaintiff by coercing and intimidating said employer with a threat that, if they employ or contract with the plaintiff, the said defendants, as agents of said union, will order all manner of mechanics affiliated with said organizations referred to to quit their employment and to strike against their employers until the said employer or contractor with plaintiff shall cease all business relations with plaintiff; and that the said defendants will by virtue of the said rules and customs impose a fine on any one who employs or contracts with plaintiff, and will require all mechanics affiliated with the said labor unions to quit or cease their employment with any employer of plaintiff and to order a strike on any job where plaintiff is employed until the said fine is paid.

By said petition it is further alleged that plaintiff in 1903 was a journeyman roofer and a member of said roofers' union, and remained as such until 1906, when he became a contracting roofer, and by reason thereof was required to terminate his membership in said union; that while he was so engaged, and until February, 1909, he submitted to all the rules and customs of said roofers' union and employed only union men; that in February, 1909, plaintiff sold out his business as a contracting roofer to the St. Louis Roofing Company and secured employment with that company; that on February 22, 1909, while employed by the St. Louis Roofing Company as a journeyman roofer, the said defendants refused to permit plaintiff to work for said company under his said employment unless all of the unemployed members of said roofers' union who were in attendance at the plant of said roofing company were first placed at work, and that said union, by its agents and officers, the defendants, threatened that, if plaintiff was placed at work before the unemployed members of said union, its officers and agents would order and require all members of said roofers'

union to strike and refuse to work for said roofing company until such time as plaintiff should be discharged from the said employment; that by the said threat the said roofing company knew, and the said roofers' union and agents and officers also knew, that unless the said demand of said roofers' union, through its officers and agents, was complied with, and plaintiff discharged, said St. Louis Roofing Company would be declared an "unfair" or nonunion shop; and its business placed under what is known as a boycott, and the said roofers' union and its officers and agents would do all in their power to prevent said roofing company from doing any work in the city of St. Louis, and would prevent any and all workmen represented in said Building Trades Council from working before, with, or after the St. Louis Roofing Company on any job in the city, and further that the said roofing company would be fined by said roofers' union and compelled to pay said fine before said strike and boycott to its business would be removed by the said roofers' union and these defendants; that thereupon the said roofing company refused to permit plaintiff to begin work under his said employment, and that thereafter, on February 23, 1909, plaintiff sought to become a member of said roofers' union and tendered the required admission fee, but that his application for membership was wrongfully denied; that thereafter, on March 9, 1909, the plaintiff did again apply for membership, which membership, however, was wrongfully refused; that thereafter, on March 16, 1909, plaintiff entered into a contract with said St. Louis Roofing Company whereby it was agreed that plaintiff, as an independent contractor, should procure labor and help and place under roof for said roofing company houses in the city of St. Louis, which contract was to obtain until dissolved by mutual consent of the parties; that said plaintiff began work under said contract on March 16, 1909; and that on March 20, 1909, the defendants and said roofers' union, acting through these defendants, as its authorized agents, did notify plaintiff, and did notify the said St. Louis Roofing Company, that unless the contract under which plaintiff was then working, and all other contracts between said roofing company and plaintiff, whereby plaintiff was employed to roof houses for said company, were canceled and annulled and plaintiff refused permission to work thereunder, or to work on any job as a roofer for said roofing company, they, the said roofers' union and its officers and agents, being the present defendants, would cause and require all members of said roofers' union to quit work and to refuse to work for said roofing company until such contracts should be annulled, and it threatened to call a strike against said St. Louis Roofing Company unless plaintiff

was prevented from working under his said contracts.

It is further alleged that thereupon, and in order to escape a total interruption of its business and also great loss and delay and also violence to its property, said roofing company did annul its contracts with plaintiff and did order plaintiff to discontinue all work for it; that by calling a strike defendants and said roofers' union intended to convey to said roofing company and said roofing company knew that no other workmen would be permitted to take the place of those who were required to quit at the order of said roofers' union and its officers and agents, and that its business could only be carried on with immediate danger of violence to its officers and property, and that its jobs would be declared "unfair" and that no mechanic belonging to any union affiliated with the Building Trades Council would be permitted to work for said roofing company on any job of work it might have in St. Louis.

By said count it is further alleged that said roofers' union and its officers and agents, being these defendants, did willfully and maliciously conspire together and with each other to prevent plaintiff from following his trade as a roofer, and have willfully and maliciously conspired together and with each other to cause plaintiff to lose his employment and contracts with said St. Louis Roofing Company, and that the said acts were malicious, and that by reason thereof plaintiff has been caused to lose his said employment and contracts with St. Louis Roofing Company, to his loss and damage.

After unsuccessfully demurring to the said second count of the petition, defendants filed an answer by way of general denial.

After the verdict as heretofore stated and the filing and overruling of a motion for new trial, the defendants have appealed to this court, assigning errors as follows:

(1) That the said second count fails to state facts sufficient to constitute a cause of action.

(2) That there is no evidence in the case tending to support the allegations of the petition.

(3) That the court should have instructed the jury that the plaintiff could not recover.

(4) That the court erred in refusing to give defendants' instructions.

(5) That the court erred in giving plaintiff's instructions.

And, lastly, that the punitive damages are excessive.

It will not be necessary to go into the details of the evidence disclosed by the record, for the reason that the facts have heretofore been stated in two opinions delivered by this court, and reference is here made to those opinions for a full statement of facts. See *Clarkson v. Laiblan et al.*, 178 Mo. App. 708,

161 S. W. 660, and *Clarkson v. Garvey*, 179 Mo. App. 9, 161 S. W. 664.

We have examined the records upon which these opinions were based, and find that they do not substantially differ from the evidence adduced by the plaintiff in the present case.

In the first of the above opinions this court, through Norton, J., after fully stating the facts, affirmed the decree of the lower court which granted to the plaintiff an injunction against these defendants which enjoined them from continuing the acts complained of in the petition. It was there held under the evidence that the actions of Garvey, the business agent, were unlawful, and that, as his acts were done under the established rules and customs of the union, the other defendants, who were officers of the union, were with him guilty of an unlawful conspiracy, and that all of them should be enjoined.

These same acts of defendant Garvey are now the basis of this action for damages. If the said acts were unlawful, as this court held, and should be enjoined, it necessarily follows that the said acts can form the basis for a suit for damages.

The gist of the second count is to the effect that by reason of the unlawful acts of defendant Garvey as business agent of the union the St. Louis Roofing Company was caused to annul its contracts with the plaintiff. The question presented by the demurrer is whether the alleged procurement by the defendants of breaches of contract which the roofing company had with the plaintiff can form the basis of a cause of action by plaintiff against the defendants. It is alleged in the petition, in substance, that by reason of threats and intimidation and fear of a strike which was threatened the St. Louis Roofing Company was caused to breach the contract with plaintiff.

[1] We think the demurrer was well ruled, and that, where the defendants, through their agent, as alleged, resorted to methods which in effect deprived the St. Louis Roofing Company of its free will in the matter of carrying out the contract with plaintiff which it desired to do, in that case the acts of the defendants would be considered the proximate cause of the damage, and therefore as giving a cause of action. *Clarkson v. Laiblan et al.*, 178 Mo. App. 708, 161 S. W. 660; *Door Co. v. Fuelle*, 215 Mo. 421, 114 S. W. 997, 22 L. R. A. (N. S.) 607, 128 Am. St. Rep. 492; *Carter v. Oster et al.*, 134 Mo. App. 146, 112 S. W. 995; *Berry v. Donovan*, 188 Mass. 353, 74 N. E. 603, 5 L. R. A. (N. S.) 899, 108 Am. St. Rep. 499, 3 Ann. Cas. 738; *Curran v. Galen*, 152 N. Y. 33, 46 N. E. 297, 37 L. R. A. 802, 67 Am. St. Rep. 496; *Giblan v. Amalgamated Union*, 2 K. B. (1903) 600; *Quinn v. Leathem*, [1901] Appeal Cases, 595; *Lucke v. Clothing Outters*, 77 Md. 396, 26 Atl. 505, 19 L. R. A. 408, 39 Am. St. Rep.

421; *Brennan v. United Hatters*, 73 N. J. Law, 729, 65 Atl. 165, 9 L. R. A. (N. S.) 254, 118 Am. St. Rep. 727, 9 Ann. Cas. 698; *Sutton v. Workmeister et al.*, 164 Ill. App. 105.

Having held that the demurrer was properly overruled, it follows that the second and third assignments of error of the defendants should likewise be overruled in the event there was evidence in the record to substantiate the allegations of the second count of the petition.

[2] While the evidence in the record is conflicting as to the rules, customs, and usages of the union and also as to business agent Garvey's authority, we think there is sufficient evidence in the record to uphold the verdict of the jury in behalf of plaintiff.

On the question of the rules and customs promulgated by the union, witness Michael McCarthy testified that Garvey was the business agent of the union and made his report to the union at its meetings, and that there was a rule of the union to the effect that the employers, including St. Louis Roofing Company, had to do their own work and were not allowed to subcontract it out, and the St. Louis Roofing Company could not, under the rules of the organization, subcontract any part of its work to any man, and no union man is allowed to take a subcontract.

As heretofore stated, the record is substantially the same, as far as plaintiff's evidence is concerned, as presented to this court in the injunction suit between the same parties, being the case of *Clarkson v. Laiblan et al.*, 178 Mo. App. 708, 161 S. W. 660. In that case Judge Norton (178 Mo. App. loc. cit. 715, 161 S. W. 662) says:

"And it appears clear enough that Garvey's threats, communicated first to the foreman and then to the manager of plaintiff's employer, caused him to lose his position as a foreman of the gang and afterwards occasioned the cancellation of his several contracts. Besides the testimony of the manager of the St. Louis Roofing Company that he canceled plaintiff's contracts in order to obviate the trouble and loss which would be entailed as a result of Garvey's 'pulling off his men,' or ordering a strike, plaintiff testified: 'Mr. Holland told me that they was too busy to have any trouble, and he says, 'I will have to take them contracts away from you.''"

Further, on page 716 of 178 Mo. App., on page 663 of 161 S. W., the opinion says:

"Here it appears, and this, too, without contradiction, that Garvey represented the other defendants, all of whom are officers of Local Union No. 1, in threatening to pull off the union men employed by plaintiff's employer, the St. Louis Roofing Company, unless it terminated all beneficial business relations with plaintiff. The evidence is abundant that Garvey was acting within the scope of his authority as business agent of the union and carry-

ing out both the letter and the spirit of its rules and regulations in so doing. \* \* \*

"Here, though the organization of the union and the membership therein were entirely proper and lawful, the end sought to be achieved in coercing plaintiff's employer to discharge him and to terminate and refuse further beneficial business intercourse with him was unlawful. Therefore, the confederation being present, a conspiracy against the rights of plaintiff appears well established."

On page 717 of 178 Mo. App., on page 663 of 161 S. W., it is further said:

"The evidence reveals that the rules and regulations of the union, with which all of defendants were affiliated and in which they occupied the several offices, forbade the employment of nonunion workmen either before, with, or to follow union workmen, unless specially authorized. Moreover, it appears to be the duty of the business agent, defendant Garvey, to proceed, as the representative of the union and its members, to enforce the regulations in respect of such matters. This being true, it is entirely clear that, though Garvey was the only one of the defendants actively pursuing the plaintiff and coercing his employer, he did so at the behest of all under the established regulations and customs of the union.

"It seems to be tacitly conceded in the brief that a case is made against Garvey, but it is argued that the evidence fails to show he was authorized to call a strike or 'pull off the men' as he threatened. It appears plaintiff had been a member of the union theretofore, and that Mr. Holland, manager of the St. Louis Roofing Company, had employed its members for years. Both of these witnesses testified that Garvey possessed authority in this behalf, and, indeed, the entire evidence affords a strong inference to that effect."

The defendants contend that they knew nothing about Garvey's conversation with the manager of the St. Louis Roofing Company, and that Garvey had no authority as the business agent to make a threat that the men would strike, and, further, that there was a failure of proof in the case to support the allegation of the petition to the effect that the defendants notified plaintiff and the St. Louis Roofing Company that, unless the contract under which plaintiff was working and all other contracts between the St. Louis Roofing Company and the plaintiff were canceled and annulled, the roofers' union would cause and require the members of the union to quit work and to refuse to work for the St. Louis Roofing Company until such contracts were annulled.

[3] While it is true that there is no specific by-law of the union which conferred authority upon Garvey, the business agent, to order a strike, it does appear clearly from the evidence that it was his duty to visit the union shops at regular intervals to see that none but union men were employed, and according to the testimony of Mr. Laiblan, the president of the union, he (Garvey) was to

use his own judgment. It appeared that sometimes he reported his action to the union, and sometimes he did not. Garvey was the only business agent of the union, and had acted as such for many years, and he testified that he reported to the union that he caught Clarkson doing St. Louis Roofing Company work and had taken the matter up with Mr. Holland, the manager, and had adjusted the matter. While the evidence does not show what specific action the union took on the report, there is nothing in the evidence showing that Clarkson's acts were ever disapproved. In addition, the testimony of Clarkson himself, and also of Mr. Holland, the manager of the St. Louis Roofing Company, was to the effect that Garvey had authority as the business agent to call a strike. It is plain from the evidence that Garvey notified both the plaintiff and the St. Louis Roofing Company that, unless the roofing company canceled its contracts with Clarkson, he would require the members of the union to quit work and to refuse to further work for the St. Louis Roofing Company until such contracts were annulled. As the evidence tended to show that these acts on the part of Garvey were within the scope of his authority as business agent of the union, the officers and members of the union, being these defendants, were bound thereby.

It follows from this that there was evidence in the case tending to support the allegations of the petition, and that the court did not err in failing to give defendants' peremptory instruction to the effect that plaintiff could not recover.

Defendants' objection to the main instruction given on behalf of the plaintiff is to the effect that there is no evidence in the case that Garvey, as business agent, had any authority to threaten to call a strike of the employees of the roofing company, and to threaten to interfere with the business of the St. Louis Roofing Company and to cause it loss unless it ceased all contractual relations with the plaintiff, and, further, that the instruction is erroneous because there is no evidence in the case that Garvey threatened to cause the St. Louis Roofing Company loss unless it ceased its contractual relations with the plaintiff.

[4] What has been heretofore said answers this contention of appellants. There being evidence of Garvey's authority to enforce the rules of the roofers' union, if in exercising that authority he threatened to call a strike in the event the roofing company did not cancel and annul Clarkson's contracts, defendants would be liable for his acts, although they did not specifically give him any authority to threaten anyone.

We do not think the instruction as given was erroneous, and find that there was sufficient evidence in the record to support it.

[5] Complaint is made of the second in-

struction given to the jury on the ground that there is no evidence upon which to bottom that part of the instruction which told the jurors that, if defendants ratified the acts of Garvey, they must find a verdict for the plaintiff. The part of the instruction complained against is as follows:

"And if you further find that in making such threats of a strike on the part of said employes (if you find he made such threats) Garvey was acting within the scope of the authority conferred upon him by Local Union No. 1 as its business agent, or that his acts were subsequently ratified by the defendants, then you must find a verdict in favor of plaintiff," etc.

While there is considerable testimony to the effect that none of the defendants knew anything about Garvey's interview with Mr. Holland, the manager of the St. Louis Roofing Company, on March 20, 1909, the evidence shows, through the testimony of Patrick Garvey, that he did report to the union the fact that he caught Clarkson doing St. Louis Roofing Company work, and that he took the matter up with Mr. Holland, and that Mr. Holland said that things would be made satisfactory.

It is true that the evidence does not show what action the members of the union took on the report, but it does appear from Garvey's testimony that he was never advised by any of the officers of the union after the report was made that they disapproved of what he had done in the matter. We think this was sufficient evidence to justify the language of the instruction, and that from that evidence the inference might be drawn that the union ratified Garvey's acts.

[6] Error is also assigned because of the refusal of the court to give three instructions asked on behalf of the defendants. The first of these instructions told the jury that there was no evidence tending to prove that the defendants were guilty of any malicious act against the plaintiff. It was not error to refuse this instruction; for, if Garvey had authority to act for the union, the defendants were liable for his acts and the manner in which he performed them.

[7] The second instruction, which was refused, told the jury that the members of a voluntary association are not liable for the wrongful acts of an agent of said association, unless they had knowledge of such wrongful acts and either directed him in the performance of the same or approved of their commission. We do not consider this a correct proposition of law; for we see no reason why a voluntary association should not be liable for the wrongful acts of an agent in the event he had authority to act and did so within the scope of his said authority, and in the event he chose to perform his duties in an unlawful manner, we think the members

of a voluntary association would be liable for his acts.

The third refused instruction was a peremptory instruction to find for the defendants, and from what has been heretofore said it was not improper to refuse this character of instruction.

[8] Defendants make the further point that the punitive damages assessed are excessive. The verdict was for the sum of \$1,200 punitive damages and \$55 compensatory damages. It appeared that this cause has been before three juries, and that each of the juries rendered a verdict in behalf of the plaintiff, and in each case for damages in sums larger than was given in the present verdict. The acts of the defendants, through Garvey, the business agent, were necessarily humiliating and annoying to the plaintiff. There are eight defendants to bear the burden of this verdict. We do not think that the verdict under the circumstances is excessive.

We rule that the case was fairly tried under proper instructions. Finding no reversible error in the record, the commissioner recommends that the judgment be affirmed.

PER CURIAM. The foregoing opinion of BIGGS, C., is adopted as the opinion of the court.

The judgment of the circuit court is accordingly affirmed.

REYNOLDS, P. J., and ALLEN and BECKER, JJ., concur.

HILTON (SUBURBAN SUPPLY CO. et al., Interveners) v. UNIVERSAL CONST. CO. et al. (No. 16635.)

(St. Louis Court of Appeals. Missouri. Dec. 2, 1919. Rehearing Denied Jan. 6, 1920.)

1. MUNICIPAL CORPORATIONS  $\Leftrightarrow$  347(1)—UNDER CONTRACT AS TO MATERIAL EMPLOYED IN WORK, BUT SUBSEQUENTLY LOST, SURETY IS LIABLE.

Under a contract and bond between a sewer contractor, the city, and the surety, providing that the contractor should pay "the proper parties all amounts due for material and labor used and employed in the performance thereof," materialmen who had furnished coal consumed in the engines of the contractor and lumber used for bracing the walls of excavations and which had been subsequently lost or washed away by floods were entitled to recover; it not being necessary that the coal and lumber so furnished actually entered into the construction of the sewer, and it being sufficient that it was used and employed in the performance of the work, regardless of whether the items would have been lienable under Rev. St. 1909, § 8212.

**2. MUNICIPAL CORPORATIONS — 346 — CITY HAS POWER TO ENTER INTO PUBLIC IMPROVEMENT CONTRACT BROADER THAN THAT REQUIRED BY STATUTE.**

The city of St. Louis held to have power to enter into a contract for construction of a sewer which provided that the contractor should pay "the proper parties all amounts due for material and labor used and employed in the performance thereof," notwithstanding that the contractor's obligations to pay materialmen were broader thereunder than the terms of Rev. St. 1909, § 1247, requiring the contractor's bond to provide for "the payment of all material used in such work and for all labor performed in such work, whether by subcontractor or otherwise."

Appeal from St. Louis Circuit Court; W. M. Kinsey, Judge.

Suit by R. L. Hilton against the Universal Construction Company and another, wherein the Suburban Supply Company and others intervened. From a judgment for interveners, defendant named appeals. Affirmed.

See, also, 212 S. W. 867.

Kinealy & Kinealy, of St. Louis, for appellant.

John B. Denvir, of St. Louis, for respondents.

**BIGGS, C.** This is a suit in the nature of an equitable garnishment against the Universal Construction Company and the City of St. Louis for materials sold to a subcontractor of a prime contractor for public work. The suit was instituted in behalf of the Hunkins-Wilkins Lime & Cement Company and R. L. Hilton, alleging that the city entered into a contract with the defendant Universal Construction Company for the construction of a public sewer, which contract provided that the city should pay for same on monthly estimates of the amount of work performed and should retain 15 per cent. until the completion of the work; that the plaintiffs furnished materials to a subcontractor on the work, J. W. Farley & Co., and to their trustee, they having afterwards been declared a bankrupt. The prayer of the petition was for an order on the city to pay out of the retained percentage in its possession the amount due the plaintiffs, the sewer having been completed.

The suit as to the original plaintiffs was afterwards dismissed on their applications, and they were permitted to withdraw; their claims having been paid and discharged. In the meantime, however, intervening petitions were filed in the suit in behalf of the Suburban Supply Company, the Lorimer & Gallagher Company, and Lumaghi Coal Company.

In their intervening petitions the Suburban Supply Company and the Lumaghi Coal Company repeat substantially the allegations con-

tained in the plaintiffs' petition, and allege that they had furnished to the subcontractor, Farley & Co., coal which was used by said Farley & Co. for the construction of said sewer, and that their claims against said subcontractor remain unpaid; the Suburban Supply Company alleging that there was due to it \$425.74, and the Lumaghi Coal Company alleging that the value of the coal furnished by it was \$822.06.

The Lorimer & Gallagher Company by its intervening petition repeat substantially the allegations of the plaintiffs' petition, and alleges that it furnished material in the shape of lumber to the subcontractor on said sewer of the reasonable value of \$359.63, which lumber was used in the construction of said sewer, and which sum remains due and unpaid.

All of these interveners pray for an order on the city to pay to them out of the fund in the city's possession belonging to the Universal Construction Company the amounts claimed in their respective intervening petitions.

The defendant, Universal Construction Company, denied generally the allegations of the intervening petitions.

The cause, upon motion of the plaintiffs, was referred to a referee, who, after hearing the evidence, filed a report recommending that as to the claims of the Suburban Supply Company and Lumaghi Coal Company a judgment be rendered in favor of the defendants, and as to the claim of Lorimer & Gallagher Company for furnishing the lumber it was recommended that a judgment be rendered in favor of intervenor Lorimer & Gallagher Company in the sum of \$358, being the reasonable value of the lumber furnished, and that the same be paid out of the money in the hands of the city of St. Louis.

On exceptions being duly filed to the referee's report, the circuit court overruled the exception filed by the defendant, Universal Construction Company, to that part of the report recommending judgment in favor of Lorimer & Gallagher Company, and sustained the exceptions filed on behalf of the Suburban Supply Company and the Lumaghi Coal Company, and thereupon entered judgment in behalf of these interveners for the amounts reported by the referee, being the reasonable value of the materials furnished as found by him, and ordered that the interveners be paid their respective claims out of the fund adjudged to be due Universal Construction Company from the city of St. Louis.

After taking the customary steps, the defendant, Universal Construction Company, appealed the cause to the Supreme Court. That court transferred the cause to this court, holding that the amount involved was within our jurisdiction, and that the city was a mere nominal party and did not appeal. Hil-

ton et al. v. Universal Const. Co. et al., not yet officially reported, but see 212 S. W. 867.

The contract under which the work was let is a combination contract and bond between the Universal Construction Company, the city of St. Louis, and the Fidelity & Deposit Company, which signed as security for the faithful performance of the contract on the part of the Universal Construction Company. By this contract and bond it is provided that, if the contractor shall fail to pay the laborers employed on the work or to pay for materials used therein, the sewer commissioner may withhold his certificate for everything in excess of 85 per cent. of the value of the work done until he shall be satisfied that all claims for labor or materials are paid. In addition, the said contract and bond provides that the Universal Construction Company shall pay the proper parties all "amounts due for material and labor used and employed in the performance thereof."

There is little dispute in the record as to the essential facts. As to the coal claims of the Suburban Supply Company and Lumaghi Coal Company, it appears from the record that this coal was furnished and delivered by the interveners to a subcontractor, Farley & Co., and was used by the said subcontractor for making steam in locomotives drawing small cars, carrying materials used in and about the sewer in question, upon a track running from one end of the sewer to the other, and also for carrying dirt along the side of the sewer as the dirt was taken from the trench, which dirt was taken out of the trench with a steam shovel and dumped onto the cars, which cars were moved from one place to another, along the sewer; that is, the dirt was placed on the cars with the steam shovel and taken from the trench at one place and moved to another place and dumped back into the sewer from the cars after the masonry and brickwork was completed. The coal was also used for operating stationary engines which furnished the power for the steam shovel and also for machines which hoisted and moved the materials which were taken from and placed in the sewer.

As to the lumber claim of the Lorimer & Gallagher Company, it appears that this lumber was furnished to the subcontractor for the purpose of bracing up the sides of the ditch to keep it from caving in while the men were engaged in the work of putting in the brickwork and masonry. It is unquestioned that the lumber in the amount claimed by this intervenor was delivered to the subcontractor which used it for the purpose stated. It appeared that a part of the lumber was left in the ditch after the work was completed, as they were unable to remove it, and that, however, they did remove a part of it, which part had been used for the purpose stated, and there is evidence to the effect that after it was removed it was washed away

by floods of the River Des Peres. When the contractor left the work, none of the lumber was taken away from the work; it was either left in the ditch, they being unable to remove it, or it was washed away by the floods.

The question presented by this appeal is whether this material in the form of coal and lumber used in the manner heretofore stated is "material" within the terms of the contract and bond referred to between the contractor and the city.

As to the coal claims, appellant contends that this material furnished as it was did not actually enter into the construction of the sewer, and therefore could not form the basis of a materialman's lien under our statute, and that under the terms of the contract and bond in suit the interveners could only recover for such items of material as were lienable under our lien statute, being section 8212 of the Revision of 1909.

As to the lumber claim, the appellant contends that as to that part of the lumber which was used up in the construction of the sewer the intervenor would be entitled to recover, but appellant contends that as the evidence shows that a part of this lumber was washed away in the floods and not used up, and that, inasmuch as the evidence fails to disclose which part was washed away and which part was used, it was error on the part of the circuit court to allow the intervenor Lorimer & Gallagher Company to recover for any sum.

The state statute, section 1247, R. S. 1909, requires that in public work of this character the authorities shall require a bond of the contractor conditioned "for the payment for all material used in such work and for all labor performed in such work, whether by subcontractor or otherwise."

The courts of this state have held that the general purpose of the statute in requiring bonds from the contractor is "to afford to those furnishing material and labor on public work, which cannot be subjected to a mechanic's lien, the same measure of protection as is afforded by the mechanic's lien law where the improvement is not of a public character. State, to the use of Supply Co., v. Construction Co., 175 Mo. App. 555, loc. cit. 562, 158 S. W. 98. It does not follow from this, however, that all material furnished on account of public work must be such articles as would be lienable under our mechanics' lien law in order to allow a plaintiff to assert a claim against a contractor who furnished material to a subcontractor on public work.

It is our opinion that the question as to whether these interveners are entitled to recover for this material hinges upon the proposition as to whether the material as furnished comes within the terms of the contract and bond in evidence, and is not dependent upon the question as to whether or not the



material as furnished was lienable under our mechanics' lien statute. As heretofore stated, the statute provides that the bond shall be conditioned for the payment of all material used in said work, whether by subcontractor or otherwise. The bond and contract in the present case appears to be broader than required by the statute, and provides that the contractor shall pay the proper parties for all amounts due for "material and labor used and employed in the performance thereof." While it may be true, as contended by appellant, that the coal and that part of the lumber which was used in the performance of the contract but which was afterwards washed away by the floods did not actually enter into the construction of the sewer so as to form the basis for a materialman's lien, still from our viewpoint of this case it is not necessary for us to here decide that proposition.

[1] Under the broad terms of this contract and bond, the defendant, Universal Construction Company, obligated itself to pay the proper parties for all material used and employed in the performance of the work. It is plain from the evidence that this coal and all of the lumber was used by J. W. Farley & Co. in the performance of the work contemplated by the contract.

In the event the contract and bond was not broader than the statute, it would have been necessary for the evidence to have disclosed that the material was used in the work of constructing the sewer. We, accordingly, hold that, under the provision contained in the bond and contract heretofore quoted, it was not incumbent upon the interveners to show that the coal and lumber furnished by them actually entered into the construction of the sewer. It was sufficient, in order to entitle them to recover, that the evidence disclosed that the lumber and coal was used and employed in the performance of the work contemplated by the contract.

[2] In their zeal to carry out the obligation placed upon them by the statute, the city officials inserted provisions in the contract and bond which were broader than was required by the statute. The question may well be raised whether the city had power

under the law to enter into such a contract and place stipulations therein in regard to the obligation of the contractor to pay materialmen on the work which are broader than the language specified in the statute, section 1247.

Whatever may be the law in other jurisdictions, it seems to be well settled in this state that the city has full power and authority to enter into the contract and bond in question. *Public Schools v. Wood*, 77 Mo. 197; *Glencoe Lime & Cement Co. v. Von Phul*, 133 Mo. 561, 34 S. W. 843, 54 Am. St. Rep. 695; *Devers v. Howard*, 144 Mo. 671, 48 S. W. 625. For other authorities from other jurisdictions, see note to *Knight & Co. v. Castle (Ind.)* 27 L. R. A. (N. S.) 573, loc. cit. 581; *Jenkins v. Chesapeake & Ohio R. R. Co.*, 49 L. R. A. (N. S.) 1183.

The case of *Kansas City Sewer Pipe Co. v. Thompson*, 120 Mo. 221, 25 S. W. 522, which seems to state a contrary rule, was overruled in the *Von Phul Case*, 133 Mo. 561, 34 S. W. 843, 54 Am. St. Rep. 695.

The contract and bond in suit under these authorities is not ultra vires the corporation, and the city having the general power to build sewers has the implied power of imposing the obligation upon the contractor to pay those who furnished labor and materials used and employed in the performance of the contract, regardless of the express power given to the city by section 1247 of the statute.

In view of the fact that the evidence disclosed that the coal and all lumber furnished by these interveners was used and employed by the subcontractor in the performance of the work, they are entitled to recover. The commissioner recommends that the judgment be affirmed.

PER CURIAM. The foregoing opinion of BIGGS, C., is adopted as the opinion of the court.

The judgment of the circuit court is, accordingly, affirmed.

REYNOLDS, P. J., and ALLEN, J., concur. BECKER, J., not sitting.

**E. O. BARNETT BROS. v. BROWN. (No. 8.)**

(Supreme Court of Arkansas. Nov. 24, 1919.  
Rehearing Denied Jan. 12, 1920.)

**1. SALES §263—IMPLIED WARRANTY OF TITLE.**

There was an implied warranty of title in the sale of a mare.

**2. JUDGMENT §707—NOT BINDING ON ONE NOT A PARTY.**

The buyer of a mare involved in litigation between the sellers and a third person not being a party to such litigation, his rights were not affected by it.

**3. SALES §442(13)—NO ALLOWANCE FOR USE OF PROPERTY ON BREACH OF WARRANTY OF TITLE.**

Where a mare was sold and used by the buyer, but the title failed, so that he sued to recover the price paid, the sellers are not entitled to a credit for the money value of the use of the mare while the buyer had her.

**4. SALES §393—BREACH OF WARRANTY; RECOVERY OF VOLUNTARY PAYMENTS.**

Where a mare was sold under an implied warranty of title and the assurance of title which the sellers were asserting in litigation with a third person, the sellers cannot resist the buyer's suit to recover the price paid after a failure of title, on the ground that any payments of purchase money were voluntarily made; the payments having been made before final termination of the litigation which determined title to the mare.

Appeal from Circuit Court, Hot Spring County; Jno. C. Ross, Judge.

Suit by Mose Brown against E. O. Barnett Bros. From judgment for plaintiff, defendants appeal. Affirmed.

Oscar Barnett, of Malvern, for appellant.  
Andrew I. Roland, of Malvern, for appellee.

SMITH, J. Appellee, Mose Brown, sued the appellants, E. O. Barnett Bros., to recover the sum of \$125, the purchase price of a horse bought by him from them, with interest from June 17, 1918, the date upon which the horse was taken from appellee's possession, alleging a breach of the warranty of title.

This cause was heard in the court below on an agreed statement of facts, and in the judgment of the court there was incorporated a summary of these facts, with accompanying declarations of law applicable thereto. From that judgment we copy the findings which there appear:

"The court makes the following findings herein:

"First. That at the time of the sale of the mare by defendants to the plaintiff here the defendants, E. O. Barnett Bros., had no title to the mare.

"Second. That at the time of the sale the plaintiff, Mose Brown, did not know of any litigation about the mare.

"Third. That at the time of the payments to the defendants by the plaintiff here for the mare the plaintiff, Mose Brown, was relying on the advice and instructions of his attorney, Oscar Barnett, of the firm sued here. That the title to the mare was in the defendants, Barnett Bros.

"Fourth. That at the time of the payments as above the plaintiff, Mose Brown, did not know and could not know that the title would be adjudged to be in Joe Porter for the reason that the payments were made in October and November, 1917, and that the Supreme Court did not finally adjudicate the case until May 6, 1918.

"Fifth. That there was a breach of warranty in the sale of the mare by the defendants to the plaintiff."

These findings—which the agreed statement of facts appears to warrant—leave but little for us to decide.

[1] There was an implied warranty of the title; and that title failed.

[2, 3] Appellants say, however, that the horse had a usable value to appellee, which should have been assessed and credited upon the purchase price, and that this is especially true, inasmuch as the usable value of the horse was assessed by the court and jury in the litigation between appellants and Porter. But appellee here was not a party to that litigation, and his rights were not affected by it. It is true that appellee had the use of the mare from the time he purchased her until she was taken away from him at the conclusion of the Barnett and Porter litigation, and that this use had a money value, and that the court below refused to assess it and credit it on the purchase price. But no error was committed in that respect. In 35 Cyc. at p. 612, in the article on Sales, the law is announced as follows:

"Where the goods have been delivered to and used by the buyer, who subsequently rescinds the sale and sues to recover the purchase price, it has been held that there should be no allowance to defendant for the value of such use or to plaintiff for the interest on his money, but that the one should offset the other."

The reason for the rule stated which is given in the cases cited in the note to the text is that the seller cannot, through the failure of the title, which he has impliedly warranted, change the attitude of the purchaser to that of a mere hirer.

[4] It is also asserted that the payments of purchase money were voluntarily made, and cannot therefore be recovered. But they were made, not only under an implied warranty of title, but under the assurance of a title which the Barnetts were vigorously asserting in litigation which they finally prosecuted to this court. These payments were made be-

fore the final termination of the litigation between the Barnetts and Porter, and before the mare had been taken from appellee's possession, and at a time when, according to the finding of the court below, appellee was relying upon the assurance of one of the appellants that the title was good notwithstanding the litigation.

The court below rendered judgment for the purchase price of the horse, with interest thereon, from the day she was taken out of appellee's possession, which judgment was correct, and is therefore affirmed.

# FIRST NAT. BANK OF MENA v. ALLEN et al. (No. 71.)

(Supreme Court of Arkansas. Dec. 22, 1919.)

## 1. COMPROMISE AND SETTLEMENT ¶6(2) — LIABILITY UPON SETTLEMENT OF DISPUTED CLAIM WHERE PAYMENT OF CHECK WAS STOP- PED.

Transferee of \$50 check, who received and disposed of check as one for 50 cents, was liable to drawee bank, which had cashed check without drawer being a depositor therein, where transferee and bank had settled their dispute by bank surrendering check to transferee for another check to bank drawn by third party as an accommodation party, though third party subsequently stopped payment on his check; the compromise being a sufficient consideration to make transferee liable, notwithstanding stopping of payment on third party's check.

## 2. COMPROMISE AND SETTLEMENT ¶8(4) — COMPROMISE OF DISPUTED CLAIM WITHOUT MERIT VALID.

The compromise of a disputed claim furnishes sufficient consideration to uphold the terms of a compromise, even though the asserted claim is without merit and could not have been sustained in the courts.

## 3. BILLS AND NOTES ¶23—MAKER LIABLE TO ONE GIVING CHECK AS ACCOMMODATION.

Where dispute between bank and indorser on check cashed by bank was compromised by return of check to indorser in consideration of third party executing check to bank, the third party, under Negotiable Instruments Act, § 29, was liable on his check, on which he had stopped payment, notwithstanding the fact that it was executed as an accommodation.

Appeal from Circuit Court, Polk County; Jas. S. Steel, Judge.

Action by the First National Bank of Mena against T. A. Allen and another. Judgment for defendants, and plaintiff appeals. Reversed and remanded.

The First National Bank of Mena commenced this suit against T. A. Allen and C. E. Sutton before a justice of the peace to recover the sum of \$50. From a judgment ren-

dered against them, the defendants duly appealed to the circuit court, where the case was tried de novo.

The facts are as follows: C. E. Sutton and his daughter, Eva Sutton, were conducting a restaurant in the city of Mena, and the daughter received a check from Fred Fonsworth, a customer, drawn in favor of her father on the First National Bank of Mena. She supposed the check was for 50 cents, and received it for that sum. She had authority to indorse checks payable to her father and indorsed the one in question to another customer in making change for \$5. She still supposed the check was for 50 cents. Some unknown person carried the check to the First National Bank of Mena and presented it without indorsing it, and it was cashed by that bank. It turned out that the check was for \$50 instead of 50 cents. At the close of the day's business, the First National Bank found out that Fonsworth was not a customer of it and called up the Planters' State Bank and was told by the officers of that bank that Fonsworth was its customer, but that he did not have enough funds in the bank to pay the check.

The president of the First National Bank of Mena found out from the Suttons that the check was intended to be for 50 cents instead of \$50. The bank insisted that Sutton was liable to it on his indorsement because the check was intended to be drawn on the Planters' State Bank and was drawn on the First National Bank by mistake.

On the other hand, Sutton claimed that, the check being drawn on the First National Bank and cashed by it, he was only liable to the bank for the sum of 50 cents, for which sum the check was intended to be drawn. In settlement of their dispute, T. A. Allen as an accommodation to C. E. Sutton gave the bank his check on the Planters' State Bank of Mena for \$50, and the bank turned over the check of Fonsworth to Sutton. Before the check was presented to the bank for payment, Allen notified it not to pay the check. Hence this lawsuit.

The case was tried before a jury, which returned a verdict for the defendants, and from the judgment rendered the plaintiff has appealed.

Norwood & Alley, of Mena, for appellant.  
Prickett & Pipkin, of Mena, for appellees.

HART, J. (after stating the facts as above). [1, 2] The court instructed the jury that, if Mr. Sutton received the check as 50 cents and disposed of it as 50 cents, neither he nor Allen were liable to the plaintiff. This was wrong. The check drawn by Fonsworth on the First National Bank in favor of Sutton was plainly written for \$50, al-

though Sutton received it for 50 cents. He indorsed the check. Inasmuch as he was not a customer of the First National Bank and was a customer of the Planters' State Bank, it was supposed that he had made a mistake and used one of the blank checks of the former bank, when he in fact intended to draw the check on the latter. The Planters' State Bank, however, refused to pay the check because Fonsworth did not have sufficient funds to meet it. Under this state of facts, the plaintiff bank approached Sutton and claimed that he was liable for the whole of the \$50. Sutton claimed that, inasmuch as the check was drawn on the First National Bank and it had cashed it, he was only liable on his indorsement for the sum of 50 cents; that being the amount for which he had received the check. The parties settled their dispute by the bank surrendering to Sutton the check which Fonsworth had drawn in favor of Sutton, and Sutton gave to the bank the check of Allen for \$50; Allen being an accommodation drawer for him. This was the settlement or compromise of a disputed claim between Sutton and the First National Bank of Mena, and it is well settled in this state that the compromise of a disputed claim furnishes sufficient consideration to uphold the terms of a compromise, even though the asserted claim is without merit and could not have been sustained in the courts. *Willingham v. Jordan*, 75 Ark. 286, 87 S. W. 424; *Fender v. Helterbrandt*, 101 Ark. 335, 142 S. W. 184; and *Simonson v. Patterson*, 213 S. W. 23, and cases cited.

[3] It follows that the compromise between the bank and Sutton furnished a sufficient consideration to make Sutton liable to the bank for the \$50 when Allen stopped payment on his check which had been given in satisfaction of the claim of the bank. The surrender by the bank of the original check drawn in favor of Sutton by Fonsworth was a sufficient consideration moving from it. Allen was also liable as an accommodation party under our Negotiable Instruments Act. Acts 1913, p. 260. Section 29 reads as follows:

"An accommodation party is one who has signed the instrument as a maker, drawer, acceptor, or indorser, without receiving value therefor, and for the purpose of lending his name to some other person. Such a person is liable on the instrument to a holder for value, notwithstanding such holder at the time of taking the instrument knew him to be only an accommodation party."

In construing a precisely similar section of the Negotiable Instruments Act of the state of Massachusetts, the Supreme Court of that state said that where a defendant for the accommodation of a debtor and without consideration gives his note or check to

a creditor of the debtor in payment of, or as security for, the debt due from the debtor to the creditor, he is liable to the creditor on the note or check. *Neal v. Wilson*, 213 Mass. 336, 100 N. E. 544. In that case the court further said that the fact that the creditor knew the check was given for the accommodation of the debtor was not a defense, for that was the purpose of the transaction. Under this decision and under the plain language of the statute just quoted, Allen was liable to the plaintiff bank.

It follows that the judgment must be reversed, and the cause remanded for a new trial.

#### DES ARC OIL MILL CO., Inc., et al. v. McLEOD. (No. 75.)

(Supreme Court of Arkansas. Dec. 22, 1919.)

#### 1. ABATEMENT AND REVIVAL §39—DISSOLUTION OF CORPORATION NOT ABATING PENDING SUIT; "CREDITOR"; "DEBT."

Under Kirby's Dig. §§ 953, 954, dissolution of corporation did not abate pending suit against it based upon claim for unascertained and unliquidated damages; the claimant being a "creditor," and the damages claimed constituting a "debt" within the protection of the law.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Creditor; Debt.]

#### 2. CORPORATIONS §617(5) — DISSOLUTION DOES NOT REQUIRE TRANSFER OF PENDING LAW ACTION TO EQUITY.

Dissolution of corporation, for which receiver has been appointed under Kirby's Dig. § 954, did not require that law action pending against corporation at time of dissolution be transferred to the court of equity having jurisdiction over receivership proceedings; but the demand will be reduced to judgment in the law court, and the judgment enforced in court of equity under such statute.

Appeal from Circuit Court, Prairie County; Geo. W. Clark, Judge.

Action by J. W. McLeod against the Des Arc Oil Mill, Incorporated, and others. From the judgment rendered, defendants appeal. Affirmed.

John F. Clifford, Price Shofner, and R. M. Mann, all of Little Rock, and F. E. Brown, of Des Arc, for appellants.

Brundidge & Neelly, of Searcy, and Emmet Vaughan, of Des Arc, for appellee.

SMITH, J. This is the third appeal in this cause and the facts out of which the litigation arises need not be re-stated here. *McLeod v. Des Arc Oil Mill Co.*, 131 Ark. 594, 199 S. W. 932;<sup>1</sup> *Des Arc Oil Mill, Inc. v.*

<sup>1</sup> Reported in full in the Southwestern Reporter; reported as a memorandum decision without opinion in 131 Ark. 594.

McLeod, 206 S. W. 655. At the trial from which this appeal was prosecuted instructions were given conforming to the law as announced in the former opinions, and no useful purpose would be served by reviewing them.

It is earnestly insisted, however, that a verdict should have been directed in favor of appellants; but there appears to be no substantial difference between the testimony on this appeal and that on the former appeals, and we have already twice held that the testimony made a case for the jury. It appears that after the second judgment had been rendered in the court below, and prior to the reversal of that judgment here, the corporation assigned its assets to one of its stockholders, and by unanimous vote of the stockholders a resolution was adopted dissolving the corporation. Before the trial from which this appeal was prosecuted a receiver was appointed on the prayer of one of the stockholders and officers, who was also a creditor, and a motion was made in the court below to transfer this cause to the Pulaski chancery court, where the receivership was pending. That motion was denied, and the cause proceeded to trial and judgment.

[1] A claimant for damages is a creditor (Papan v. Nahay, 106 Ark. 230, 152 S. W. 107; Horstmann v. La Fargue, 215 S. W. 729), and the damages claimed constitute a debt within the protection of the law; and we do not think the dissolution of the corporation abated appellee's suit for damages.

It is pointed out that at the common law, and in the absence of any saving statute, the dissolution of a corporation effectually abates all actions pending against it at the time of such dissolution, and it is asserted upon the authority of the opinion in the case of State ex rel. Attorney General v. Arkansas Cotton Oil Co., 116 Ark. 74, 171 S. W. 1192, Ann. Cas. 1917A, 1178, that we have no saving statute which prevents the abatement of suits for debt. That case, however, was a suit for a penalty, and, recognizing the rule of the common law stated above, we there held that our statute on the subject of the dissolution of corporations did not contain a saving clause making the corporation liable for penalties claimed against the corporation at the time of the dissolution. The statute on the subject is as follows:

"Sec. 953. If any corporation shall expire or cease to exist, either by its own limitation, judicial judgment or forfeiture of charter, or by legislative act, the common law in relation to corporations shall not be in force in relation thereto, but the goods and chattels, lands, tenements and hereditaments, and every right or profit issuing out of or appertaining thereto, moneys, credits and effects of such corporation, shall immediately vest in the state in trust for the uses and purposes by said charter contemplated; and each, every and all right, upon

the expiration or dissolution of said corporation, shall be and is in abeyance until the action of the Legislature shall be had thereon, unless provisions shall be made by law for the management of said corporation fund in contemplation of such dissolution.

"Sec. 954. Hereafter courts having equitable jurisdiction may make decrees upon the application of the stockholders or creditors of any corporation, to dissolve and wind up such corporation and to pay its debts and distribute its assets among the holders of the shares of stock thereof, in all cases where it shall be made to appear that such corporation is insolvent, and therefore unable to continue its business, and in all cases where it shall be made to appear that the corporation has ceased to transact business."

Kirby's Digest.

It will be observed that in express terms the common-law rule is abrogated, and courts having equitable jurisdiction are authorized to wind up such corporations and "to pay its debts and distribute its assets," and in the case of State ex rel. Attorney General v. Arkansas Cotton Oil Co., supra, we said of the statute quoted that it—

"does, as before stated, contain a provision for the payment of debts, and the distribution of assets, but this does not, for obvious reasons, apply to the recovery of a penalty."

And in the same case it was also said:

"(3) Since there is no provision in the statute for the payment of this kind of a claim against a dissolved corporation, it is plain that there can be neither a continuation of the action nor a revival thereof. Whether there would be an abatement of an action which does in effect survive under the statute, we need not stop to inquire, for the reason that that question is not raised here. We have before us the question of enforcement of a strictly penal statute, which does not survive under this or any other statute, no provision is made for the enforcement of such claim against a dissolved corporation, and it necessarily follows that the action does not survive even where the dissolution takes place after the commencement of the action."

[2] Although appellee's demand was a debt, it was based upon a claim for unascertained and unliquidated damages, which must first be ascertained, and the suit for that purpose pending at the time of the dissolution did not abate. It was not necessary to revive it against any one, because it had not abated, and the court properly refused to transfer it to the chancery court, where the receivership was pending, because the statute quoted manifests no purpose to lift out of the law courts the jurisdiction of pending causes which were otherwise properly triable at law. Of course, when such demands have been reduced to judgment, payment must be enforced in the manner pointed out by the statute—that is, through the aid of courts having equitable jurisdiction.

It is pointed out in the opinion in the case

of State ex rel. Attorney General v. Cotton Oil Co., supra, that business corporations were unknown at the common law, and that only municipal, ecclesiastical, and eleemosynary corporations then existed; and we think the purpose and effect of our statute changing the common-law rule in regard to dissolved corporations was to prevent corporations generally from freeing themselves from liability for their debts by dissolving. The statute makes no attempt to prevent corporations from dissolving; indeed, it provides the method by which they may do so; but its purpose would be largely defeated, if it were given a construction which rendered it impotent to prevent a corporation ridding itself of a debt in the manner here attempted.

Judgment affirmed.

### KOONTZ v. SMITH et al. (No. 66.)

(Supreme Court of Arkansas. Dec. 22, 1919.)

**GIFTS**  $\Rightarrow$  49(4)—EVIDENCE INSUFFICIENT TO SHOW PAROL GIFT OF LAND FROM FATHER TO SON.

In daughters' action for partition of land left by deceased father, against son who asserted title under a parol gift from father, finding that father had not given the land to son held not against the preponderance of the evidence.

Appeal from Little River Chancery Court; Jas. D. Shaver, Chancellor.

Action by Callie Smith and others against Emanuel Koontz, in which defendant filed a cross-complaint. From decree for plaintiffs, defendant appeals. Affirmed.

A. D. DuLaney and Langley & Johnson, all of Ashdown, for appellant.

Reynolds & Steel, of Ashdown, for appellees.

MCCULLOCH, C. J. Emanuel Koontz, an aged negro residing in Little River county, Ark., originally owned the tract of land in controversy, containing 40 acres, and he died intestate in the year 1914, leaving surviving his widow and the appellant, his son, and appellees, his seven daughters.

This action was instituted in the chancery court of Little River county by appellees against appellant asking for a division of the land, or a sale thereof for division, if it be found that the land cannot be divided. The action was commenced in November, 1918, and the widow joined therein for the purpose of having her dower assigned, but she died after the institution of the action. Appellant filed a cross-complaint asserting title to the land under a parol gift from his father in the year 1906. He alleged in the

complaint that his father gave him the land in controversy on January 9, 1906, and delivered to him the title deed under which his father held the land. Appellant did not move on the place at that time, nor did he move on it during the lifetime of his father; but he testified that he occupied the place by his tenants from the time his father gave him the place up to the commencement of this action, and that he made valuable improvements on the place at a cost of \$600.

The case was tried before the chancellor on the issue concerning the alleged parol gift of the land to appellant by his father, and the chancellor decided the issue against appellant. It was found that the land could not be fairly and equally divided, and the court ordered a sale by commissioner and the equal distribution of the funds, except that appellant was awarded a decree for the balance of cost of improvements made by him, over and above the rents and profits received and the taxes paid by him.

The appeal presents merely a question of fact, and we cannot say that the finding of the chancellor is against the preponderance of the testimony. Appellant introduced testimony tending to show that his father gave him the land and that he occupied it continuously under the gift and made valuable improvements thereon. His testimony shows that he occupied the land about five years before his father's death, and his own testimony is corroborated very substantially by the testimony of other witnesses. But there is a sharp conflict in the testimony, and we are unable to discover a preponderance against the finding of the chancellor.

One important item against the contention of appellant is that he was approached on a certain occasion, a few years ago, and asked to execute a mortgage on this land for the purpose of securing a debt; but he declined to execute the mortgage on the ground that he did not own the land. Another circumstance which militates against his contention is that during several years his mother, the widow of Emanuel Koontz, rented the land to certain tenants, and this was done with the knowledge and acquiescence of appellant. In other words, the testimony shows that the widow in this way jointly occupied and controlled the place which appellant now contends his father gave him five years before the latter's death. The testimony adduced by appellees also tends to show that appellant recognized the title and interest of two of his sisters in the land and offered to pay them for their interest.

There are other circumstances in the case which make it inappropriate for us to say that the testimony preponderates against the findings of the chancellor.

The decree is therefore affirmed.

SECURITY MORTGAGE CO. v. WESTERN  
UNION TELEGRAPH CO. (No. 88.)

(Supreme Court of Arkansas. Dec. 22, 1919.)

Dissenting opinion.

For majority opinion, see 216 S. W. 10.

MCCULLOCH, C. J. (dissenting). It seems to me that the majority miss the point of the case in basing the decision on the ground that the message, if correctly transmitted, might not have resulted in a contract between the parties. The message constituted an explicit proposal for the sale of certain securities of a stated kind and amount, and, if the proposal had been seasonably accepted, it would have resulted in a definite contract. The fact that the proposal as originally worded was not accepted and would not have been accepted does not affect the right of the sender to recover damages. The message, as incorrectly worded when delivered to the sender, was promptly accepted, and this purported to establish a contract on which the minds of the parties appeared to meet. The parties construed it to be a contract between each other, and the sender, acting on the faith that the message had been correctly transmitted, incurred considerable expense in complying with the terms of the contract. This was caused by the negligence of the telegraph company, and, according to the allegations of the complaint, a cause of action arose for damages.

I fail to see that the message lacks any of the elements of a definite proposal. It contained an offer to sell and stated the amount of the security, the rate of interest, and other facts in description of the kind and value of the security.

HUMPHREYS, J., concurs in these views.

WHITE RIVER LUMBER CO. v. WHITE  
RIVER DRAINAGE DIST. OF PHILLIPS  
AND DESHA COUNTIES. (No. 49.)

(Supreme Court of Arkansas. Dec. 15, 1919.)

1. STATUTES ~~§~~141(2)—ACT NOT AN ATTEMPT  
TO EXTEND LAW BY REFERENCE TO TITLE.

Acts 1913, p. 751, § 20, repealing Acts 1911, p. 200, § 7, specifying the nonapplication of such drainage act of 1911 to Phillips and Crittenden counties, held not violative of Const. art. 5, § 23, as an attempt to extend a law by reference to title only; the Constitution not prohibiting repeal of statute, or part thereof, by reference to title.

2. STATUTES ~~§~~169—REVIVAL BY REPEAL OF  
REPEALING LAW.

At common law the repeal of a repealing law revived the original law repealed.

3. LEVEES ~~§~~5—ORGANIZATION OF DISTRICTS  
TO CONSTRUCT LEVEES AUTHORIZED.

Acts 1913, p. 745, § 5, amending Acts 1909, p. 852, § 32, expressly confers authority for the organization of drainage districts, the main object of which is the construction of levees.

4. STATUTES ~~§~~130—RULE AS TO AMENDMENT  
OF STATUTE TO CHANGE ORIGINAL PURPOSE  
NOT APPLICABLE TO AMENDMENT TO FORMER  
STATUTE.

Const. art. 5, § 21, providing that no bill shall be so altered or amended on its passage through either house as to change its original purpose, applies only to amendments to a bill during its progress through the houses of the Legislature, and does not apply to an amendment of a former statute.

Appeal from Circuit Court, Phillips County; J. M. Jackson, Judge.

Petition for the formation of the White River Drainage District for Phillips and Desha counties, opposed by the White River Lumber Company. From judgment granting the prayer of the petition, the Lumber Company appeals. Affirmed.

Fink & Dinning, of Helena, and Buzbee, Pugh & Harrison, of Little Rock, for appellant.

Moore & Vineyard and J. G. Burke, all of Helena, for appellee.

MCCULLOCH, C. J. This cause originated in the circuit court of Phillips county to create a drainage district embracing 170,000 acres of land in Phillips and Desha counties, according to plans which provided also for the construction of certain levees in connection with the drainage plans. The petition for formation of the district was signed by numerous owners of land in the proposed district, and appellants, also owners of land in the district, appeared in court and were made parties for the purpose of opposing the formation of the district. The matter was heard by the court on the petition and the remonstrance of appellants, on the plans and estimates of the engineer, and on oral testimony. The plans provide for the construction of drains and levees at the estimated cost of \$2,056,285, the greater portion of which is the cost of constructing the levees. The testimony shows, however, that the whole is a related project essential to the proper reclamation of the lands in the proposed district. The circuit court granted the prayer of the petition for the formation of the district.

The contention of appellants is (1) that the circuit court of Phillips county has no jurisdiction under the statutes of the state to grant such a petition; and (2) that there is no authority to organize a district, the main purpose of which is to construct levees. The laws authorizing the formation of such dis-

tricts are found in Act No. 279 of the legislative session of 1909, as amended by Act No. 221 of the session of the year 1911, and by Act No. 177 of session of 1913.

The act of 1909, *supra*, is general in its application, and confers exclusive jurisdiction on the county court, with a further provision that, after a district embracing lands in more than one county has been created by a county court, the subsequent proceedings shall be in the circuit court of one of the counties. The act of 1911 provides that, when a district is to be formed embracing lands in more than one county, the original proceedings for such formation shall be in the circuit court of one of the counties. Section 7 of the act of 1911 reads as follows:

"That this act does not apply to Phillips and Crittenden counties, and this act being necessary for the immediate preservation of public peace, health and safety, shall take effect and be in force from and after its passage."

The Act of 1913 amended, in certain respects not material to this controversy, both the acts of 1909 and 1911, and section 20 of that act contained an express repeal of section 7 of the act of 1911. Said section 20 reads as follows:

"That section 7 of the act of April 28, 1911, entitled 'An act to amend an act entitled "An act to provide for the creation of drainage districts in this state," approved May 27, 1909, and to cure defects in the organization of districts thereunder,' be repealed; and said act and this act shall apply also to Crittenden and Phillips counties."

Section 32 of the act of 1909 reads as follows:

"The word 'ditch' as used in this act shall be held to include branch or lateral ditches, tile drains, levees, sluice ways, flood gates, and any other construction work found necessary for the reclamation of wet, and overflowed land."

That section was amended by the act of 1913 so as to read as follows:

"The word 'ditch' as used in this act, shall be held to include branch or lateral ditches, tile drains, levees, sluice ways, flood gates, and any other construction work found necessary for the reclamation of wet and overflowed land. And this act shall apply to the organization of districts the main object of which is the construction of levees."

[1] Learned counsel contend that section 20 of the act of 1913, repealing section 7 of the act of 1911, was an attempt to extend a law by reference to title only, in contravention of article 5, § 23 of the Constitution, which provides as follows:

"No law shall be revived, amended, or the provisions thereof extended or conferred by reference to its title only; but so much thereof as is

revived, amended, extended or conferred shall be re-enacted and published at length."

It is argued that, although the express provision of the last statute is to repeal a section of the prior statute which exempted the counties named, its necessary effect is to extend operation of the prior statute to those counties by repealing the exemption, and that it amounts to the extension of a law by mere reference to the title. This argument is unsound. The thing prohibited by the Constitution is the extension of a law by reference to title only, and this was not an attempt to do that. The Constitution does not prohibit repeal of a statute or part thereof by reference to title only. *Vance v. Austell*, 45 Ark. 400.

[2] The act of 1911 expressly exempted Phillips and Crittenden counties from its operation, and, this exemption being found in a separate section, it left the original act of 1909 in full and unamended force as to those counties. *Rennau v. State*, 72 Ark. 445, 81 S. W. 605. The extension of the act of 1911, so as to operate in Phillips and Crittenden counties, resulted under the act of 1913, not from extension by mere reference to the title of the act of 1911, but from the express repeal of the exemption, which had the effect of making the statute altogether general in its application. This is not forbidden. Under the common-law rule the repeal of a repealing law revived the original law repealed, and our statute on that subject (*Kirby's Digest*, § 7796) does not affect the subject in this case, for section 20 of the act of 1913 expressly provided that the act of 1911 shall apply to the counties originally exempted. *Faucette v. Patterson*, 216 S. W. 300. The case of *Rider v. State*, 132 Ark. 27, 200 S. W. 275, relied on by counsel for appellants, is not applicable.

[3] The act of 1913, amending section 32 of the act of 1909, expressly confers authority "for the organization of districts the main object of which is the construction of levees." This language is too plain to leave any doubt as to its meaning. The original act of 1909 did not confer such authority, but the manifest purpose of the amendment was to confer that authority.

[4] The amendment does not, as contended by counsel, offend against the provision of the Constitution (article 5, § 21) that "no bill shall be so altered or amended on its passage through either house as to change its original purpose." That provision of the Constitution applies only to amendments to a bill during its progress through the houses of the Legislature, and does not apply to the amendment of a former statute.

The judgment of the circuit court is sustained by the testimony. Affirmed.



## SCONYERS v. SCONYERS. (No. 57.)

(Supreme Court of Arkansas. Dec. 15, 1919.  
Rehearing Denied Jan. 12, 1920.)1. GUARDIAN AND WARD §60—GOOD FAITH  
REQUIRED IN PURCHASE BY GUARDIAN FROM  
WARD.

A guardian's purchase of real estate from his minor ward is valid only in case the guardian has exercised the utmost good faith in the transaction.

2. GUARDIAN AND WARD §131 — EVIDENCE  
OF GOOD FAITH OF GUARDIAN IN PURCHASE  
FROM WARD.

Evidence that land purchased by a guardian from his minor ward was worth at least the purchase price and perhaps more, that the guardian did not disclose that his ward had some money without selling the land, etc., held not to show that utmost good faith on the guardian's part which is necessary to sustain a guardian's purchase from his ward.

3. GUARDIAN AND WARD §70—WARD'S RAT-  
IFICATION OF SALE TO GUARDIAN.

A ward did not ratify a sale of real estate to his guardian upon demanding payment of a purchase-money note after the guardianship expired where he demanded payment without knowing that he could elect to rescind, and the guardian's influence over the ward still continued.

4. GUARDIAN AND WARD §131—PRESUMP-  
TION REGARDING RELATION OF TRUST.

There is no presumption of law that the relation of trust and confidence terminates immediately upon the ward becoming of age or the guardianship ceasing.

Appeal from Jackson Chancery Court; L. F. Reeder, Chancellor.

Suit between E. Homer Sconyers and Robert L. Sconyers. Decree for defendant, and plaintiff appeals. Reversed and remanded, with directions.

John W. Stayton, of Newport, and Samuel M. Casey, of Batesville, for appellant.  
Boyce & Mack, of Newport, for appellee.

SMITH, J. Appellant and appellee are the sons of T. J. Sconyers, who died in the year 1905, owning at the time of his death a tract of land in Independence county, which was his homestead. In addition he owned a tract of land containing 200 acres in Jackson county. He was survived by six children and a widow, who was the stepmother of the children. In a manner not necessary to state here the Wolf-Goldman Realty Company, of Newport, acquired three of these shares in the year 1915. The other shares were owned by appellant, appellee, and another brother named Oscar. Appellee had acquired the interest of the widow. Shortly before the transactions occurred out of which this liti-

gation arose appellee bought the share of the Wolf-Goldman Realty Company, and of his brother Oscar, who had just come of age, thereby becoming the owner of the whole title to all the land except the undivided one-sixth interest owned by appellant. Appellant was born January 16, 1898, and was the youngest of the children.

On April 9, 1912, appellee was appointed guardian for appellant, and took charge of his interest in the above lands as well as the personal property in which he had an interest. About May, 1916, appellant entered into a contract with appellee for the purchase of the undivided one-sixth interest which appellee did not then own, and, as appellant was not of age, an order was procured from the Independence chancery court on June 5, 1916, removing appellant's disability of non-age. It is shown that appellant employed the attorney who had charge of that proceeding; but it is reasonably certain that this action was taken at the suggestion of appellee. Appellee was finally discharged as guardian on October 18, 1916, one day after the execution and delivery of the deeds. On October 17, 1916, appellant executed to appellee two deeds, one of which conveyed the lands in Independence county for the recited consideration of \$250, and the other conveyed the lands in Jackson county, the same being the lands in controversy, for the recited consideration of \$1,250; and this suit was brought to set aside the conveyance of the Jackson county lands.

The complaint contains many allegations of fraud, among others one to the effect that appellant was told and believed that the two instruments which he executed were mortgages, and that the purpose of their execution was to enable him to procure money to pay his expenses at school. But, without setting out the testimony, it may be said that the testimony does not support that allegation and the relief prayed cannot be awarded on that account.

[1] It is insisted, however, that the law denied appellee the right to purchase appellant's interest under any circumstances whatever, but that, if such right did exist, the testimony does not show that uberrima fides which must exist before the guardian can purchase the land of his ward. We think appellant is not correct in his first contention, but is correct in his second. The court below held with appellee on both contentions, and in support of the decree there pronounced it is here insisted that the court below correctly found the facts on the issue of undue influence, but that, if that finding is not supported by the testimony, a subsequent ratification of the sale has been shown.

In support of the contention that appellee could not purchase appellant's interest in the land the cases of Hindman v. O'Connor, 54

Ark. 633, 16 S. W. 1052, 13 L. R. A. 490, and *Haynes v. Montgomery*, 96 Ark. 573, 132 S. W. 651, and *Sorrels v. Childers*, 129 Ark. 149, 195 S. W. 1, L. R. A. 1917F, 430, and other cases, are cited, in which the trustee had bought at a sale the title of the cestui que trust, all of which cases held that as a matter of public policy this could not be done. Those cases are not applicable here, for the reason that the guardian has not acquired at some sale the title of the ward, but has acquired title from the ward. This last is a transaction which the law subjects to the closest scrutiny, and, having done so, permits to stand in the event only that the negotiation and consummation of the deal has been characterized by the utmost good faith on the part of the guardian. The test in such cases is stated in the case of *Waldstein v. Barnett*, 112 Ark. 141, 165 S. W. 459, in a quotation there copied from the case of *Reeder v. Meredith*, 78 Ark. 111, 93 S. W. 558, 115 Am. St. Rep. 22, which had been taken from section 195 of *Perry on Trusts*, and which need not be restated here.

[2] We think, however, that the testimony in this case does not meet that test. The testimony is conflicting as to the value of the land, but all the witnesses agree that it was worth at least as much as appellee paid for it at the time of the purchase, and a number of witnesses placed the value much higher. Several of the witnesses who testified that a fair price had been paid for the land also stated that their estimate of the value of the interest sold was based upon the rent derived from it. It was shown that appellee, in his settlement with appellant, charged himself with rent at \$5.50 per acre, when he was in fact working the land on shares and receiving the equivalent of \$10 to \$20 per acre. Appellant was not advised of that fact, and appellee excuses his failure so to do by saying that he regarded himself as the tenant, and that he was charging himself with what he regarded as reasonable rent for the land.

Appellant desired to go to school, and sold the land to raise money for that purpose. Appellee had failed for nearly four years to file a settlement of his guardianship, and appellant did not know that any sum was due him by his guardian; and it is now insisted that no sum was due him; but, as we understand the testimony, there was in fact \$147.85 due appellant at the time of the sale. This sum might not have been sufficient to defray appellant's expenses at school, but he was entitled to know that this sum was due him in reaching a decision as to whether or not he should sell his land.

[3, 4] Appellant had gone to school near Ft. Smith, and was at school when this sale was made, and he accompanied his brother to Ft. Smith for the purpose of acknowledging the deeds. At the time the deeds were delivered no money was paid and no notes

for purchase money were given. A straight warranty deed was made, reciting the receipt in full of the consideration, and no lien was reserved in the deed or other security given. At the end of about a year a settlement between the brothers was had, in which no calculation of interest was made. Notes for the purchase money were not given until the fall of 1917, and these were not paid when due. An attorney was employed by appellant to collect the first of these notes to fall due; and it is said that this constituted a ratification of the sale. Another note has not yet been paid, although a tender of payment was made by appellee and refused by appellant. It is now said that when appellant demanded payment of the first note he did not know that he had any rights in the matter except to require payment of the notes, but that, when he was advised that he could rescind, he elected so to do, and refused to receive payment of the unpaid note.

We think there has been no ratification; for appellant was not advised as to his rights when he demanded payment of the first note.

There is no presumption of law that the relation of trust and confidence terminates instantly when the ward comes of age or the guardianship closes. The contrary is shown to be the law in the case of *Haynes v. Montgomery*, 96 Ark. 573, 132 S. W. 651, where this court quoted with approval from 1 *Story on Equity* (13th Ed.) § 317, the following statement of the law:

" \* \* \* It is obvious that during the existence of the guardianship the transactions of the guardian cannot be binding on the ward if they are of any disadvantage to him; and indeed the relative situation of the parties imposes a general inability to deal with each other. But courts of equity proceed yet further in cases of this sort. They will not permit transactions between guardians and wards to stand, even when they have occurred after the minority has ceased and the relation becomes thereby actually ended, if the intermediate period be short, unless the circumstances demonstrate in the highest sense of the term the fullest deliberation on the part of the ward and the most abundant good faith (*uberrima fides*) on the part of the guardian. For in all such cases the relation is still considered as having an undue influence upon the mind of the ward, and as virtually subsisting, especially if all the duties attached to the situation have not ceased, and if the accounts between the parties have not been fully settled, or if the estate still remains in some sort under the control of the guardian."

There was no ratification here, for the additional reason that the influence of the guardian had not ceased when the settlement was made, as is evidenced by appellant's failure to charge the interest then due. He was still under 21 years of age, although his disability of nonage had been removed, and the guardianship had closed.

The decree of the court below will therefore be reversed, and the cause remanded, with directions to set aside the deed to the Jackson county lands.

**PAYNE v. ROAD IMPROVEMENT DIST.  
NO. 1 OF MARION COUNTY.  
(No. 63.)**

(Supreme Court of Arkansas. Dec. 22, 1919.)

**1. MUNICIPAL CORPORATIONS — 646—TERM  
"PUBLIC HIGHWAY" INCLUDES STREET OR  
ALLEY.**

The term "public highway," in its generic sense, includes streets and alleys as well as rural roads, though it is not always so understood in the popular sense, and there is usually enough ambiguity in the use of the term to warrant examination of the context wherever used for the purpose of determining the precise meaning.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Highway.]

**2. HIGHWAYS — 90—INCLUSION OF HIGH-  
WAYS IN SEVERAL MUNICIPALITIES IN ONE  
DISTRICT IMPROPER.**

Road Laws 1919, vol. 2, p. 1681, creating road district No. 1 of Marion county, is invalid in that it provides for the improvement of all the highways in the district, including streets in three incorporated towns, and thereby attempts to join together as a single improvement projects necessarily separate and distinct.

**3. HIGHWAYS — 90—IMPROVEMENT DISTRICT  
INCLUDING STREETS OF TOWN.**

A road improvement district created to improve a general highway could properly include portions of the streets of towns which formed a part of the general highway.

**4. STATUTES — 8½(1)—NOTICE OF EXPRESS  
AMENDMENT TO LOCAL STATUTE NECESSARY.**

An express amendment to a local statute falls within the requirements of the Constitution with reference to notice of the introduction of bills for local statutes.

Appeal from Marion Chancery Court; Ben F. McMahan, Chancellor.

Action by H. R. Payne against Road Improvement District No. 1 of Marion County. Decree for defendant, and plaintiff appeals. Reversed and remanded, with directions.

Elmer O. Owens, of Yellville, for appellant.  
Williams & Seawel, of Yellville, for appellee.

**McCULLOCH, C. J.** Appellee is a road improvement district created by a special statute enacted by the General Assembly of 1919, embracing certain territory in Marion county and for the purpose of improving the public highways in that district. Acts 1919, vol. 2, p. 1681. In the first section of the statute

the boundaries of the district are designated by the description of the lands to be embraced therein, and the second paragraph of section 1 describes the roads to be improved as follows:

"That said road improvement district is hereby created and organized for the purpose of making improvements on the public highway leading from a point on Searcy county line where road district number one (1) of Searcy county intersects the Marion county line near Salgado, thence to Rush, thence to Yellville, and Summit, and thence following Ridge road by way of Lee's Mountain to the Boone county line west of Dodd City, Arkansas, to build, improve, widen, straighten and repair all public highways within the boundaries of said district which have heretofore been dedicated as a public highway, by the county court of Marion county, or by the town council of the incorporated towns of Rush, Yellville, and Summit and for that purpose shall have the right by its board of commissioners hereafter provided for to condemn right of ways for the purposes herein mentioned, to sue and be sued, to plead and be impleaded and to constitute a body politic, for the purposes of carrying out the intention of this act."

Section 4 of the statute reads as follows:

"The said board of commissioners shall have and they are vested with power and authority, and it is hereby made their duty to build, construct, maintain and repair said roads within said district, and all public highways therein as they deem necessary and proper, as herein contemplated, and in doing so shall expend all necessary sum[s] of money authorized to be levied and collected under authority of this act, and as herein provided."

The remainder of the statute, which contains 24 sections, outlines a comprehensive scheme for the construction of the improvements and for the levying of assessments on the benefits to real property in the district and the enforcement of such assessments, and also for the borrowing of money in advance to pay for the improvement. Authority is conferred for the appointment of assessors to "make an assessment of all benefits to be received by the lands in said district."

Appellant is the owner of real property in the district, and instituted this action attacking the validity of the statute on the ground, among others, that in providing for the improvement of all the highways in the district, including the streets in the three incorporated towns, the Legislature had attempted to join together, as a single improvement, projects which are necessarily separate and distinct.

The argument of counsel for appellee in seeking to sustain the validity of the statute is that the term "public highways" in the statute was not intended to refer to streets in incorporated towns, but referred only to country roads. It therefore becomes necessary in the first place to construe the statute

to determine what it meant by its language describing the improvements to be made.

It is clear that the first part of the paragraph describing the improvement refers to an established public highway beginning at a point on the line between Searcy and Marion counties, near Salgado, and running north to Yellville, the county site, and thence northwesterly to a point on the boundary line between Marion and Boone counties. This much of the description is clear and definite, and if there was nothing more in the statute there would be no grounds for attack upon it. But the descriptive words used with reference to the contemplated improvement continue as follows:

"To build, improve, widen, straighten and repair all public highways within the boundaries of said district which have heretofore been dedicated as a public highway by the county court of Marion county, or by the town council of the incorporated towns of Rush, Yellville, and Summit."

[1, 2] Section 4 makes it the duty of the board of commissioners "to build, construct, maintain and repair said roads within said district, and all public highways therein as they deem necessary and proper, as herein contemplated." The term "public highway" in its generic sense includes streets and alleys as well as rural roads (Webster, definition "highway"), though it is not always so understood in the popular sense. *Texarkana v. Edwards*, 76 Ark. 22, 88 S. W. 862. There is usually enough ambiguity in the use of the term to warrant the examination of the context, wherever used, for the purpose of determining the precise meaning, and when that is done in the present case we think that it is clear that the framers of the statute meant to include the public streets of the three incorporated towns mentioned. If that was not the intention of the lawmakers, no reference would have been made to the dedication of public highways "by the town councils of the incorporated towns of Rush, Yellville and Summit." The word "dedicated" was not correctly used, but it is clear that the framers of the statute meant by the language used to refer to streets opened by authority of the respective town councils of the incorporated towns mentioned as well as the country roads established as public highways by the county court. If streets and alleys had not been intended to be embraced, there was no occasion whatever for making reference to highways "dedicated" by the town councils. It may be argued that the framers of the statute had in mind main thoroughfares through each of the incorporated towns which would form a part of the general highway to be improved, and that it was not necessary to designate this part of the highway which ran through the incorporated towns. There is much reason to believe this to be so. But when it is conceded that any of the streets through any of these incorporated towns formed, under

the language used, a part of the general public highway to be improved, then it necessarily follows from the other language of the statute that the improvement was not to be limited to those streets, but that all of the public highways, including streets and alleys, were to be improved. In other words, the same description which would embrace the particular streets forming a part of the general highway designated necessarily embraces all other streets and alleys in the towns.

We see no escape from the interpretation of the language used that it embraces all of the streets and alleys of the incorporated towns mentioned. This may have come about by inadvertence, but such is the only reasonable interpretation which can be given to the language used. Such being the proper interpretation of the statute, our conclusion is that it is invalid because it joins together as a single improvement the improvement of all of the streets and alleys of three different incorporated towns in the same county, but widely separated from each other.

[3] We do not mean to hold that the inclusion of that portion of the streets of the towns which formed a part of the general highway to be improved would be invalid. Our previous decisions on that subject lead to the contrary. *Nall v. Kelley*, 120 Ark. 277, 179 S. W. 486; *Conway v. Miller County Highway & Bridge District*, 125 Ark. 325, 188 S. W. 822; *Bennett v. Johnson*, 130 Ark. 507, 197 S. W. 1148. But it is different where all of the streets and alleys of different municipalities are attempted to be grouped together as a single improvement. They are necessarily separate, and the improvement of the streets and alleys of one municipality as a whole cannot possibly inure to the benefit as a local improvement to the real property in another municipality distantly removed. It is an obviously demonstrable error to join them together as a single improvement to be constructed by a single assessment on all the property in the district. This statute only provides for one assessment of the benefits and that of the benefits arising from all of the designated improvements considered as a whole. Under the terms of the statute it is the duty of the board of assessors to assess the benefits of the whole improvement on the different pieces of real property in the district and the assessments to pay for the improvement are to be levied on the benefits thus appraised. It necessarily follows that under this scheme the improvement in a given municipality would have to be paid for by contributions from assessments levied on property in the other municipalities as well as on the rural property. If we had a case where each of the improvements in the district were treated as separate ones and authority was conferred to assess separately the benefits arising from each improvement, then it would be different; but here the necessary result from the proposed scheme is

to levy assessments on all the property in the district to pay for improvements which are obviously distinct and separate.

We are of the opinion that this feature of the statute renders it invalid, and it is unnecessary to discuss the other grounds for attack on the validity of the statute.

At the recent special session of the General Assembly, another statute was enacted correcting the defects in this one which we have discussed by omitting the general authority to improve all the highways in the district; but that statute was also invalid for the reasons stated in the case of *Booe v. Road Improvement District No. 4 of Prairie County*, 216 S. W. 500.

[4] An express amendment to a local statute falls within the requirements of the Constitution with reference to notice of the introduction of bills for local statutes.

Reversed and remanded, with directions to enter a decree granting the prayer of the complaint.

### MARION HOTEL CO. v. DICKINSON. (No. 48.)

(Supreme Court of Arkansas. Dec. 15, 1919.  
Rehearing Denied Jan. 12, 1920.)

#### 1. CONTRACTS §10(2) — FOR REMOVAL OF GARBAGE LACKING IN MUTUALITY.

Written contract for removal and use by firm of all trash and garbage accumulating at hotel, so long as firm "handle satisfactory to the" hotel company, *held* lacking in mutuality, in that no time for performance was specified, and to be terminable at the will of either party.

#### 2. CONTRACTS §10(2)—AGREEMENT NOT TO REVOKE NOT WANTING IN MUTUALITY.

Subsequent oral addition to contract for the giving of year's notice by hotel company before revoking written contract for removal of trash and garbage from hotel implied a reciprocal obligation of the other party to continue the services at least the full period of the notice, so that the later contract was not lacking in mutuality.

#### 3. DAMAGES §120(1)—FOR BREACH OF CON- TRACT FOR REMOVAL OF GARBAGE.

Where plaintiff notified defendant that he had 275 hogs on hand, and would suffer damages if contract to allow plaintiff to remove all garbage from defendant's hotel was breached, but defendant nevertheless breached the contract, plaintiff was, as regards the 275 hogs on hand, entitled to recover for all loss sustained by his being unable to prepare them for the market.

#### 4. DAMAGES §40(2)—ESTIMATED PROFITS RE- COVERABLE ON BREACH OF CONTRACT FOR RE- MOVAL OF GARBAGE.

Where defendant breached contract whereby plaintiff was given right to remove all garbage from defendant's hotel and use it for feeding hogs, plaintiff was not compelled to con-

tinue to purchase or raise hogs for the purpose of carrying out the contract, but was entitled to recover the estimated profits which he would have realized if the contract had not been breached.

#### 5. CONTRACTS §304(2) — RECEIPTS CON- STITUTING ACCEPTANCE OF PERFORMANCE.

Slips signed by steward of defendant's hotel for driver of each garbage wagon, reciting that garbage had been removed "to my entire satisfaction," *held* to preclude defendant from showing affirmatively that garbage had not been handled "satisfactorily to the" defendant, since the execution of these slips constituted a binding acceptance by defendant.

Appeal from Circuit Court, Pulaski County; G. W. Hendricks, Judge.

Action by J. A. Dickinson against the Marion Hotel Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Cohn, Clayton & Cohn, of Little Rock, for appellant.

Lewis Rhoton and Carmichael & Brooks, all of Little Rock, for appellee.

McCULLOCH, C. J. Marion Hotel Company, a domestic corporation engaged in operating a hotel in the city of Little Rock, entered into a written contract with appellee for the removal and use by the latter of all of the trash and garbage accumulating at said hotel. The contract recited a cash consideration of \$1, and mutual obligations of the respective parties, one to permit the other to remove the trash and garbage, and the other to remove it twice per day from the hotel and "to return all silver, towels, and other material belonging to the hotel company." The contract also specified that the lids of the garbage cans were not to be removed while being hauled, and that the requirements of the government with respect to sanitary rules were to be observed. The contract was dated December 24, 1917, and did not specify any period of duration, but concluded with the following paragraph:

"This agreement is to begin on the first day of January, 1918, and continue in force as long as Dickinson & Wilbourn handle it satisfactorily to the Marion Hotel Company."

The contract was executed by Mr. Everett, the manager for the Marion Hotel Company, and the firm of Dickinson & Wilbourn, but later Wilbourn retired from the firm, and appellee, Dickinson, alone undertook to perform the contract, and he continued in the performance of the contract until July 17, 1918, when appellant gave notice of a discontinuance of the permission extended to Dickinson to take the trash and garbage.

Preparatory to performance of the contract appellee established a pasture and pens at a place a few miles out from the city limits

of Little Rock, for the purpose of keeping and fattening hogs, and began the purchase and raising of hogs to be fattened for the market, expecting to use the garbage as feed. He procured wagons and other equipments to handle the garbage, and kept two men in his employment engaged in doing the hauling. Appellee testified on the trial of the cause that shortly after the contract was entered into he called the attention of appellant's manager to the fact that the contract specified no particular term of duration, and that he expected to equip himself to handle about 300 hogs at a time, and that he could not afford to thus equip himself for handling the business unless he was assured that the contract would not be rescinded short of a year's notice, and that the manager then agreed that the contract should not be revoked without such notice.

This is an action instituted by appellee for breach of the contract. Appellant in its answer admitted the execution of the writing set forth in the complaint, but denied that there was any oral contract subsequent thereto. Appellant admits that it rescinded the contract, which it contends it had a right to do under the written contract. The answer also contains appropriate denials concerning the extent and amount of damages alleged to have been sustained by appellee by reason of the alleged breach of the contract. There was a trial before a jury, which resulted in an award of damages in favor of appellee in the sum of \$2,500.

Appellant contends for reversal on three grounds set forth in the brief as follows:

"First. That the contract upon which appellee (plaintiff below) based his cause of action lacked mutuality and definiteness and was terminable at the will of either party.

"Second. That the lower court improperly instructed the jury as to the measure of damages.

"Third. That the testimony of H. A. Scott, set forth in paragraph 3 of the motion for a new trial, was improperly excluded."

[1] The argument of appellant in support of its first ground for reversal is, we think, sound so far as it applies to the written contract. The obligations expressed in the contract lack mutuality in that no time for performance was specified, and it was, therefore, terminable at the will of either party. *St. L., I. M. & So. Ry. Co. v. Matthews*, 64 Ark. 398, 42 S. W. 902, 39 L. R. A. 467. The writing specified that it was to remain in force "as long as Dickinson & Wilbourn handle satisfactorily to the Marion Hotel Company," but there was no expressed obligation on the part of Dickinson & Wilbourn to continue for any specified length of time, and no obligation could be implied on their part to continue as long as the service remained satisfactory to the Marion Hotel Company. It is not one of those kind of contracts where

a reciprocal obligation is implied, as has been held in numerous decisions of this court. *Thomas-Huycke-Martin Co. v. Gray*, 94 Ark. 9, 125 S. W. 659, 140 Am. St. Rep. 93; *Keopple v. National Wagonstock Co.*, 104 Ark. 466, 149 S. W. 75.

[2] The same contention is made by learned counsel for appellant with respect to the alleged oral addition to the contract. In other words, the contention is that the subsequent verbal agreement that the contract should not be rescinded without giving a year's notice is open to the same objection that it lacks mutuality in that one of the obligors was not bound to continue the service or to give notice of a rescission of the contract.

We are of the opinion that the contract for the giving of a year's notice by one of the parties necessarily implied a reciprocal obligation on the part of the other party to continue the service for at least the full period of the notice, that is to say, for one year, and that it amounted to a mutual agreement for at least one year. The exaction by appellee of a promise on the part of the hotel company not to rescind the contract without giving a year's notice necessarily implied that he would carry on that service at least a year from that time. It is unnecessary to determine whether or not there was sufficient mutuality in the contract to extend it longer than one year.

Our conclusion, therefore, is that there was a binding contract between the parties which was enforceable, and that appellant was liable for damages for the breach.

The jury found upon legally sufficient evidence that the contract was performed "satisfactorily to the Marion Hotel Company," and that appellant broke the contract without sufficient cause.

The court gave two instructions on the measure of damages, as follows:

"No. 2. If you find from the evidence that the defendant breached the contract on some ground other than the work was not carried out to its satisfaction, then you will find for the plaintiff such damages as you may find he sustained by breach of the contract, and in ascertaining the proper amount you may take into consideration whatever profits you may find from the evidence to a reasonable certainty, he would have made if the contract had not been breached. And if you find from the evidence that the plaintiff was to have a year's notice before the contract should be terminated, and the garbage and trash given him as long as he did the work to the satisfaction of the defendant, and if you further find that a year's notice was not given, and the plaintiff did the work to the satisfaction of the defendant, then you will find for the plaintiff in such amount as you may find his entire profits would have amounted to if the contract had been carried out."

"No. 5. If you find from the evidence that the plaintiff notified the defendant that he had

275 Duroc Jersey hogs, and he would suffer damages if the contract was breached by the defendant, then you will find for the plaintiff in such sum as will compensate him for any and all loss which you may find he sustained by being unable to prepare said 275 Duroc Jersey hogs for market. And in arriving at such amount of damages you may take into account what it would have cost the plaintiff to feed the hogs until they were ready for market under the contract with the defendant, and what it has actually cost him by reason of not being able to get the garbage, and the difference would be the amount of the verdict which you should render in favor of the plaintiff, if you find for the plaintiff."

The evidence tends to show that appellee prepared to take care of, and fatten for market, 300 hogs at a time, and that at the time of the breach of the contract he had on hand 275 Duroc Jersey hogs which he was fattening for market, and that he sustained loss by reason of inability to procure swill to feed to the hogs. Appellee in his testimony went into detail as to his method of feeding the hogs after putting them up to be fattened for market, and also testified as to the increased weight of the hogs thus handled, and the cost of feeding and the profits to be derived from the business. Instruction No. 5 relates specifically to the 275 hogs on hand, and the measure of damages declared by the court as to that lot of hogs was correct, and the testimony brought the case within the operation of the instruction. The evidence tends to show that it was impossible for appellee to get sufficient swill from the hotels and restaurants, and other sources, and that he had to buy feed at almost prohibitive prices.

[3, 4] The other instruction relates to the profits that would have been realized on the contract outside of the particular lot of hogs mentioned in instruction No. 5. If there was a breach of the contract, appellee was entitled to recover compensation for his losses on the 275 hogs on hand at the time of the breach, but this was not the full measure of his damages, as he was entitled to losses sustained for the remainder of the period of the contract. He was not compelled to continue to purchase or raise hogs for the purpose of carrying out the contract which appellant had broken, but was entitled to recover the estimated profits which he would have realized if the contract had been carried through. We think that the instructions can be harmonized, and that they were understood by

the jury in the light of the testimony on the subject of damages.

[5] Now as to the last assignment: Soon after appellee began the performance of the contract he adopted a method of having the steward of the hotel to sign printed slips for the driver of each garbage wagon, reciting that the "garbage and trash at the Hotel Marion has been cleaned up to my entire satisfaction." A great many of these slips were produced at the trial of the cause. Appellant offered to establish by the testimony of Scott, the steward of the hotel, facts and circumstances which tended to show that appellee had not been removing the garbage in proper manner and to the satisfaction of the management of the hotel, but the court excluded the testimony. It is argued that these slips acknowledging the service in removing the garbage should be likened to mere receipts for the payment of money, and that the execution by the employees of the hotel company from day to day did not preclude appellant from showing as a matter of fact that the garbage had not been properly handled, or handled "satisfactorily to the Marion Hotel Company."

The weakness of appellant's contention is in treating these signed slips merely as receipts, for they amounted to more than that. The execution of those receipts constitutes acceptances of the performances of the contract from day to day, and they cannot be repudiated by appellant by showing that the contract had not in fact been performed in a satisfactory manner. Under the method of operating the business of removing the garbage appellee saw fit to exact an approval from day to day, and appellant's authorized employé acquiesced in this method of doing business. If appellant had refused to sign the written acknowledgment day by day it would have constituted notice to appellee that the service was not satisfactory, or, at least, that the service had not been accepted as satisfactory, but the execution of these acknowledgments, in the absence of fraud or collusion, constituted a binding acceptance on the part of appellant of the past service in the removal of the garbage, and prevented the reopening of that question. After having once accepted the service as satisfactory, appellant cannot be permitted to show that it had a right to cancel the contract because the service was unsatisfactory.

This disposes of the several grounds of attack made upon the rulings of the court, and results in an affirmance of the judgment. It is so ordered.

## SUTTON et al. v. SUTTON et al. (No. 31.)

(Supreme Court of Arkansas. Dec. 1, 1919.  
Rehearing Denied Jan. 12, 1920.)

1. EVIDENCE  $\S$  419(2)—PAROL EVIDENCE OF CONSIDERATION OF DEED.

The true consideration of a deed may be shown by parol evidence, even though contradicting the written consideration expressed in the deed, for the purpose of recovering the consideration, but it cannot be shown for the purpose of destroying or invalidating the instrument itself.

2. WILLS  $\S$  88(2)—"DEED" AS TESTAMENTARY DISPOSITION.

Instrument in the form of a warranty deed, headed "Warranty Deed," and referred to in body of instrument and in acknowledgment as "deed," conveying land to grantee, "and unto his heirs and assigns forever," held a deed, and not a will, notwithstanding habendum clause making deed inoperative prior to grantors' death; such clause not defeating the passing of title, but merely reserving possession to grantors during their lifetime.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Deed.]

3. DEEDS  $\S$  97—CONSTRUCTION OF REPUGNANT CLAUSES.

Where instrument has been ascertained to be a deed, and not a will, the rule that in construing repugnant clauses effect will be given to last expression of grantors is inapplicable.

4. DEEDS  $\S$  97—CONFLICT BETWEEN GRANTING AND HABENDUM CLAUSES.

Where there is an irreconcilable conflict between the granting and habendum clauses of a deed, the habendum is rejected and full effect given to the granting clause.

5. WILLS  $\S$  87—DETERMINATION OF CHARACTER OF INSTRUMENT.

The apparent character of an instrument should never be converted by interpretation into an instrument of a different character, unless its provisions, when harmonized, if possible, are inconsistent with its apparent character.

Appeal from Pike Chancery Court; Jas. D. Shaver, Chancellor.

Suit by Sarah A. Sutton and another against Etta A. Sutton and others. From the decree sustaining defendants' demurrer and dismissing the bill, plaintiffs appeal. Affirmed.

O. A. Featherston and Pinnix & Pinnix, all of Murfreesboro, for appellants.

W. S. Coblenz, of Murfreesboro, for appellees.

HUMPHREYS, J. This suit was instituted on the 18th day of April, 1919, in the Pike chancery court, by appellants against appellees, to cancel an instrument of record, purporting to be a deed from appellants to James

N. Sutton, because (1) the consideration failed, and (2) that the instrument constituted a testamentary disposition of their property, revocable at their will. In substance it was alleged in the bill that appellants' son James N. Sutton, the deceased husband of Etta A. Sutton, and father of the other appellees, in his lifetime procured a deed for record from appellants, purporting to convey 60 acres of land in said county, the separate property of appellant Sarah A. Sutton, which had been, and was still, occupied by appellants as their homestead, in consideration of a verbal promise that he would care for and support appellees; that the said James N. Sutton, in his lifetime, and his widow and heirs after his death, failed to render them either care or support; that the consideration expressed in the granting clause of the instrument was as follows:

"For and in consideration of divers covenants of value, and the further sum of two hundred (\$200.00) dollars, to us in hand paid, the receipt of which is hereby acknowledged and confessed, and relying on the fidelity and integrity of James N. Sutton, their only son, do hereby grant, bargain, sell, and convey unto the said James N. Sutton, and unto his heirs and assigns, forever, the following lands lying in the county of Pike and state of Arkansas."

In the habendum the following provisions are found:

"To have and to hold the same unto the said James N. Sutton, subsequent to the death of said Sidney D. Sutton and Sarah A. Sutton, and unto their heirs and assigns forever, with all appurtenances thereunto belonging."

"It is hereby agreed and understood that this deed is inoperative prior to the death of the said Sidney D. Sutton and Sarah A. Sutton, but subsequent to their demise or death, this deed is to become absolute without question;" that it was the intention of the parties that the instrument should have no force or effect until after the death of the grantors.

Appellees filed a general demurrer to the complaint, which was sustained by the court. The appellants refused to plead over, whereupon the bill was dismissed for want of equity. From the decree sustaining the demurrer and dismissing the bill, an appeal has been duly prosecuted to this court.

[1] It is first insisted by appellant that it was error to sustain the demurrer, because, it is said, even if it be conceded that the instrument was a deed, it contained a condition subsequent, a breach of which authorized the grantors to declare a forfeiture. The breach which it is contended worked a right of forfeiture in favor of appellants consisted in the failure of appellee, in his lifetime, or his widow and heirs after his death, to furnish care and support to said appellants. As the deed itself does not recite such a considera-



tion, the determination of this question involves the right to make oral proof of the additional consideration and the failure thereof. The rule is well established that the true consideration in a deed may be shown by parol evidence, even though contradicting the written consideration expressed in the deed, for the purpose of recovering the consideration; but it cannot be shown for the purpose of destroying or invalidating the instrument itself. *Davis v. Jernigan*, 71 Ark. 494, 76 S. W. 554; *Wallace v. Meeks*, 99 Ark. 350, 138 S. W. 638. It was said in the case of *Hampton v. Haneline*, 125 Ark. 441, 189 S. W. 40, that:

"The grantor makes the deed. The presumption is that he had the real consideration recited therein, and in the absence of testimony tending to show that the pecuniary consideration named in the deed was inserted therein by mutual mistake, or by some fraud practiced upon the grantor at the time he signed the deed, neither the grantor nor those claiming under him can be permitted to question the consideration named in the deed, for the purpose of invalidating the same."

Again in the same case it was said:

"Hence the consideration cannot be contradicted or shown to be different from that expressed, when thereby the legal operation of the instrument to pass the entire interest according to the purpose therein designated would be defeated."

The purpose of the allegation in the bill, to the effect that an additional consideration, not expressed in the instrument, had been promised, and that said consideration had failed, was to defeat the instrument as a deed in fee simple, or with a condition subsequent attached. The allegation, therefore, or any inference that might be drawn from it, failed to state a cause of action that could be established by oral evidence.

[2] It is next insisted that the instrument constituted a testamentary disposition of the real estate, revocable at the will of appellants, who were the grantors in the instrument, and that it is proper for a court of equity to cancel the instrument in aid of the desire of appellants to revoke it. The solution of this question involves a determination of whether the instrument is a deed or a will. The instrument was incorporated in the bill and made part thereof. If not ambiguous in its terms, the instrument itself must control the allegation in the bill to the effect that the intention of the parties was for the instrument to become effective at the death of the grantors, and not before. In order to interpret the instrument, it is unnecessary to set it out in full. Suffice it to say that "Warranty Deed" appears at the head of the instrument; that it is referred to, in the body of the instrument, as well as the acknowl-

edgment, as a deed; and that its form in all particulars is that of a warranty deed.

[3] It is suggested by learned counsel for appellants that the instrument must be interpreted a will, because it is provided in the habendum that the grantee shall have and hold said real estate subsequent to the death of the grantors, and further that the deed is inoperative prior to the death of the grantors, but subsequent to their death is to become absolute, for the reason that this was the last expression of the grantors as to their intention. That is the rule for construing repugnant clauses in a will, after it has been determined that the instrument is a will. The rule, however, does not apply in construing repugnant clauses in a deed, after it is ascertained to be a deed.

[4, 5] Where there is irreconcilable conflict between the granting and habendum clauses of a deed, the habendum is rejected, and full effect given to the granting clause. Neither rule is the test for determining whether an instrument is a deed or a will. In order to determine the character of an instrument, each clause or part must be reconciled, if possible, with every other clause or part, and the intention of the parties, gathered from reading the whole instrument, thus harmonized. If an instrument appears on its face to be a deed, it should be upheld to be a deed, if possible. If apparently a lease or will, likewise it should be upheld as a lease or will, according to its appearance. The apparent character of an instrument should never be converted by interpretation into an instrument of a different character, unless its provisions, when harmonized, if possible, are wholly inconsistent with its apparent character. As stated above, the apparent character of the instrument before us for consideration is that of a warranty deed. In fact, it is alleged in the bill to be a deed in form. It bears the name of a warranty deed, and is referred to in both the body of the instrument and the acknowledgment as a deed. It contains a granting, habendum, and warranty clause. Having every earmark of a warranty deed, it should be so construed.

It is suggested, however, that effect cannot be given the instrument as a deed because it is manifest from the habendum that it was not the intention of the parties to pass a present interest in the property attempted to be conveyed. The clauses may be read together, and the apparent conflict between the granting and habendum clauses eliminated, by referring the transfer of the legal title to the granting clause and the transfer of possession to the habendum clause. In other words, purpose and effect may be given to each clause, and the instrument upheld as a deed, by saying that the title to said land passed through the operation of the granting clause, but that the possession was

reserved to the grantors during their lives, through the operation of the habendum. Our construction, therefore, of the instrument, is that it is a warranty deed, conveying the title to the grantee, with the reservation of the possession for life in the grantors.

The decree is affirmed.

# YAZOO & M. V. R. CO. v. HILL. (No. 73.)

(Supreme Court of Arkansas. Dec. 22, 1919.)

## 1. CARRIERS $\S$ 320(28)—NEGLIGENCE IN PROVIDING A STAGE PLANK TO TRANSFER BOAT FOR PASSENGERS QUESTION FOR JURY.

In an action by plaintiff for damages for the death of her husband, caused by his attempting to jump from a stage plank provided by the defendant railroad for him and other passengers being transferred from coaches to transfer boat, which was to carry them across river, *held* that question of negligence was for the jury.

## 2. CARRIERS $\S$ 286(4)—DUTY TO PROVIDE SAFE METHOD OF INGRESS AND EGRESS FOR PASSENGERS.

It is the duty of a railroad company to use ordinary care to provide passengers with a safe and convenient method of ingress and egress to and from its cars, and the company is liable for damages by reason of neglect of such duty.

## 3. CARRIERS $\S$ 318(2)—EVIDENCE OF CUSTOM NOT CONCLUSIVE ON QUESTION OF NEGLIGENCE.

While custom of others under like conditions was evidence tending to show that defendant railroad was not negligent in providing a safe and suitable place for the passage of its passengers from its coaches to a transfer boat, it was not conclusive evidence of that fact.

## 4. CARRIERS $\S$ 347(9)—PASSENGER'S CONTRIBUTORY NEGLIGENCE QUESTION FOR JURY.

In an action by plaintiff for damages for the death of her husband, caused by his attempting to jump from a stage plank provided by the defendant railroad for him and other passengers being transferred from coaches to transfer boat, question of contributory negligence *held* for the jury.

## 5. APPEAL AND ERROR $\S$ 904(2)—CREDIBILITY OF WITNESSES FOR JURY.

The jury, and not the appellate court, were the judges of the credibility of the witnesses.

## 6. CARRIERS $\S$ 338—PASSENGER IN IMMINENT DANGER NEED NOT DELIBERATE ON MEANS OF ESCAPE.

Where a passenger is suddenly confronted by imminent danger, he cannot reasonably be expected to calculate chances or to deliberate upon the means of escape, and, if he acts as a man of ordinary prudence placed in similar circumstances, and in doing so makes an effort to escape injury, and is injured, the carrier is responsible for damages.

## 7. TRIAL $\S$ 260(8)—INSTRUCTION COVERED BY INSTRUCTIONS GIVEN PROPERLY REFUSED.

In action by plaintiff for death of her husband, caused by his attempting to jump from a stage plank provided by the defendant railroad for him and other passengers being transferred from coaches to transfer boat, which was to carry them across the river, requested instructions as to carrier not having to furnish absolutely safe premises *held* fully covered by instruction given.

## 8. TRIAL $\S$ 260(8)—INSTRUCTION COVERED BY INSTRUCTIONS GIVEN PROPERLY REFUSED.

In such action requested instruction that the law does not impose on the carrier the duty of so providing for the safety of persons going from train to boat that they will encounter no possible danger *held* to be covered by matters embraced in given instructions.

## 9. TRIAL $\S$ 240—ARGUMENTATIVE INSTRUCTIONS AS DUTY OF CARRIER MAY BE REFUSED.

Requested instruction "that the law does not impose on the railroad company the duty of so providing for the safety of persons going from the train to the boat, in this case, that they will encounter no possible danger and meet with no casualties in the use of the appliances provided," was argumentative in form, and for that reason would not have to be given.

## 10. CARRIERS $\S$ 347(15)—PASSENGER CHOOSING COURSE WHICH PROVED FATAL NOT NEGLIGENT AS MATTER OF LAW.

That result showed that deceased, whose death resulted from injury caused by his attempt, when emergency arose, to jump from stage plank to transfer boat provided by defendant company for him and other passengers, could have escaped mortal injury by jumping on the sand, did not make his act negligent as a matter of law.

## 11. DEATH $\S$ 77—DAMAGES WARRANTED BY EVIDENCE.

In an action by a wife for the death of her husband, 61 years old, her testimony that he gave her from \$150 to \$175 per month for the support of the family, though contradicted, *held* to warrant a verdict for \$12,000.

Appeal from Circuit Court, Phillips County; J. M. Jackson, Judge.

Action by Mattie Lee Hill, administratrix of the estate of W. L. Hill, deceased, against the Yazoo & Mississippi Valley Railroad Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Mattie Lee Hill, administratrix of the estate of W. L. Hill, deceased, brought this action against the Yazoo & Mississippi Valley Railroad Company to recover damages for the death of her husband and intestate, W. L. Hill, which was caused by his attempt to jump from the stage plank of the transfer boat of the defendant at Trotter's Point, Miss., his body striking the guard of the boat, whereby he received injuries from which he died.

The defendant was a common carrier operating a railroad from Memphis, Tenn., to Helena, Ark. The coaches of the train were usually carried down an incline at Trotter's Point, Miss., and run on a track which was laid on the transfer boat and was thus carried across the Mississippi river to Helena, where the coaches were pulled by an engine from the boat up the incline on that side of the river.

W. L. Hill was a resident of Memphis, Tenn., and on the 24th day of May, 1917, bought a ticket from Memphis to Helena, Ark. He took passage on one of the defendant's trains, and when the train arrived at Trotter's Point, Miss., it was ascertained that the incline was out of repair, and that the passengers would have to leave the coaches and walk down the river bank to the transfer boat and thus be carried across the river. For this purpose the railroad company had prepared a passageway to the boat by making an excavation in the sand at the top of the bank of the river about 8 feet in length and 6 feet deep. This incline was gradual, and was followed by ten steps which had been cut in the sand. Each step was about 12 inches wide, and was variously estimated to be from 6 inches high up to the height of a regular house step. From the bottom of the steps cut in the sand a gang or stage plank about 24 feet in length and 3½ feet wide extended to the boat. The gang plank was without guard rails.

One of the witnesses for the plaintiff said that the end of the gang plank resting on the bank of the river was much higher than the end which rested on the boat.

The witnesses for the defendant said that the gang plank was about 5 feet higher on the bank than it was at the boat. Some of the passengers had gone on down the bank ahead of W. L. Hill after they had left the train. A woman with her little child and its nurse were walking along the stage plank next to the boat. Another woman and her companion were on the stage plank next to the bank. Hill started down the bank, and while going down the steps his foot slipped, and in attempting to recover his balance he first walked fast and then began to run as he approached the stage plank, and halloosed to the passengers next to him to look out, and brushed by the woman and her companion. Before he reached the boat he leaped from the stage plank towards the boat and struck the edge of the boat with great violence, falling on the pit of his stomach. He was rendered unconscious, and was given first aid by a physician present who was also a passenger. The physician gave him an injection of morphine to ease his pain and said that as soon as he examined Hill he knew that his injuries were fatal. When the transfer boat had crossed the river to Helena, Hill was placed in charge of the conductor of the train. In a short time a surgeon of the railroad com-

pany came down to the station and ordered Hill removed to the hospital of the railroad company. After remaining at the station for a while he was carried to the hospital, and died four or five days later. In the meantime he suffered great agony.

The physician who rendered first aid to him testified that, when he first examined Hill, Hill did not appear to have been drinking. He also said that Hill talked in a rational manner after he became conscious. He admitted, however, that he had given a statement to the claim agent of the railroad company in which he stated that he had smelt whisky on Hill's breath. He asserted, however, that he was testifying as to the truth of the matter as he recollected it, and did not know how this came to be in the statement he made to the claim agent. When Hill was received at the hospital he had two one-half pint bottles of whisky in his pockets, and about one-half of one of them had been drunk. His wife was summoned to his bedside and remained there until he died. She testified that he left home with two one-half pint bottles of whisky, and that neither of them had been opened when he left home. She said that he drank whisky, but was not addicted to getting drunk, and that he was perfectly sober on the day he left home on the journey which proved fatal to him.

Other witnesses for the plaintiff also testified that he appeared to be sober on the occasion in question. They were passengers on the train and witnesses to the accident, and stated that Hill's foot slipped, and that he began to walk fast and then run in an effort to regain his balance. It was also shown that the sand of the river bank was soft and yielding and wet and slippery. One of the witnesses for the defendant, who was a much younger man than Hill, testified that his foot slipped in going down the steps and that he nearly fell. He characterized the condition of the steps as dangerous. Hill was 61 years old at the time of his death. He was accustomed to traveling, and was a stout active man for his age.

On the part of the defendant it was shown that a sudden rise in the Mississippi river had caused some of the pilings of the incline to become loose, and that for this reason it was necessary for the passengers to leave the coach on top of the river bank and walk down the bank to the transfer boat for a few days until the incline could be repaired. Passengers were transported several times a day in this manner. The section crew of the railroad made the pathway as has been described above, and it was shown by the railway company that there was no obstruction in the way which could have caused Hill to stumble. The section crew were witnesses for the defendant, and testified that the sand was soft and yielding, and that, when each train load went either down or up the incline, they smoothed

off the steps which they had cut in the sand and made them entirely safe for the next trip.

The transfer boat had a night and day captain, who were also the pilots of the boat. Each of them had had much experience in navigating the Mississippi river, and testified that the method adopted for transferring the passengers from the coaches to the transfer boat and from the transfer boat back to the coaches was the best method of doing so under the circumstances, and that it was the method usually adopted by boats plying the Mississippi river. They said that it was not customary and that it was impractical to have guard rails on the stage plank. It was also shown that between the boat and the river and under and on the sides of the gang plank there was soft sand and no rocks, sticks, or other obstructions.

Several witnesses for the defendant testified that Hill was drunk on the train from Memphis to Trotter's Point, and that he was drunk as he walked down the river bank. Some of them said he gave a yell as he started to run and another one as he jumped from the stage plank towards the boat. The conductor of the train said that after they arrived at Helena Hill admitted to him that he was drunk. The driver of the ambulance also stated that Hill admitted to him on the way to the hospital that he was drunk; the head nurse at the hospital, also the one who attended him, both say that he was very drunk when he was received at the hospital. Other facts will be stated or referred to in the opinion under appropriate headings.

The jury returned a verdict for the plaintiff, and the defendant has appealed.

F. A. Montgomery, of Tunica, Miss., and Fink & Dinning, of Helena, for appellant. Pace, Seawel & Davis, of Little Rock, for appellee.

HART, J. (after stating the facts as above). The court submitted to the jury the question of the negligence of the defendant and the contributory negligence of W. L. Hill. The court instructed the jury that the burden of proof was upon the plaintiff to establish the negligence of the defendant and upon the defendant to show contributory negligence on the part of W. L. Hill.

[1, 2] In the first place, it is strongly insisted by counsel for the defendant that the evidence fails to show any negligence on the part of the defendant, and that for this reason the court erred in submitting the question to the jury. In determining this question it becomes necessary to consider the duty of the defendant toward W. L. Hill. The relation of the carrier and passenger still existed when Hill was injured. It is the duty of a railroad company to use ordinary care to provide passengers with a safe and convenient method of ingress and egress from its cars, and the company is liable for dam-

ages by reason of the neglect of such duty to its passengers in descending from a car at a station or from the cars down the river bank to the transfer boat in the present case. *K. O. So. Ry. Co. v. Watson*, 102 Ark. 490, 144 S. W. 922; *St. L., I. M. & S. R. Co. v. Woods*, 96 Ark. 311, 131 S. W. 869, 33 L. R. A. (N. S.) 855; *St. L. & S. F. R. Co. v. Caldwell*, 93 Ark. 286, 124 S. W. 1034; and *Little Rock & Ft. Smith Ry. Co. v. Cavenesse*, 48 Ark. 106, 2 S. W. 505.

The defendant admits that it was bound to use ordinary care to provide safe and suitable accommodations to enable its passengers to leave its coaches on top of the river bank and to embark on the transfer boat, but they insist that the undisputed evidence shows that they did provide such accommodations, and that the happening of the accident in question was such an accident as could not reasonably have been anticipated by the defendant, and the omission to provide against it could not constitute actionable negligence. They point to the fact that they first made an incline at the top of the bank and followed this with steps down to the gang plank, and that the gang plank itself was 3½ feet wide with cleats on it for the purpose of preventing the passengers from slipping while walking on it. They kept a crew there for the purpose of smoothing out the steps after each trainload of passengers passed down them. All the members of this section crew testified that they did smooth out the steps after each trip and that there were no obstructions there. It was also proved by the two captains that they were experienced rivermen, and that the method used there was the best method in use on the Mississippi river and that it was the one usually adopted by all the boats on the river. This testimony was not sufficient to take the case from the jury upon the question of the negligence of the defendant. The river bank at the point in question was sand and the witnesses for the plaintiff testified that the sand was soft and yielding and wet and slippery. One of the witnesses for the defendant testified that the steps were dangerous on this account. There were no posts driven up and down the bank and ropes or guard rails attached to them. This might have been done in a very short time and at a very little expense. Moreover, there were only ten steps, and the carrier might have built wooden steps of rough lumber and temporarily anchored them in the sand.

[3] The jury, as men of experience in the ordinary affairs of life, might have found that this could have been done at little cost and was necessary for the safety of the passengers in ascending and descending the river bank. It is true the captains of the transfer boat testified that the method used was the best method, but the jury might not have believed their testimony in this regard.

Moreover, if the method adopted by the railroad company was wrong, the use of the same method by others could not right the wrong. What was the custom of others under like conditions was evidence tending to show that the railroad company was not negligent in providing a safe and suitable place for the passage of its passengers from its coaches to the transfer boat, but it was not conclusive evidence of that fact. The jury might find from other evidence that the way provided was dangerous and defective in spite of this evidence. The conduct of others is received as evidence of the nature of the thing in question because it indicates what is the influence of the thing on the ordinary person in that situation; but it is not to be taken as fixing a legal standard for the conduct required by law. *Wigmore on Evidence*, § 461, and *Oak Leaf Mill Co. v. Littleton*, 105 Ark. 392, 151 S. W. 262, and cases cited. In the case last cited the court was dealing with the test of a master's duties in furnishing a safe place for his servant to work, but the principle is the same, and what was said in that case applies with equal force here. The jury might have found that the method used by the railroad company was not a safe method for the discharge of its passengers, and it is not a sufficient answer to say that it was the same kind of way that is usually used by boats plying the Mississippi river. The court submitted the question of the negligence of the defendant to the jury under the principles of law above announced, and we do not think it erred in doing so.

[4] It is next earnestly insisted by counsel for the defendant that the court erred in not telling the jury as a matter of law that the defendant was guilty of contributory negligence. In the first place, they contend that practically the undisputed evidence shows that W. L. Hill was drunk at the time the accident occurred, and that this caused him to stumble, and that the consequences which followed were due to his being drunk.

We cannot agree with counsel in this contention. Hill's wife testified that he left home sober and only had two one-half pint bottles of whisky when he left home. She said that he placed them in his pocket because his grip was full of other things. The witnesses for the plaintiff, who were passengers on the train and saw the accident, said that Hill did not appear to be drunk, and that he walked down the river bank much in the same way the others did until he stumbled and endeavored to recover himself by walking faster. The physician who administered first aid to him and gave him an injection of morphine said that he did not appear to be drunk, and that after he regained consciousness Hill talked to him intelligently.

It is true the conductor testified that Hill was very drunk while they were waiting at

the station for an ambulance to take him to the hospital, but the jury might have found that Hill drank some of the whisky after he was injured to ease his pain, and that the whisky and morphine together made him very drunk. The ambulance driver says that he admitted to him that he was drunk, and the head nurse at the hospital said that he was very drunk when he reached there, but, as above stated, this might have been accounted for by the jury on the theory that he drank some whisky after he was injured.

[5] It will be remembered that his wife testified that there was no whisky used out of the two one-half pint bottles at the time he left home. The jury were the judges of the credibility of the witnesses, and it cannot be said that there is no evidence of a substantial character to support their finding that Hill was not guilty of contributory negligence in this respect.

[6] Again, it is contended that the court should have told the jury as a matter of law that Hill was guilty of contributory negligence because he jumped from the stage plank towards the boat when all around the stage plank there was soft sand upon which he might have jumped and thus prevented the injury. We cannot agree with counsel in this contention. This court has uniformly held that on occasions where a passenger is suddenly confronted by imminent danger he cannot reasonably be expected to calculate chances, or to deliberate upon the means of escape, but that he must of necessity judge of the danger by the circumstances as they at the instant appear to him, and not by the result. Immediate action and decision are required of him, and if he acts as a man of ordinary prudence placed in similar circumstances, and in doing so makes an effort to escape injury and is injured, the railroad company is responsible to him for his damages. *Railway Co. v. Murray*, 55 Ark. 248, 18 S. W. 50, 16 L. R. A. 787, 29 Am. St. Rep. 32; *Jacks v. Reeves*, 78 Ark. 426, 95 S. W. 781; *St. L., I. M. & S. R. Co. v. Stamps*, 55 Ark. 248, 18 S. W. 50, 16 L. R. A. 787, 29 Am. St. Rep. 32; *K. C. So. Ry. Co. v. Watson*, 102 Ark. 499, 144 S. W. 922.

Under the evidence adduced by the plaintiff, the jury might have found that Hill did not have time to look at the ground under the gang plank and see whether it was safe to jump there or not, but that, realizing that a woman and child and its nurse were in front of him on the stage plank, with whom he must come in contact unless he jumped, he leaped from the gang plank to avoid injuring them and himself, thinking that he could safely land on the boat. Therefore we do not think the court erred in submitting the contributory negligence of Hill in this regard to the jury.

[7] It is next insisted that the court erred in refusing to give instruction No. 4 asked

by the defendant. The instruction reads as follows:

"You are further instructed that the duty of the carrier as to its premises is not to furnish absolutely safe premises, or premises as safe as possible. If it adopts a method of construction of a standard character such as is generally adopted by other well-regulated carriers, and exercises reasonable care to keep the premises in repair, its duty is sufficiently performed."

If it be assumed that the instruction was correct, it is fully covered by instruction No. 3, which was given to the jury at the request of the defendant. This will be readily apparent from reading and considering the two instructions together. Instruction No. 3 is as follows:

"You are instructed that, if you believe from the evidence that the incline of the defendant at Trotter's Point, Miss., connecting its railroad track with its transfer boat was out of repair without the fault of the defendant, but owing to the changes of the water of the river, and that the defendant was for that reason obliged to transfer its passengers from the train on the Mississippi side onto a train on the boat, and that the defendant provided such a reasonably safe way to approach the boat as was in general use and such as a reasonably prudent person would provide, then the jury will find for the defendant, even though they believe that he was sober and in the exercise of reasonable care for himself, and did slip on the sand steps that had been provided on account of the condition of the ground, and this was the cause of his injuries."

[8, 9] It is next insisted that the court erred in refusing to give instruction No. 5 at the request of the defendant. The instruction is as follows:

"You are further instructed that the law does not impose on the railroad company the duty of so providing for the safety of persons going from the train to the boat in this case that they will encounter no possible danger and meet with no casualties in the use of the appliances provided."

This instruction was also covered by the matters embraced in instruction No. 3. Besides, the instruction as asked is argumentative in form, and for that reason need not have been given by the court.

It is next insisted that the court erred in not giving instructions Nos. 6 and 8 asked by the defendant. These instructions will be considered together. They are as follows:

No. 6. "You are further instructed that, if you believe from the evidence that the death of the plaintiff's intestate was caused by his attempting to jump from off the gang plank of the defendant's landing from the river to its transfer boat, when there were other means by which he could have reached the boat in safety to himself and others, the law is that the plaintiff's intestate assumed the risk of jumping into the boat, and the defendant is not liable, and the jury will so find."

No. 8. "You are instructed that, if you believe from the evidence that the cause of the death of the plaintiff's intestate was that he unnecessarily jumped or attempted to jump from the gang plank to the boat, then you are instructed that the casualty has no connection with the fact that he lost his balance in coming down the bank, if you believe he lost his balance in that way and the injury to him, but that his injuries were solely caused by the jump, and the jury will find for the defendant."

[10] As we have already seen, the fact that the result showed that there was a way for Hill to have escaped mortal injury by jumping on the sand and that in the emergency he chose the one which proved fatal to him would not characterize his act as one of negligence as a matter of law. Therefore the court did not err in refusing to give either of these instructions.

Finally it is insisted that the verdict is excessive. The complaint is in two counts. In the first count the plaintiff sued for the use of herself and her minor child for their financial loss in the death of the husband and father. In the second count the plaintiff sued for the use and benefit of the estate of W. L. Hill on account of the mental and physical pain and suffering resulting from the injury. There was a verdict and judgment for the plaintiff on the first count in the sum of \$12,000 and on the second count in the sum of \$500, making a total of \$12,500.

[11] It is the contention of counsel that the verdict on the first count is excessive. No point in this respect is made on the second count; for it is conceded that W. L. Hill suffered great agony for the four or five days which he lived after receiving his injuries. At the time of his death W. L. Hill resided in Memphis, and, besides his adult children, left his widow and a daughter 17 years of age, who were dependent upon him for support. His wife testified that he was a very affectionate husband and father, and that he took great pride and interest in helping to raise their daughter. She said that her husband was 61 years old at the time of his death; that he weighed 160 pounds and was about 5 feet 6 inches tall; that he was very strong and also very industrious; that he was a piano salesman and solicitor; that he would get pianos by buying them and then sell them to other people; that he had a tuner with him who assisted him in his work, and that he made outside money enough in this way to pay his traveling expenses; that his earnings were from \$150 to \$175 per month; that he paid all of this to her alone, and that she disbursed it for the support of herself and family; that Mr. Hill's business called him away from home a good deal, and that she stayed at home with their daughter; that they had lived in Memphis about 26 years before his death, during which period he had

followed the business of selling pianos either on salary or on commission; that sometimes he bought pianos and sold them again; that they were not in debt at the time of his death; and that she usually paid cash for their living expenses. She denied that her husband got on frequent and protracted sprees. She testified that she had known him to go 5 years without drinking any at all. She testified that he was not addicted to excessive drinking; that he drank moderately; and that it never interfered with his business.

On the other hand, it was shown by the defendant that Hill was addicted to the excessive use of intoxicating liquors, and for this reason could not hold a position long at a time and that he did not make more than \$50 per month above his traveling expenses. These facts were proved by the men for whom Hill had worked for several years prior to his death. It was shown that Hill's wife was having trouble with one of these firms with regard to a settlement of the amount alleged to be due her husband, but the witnesses said that this did not influence their testimony. They all claimed they were testifying to matters shown by their books. The life expectancy of Hill was 13½ years.

It is claimed by counsel for the defendant that the verdict is excessive, and that the evidence of Mrs. Hill has been completely overcome by the evidence adduced by the defendant. We cannot agree with counsel in this respect. It is true that the defendant offered evidence as to what Hill was making, and the witnesses were men for whom Hill had worked, and that they testified that they had taken the items from their books which showed the state of his account. This evidence, however, was not conclusive, because it was not admitted to be true, and Mrs. Hill testified that her husband gave her from \$150 to \$175 per month to be used in the support of herself and family. Her testimony in this respect was as to a matter which might or might not be true. It was as to a matter of which she had personal knowledge, and therefore her testimony was positive evidence. The testimony of the witnesses for the defendant, of course, was in direct conflict with her testimony, but the jury were the judges of the credibility of the witnesses, and it cannot be said that the evidence adduced for the defendant conclusively disproved the testimony of Mrs. Hill. This is true because she testified as to matters of which she had personal knowledge, and her testimony was therefore evidence of a substantive character. It was not opposed to any law of nature or to any well-known scientific fact. It was relevant to the point at issue, and, if true, warranted the jury in returning a verdict for \$12,000. Being evidence of a substantive

character and of matters of which Mrs. Hill had personal knowledge, it could not be overcome by the testimony of the defendant as a matter of law, no matter how strong it might be. It is our duty to uphold a verdict when there is any evidence of a substantial character to support it. Therefore it would be useless for us to enter into a discussion of the truth or falsity of her testimony. It is sufficient to say that it was believed by the jury and warranted the verdict.

It follows that the judgment must be affirmed.

### COLLISON v. CURTNER. (No. 36.)

(Supreme Court of Arkansas. Dec. 8, 1919.  
Rehearing Denied Jan. 12, 1920.)

#### 1. MASTER AND SERVANT — 316(1)—INJURIES TO THIRD PERSONS; LESSEE OF COTTON GIN NOT INDEPENDENT CONTRACTOR.

A lease of a cotton gin, requiring lessee to pay rent and keep the gin running, and to be responsible for damages, and requiring the owner to "furnish all repairs necessary for the successful operation of the plant," binds the owner to make all repairs, so that he cannot escape liability for injury to third persons resulting from a boiler explosion, on the ground that lessee was an independent contractor.

#### 2. NEGLIGENCE — 132(1)—EVIDENCE ON ISSUE OF CONTRIBUTORY NEGLIGENCE.

In an action for injury by the explosion of a boiler operating a cotton gin, evidence that it was a custom for persons to enter the boiler room to interview those in charge relative to ginning cotton was competent on the issue as to whether the injured parties were trespassers, and guilty of contributory negligence in going into a dangerous place.

#### 3. NEGLIGENCE — 130(1)—EVIDENCE AS TO CONDITION OF BOILER ON MORNING AFTER EXPLOSION COMPETENT.

In an action for injuries from the blowing out of a plug in the boiler of a cotton gin plant, testimony that witness went to the gin the next morning after the explosion and found the threads on the boiler to be badly worn was competent on the question of negligence, as showing the real condition at the time the accident occurred.

#### 4. NEGLIGENCE — 130(1)—EVIDENCE AS TO CONDITION OF BOILER AFTER EXPLOSION COMPETENT.

In an action for injury by an explosion testimony as to the condition of the boiler 15 days after the accident was competent, where there was no showing that it was in a different condition at the time the witness saw it than immediately after the injury.

Appeal from Circuit Court, White County;  
J. M. Jackson, Judge.

Actions by David Curtner, for himself and as administrator of his deceased son, Wood-

row Curtner, against J. Collison. Causes consolidated for trial. Judgment for plaintiff, and defendant appeals. Affirmed.

Brundidge & Neely, of Searcy, and Cui L. Pearce, of Bald Knob, for appellant.

Pace, Seawel & Davis, of Little Rock, and G. G. McKay, of Bald Knob, for appellee.

WOOD, J. On the 3d of October, 1918, David Curtner, accompanied by his son, Woodrow Curtner, 5 years of age, drove a load of cotton to the gin of J. Collison, at Bald Knob, Ark. While waiting to have the cotton ginned, Curtner and his son went into the boiler room of the gin, and while there a plug at the bottom of the boiler was blown out, and Curtner and his son were scalded. The son died from the injuries received, and David Curtner instituted a separate action in his own right, and as administrator of the estate of his son instituted another action, against the appellant to recover damages for the injury and death of the son.

The grounds of negligence set forth in the complaints are that Collison negligently and carelessly permitted the boiler to become and remain insecure and unsafe, in that the plug used by him to stop the blowpipe at the bottom of the boiler was too large for the opening, and when screwed into the opening only a few threads would catch; that the threads in the opening of the boiler were worn, some of them being entirely gone, making the plug insecure in the opening; that the plug blew out, and permitted the steam and hot water to escape and burn the plaintiff below, appellee here, rendering him a cripple for life; that Collison, at the time of and before the happening of the accident, knew of, or in the exercise of ordinary care could have known, of the defective condition of the boiler, and that such condition was wholly unknown to the appellee. The appellee then set forth minutely the nature of the injuries received. The appellee alleged that he had suffered, and that he will continue to suffer for the remainder of his life, great pain of body and anguish of mind as a result of the injuries; that on account of his own personal injuries he had been damaged in the sum of \$30,000, for which he asked judgment.

In the case of the appellee as administrator of the estate of his son he alleged the same grounds of negligence, and set up that his son was injured by reason thereof, and suffered great agony and finally died as the result of the negligence alleged. He averred that the services of his minor son were worth to him the sum of \$5,000, and that he should recover for the benefit of the estate in the sum of \$15,000. He therefore prayed for judgment in the sum of \$20,000.

In his answer the defendant, appellant here, denied all the material allegations of the complaint, and set up as an affirmative

defense that the gin where the accident happened had been rented by the appellant to one N. B. Ledgerwood, who at the time was in the exclusive possession, control, management, and operation of the same; that, if the appellee and his son were injured, their injuries were caused by the appellee's going into the boiler room and taking his son, without the invitation or permission of the appellant; that appellee knew, or should have known, that it was a dangerous place, and was a trespasser, and was therefore guilty of contributory negligence. The allegations of the answer in the case of the appellee as administrator of the estate of his son were substantially the same. In that case the appellant charged that the appellee was guilty of contributory negligence in taking his son into a dangerous place and allowing him to remain there.

The causes were consolidated for the trial.

Appellant first contends that at the time of the accident the gin was being operated by one N. B. Ledgerwood, under a lease from appellant which exempted him from liability in damages for the injuries of which the appellee complains. The lease was dated August 1, 1918, and was between J. Collison, the lessor, and N. B. Ledgerwood, the lessee, and recites in part as follows:

"For and in consideration of the payment of rentals hereinafter reserved, and the covenants herein, the lessor hereby grants, lets, and leases unto the lessee, his executor, administrator, and assigns, for a period of one (1) year from the date hereof, the following property: All the property, personal and real, now used and known as the 'Collison Gin Plant,' including the realty upon which it is located, in the town of Bald Knob, Ark., and the use and the employment of all machinery, fixtures, implements, utensils, supplies on hand and all other things which now constitute or are a part of the said gin plant, or located upon the premises and which are considered a part of the said gin plant. \* \* \* It being agreed that the lessor shall furnish all wood, coal, and other fuel, oil, belting, and other supplies, all repairs and new parts of machinery and other similar things necessary for the successful operation of the said plant, and shall receive from the lessee the sum of \$4.25 for each and every bale of cotton ginned and turned out at the said plant, and shall also receive all profits and gain from the handling and sale of cotton seed coming from said gin. And the lessee shall pay said amount per bale, and concede all profits and gain from the handling and sale of cotton seed from said plant, and assumes and agrees to be responsible for, and assumes all liabilities for, wages, debts, damages, and otherwise, arising from or growing out of the operation of the said gin plant. And the lessor shall, during the period of said lease, be in no wise connected with the operation or management of the said gin plant, and assumes no liability therefor. But the lessor shall assist the lessee in keeping books, accounts, and do other records of the business when requested so to do."



The contention of the appellant is that under the above lease Ledgerwood, at the time of the accident, was an independent contractor, and if the explosion was caused through any acts of negligence, such acts were those of Ledgerwood.

[1] The court, at the instance of the appellee, over the objection of the appellant, gave instructions to the effect that under the terms of the lease appellant agreed to furnish all the repairs on the cotton gin; that if the jury found that at the time the alleged lease was executed the boiler plug near the back end was insecurely fastened, and that the threads of the boiler would not catch and hold the plug in position, and that by reason thereof the boiler at said place was unsafe and dangerous, and that appellant knew this or could have known it by the use of ordinary care and reasonable inspection; and that if they found that there was this unsafe and dangerous condition, and that it continued to exist from the date of the alleged lease until the injury, and that appellant negligently failed to repair it, the alleged lease would not constitute a defense, provided that the appellee and his child were lawfully upon the premises at the time and place of the alleged injury and that the negligence, if any, of the appellant, was the direct and proximate result of the injury as defined in other instructions.

The specific grounds of objection to the above instructions were that they told the jury that the appellant agreed to furnish all the repairs on the cotton gin, when under the undisputed evidence the appellant was only to furnish the material for making such repairs as his lessee might find necessary and such as he might make demand for, and further because the undisputed evidence showed that appellant had nothing to do with putting the machinery in condition and repair prior to the operation of the same for the season of 1918.

The instructions and the objections raised to them call for a construction of the alleged lease. A majority of the court have reached the conclusion that the trial court was correct in construing the alleged lease as one which bound the appellant, not only to furnish the material for making the repairs, but also to actually make all the repairs that were "necessary for the successful operation of the plant." It occurs to us that this is the correct construction of the contract, when the words "furnish all repairs" are given their ordinary and obvious meaning. The word "repair," as used in the instrument, is a noun. It means:

"Act of repair; restoration; or state of being restored to a sound or good state after decay, waste, loss, reparation; mending; also an instance or result of such restoration; often in the plural, as the repairs to the house are extensive." Webster's New International Dic-

tionary; Funk & Wagnall's New Standard Dictionary, "Repairs."

One of the definitions of the word "repairs" given by the latter author is:

"Condition after use, specially good condition; condition after repairing."

The definition of the verb "furnish," as given by Funk & Wagnall's, is:

"To equip or fit out; supply what is necessary or fitting."

As given by Webster is:

"To accomplish; insure; to provide for; to provide what is necessary for."

If the appellant had intended that the words should have the meaning which he now insists they have, it would have been easy for the attorney who prepared the instrument under his direction to have so worded it as to convey that meaning, by simply using the exact words to express his meaning which he now contends the words used do express, to wit, "to furnish all materials for making repairs," instead of the words "furnish all repairs," the words actually used. The appellant, having prepared the instrument, is responsible for the language employed, and, as he relies upon the instrument for his protection, he is not in a position to insist upon a different interpretation of the words than that of their plain and ordinary meaning.

Other portions of the instrument strengthen this construction, and show that the party named as the lessee in the instrument was to have nothing whatever to do, except to pay the rent and keep the gin running or in operation, after all machinery, wood, coal, supplies, repairs, etc., necessary for its successful operation, were furnished or made by the appellant. Such being the meaning of the alleged lease, the issue as to whether or not the negligence averred was that of an independent contractor, and the doctrine applicable thereto, have no place in this case. The court, therefore, ruled correctly in refusing prayers by the appellant for instructions seeking to have that issue submitted to the jury.

The issues of negligence and contributory negligence, under the evidence, were issues of fact for the jury. They were submitted under familiar and correct declarations of law.

[2] Appellant complains here of the ruling of the court in admitting the testimony of certain witnesses tending to show what the custom was with reference to parties being permitted to enter the boiler room, where the appellee and his son were injured. The abstract of the appellant does not show that any objection was made at the time to the

testimony of these witnesses. Furthermore, if such testimony had been objected to, there was no error prejudicial to appellant in admitting it, for appellee testified without objection, and there was no testimony to the contrary, that he went into the engine or boiler room for the purpose of inquiring when his cotton would be ginned. Those in charge knew that he and his son were in the boiler room, and no objections were made to their presence there. The testimony as abstracted was competent on the issue as to whether or not the appellee was a trespasser, and guilty of contributory negligence in going in and taking his son into a dangerous place. The testimony tends to prove that persons going to the gin on business were permitted to go into the boiler or engine room; that no steps were taken in any manner, to prevent those having business at the gin from going into the engine or boiler room.

[3] The appellant complains of the ruling of the court in permitting the witness Graham to testify that—

"he went down to the gin the next morning after the explosion, and that he found where the boiler had a plug in it, and that it had been blown out; that the threads were mighty bad on the boiler, where the plug is supposed to set in; it was eaten out considerable; that the threads on the boiler had an appearance of being freshly done, but were worn slick; that Mr. Collison spoke to him about the matter," etc.

The abstract of appellant does not show that any objection was made to the introduction of this testimony, and, even if it had been objected to, the testimony was competent, for the reason that it tended to show

the real condition that the boiler was in at the time the accident occurred.

[4] The appellant also urges here that the court erred in permitting witness P. J. Donahue to testify as to the condition that the boiler was in some 15 days after the accident; but the appellant neither in his brief nor in his abstract set out any testimony of the witness which shows that the boiler was in any different condition at the time witness saw the same than it was at the time the injury occurred. The testimony of this witness as abstracted shows that he testified as an expert, and in answer to hypothetical questions propounded to him he gave his opinion concerning the causes that must have brought about the worn condition of the threads in the hole of the boiler from which the plug was blown, as assumed in the question propounded to the witness.

In the testimony as abstracted it does not appear that any objection was urged at the trial either to the question or to the answer. But again we say that, even if objection had been offered to the testimony in the form in which it appears in appellant's abstract, we would have to hold that the testimony was competent, and that it did not in any manner contravene the doctrine announced by us in *Prescott & N. Ry. Co. v. Smith*, 70 Ark. 179, 67 S. W. 865, *St. L. S. W. Ry. Co. v. Plumlee*, 78 Ark. 148, 95 S. W. 442, and other cases more recent of the same purport, to the effect that testimony is incompetent, after an accident occurred, tending to show that the defect causing the accident and injury was removed, altered, or changed by the master, for the purpose of showing negligence.

There is no error in the record, and the judgment is therefore affirmed.

LOUISVILLE & N. R. CO. v. SMITH'S  
ADM'R.(Court of Appeals of Kentucky. Nov. 14,  
1919.)1. RAILROADS ⇨400(1)—EVIDENCE IN ACTION  
FOR INJURY ON TRACK SUFFICIENT FOR JURY.

In an action against a railroad for a death on its track, under the evidence, though its weight was in the railroad's favor, case *held* for jury.

2. RAILROADS ⇨356(1) — DUTY OF ROAD  
WHICH PERMITS USE OF TRACK BY PUBLIC.

Where the public generally, with the knowledge and acquiescence of a railroad, have used its track continuously for a long time, the railroad in running trains must anticipate the presence of people on the track; the mere fact, however, that the place is within the corporate limits of a town or city, not in itself imposing on the railroad the duty of warning, looking out, or other care.

3. RAILROADS ⇨400(2) — WHETHER PERSON  
KILLED WAS TRESPASSER OR LICENSEE JURY  
QUESTION.

In an action against a railroad for a death on its track within the corporate limits of a town, whether decedent was a trespasser or a licensee *held* for the jury under the evidence.

4. RAILROADS ⇨401(1)—INSTRUCTION IN AC-  
TION FOR DEATH ON TRACK.

In an action against a railroad for a death on its track, instruction not qualifying the extent of the use of the track by the public to charge the railroad with the duty to look out, give signals, etc., though open to misunderstanding if alone and unexplained, *held* proper in view of the context and the facts.

5. RAILROADS ⇨356(1)—NOTICE OF USE OF  
TRACK BY PUBLIC.

If the use of a railroad's track by the public was general and acquiesced in by the road, it was charged with notice of such use.

6. RAILROADS ⇨350(1)—TRESPASS ON TRACK  
BY SITTING OR LYING DOWN.

Though a railroad acquiesces in the use of its track by the public as a way, so that persons using the track become licensees, if a pedestrian sits down or goes to sleep, he becomes a trespasser, to whom the road owes no duty other than to avoid injury to him after discovery of his peril.

7. RAILROADS ⇨401(2)—PRESENTATION OF  
ISSUE BY INSTRUCTION ON REQUEST.

Where there was evidence that deceased was lying on defendant's track, when discovered, the court should have instructed at defendant's request, that, if the jury believed that deceased just before he was run over was sitting or lying on the track, the defendant was not liable, unless he was actually discovered in time to save him by stopping the train.

Appeal from Circuit Court, Letcher County.

Action by James F. Smith's administrator against the Louisville & Nashville Railroad

Company. From judgment for plaintiff, defendant appeals. Reversed.

Morgan & Harvie, of Whitesburg, Morgan & Nuckols, of Hazard, Samuel M. Wilson, of Lexington, and Benjamin D. Warfield, of Louisville, for appellant.

T. W. Wylie and W. G. Dearing, both of Whitesburg, for appellee.

QUIN, J. Appellee's intestate, J. F. Smith, was run over and killed by a train of the appellant, and in this suit to recover damages for his death there was a verdict against the appellant for \$5,000. The accident happened about 8 o'clock on the evening of October 25, 1916. The train was a local freight and was on its way from McRoberts to Neon. It consisted of one box car, a caboose, four cars, the tender, and the engine, in the order named, and at the time of the accident was backing, in a northerly direction; the first box car being the front of the train. There was no Y or turntable at McRoberts, and it was customary for this train to proceed to Neon, where the engine was reversed on the Y. Between McRoberts, a town of approximately 2,500 inhabitants, and Neon, with 150 inhabitants, is the town of Fleming, with a population of probably 1,500 or 2,000 persons.

The northern or western limits of McRoberts are coincident with the southern or eastern limits of the town of Fleming. The accident occurred at a point about 30 feet from tipple No. 301 of the Elkhorn Coal Corporation, and within the limits of the town of Fleming, at a point approximately 400 feet from the last house in Fleming. There is a road crossing near the tipple. The public road parallels the tracks of the company for some distance at this place. In the use of this road and in going from one town to the other it is necessary to cross the creek some three or four times. The track is elevated from 6 to 8 feet above the level of the road and was in continuous daily use by from 75 to 200 persons traveling between the two towns. This use is spread over the entire day and as late as 11 o'clock at night.

[1] Appellant insists it was entitled to a directed verdict. With this contention we cannot agree, though the weight of the testimony is in its favor.

Without undertaking to give a detailed statement of the evidence, it might be summarized, in part, as follows:

For appellee: Decedent was a drinking man, and often got drunk. The sprees would last a week or ten days. He had them as frequent as once a month. When sober he was a good workman. As late as 7 or 7:30 the evening of the accident, he was talking to one witness who said he appeared to be sober, he was standing erect, and talked as he usually did. The train was seen by

a number of persons backing from McRoberts. According to many of these, there was no light on the front box car; two or three saw a white lantern on top of the car; some saw at least one man on top of the car; others saw a light on the caboose.

Decedent was last seen alive walking on the track when the box car was 20 or 30 yards from him. Other than the noise of the train heard by some of the witnesses, there was no sounding of the bell or blowing of the whistle. The scene of the accident was on a curve near the tipple referred to.

For the appellant: The flagman and one brakeman were on the top of the front box car with lighted lanterns and were keeping a lookout ahead. Before leaving McRoberts, they had placed a yellow fusee two or three feet above the drawbar on the head end of the car. This fusee will burn from 10 to 15 minutes. From the time they left McRoberts until they reached the point of accident was 8 or 10 minutes. The light from the fusee enabled them to see from three to four rail lengths ahead of the car. The flagman said he did not see anything until the brakeman said: "Look there! What is that? I believe we have run over a man." Just as he spoke, the flagman says he flashed his eyes down expecting something to be on the track. He had not seen anything, but he caught a glimpse of something, just as the car passed over a white looking something near the end of the ties. He could not distinguish what it was. He immediately gave the signal to the engineer, and the train was stopped after the engine had passed beyond decedent about 100 feet.

The brakeman on the front car, in an affidavit read as a deposition, testifies to facts substantially the same as the flagman. He saw decedent when the end of the car was about 30 feet from him. Decedent was lying on the track, partly across one of the rails. He immediately called the flagman, who gave the signal to stop. The train was running from six to eight miles an hour downgrade, and there was no exhaust from the engine. The train whistled for two crossings, one about one-half mile north of McRoberts and one north of the crossing south of the tipple. The bell was ringing and the fusee was still burning after the train had stopped.

About 2 o'clock in the afternoon of the day of the accident, decedent took a nap in the yard of a Mrs. Branham in McRoberts. He slept until sundown. He had a pint of whiskey in a quart bottle. This he consumed. He was seen in this yard by Mrs. Branham, her father, and a schoolboy. After awakening from his slumber, he started out of the yard and down the road "staggering and pitching along." The last seen of him by two of these witnesses was when he came

to a turn in the road and disappeared from view.

To have authorized a peremptory instruction in appellant's favor, it should appear that admitting the testimony introduced in appellee's behalf to be true, as well as every inference fairly deducible therefrom, he failed to support his cause of action. This is not the case, as there was evidence sufficient to warrant a submission to the jury.

It is earnestly argued that decedent was a trespasser and the company owed him no duty of lookout or warning.

[2] This court has had frequent occasion to pass upon cases involving facts similar to these, and the rule applicable here might be thus stated: That where the public generally, with the knowledge and acquiescence of the railroad company, have continuously used its tracks for a long period of time, the presence of persons on the track at the point where it is so used must be anticipated by the company in the running of its cars or trains thereon, and it is the company's duty, in the movement of cars at such places, to give warning of the approach of its trains, to operate same at a reasonable rate of speed, and to maintain a proper lookout. This duty of the company depends, not on the fact that the place of injury was in an incorporated town or city, but whether the company's track at the place of the accident was used by the public with such frequency or in such large numbers with the knowledge and acquiescence, of the company that the presence of persons on the track should be anticipated. It is the habitual use, rather than the location of the track, that is determinative of the question whether one is a trespasser or a licensee. That the accident occurred within the corporate limits of a town or city does not of itself impose upon the railroad company the duty of warning, lookout, or other care necessary on streets or crossings. The track might be located within the corporate limits, and yet not be on a street or place habitually used by the public. *L. & N. R. R. Co. v. McNary*, 128 Ky. 408, 108 S. W. 898, 32 Ky. Law Rep. 1266, 17 L. R. A. (N. S.) 224, 129 Am. St. Rep. 308; *Southern Railway Co. v. Sanders*, 145 Ky. 879, 141 S. W. 77 (second appeal, 154 Ky. 421, 157 S. W. 731); *C. & O. Ry. Co. v. Warnock's Adm'r*, 150 Ky. 75, 150 S. W. 29; *Corder's Adm'r v. C., N. O. & T. P. Ry. Co.*, 155 Ky. 536, 159 S. W. 1144; *C., N. O. & T. P. R. Co. v. Blankenship*, 157 Ky. 699, 163 S. W. 1123; *C. & O. Ry. Co. v. Dawson's Adm'r*, 159 Ky. 296, 167 S. W. 125; *Willis' Adm'r v. L. & N. R. R. Co.*, 164 Ky. 124, 175 S. W. 18; *C. & O. Ry. Co. v. Berry's Adm'r*, 164 Ky. 280, 175 S. W. 340; *C. & O. Ry. Co. v. Isaacs*, 170 Ky. 190, 185 S. W. 816; *Cornett's Adm'r v. L. & N. R. R. Co.*, 181 Ky. 132, 302 S. W. 1054; *L. & N. R. R. Co. v. Vaughan's Adm'r*, 183 Ky. 829, 210 S. W. 938.

While the accident occurred within the corporate limits of the town of Fleming, this of itself did not constitute decedent a licensee.

[3] The evidence shows such a use of the track at the time and place of the accident as made this issue one for the jury.

[4] Instruction No. 1 is criticised because it did not qualify the extent of the use of the track. This instruction was approved in *Southern Ry. Co. v. Sanders*, 145 Ky. 679, 141 S. W. 77. See *Hobson, Blain & Caldwell on Instructions*, § 521. Standing alone and unexplained, the instruction might be misunderstood; but it was fully justified by the evidence in the *Sanders* Case and in any other case presenting similar facts, where the use was such as warranted a submission of that question to the jury. Unless a sufficient use be shown, the case would be one for the court and not the jury. *Willis' Adm'r v. L. & N. R. R. Co.*, 164 Ky. 124, 175 S. W. 18.

[5] It is urged there was no evidence that the company knew of the extent of the use. If the use of the track was general and acquiesced in by appellant, it was charged with notice of such use, and this question was properly submitted in instruction No. 1; acquiescence implies consent and there could be no consent or approval without knowledge.

[6, 7] The court refused to give the following instruction tendered by appellant:

"If the jury believe from the evidence that J. F. Smith, the plaintiff's intestate, just before and at the time he was run over by defendant's train, was sitting or lying upon defendant's track or partly across one of the rails of said track, the jury will find for the defendant."

The theory presented by this instruction was a vital question in this case, and this issue raised by the testimony of the company's brakeman should have been presented to the jury under proper instructions.

The use of the railroad tracks as footways is not due to any wish or intention on the part of the company that they be so used; indeed, the contrary is true. But, despite many and varied efforts to keep the public off the tracks, people persist in their use of them. It would seem that some plan or scheme should be provided by which the railroad should be accorded their superior if not exclusive right to use their property without the interference of the public.

Though extremely hazardous and the cause of many serious and fatal accidents, the use of railroad rights of way by pedestrians continues.

The sporadic or occasional use of the tracks by persons does not require or exact

of the company's operatives or employes any duty other than the exercise of ordinary care by the means at their command to save from injury any one on the track in danger, after their peril has been discovered—this is the only duty to trespassers or to those who have no right on the track. But by continued or habitual use and increasing numbers the use of the track may ripen into certain rights on the part of the pedestrian and corresponding duties by the company; he then becomes a licensee. Whether a person is a trespasser or a licensee depends upon the number of persons using the track at any given point. Use of a track at a certain place in the day-time might be sufficient to classify the users as licensees, while at night the use may be so occasional at the same point as would constitute the user a trespasser.

While the use of the track at the place of accident was shown to be in such numbers as authorized a submission to the jury as to whether a pedestrian or one lawfully using the tracks was a licensee, if a person ceases to so use the track and decides to take a nap, with the track as a bed, or to sit or lie down upon the track, he thereby became a trespasser, and the company owes him no duty other than to avoid injury to him after discovery of his peril. One who goes to sleep upon a railroad track is a trespasser, though at a point where persons are accustomed to cross or use the tracks in large numbers. *C., N. O. & T. P. R. Co. v. Mayfield's Adm'r*, 145 Ky. 305, 140 S. W. 810; *Cornett's Adm'r v. L. & N. R. R. Co.*, 181 Ky. 132, 203 S. W. 1054.

The duty of lookout, warning, and control which the law imposes upon railroad companies in favor of licensees applies to persons using the track as a footway and will not be extended so as to include sleepers or persons sitting or resting on the ties or track.

Upon a retrial of this case, if the evidence is substantially the same as upon the first trial, the court, in lieu of instruction No.—tendered by appellant, will instruct the jury as follows:

"If the jury believe from the evidence that J. F. Smith, plaintiff's intestate, just before and at the time he was run over by defendant's train, was sitting or lying upon defendant's track or partly across one of the rails of said track, and the defendant or those in charge of said train, after it saw decedent or discovered his peril, could not in the exercise of ordinary care and in the use of the means at its command have avoided injuring him, the law is for the defendant, and you will so find."

For the reasons herein stated, the judgment is reversed for further proceedings consistent with this opinion.

## LUCK et al. v. SCHABELL et al.

(Court of Appeals of Kentucky. Dec. 19, 1919.)

1. JUDGMENT  $\S$  486(1)—COLLATERAL ATTACK ON VOID JUDGMENT.

Only a void judgment can be collaterally attacked in a subsequent suit.

2. INFANTS  $\S$  80(1) — RECORD SHOWING OF APPOINTMENT OF GUARDIAN AD LITEM.

Issuance of summons by the clerk of court against a stranger to the record as guardian ad litem after affidavit had been filed making it his duty to make the appointment as guardian under Civ. Code Prac.  $\S$  52, attested the clerk's appointment of such stranger as guardian ad litem sufficiently at least to render it impossible to assert that the record affirmatively showed that no such appointment was made by him.

3. PROCESS  $\S$  100—ENTRY OF WARNING ORDER ON PETITION.

A warning order, under Civ. Code Prac.  $\S$  57, subsec. 7, must be spread upon the petition as required by the Code, since it takes the place of a summons, determines the date of constructive service and commencement of action, and gives the court jurisdiction over the nonresident's property, which is fixed and evidenced by the clerk's order.

4. INFANTS  $\S$  89 — PROCESS IN PARTITION OF LANDS OF INFANT UNDER FOURTEEN WHEN SERVED.

Where an infant, pursuant to Civ. Code Prac.  $\S$  52, was brought before the court trying suit to partition his lands when he was under 14 years of age, having been sued by guardian ad litem, he was in court, and the authority of his guardian to defend continued until termination of the cause, unless he was removed by the court or his authority terminated by the infant's arrival at majority, and orders of sale and confirmation made after the infant reached 14 were not void, though process required when infant is 14 years old was not served.

Appeal from Circuit Court, Campbell County.

Action by Albert Schabell and others against John Luck and others. From judgment for plaintiffs, defendants appeal. Reversed, with directions to dismiss petition.

Healy & Hawkins, of Newport, for appellants.

Barbour & Bassman, of Newport, for appellees.

CLARKE, J. This action is an attack upon a judgment of the Campbell circuit court in another suit selling for partition, under section 490 of the Civil Code of Practice, 22

acres of land then owned jointly by the appellant John Luck and his four infant children, and which he has since acquired through several mesne conveyances from the purchaser at the judicial sale.

Accompanying the petition in that action, in which John Luck and his second wife, Lillie Luck, were plaintiffs, and his infant children the only defendants, was an affidavit by John Luck that the infant defendants had no statutory guardian and were all under 14 years of age; that their mother was dead; and that he was their father and custodian and a plaintiff to the action.

Under section 52 of the Civil Code of Practice, it is made the duty of the clerk of the court under such circumstances to appoint a guardian ad litem for the infants upon whom summons may be served for them. The record shows that, upon the same day this affidavit was filed by the plaintiffs, the clerk of the court issued summons, regular in form and directed to the sheriff of Campbell county, commanding him to summon M. R. Lockhart, guardian ad litem for each of the infant defendants, which summons was regularly returned by the sheriff indorsed:

"Executed the above summons this 5th day of December, 1910, on John Luck, an infant 11 years of age; also Margaret Luck, an infant 7 years of age; also Gussie Luck, an infant 6 years of age; also Howard Luck, an infant 2 years of age, by delivering a copy for each and every one of them to M. R. Lockhart, he being guardian ad litem for said four minor children."

Thereafter, and before the judgment was entered ordering the land to be sold for partition, M. R. Lockhart filed answer as guardian ad litem for each of the infant defendants.

[1] This is all the record discloses with reference to the appointment of M. R. Lockhart as guardian for the infant defendants. The infant defendants in that action are not parties to this action, and no question is involved as to their right to question the correctness of the judgment in the former suit in any of the ways provided by section 391 or 518 of the Civil Code of Practice. Neither have the appellees, who were plaintiffs below, attempted a direct attack upon that judgment. The sole question involved is therefore whether it affirmatively appears from the record in the former case that M. R. Lockhart was not appointed as guardian ad litem, for unless so the judgment was not void and cannot be collaterally attacked, as is attempted in this action. *Bamberger v. Green*, 146 Ky. 258, 142 S. W. 384; *Baker v. Baker, Eccles & Co.*, 162 Ky. 683, 173 S. W. 109, L. R. A. 1917C, 171; *Harrod v. Harrod*, 167 Ky. 308, 180 S. W. 707; *Ratliff v.*

Childers, 178 Ky. 102, 198 S. W. 718; Bentley v. Stewart, 180 Ky. 23, 201 S. W. 978; Fraize et al. v. Walls, 180 Ky. 168, 202 S. W. 310; Potter v. Webb et al., 216 S. W. 60, decided Nov. 7, 1919.

It is a familiar rule that infants may not be divested of their title to real estate except by strict compliance with the provisions of the Code. The old record now being considered shows that every provision of the Code was strictly complied with in the sale of this land, unless it shows, as claimed by appellee, that M. R. Lockhart was not regularly appointed as guardian ad litem for them. That he was summoned and answered as their guardian, and was allowed compensation for performing his services as such, affirmatively appears from the record; but it is insisted that the clerk's appointment of the guardian ad litem should have been made by an order signed by him and spread upon the record, or upon the petition or some of the papers in the case, before there could have been a valid appointment by him under section 52 of the Civil Code of Practice, and that from the absence in the record of such a formal order of appointment it must be held that it affirmatively appears from the record that no valid appointment of M. R. Lockhart as guardian ad litem for the infants was ever made, and that hence the issuance of summons against him as such, the service of summons upon him, his answer, the judgment, sale, and confirmation thereof, were all void.

It is only true, however, that the record does not contain a formal order of appointment, but if any presumptions whatever are to be entertained that the clerk performed the duties imposed upon him by law, or in favor of the regularity of the court proceedings and judgment, as is usual when attacked collaterally, then upon this record it certainly would have to be presumed that the clerk, before issuing summons against M. R. Lockhart as guardian ad litem, appointed him as such as it was his duty to have done; and that he did so is the only reasonable inference from the record. To hold otherwise we would have to presume that he issued a summons against M. R. Lockhart as guardian ad litem knowing that he had not been appointed as such, which is a presumption not only at variance with his duty as clerk of the court, but contrary to every reasonable inference from the record. The clerk could not have spread an order upon the court's order book, when he made the appointment; nor does the Code provide where or how or by what means he shall manifest his appointment of a guardian ad litem.

[2] Unquestionably, he could and should have made and spread such an order upon the petition or some paper to be then or la-

ter filed with the papers in the case and noted of record by order of the court; but does not his issuance of summons against a stranger to the record as guardian ad litem, after affidavit had been filed making it his duty to make the appointment, attest his appointment of such stranger as the guardian ad litem sufficiently at least to render it impossible to assert that the record affirmatively shows that no such appointment was made by him? We think it does, and that the chancellor erred in holding otherwise.

[3] There is no analogy between the clerk's appointment of a guardian ad litem under section 52, and his making a warning order under subsection 7 of section 57 of the Civil Code of Practice, because in the latter case he is by express provision of the Code required to enter the warning order upon the petition. There is, moreover, a good and sufficient reason for this difference in practice recognized by the Code. The warning order itself takes the place of a summons, determines the date of constructive service and commencement of the action, and gives the court jurisdiction over a nonresident's property, which is fixed and evidenced only by the clerk's order; hence it must be spread upon the petition as required by the Code. Hyden v. Calames, 161 Ky. 593, 171 S. W. 186. The appointment of a guardian ad litem does not accomplish any of these results. Process must thereafter be issued against him, if the infants are under 14 years of age, to commence the action, and the process must be served upon him to give the court jurisdiction of the infants' property. These important facts are established, not from the clerk's order alone, but rather from the summons and its service. It must have been for these reasons the Legislature required the one order to be spread on the petition but not the other. At least, it is imperative that the warning order be entered on the petition, as only thus may it be evidenced, while the clerk's order of appointment of a guardian ad litem may be proven by any competent evidence, since there is no provision for its being made a part of the record in the case.

The clerk's authority under the Code to make such an appointment in this case is admitted. That he exercised this authority and made the appointment before issuing the summons as he could have done validly only after such an appointment had been made by him is proven by the record; not, however, by primary evidence, but by evidence which upon collateral attack must be considered competent and satisfactory.

The cases relied upon by appellee (Searcey's Heirs v. Morgan, 4 Bibb, 96; Irons' Ex'r v. Crist, 3 A. K. Marsh. 143; Shields v. Craig, 1 T. B. Mon. 72; Roy v. Allen's Adm'r, 118 S. W. 981; and Fraize v. Walls,

180 Ky. 168, 202 S. W. 310) are not in point, since in each the appointment of the guardian ad litem should have been made, not by the clerk, as here, but by the court. The court's authority to make such an appointment is conferred by section 38 of the Civil Code of Practice, and can be exercised only "after" service of process upon the infant in conformity with section 52 of the Code. The clerk's authority to make such an appointment is conferred by the latter section and can be exercised only upon the filing of a prescribed affidavit manifesting conditions necessitating the appointment "before" service of process can be had upon the infant.

In the cases cited the court's authority to make the appointment was questioned and determined. In this case the clerk's authority to make the appointment is conceded.

[4] Appellees also contend the orders of sale and confirmation were void as to at least one of the infants who was over 14 years of age at the time the orders were entered, but, having been brought before the court while under 14 years of age in the manner prescribed by the Code, he was in court, and the authority of his guardian ad litem to defend for him in that action continued until the termination of the cause, unless removed by the court or terminated by the arrival of the infant at the age of majority. *Staggenborg v. Bailey*, 118 Ky. 301, 80 S. W. 1109, 26 Ky. Law Rep. 188.

This manner of serving process upon infants under 14 years of age is provided for under article 1 of chapter 2 of the Code treating of "actual service," and is a substituted service that in effect and law is actual. The status of an infant or the method of his defense is not changed by his becoming 14 years of age; he is equally impotent to defend for himself, and defense must be made for him in exactly the same way after as before he is 14 years old. The method of service on him only is different; the purpose and effect just the same. He must be brought into the case in accordance with the manner prescribed by law for his age when the suit is begun against him in order to give the court jurisdiction of his person and property. This jurisdiction once acquired by a court having jurisdiction of the subject-matter continues until the action is terminated, without further or additional service, and he is bound by the court's judgment, subject only to his right of appeal or a new trial just as an adult, except the time is prolonged for him until a certain time after he attains his majority. But under such circumstances the judgment could only be voidable, not void, and even he could not attack it collaterally.

Wherefore the judgment is reversed, with directions to dismiss the petition.

# LAWRENCE et al. v. FIELDER.

(Court of Appeals of Kentucky. Dec. 19, 1919.)

## 1. JOINT TENANCY §12 — LEASE BY ONE JOINT OWNER.

The lease of joint property by one or more of the joint owners is not binding upon the other joint owner or owners, who do not join in the lease or consent to its execution.

## 2. PRINCIPAL AND AGENT §123(11) — AUTHORITY TO MAKE LEASE FOR JOINT OWNER.

Evidence held sufficient to show that lessor had authority, from her sister and joint owner, to make lease in question.

## 3. LANDLORD AND TENANT §129(4)—SPECIAL DAMAGE FOR LESSOR'S REFUSAL TO DELIVER POSSESSION.

Expenses incurred by plaintiff lessee in relieving himself of contract subletting a part of the premises, in obtaining a residence for himself and family, and in an effort to induce defendants to carry out their contract, were legitimate items of damage for failure to deliver possession of leased premises.

## 4. LANDLORD AND TENANT §129(4)—MEASURE OF DAMAGES FOR REFUSAL TO GIVE LESSEE POSSESSION.

The measure of damages for refusal of a lessor to deliver possession of the leased premises to the lessee is the difference between the consideration agreed to be paid and the actual value of the lease at the time possession is to be given.

## 5. LANDLORD AND TENANT §129(4)—AMOUNT AWARDED FOR FAILURE TO GIVE LESSEE POSSESSION NOT EXCESSIVE.

For refusal to deliver possession of a 320-acre farm leased for one year by plaintiff, held a verdict of \$1,200 for general and special damages was not excessive.

## 6. LANDLORD AND TENANT §129(3)—EVIDENCE OF DAMAGE FOR LESSOR'S REFUSAL TO DELIVER POSSESSION.

In action for damages for refusal to give plaintiff lessee possession, testimony, showing the productiveness of the leased premises and the adaptability of certain portions to particular crops agreed to be planted, as well as the value of the remaining land for pasturage, was admissible.

## 7. APPEAL AND ERROR §1053(5)—ADMISSION OF INCOMPETENT EVIDENCE NOT PREJUDICIAL.

In action for damages for refusal to give plaintiff lessee possession, admission of testimony as to probable yield of leased premises and its possible market value, if erroneous, held, in view of all the facts and circumstances and instructions not submitting the issue of profits, not prejudicial.

## 8. DAMAGES §62(4)—LESSEE NOT BOUND TO MINIMIZE DAMAGE BY LEASING OTHER PREMISES.

It being admitted that defendant joint owner declined to be bound by lease made by her



sister and joint owner, and refused to deliver possession, defendants cannot complain of exclusion of a letter written to plaintiff lessee, informing him of such fact, though the letter was notice to plaintiff soon enough to enable him to arrange for other premises; plaintiff not being required to minimize his damages by procuring other premises.

**9. LANDLORD AND TENANT §129(1) — INSTRUCTION ON RENTAL VALUE NOT MISLEADING.**

In action for failure to give plaintiff possession of premises leased by him from March 1, 1917, to March 1, 1918, instruction to find for plaintiff the difference between agreed rental price for the year 1917 of the farm described and its fair and reasonable rental value for uses and purposes stated in the contract in the year 1917, etc., held a correct statement of law, and not to have misled jury into fixing rental value of the premises as of any other date than when possession was due.

Appeal from Circuit Court, Shelby County.

Action by Joe Fielder against M. A. C. Lawrence and another. Judgment for plaintiff, motion for new trial overruled, and defendants appeal. Affirmed.

Beckham & Gilbert, of Shelbyville, for appellants.

E. H. Davis and Beard & Pickett, all of Shelbyville, for appellee.

THOMAS, J. On and prior to October 20, 1916, the appellants, Mrs. M. A. C. Lawrence and her sister, M. E. Carrithers, who were defendants below, were the joint owners of a farm near Shelbyville, in Shelby county, containing 320 acres. On that day the defendant M. E. Carrithers executed to appellee and plaintiff below, Joe Fielder, a written lease, whereby the farm was let to him for one year, beginning March 1, 1917, and ending March 1, 1918. The lease was signed by the lessee and by the lessor, Miss Carrithers, who also signed the name of her joint owner, Mrs. M. A. C. Lawrence. The rent agreed to be paid was \$1,900. The lease specified the character of crops and the particular land upon which each was to be grown and the way in which the lessee should use other portions of the premises.

At the time of the execution of the lease Mrs. Lawrence was in Virginia, to which place she had gone on September 28th, prior thereto. She returned from that visit on November 2d, following, and expressed great dissatisfaction over the leasing of the farm. She and her sister finally refused to give the lessee possession, and absolutely repudiated the lease. This suit was thereafter filed by the lessee, Fielder, to recover damages for the breach of the lease contract, and upon trial there was a verdict in his favor for \$1,200, upon which judgment was rendered, and,

defendants' motion for a new trial having been overruled, they prosecute this appeal.

Before taking up the grounds urged for a reversal, it might be well, to a proper understanding of the case, to state some facts appearing in the record. At the time of the visit of Mrs. Lawrence to the state of Virginia a prospective purchaser of the farm held an option on it which would expire between the 1st and 20th of October. In anticipation of his probable purchase of the place under the option, Mrs. Lawrence executed to her sister, Miss Carrithers, a power of attorney authorizing the latter to execute in the name of Mrs. Lawrence a deed to the farm in the event a sale thereof was made before her return. Nothing was said in that power of attorney with reference to leasing the farm. It is shown, however, that Mrs. Lawrence, prior to her departure, had offered to lease it to another for the sum of \$1,800 if the sale of it should not be consummated. Shortly after her return from Virginia the place was sold for the sum of \$200 per acre, but not to the holder of the option, since it expired without his exercising his right thereunder.

The grounds urged against the propriety of the judgment in the motion for a new trial are: (1) Insufficient evidence and excessive damages; (2) incompetent evidence admitted and competent evidence refused; (3) proper instructions refused and improper ones given. Ground (1) may be subdivided into (a) that the evidence is insufficient to sustain a verdict for any amount against Mrs. Lawrence, since it is claimed that she was not bound by the lease because she gave no authority to her sister to execute it, and the latter as joint tenant could not bind her upon a lease of the joint property; and (b) that, if the first position is incorrect, the verdict against both defendants is excessive and not sustained by sufficient evidence.

[1] Considering the first subdivision (a): It is admitted as a correct principle of law that the lease of joint property by one or more of the joint owners is not binding upon the other joint owner or owners who did not join in the lease or consent to its execution. *Geary v. Taylor*, 166 Ky. 501, 179 S. W. 426.

[2] The issue as to whether the defendant Miss Carrithers had authority from her sister and joint owner, Mrs. Lawrence, to bind the latter upon the lease was submitted to the jury by an appropriate instruction, and we think there was not only sufficient evidence to authorize that instruction, but it was likewise sufficient to uphold the verdict which found the existence of such authority. It is true that Mrs. Lawrence in her testimony denied that she had ever given her sister any such authority, although she executed the power of attorney to the latter for the sale of the premises. We have seen that

there was testimony to the effect that just prior thereto Mrs. Lawrence had offered to lease the premises, which fact shows her willingness to execute a lease, provided the farm was not sold. Miss Carrithers does not deny but that she had authority from her sister to execute the lease, although she was repeatedly asked the specific question, which could have been effectually answered by either Yes or No. Her testimony upon this point as disclosed by the record is:

"Q. Had Mrs. Lawrence given you any authority to rent the farm before she left? A. She always said, 'I want to sell.'"

The answer was objected to, and the appellee moved the court to require a direct answer, whereupon the court ordered the stenographer to read the question to the witness, which was done, and she answered:

"Well, as I said, she always spoke of it; she wanted to sell instead of renting it."

The court then admonished the witness to give a responsive answer to the question by saying to her, "You can answer that Yes or No," whereupon the witness said, "I do not think we really—I do not think she did." This was all that the attorneys and the court were able to make her say in response to the direct question.

Facts are sometimes as firmly established by the manner of the witness in giving his testimony (including his hesitancy to make appropriate answers to proper questions) as if done by positive and direct answers. It is this feature of the conduct of trials that gives juries and trial courts better opportunities to determine the facts than are afforded appellate courts. This fact is universally recognized by this and other courts of review.

It must not be overlooked that an active participant in negotiating as well as executing the lease was the husband of Mrs. Lawrence, whom we cannot believe would have consented to the lease and have been so active in bringing it about had the wife been openly opposed to it. While this fact is by no means conclusive, it is a circumstance which, together with other evidence, may be considered in determining the truth of the matter. The court properly overruled the motion to direct the jury to return a verdict in favor of Mrs. Lawrence.

[3] Briefly considering subdivision (b) of this ground, there was evidence that the plaintiff had sustained special damages on account of the breach of the contract in the sum of \$300, \$100 of which was incurred in relieving himself of a contract subletting a part of the premises, and the remainder in expenses in obtaining a residence for himself and family, and in an effort to induce the defendants to carry out their contract, all of which are legitimate items of damage upon

a breach of this character of contract, as we shall hereafter see.

[4] The measure of damages for the refusal of a lessor to deliver possession of the leased premises to the lessee is the difference between the consideration agreed to be paid and the actual value of the lease at the time possession is to be given. This rule for the measurement of damages in such cases, as well as the one allowing special damage, is thus stated in the case of *Devers v. May*, 124 Ky. 387, 99 S. W. 255, 30 Ky. Law Rep. 528:

"We therefore again declare that when a valid contract for the lease of a farm is entered into, and the lessor refuses to place and keep the lessee in possession according to the terms of the lease, the measure of damages the lessee is entitled to recover for the breach of the contract is the difference between the price he agreed to pay and the actual rental value of the property; and, the facts authorizing it, the lessee in the same action may recover such special damages as he has sustained. Nor is it necessary to entitle the lessee to recover general or special damages that he should allege or prove any effort upon his part to rent other land, or to engage in other occupations, because the recovery is not sought on account of loss of time or services, but as damages for the breach of a distinct contract for the use and possession of specific property."

[5] Other cases from this court wherein the same question was considered are *Smith v. Phillips*, 29 S. W. 353, 16 Ky. Law Rep. 615, and *Geary v. Taylor*, *supra*. Under this rule, incorporated by the court in its instructions, the jury found in favor of the defendant as general damages the sum of \$900, and this with the special damages made the total amount of the verdict, which we think they were authorized to do under the testimony, and further that the verdict is not excessive.

[6] The alleged incompetent evidence complained of by ground (2) was testimony introduced by defendant showing the productiveness of the leased premises, and the adaptability of certain portions of them for the particular crops agreed to be planted thereon, as well as the value of the remaining land for pasturage. It is insisted that such evidence was improper, under the above rule for the measurement of damages, but we think not. The jury could not well arrive at an intelligent conclusion without knowing something of the nature of the premises involved, including their productiveness as well as their adaptability to the purpose for which they were leased, and so in the *Geary Case*, *supra*, where the rental was for the purpose of pasturage only, this court, in dealing with the exact question now under consideration, said:

"In determining the rental value of the land, plaintiff will be permitted to introduce evidence tending to show its value for pasturage purposes, but will not be permitted to show

the probable profits which he would have realized from the use of the land."

[7] There was no issue of profits submitted to the jury in the court's instruction, and we think the complained of testimony had no further effect than to place before the jury the suitability of the rented premises for the purposes stated in the lease, and from which the jury was authorized to arrive at its conclusions and not accept the mere opinions of witnesses as to the value of the lease without stating any facts upon which such opinions were based. The testimony complained of as to the probable yield of the leased premises and its possible market value, if erroneously admitted, could not be substantially prejudicial in view of all the facts and the instructions of the court.

[8] The alleged competent evidence which the court refused, and of which complaint is made under this ground, was a letter written to plaintiff by Miss Carrithers on December 18th following the date of the lease, in which she informed him that her sister declined to abide by its terms, and that she was mistaken as to her authority to subscribe her sister's name to it. It is difficult for us to see what bearing the letter could have on the merits of the case, since it is admitted by every one that Mrs. Lawrence did decline to be bound by the lease, and refused to deliver possession to defendant. Indeed, that fact furnishes the only foundation for this lawsuit. If it should be insisted, as intimated by counsel, that the letter was notice to the plaintiff soon enough for him to arrange for other premises, it would then be of no service to defendants, since he was not required to minimize his damages by procuring other premises. The suit is not to recover for loss of time or services, but for damages for breach of a distinct contract for a specific thing, to the entire benefit of which defendant was entitled, independent of any other contracts of a similar nature which he either had or might enter into. *Devers v. May*, supra.

[9] Briefly considering ground (3), the court on its own motion gave to the jury instructions Nos. 1 and 2, and defendants offered Nos. 3, 4, and 5. No. 3 was a peremptory instruction to find for defendant Lawrence, and No. 4 told the jury that it was the duty of plaintiff to use reasonable diligence to find another place; that if he failed to do so the law was for the defendants, and they should so find. No. 5, offered by the defendants, directed the jury to assess in favor of plaintiff, if they found for him the difference between the reasonable rental value of the premises for the year between March 1, 1917, to the same date, 1918, for the use and purposes for which they were rented, and the rental agreed to be paid. We have already considered the impropriety

of instructions Nos. 3 and 4, and the issue submitted in instruction No. 5 was substantially incorporated in instruction No. 2, given to the jury. Upon this point it said:

"The jury should find for the plaintiff the difference, if any, between the agreed rental price for the year 1917 of the farm described in the evidence and its fair reasonable rental value for the uses and purposes stated in the contract in the year 1917," etc.

We think this a correct statement of the law, and the jury could not have been misled into fixing the rental value of the premises as of any other date than when possession was due.

Finding no error prejudicial to the substantial rights of the defendants, the judgment is affirmed.

### McCULLOCH v. FIELD.

(Court of Appeals of Kentucky. Dec. 19, 1919.)

#### 1. BILLS AND NOTES $\S$ 266—INDORSERS' LIABILITY TO CONTRIBUTION.

Where defendant and others signed a note as indorsers for a corporation, *held*, under the pleadings and the evidence in an action for contribution, that an instruction that, unless defendant, who claimed that he signed as surety for the other indorsers, did so at their request, he was jointly liable with them was correct.

#### 2. BILLS AND NOTES $\S$ 266—ADMISSIBILITY OF EVIDENCE ON ACTION BETWEEN INDORSERS FOR CONTRIBUTION.

In an action by one of several indorsers who had paid more than his pro rata share against another indorser, who claimed that he was a surety, not only for the corporate maker but for the other indorsers, evidence that the note was executed under an agreement that all of the stockholders of certain corporations should be cosureties, etc., was admissible to show the history and origin of the indebtedness.

Appeal from Circuit Court, Daviess County.

Action by C. L. Field against J. W. McCulloch. From a judgment for plaintiff, defendant appeals. Affirmed.

James J. Sweeney, of Owensboro, for appellant.

R. M. Holland, of Owensboro, for appellee.

CLARKE, J. On May 12, 1914, the Owensboro Pressed Brick Company, R. P. Farnsworth, the appellee, C. L. Field, and appellant, J. W. McCulloch, executed a note for \$4,500 to the Owensboro Banking Company. The note was not paid at maturity, and the payee instituted suit thereon against all four of the makers, but, summons not having been served upon Farnsworth or McCulloch, judgment was taken by default against the brick company and Field. Thereafter Farnsworth

and Field satisfied the judgment, the former paying one-third and the latter two-thirds thereof. Field then instituted this action under section 4665, Kentucky Statutes, against McCulloch for contribution, alleging that the Brick Company was the principal and that he, Farnsworth, and McCulloch were sureties thereon.

McCulloch answered, denying that he was cosurety with Farnsworth and Field for the brick company, and alleging that the brick company, Farnsworth, and Field were principals on the note, and that he was surety for all of them. He also set up in his answer a detailed and involved statement of the origin of the indebtedness and its several renewals. The allegations of the answer were traversed by reply, and upon a trial before a jury appellee recovered judgment against appellant for one-half of the amount he had paid in satisfaction of two-thirds of the note. McCulloch by this appeal seeks to reverse that judgment upon the ground that the court erred in the instructions given and in refusing to give an offered instruction.

The instructions given (Nos. 1 and 2) and the one refused (No. 3) are as follows:

No. 1: "Gentlemen of the jury, the court instructs you, that you will find for the plaintiff, C. L. Field, as against the defendant, J. W. McCulloch, the sum of \$1,663.75, with 5 per cent. interest from 6th day of May, 1916, unless you shall believe as set out in the second instruction."

No. 2: "If you believe from the evidence that the defendant, J. W. McCulloch, signed the notes in question mentioned in the evidence herein at the request and the instance of the said R. P. Farnsworth and C. L. Field, and upon the understanding between them, if any there was, that he signed same as their surety, you will find for the defendant, J. W. McCulloch; but, if you believe from the evidence that the said R. P. Farnsworth and C. L. Field did not request the said J. W. McCulloch to become surety for them on said notes, as aforesaid, and although you may believe from the evidence that the said J. W. McCulloch signed them under an agreement that all the stockholders in the two corporations would be bound therefor as though they each signed their names, as claimed by J. W. McCulloch, then you will find for plaintiff C. L. Field, as under first instruction."

No. 3 (offered by defendant): "The defendant moves the court to instruct the jury that, if they believe from the evidence that the amalgamated corporation acted under said agreement from the time of consolidation until the — day of — 191—, when by mutual consent of all the stockholders interested in the two corporations it was agreed to separate said corporation and its business and to return the stock of each of said corporations to the original owner thereof, and it was further agreed and understood between all the stockholders that each corporation should take care of its own indebtedness existing before the consolidation, or incurred

thereafter, and should be treated as if no consolidation had taken place, and that under this agreement that the note sued on was executed and McCulloch signed his name as surety thereto, they should find for the defendant."

[1, 2] The only objection to the instructions given is to that part of instruction No. 2 which authorized a finding for Field if the jury believe from the evidence that Farnsworth and Field did not request McCulloch to become surety for them on the note, "and although you may believe from the evidence that the said J. W. McCulloch signed them [the note and several renewals] under an agreement that all of the stockholders in the two corporations would be bound therefor as though they signed their names, as claimed by J. W. McCulloch." It is insisted for appellant that this quoted clause of the instruction deprived him of the second of his two pleaded defenses, as did also the refusal to give instruction No. 3.

On the other hand, appellee insists that the only defense pleaded or supported by evidence was the one that appellant was surety for, rather than cosurety with, Field and Farnsworth, that this defense was properly submitted, and that the direction to the jury, quoted above, to disregard the evidence as to any agreement between the stockholders in the event they believed Field and Farnsworth did not request appellant to become surety for them, was not only erroneous, but necessary to prevent a misunderstanding by the jury of the purpose and effect of some of the evidence they had been permitted to hear.

It is therefore apparent that the first, if not the only, question presented is whether or not such an agreement between the stockholders was supported by pleading and proof as would relieve appellant of liability as cosurety to Field, even though the jury did not sustain his claim that he signed the note at Field's request and as his surety. To decide this question we need not look only to the answer, which is not styled a set-off, counterclaim, or made a cross-petition against any of the stockholders in either of the two corporations referred to therein, one of which was the Owensboro Pressed Brick Company, the other the Owensboro Sand & Lime Brick Company. Neither is the answer paragraphed so as to indicate a purpose to assert two defenses. It does certainly deny that appellee and appellants were cosureties and aver the latter was surety for the former and Farnsworth, but the additional matter contained therein seems to us merely inducement to and explanatory of the single defense that appellant was surety for and not cosurety with appellee.

Unless McCulloch did sign the note as he claimed upon the request of and as surety for Farnsworth and Field, he and they were cosureties, even though, as stated by the

court in the latter part of instruction No. 2, McCulloch signed "them" under an agreement that all of the stockholders in the two corporations would be bound therefor as though each had signed same.

The effect of such an agreement, while it existed, would have been to make Farnsworth, Field, and McCulloch cosureties for the stockholders of the two corporations as well as for the Pressed Brick Company, and, being cosureties, whether for the Pressed Brick Company or for all of the stockholders in the two corporations, they were liable as between themselves as cosureties and for contribution as such, so long as that agreement was in effect, but this agreement was not in effect at the time the note sued on was executed, as will later appear. Evidence thereof was therefore competent and admitted only to show the origin and history of the indebtedness, and it was evidently to avoid the possibility of the jury giving other importance thereto that the court admonished them of its lack of effectiveness as a separate defense.

Hence, in our judgment, the qualifying clause at the end of instruction No. 2 was not improper, and certainly not prejudicial, since the effect of the evidence thereby limited was not sufficient to defeat appellant's liability as cosurety in the event the jury did not believe from all of the evidence he was simply a surety for the other obligors on the note.

That this agreement made by some, though not all, of the stockholders in the two corporations to be bound for this indebtedness, whether they signed the notes evidencing it or not, was not relied upon by appellant as a defense in this action, but was simply a recital of a step leading up to and explaining the final arrangement which fixed the liability on the note sued on, is apparent from both his pleading and his evidence, since he pleaded and stated as a witness that this agreement was superseded by a later one, which he contends released him even as a stockholder. This subsequent agreement as pleaded and supported by his evidence was that after the attempted consolidation, accompanied by exchange of stock, by some of the stockholders in each corporation, the business of the two corporations was separated, the exchanged stock returned to its original owners, and "it was further agreed and understood between all of the stockholders that each corporation should take care of its own indebtedness, \* \* \* and should be treated as if no consolidation had taken place, and that under this agreement the note sued on was executed and McCulloch signed his name as surety thereto."

That this was the only agreement claimed to have been in effect between the parties at

the time the note sued on was signed by McCulloch, other than his claim he signed for and as surety of Field, is manifested not only by his pleadings and proof, but by the further fact that only this later agreement was presented as a defense by an offered instruction. So clearly he can urge here as error only the refusal of the court to hold this final agreement as a defense to plaintiff's suit.

That this agreement did not obligate Farnsworth and Field or any of the stockholders in the Pressed Brick Company personally to take care of its indebtedness, but relieved them as well as McCulloch and other stockholders in the Sand & Lime Brick Company from liability therefor under the former agreement is apparent. As stated in the offered instruction, by this later agreement each corporation (not the stockholders) should take care of its own indebtedness as if no consolidation had taken place; and, if as he claims McCulloch signed his name as surety to the note sued on under this later agreement, he was necessarily surety for the Pressed Brick Company, and not for its stockholders or any one else, just as were Farnsworth and Field, unless only if they got him to sign it as surety for them, as submitted in instruction No. 2. Hence the court did not err in refusing this instruction.

Judgment affirmed.

# CHOATE et al. v. PROVIDENT SAVINGS LIFE ASSUR. SOC.

(Court of Appeals of Kentucky. Dec. 19, 1919.)

## 1. INSURANCE — 517 — PRESUMPTION THAT POLICY HOLDER EXERCISED BENEFICIAL OPTION.

Where a 19-payment life policy provided various options which might be exercised by the insured at the expiration of the premium period, and the last option provided that the insured might continue it as a paid-up life contract without payment of further premiums, and insured did not take any steps to obtain the surrender value of the policy, etc., it will be presumed that he continued it as a paid-up policy.

## 2. INSURANCE — 517 — INSUREE'S LIABILITY ON 19-PAYMENT POLICY AFTER EXPIRATION OF PREMIUM PERIOD.

Where a 19-payment policy provided that in event of the death of the insured during the premium period the beneficiary should be entitled to the face value of the policy, plus an amount equal to its loan value, and further provided that, after payment of the last premium the policy should become paid up for life for its full face value, *held* that, where the insured did not exercise options to obtain the cash surrender of the policy on payment of the last premium, his beneficiaries were not, upon his death

after expiration of the premium period, entitled, in addition to the face of the policy, to an amount equal to its loan value.

**Appeal from Circuit Court, Franklin County.**

Action by Virginia Choate and others against the Provident Savings Life Assurance Society. From a judgment for the amount which defendant admitted was due, and denying further recovery, plaintiffs appeal. Affirmed.

Scott & Hamilton and James Polsgrove, all of Frankfort, for appellants.

J. P. Hobson, of Frankfort, and Keith Bullitt, of Seattle, Wash., for appellee.

**SETTLE, J.** Robert S. Choate died in Franklin county, Ky., in the year 1917, survived by his widow, the appellant Virginia Choate, and three children, the appellants Lula V., Leroy, and J. S. Choate, all adults. At the time of his death the decedent held on his life a policy of insurance in the appellee, Provident Savings Life Assurance Society, of the face or paid-up value of \$3,000, of date June 15, 1891, payable at his death to his widow and children, who, as the beneficiaries named in the policy, brought this action in the court below, seeking to recover of the appellee \$5,297.10, as the amount of insurance claimed to be due them on the policy; this amount being made up, as alleged in the petition, of the \$3,000, stated in the face of the policy, \$1,767, by way of additions accumulated on the policy from its issuance, June 15, 1891, down to June 15, 1911, the date to which the last payment of premium carried it, and the further sum of \$530.10, by way of accumulations on the policy after June 15, 1911.

The answer of appellee denied appellants' right to the accumulations of the policy, or any of them, claimed in the petition; alleged that the value of the policy was only \$3,000; set up an indebtedness against the policy due appellee of \$2,099.14, the principal and interest of a note for reserve premiums thereon executed by the insured, which, deducted from the face value thereof, would, as alleged, leave appellee owing only \$900.86, and this amount it tendered appellants and offered to pay into court.

No proof was taken by the parties, and, following a motion by appellants in the circuit court to strike from the answer the paragraph appearing below in the opinion, the case was submitted in that court on the motion and pleadings. The court sustained the appellee's several contentions; hence appellants' motion to strike from the answer the paragraph objected to was overruled, and their recovery on the policy limited to the \$3,000 named therein, with 6 per cent. interest from August 24, 1917, and costs of the action, credited by the insured's indebtedness to the appellee of \$2,089.29, with 5 per cent.

interest from December 1, 1917, thereby leaving due appellants on the policy the net balance of \$900.86, admitted by the answer. From the judgment manifesting the above rulings the latter have appealed.

The only question urged for decision on the appeal must be determined by a construction of certain provisions of the policy before us. The question seems to be presented by the following averments of the answer which the circuit court refused to strike out:

"By reason of the failure of the insured, Robert S. Choate, to elect to discontinue the insurance, said insurance was, on June 15, 1911, by virtue of the provisions of said policy above set forth, continued as a paid-up contract during the life of Robert S. Choate for its full amount, to wit, \$3,000, without the payment of further premiums by him, and as there were no profits earned by, or properly belonging to, or apportioned or apportionable to, said policy, or other participation policies then existing, said policy was, at the date of the death of Robert S. Choate, a contract for its full amount, to wit, \$3,000, and no more, charged with a lien on account of the loan hereinabove mentioned of \$935.52 and interest accumulations thereon."

Choate first obtained of the appellee in 1891, a renewable annual policy for \$3,000, which he carried on his life until 1901. In that year appellee issued to him, in lieu of the first policy, the policy now under consideration known as a 19-payment whole-life policy. In order to give the insured the benefit of a lower rate of premium than would have been chargeable to him at his actual age in 1901, the new policy was dated back to June 15, 1891, and a note given by him to represent the reserve portion of the premiums that would have been paid by him if the policy had in fact been issued on June 15, 1891. The note when given amounted to \$935.52, but at the institution of this action it amounted, with its accrued interest, to \$2,099.14.

The premium on the first policy was payable semiannually, i. e., \$74.82, on June 15, 1891, the date of issue, and \$74.82 on the following December 15, 1891, which would thus carry the policy to June 15, 1892. It was provided in the policy that if the insurance was kept up until June 15, 1892, that is, if the December 15, 1891, half portion of the premium should be paid, the company would renew the policy as a "19-payment, whole-life policy," upon the payment of \$74.82 on June 15th and December 15th in each year, "until such premiums for 19 years had been fully paid." Therefore the period between June 15, 1910, and June 15, 1911, would be the nineteenth year after June 15, 1892, so upon the payment of the semiannual premium due on December 15, 1910, the last installment of the premium for the nineteenth year would thereby be paid. Hence, under the expressed provisions of the policy, it became a whole-life policy immediately upon the payment of

the semiannual premium on December 15, 1910. That was the last premium the insured was compelled to pay in order that the policy might become a whole-life policy. In other words the premium paying period began on June 15, 1892, and ended on December 15, 1910, after which date no further premiums of any kind were to be paid.

[1, 2] On page 3 of the policy is the following provision:

"Should the death of the assured occur within the premium paying period hereunder and while this assurance is in force, the society then promises to pay to the beneficiaries, in addition to the face value of this policy as defined above, an amount equal to the loan value of this policy at its last anniversary, as set forth in the table of surrender values below."

This is followed by a table allowing certain loan values up to June 15, 1910, and no later.

In the absence of this special provision it would seem that upon the death of the insured, whenever it occurred, there would have been payable to the beneficiaries only the sum of \$3,000, principal sum provided for in the policy. It also seems apparent that under that special provision the payment of the additional sum, or sums, was expressly contingent upon the death of the insured "within the premium paying period." Apparently, however, to make it doubly clear that the additional sum was to be paid only in the event that the "death of the insured occur within the premium paying period," the policy contained the following additional special provisions (appearing under the table setting forth the loan values):

"The last premium hereunder falls due upon the fifteenth day of December 1910, upon payment of which this policy becomes paid up for life thereafter for its full face value of \$3,000.00."

It is the contention of appellee that as the premium paying period ended at the moment the last premium was paid on December 15, 1910, under the provisions of the policy above quoted, the amount to which the beneficiaries were entitled upon the occurrence of the death of the insured after December 15, 1910, was \$3,000, and no more; and such was the holding of the circuit court.

Under the table of loan values on the third page of the policy it is provided that the accumulation period (as distinguished from the "premium paying period") should end on June 15, 1911, and that the entire terminal cash value of the policy on that date would be \$1,908, which was available to the insured after he elected to abandon the policy and take its equivalent in cash. At the bottom of the same page is the further provision that if the insured should, at the end of the accumulation period on June 15, 1911, wish to discon-

tinue the insurance by cashing the policy in he might take its entire cash value of \$1,908, or its value converted into an annual income for life. As the insured admittedly failed to exercise his right to surrender the policy for its cash value, the presumption must be indulged that he elected to take some other option given him under the policy, and the only remaining option provided for in the policy was that the insured might, at the end of the accumulation period on June 15, 1911, "continue this assurance as a paid-up life contract for its full amount without the payment of further premiums. \* \* \*"

Obviously the words "continue this assurance as a paid-up life contract for its full amount" mean a continuance of the insurance for the full amount which would be payable as a death claim if the insured died on or after the date at which the option became available. This meaning is also given the language referred to by this further provision also appearing under the table of loan values:

"\* \* \* This policy becomes paid up for life thereafter for its full face value of \$3,000.00."

It would seem to follow from what has been said that the right to the additional insurance that might have accumulated on the policy was conditional upon the insured's dying "within the premium paying period"; consequently, when the premium paying period ended on June 15, 1911, without an exercise by the insured of the option then available, the full amount of the policy was \$3,000, and only that amount was due thereon upon the death of the insured in 1917, subject, of course, to be reduced to the extent of the indebtedness owing by the insured to the appellee at the time of his death, which, as we have seen, amounted to \$2,099.14. The appellants' contention as to the amount to which they are entitled under the policy rests upon the theory that, as the accumulations claimed would have been payable if the death of the insured had occurred prior to June 15, 1911, it would be unjust to relieve appellee of their payment merely because he died subsequent to that date. The contention is overthrown by the contract made by the parties themselves. It is the opposite of what is known as a semitontine policy contract, under which there is payable a reduced amount if the insured dies within a certain period, and an increased amount if he dies after the expiration of the period. Under the plan of insurance contained in the policy sued upon there is payable an increased amount if the insured dies within a certain period and a reduced amount if he dies after the expiration of the period. It is not improper to add, however, that both plans of insurance have become practically obsolete, as in the light of modern insurance experience and development their inferiority has been strikingly demonstrated.

However, the plan of insurance contained in the policy here involved was in vogue when the policy was issued, and we are aware of no authority which declared such a policy invalid, nor have counsel cited any such authority. In *Equitable Life Ins. Co. v. Cosby*, 128 S. W. 142 (not elsewhere reported) it is said:

"There is nothing peculiar about a contract of insurance that entitles it to be treated different from any other contract. It is true, such contracts are at times so worded that the rights of the parties are not easily determined; but, when they are determined, they are enforced as other contracts. Here no such difficulty is encountered. The contract is plain, the rights of the parties agreed upon in advance, and the only questions open for determination were, How many premiums had been paid, and what was the present worth or cash-surrender value of the paid-up policy on April 30, 1907?"

Although a part of the profits are alleged in the petition to have accumulated upon the policy since June 15, 1911, the right to such profits is not allowed by the terms of the policy and, besides, the allegations of the appellee's answer that there were no such profits is uncontroverted.

As no legal ground is shown for disturbing the judgment, it is affirmed.

#### ESKEW v. H. FRIEDBERG & CO.

(Court of Appeals of Kentucky. Dec. 19, 1919.)

##### 1. PRINCIPAL AND AGENT ⇐78(8)—MEASURE OF DAMAGES FOR AGENT'S BREACH OF CONTRACT.

If defendant, having agreed to buy tobacco only for plaintiffs, bought and resold on his own account, plaintiffs' measure of damages would be the difference between the proven price at which plaintiffs were selling tobacco and amount computed by adding cost of tobacco to defendant, expenses which plaintiffs were to have paid, and defendant's commission.

##### 2. PRINCIPAL AND AGENT ⇐78(1)—LIABILITY OF AGENT FOR SHRINKAGE IN GOODS PURCHASED FOR PRINCIPAL.

Tobacco dealers who had employed agent to purchase tobacco for them in certain counties could not recover difference between amount purchased for them and paid for by them and amount actually delivered by agent, if shortage was the result of shrinkage or other natural loss, and not the result of agent's failure to deliver tobacco paid for the dealers.

##### 3. DAMAGES ⇐140 — EXCESSIVE ALLOWANCE IN VERDICT GROUND FOR REVERSAL.

Where verdict for damages for breach of contract is greatly in excess of highest sum proved, the judgment entered thereon must be reversed for new trial.

Appeal from Circuit Court, Jefferson County, Common Pleas Branch, First Division.

Action by H. Friedberg & Co. against William Eskew. Judgment for plaintiffs, and defendant appeals. Reversed and remanded for new trial, with directions.

Burnett, Batson & Cary, of Louisville, and Union W. Youngblood, of Booneville, for appellant.

A. J. Carroll, of Louisville, for appellees.

SAMPSON, J. On November 25, 1916, Eskew entered into a written contract with H. Friedberg & Co., of Owensboro, Ky., whereby Friedberg & Co. agreed to take over all tobacco bought by Eskew in Spencer and Warrick counties, Ind., for the season 1916-17, "paying him 75 cents per 100 pounds above the actual cost price." The written contract reads as follows:

"Louisville, Ky., Nov. 25, 1916."

"This contract entered into by and between H. Friedberg & Co., of Owensboro, Ky., parties of the first part, and William Eskew, of Booneville, Ind., party of the second part, to wit: H. Friedberg & Co. agree to take over all contracts for tobacco bought by William Eskew in Spencer and Warrick counties, Ind., season 1916-17, paying 75 cents per hundred above the actual contract price. William Eskew agrees to put tobacco on wagons at his factory in Booneville, in case he is unable to secure the Farmers' Warehouse in Booneville; in case he does secure the Farmers' Warehouse, the tobacco is to be put f. o. b. cars Booneville, Ind.

"H. Friedberg & Co. agree that William Eskew shall continue buying tobacco in the country and not to exceed an average price of \$7 per 100 pounds until further notice.

"H. Friedberg & Co. agree that William Eskew shall pay for tobacco to the growers with drafts furnished by them.

"William Eskew agrees to furnish H. Friedberg & Co. with a copy of all contracts made by him with the growers or shall hereafter make.

"[Signed]

H. Friedberg & Co.,  
"By. H. Friedberg.  
"William Eskew."

Friedberg & Co. was a partnership composed of H. Friedberg, Labin Phelps, and J. C. Bright, engaged in buying, handling, and selling tobacco. Eskew was an experienced tobacco man and an expert in buying tobacco from producers. The 75 cents mentioned in the written contract as going to Eskew was to be his commission for buying. Although Eskew had contracted for considerable tobacco before the making of this contract, he immediately upon entering into the written contract began to make contracts for the purchase of other tobacco and to pay for tobacco already contracted for by him, with drafts drawn on Friedberg & Co. Very soon



the price of tobacco began to rise, and it was found necessary to pay more than 7 cents per pound as stipulated in the written contract, and Friedberg & Co. agreed for Eskew to pay either  $7\frac{1}{2}$  cents or 8 cents per pound for tobacco on an average, but this price was soon found to be insufficient to induce the farmers to turn in their crops, and Eskew was allowed to pay even more, but just how much more is involved in doubt, in order to obtain tobacco. At any rate, on January 3d the parties to the written contract entered into a verbal agreement whereby, as Friedberg & Co. contend, they were to have all of the tobacco purchased by Eskew in the counties named during the entire season, paying him cost and \$1.10 commission, and Friedberg & Co. were to bear the expenses of insurance, storage, etc. Eskew contends that he made no such verbal agreement, but says he did agree to continue to buy tobacco for Friedberg & Co., but reserved the right to purchase tobacco on his own account as and when he could not buy tobacco at the price fixed by Friedberg & Co. He says that in buying tobacco he found it necessary to pay more than 8 cents, which Friedberg & Co. fixed as the limit, and that such tobacco was purchased on his own account and for his own use and benefit, and not for Friedberg & Co. The company, however, asserts that it would not have employed Eskew to buy tobacco for it and allowed him the privilege to buy for his own account at the same time even at a higher price than the limit fixed by it. At any rate, Eskew bought about 5,000,000 pounds of tobacco during the season, of which he delivered to Friedberg & Co. 257,658 pounds as claimed by them. The balance he sold upon his own account at a profit greater than his commission. Eskew contends that he delivered to Friedberg & Co. 276,172 pounds, or at least all of the tobacco which was sold to him at that weight, but that from the time he purchased it, in the early part of the season, it shrunk and became lighter, as is the nature of tobacco, until it weighed less than at the time he purchased and received it, and that he delivered every pound of the identical tobacco of which plaintiffs complain. Friedberg & Co. contend that they had all of the tobacco sold to a named concern at the price of \$10.84 per 100 pounds, which they insist would have netted them a handsome profit.

After the season closed and a settlement had been made between Friedberg & Co. and Eskew, this suit was instituted March 19, 1917, to recover of Eskew on three items: (1) The failure of Eskew to deliver 18,514 pounds of tobacco purchased by him for the company at a cost of \$1,616.52, and paid for with its funds, and which the company claims to have resold for a gross sum of \$2,036.54, or a profit of \$420.02, and which tobacco Eskew claims to have delivered to

the company; (2) the failure of Eskew to deliver to the company 226,300 pounds of tobacco which he purchased during the season with his own money, but at a time when the company contends he was their agent and purchasing exclusively for them, whereby the company lost \$7,513.16 in profits from a resale which they had effected; (3) Eskew substituted 88,000 pounds of lugs, an inferior grade of tobacco, for a corresponding amount of leaf tobacco, whereby the company lost the sum of \$1,127.78. Their first contention, however, is that Eskew purchased about 276,172 pounds of tobacco for them and paid for the same with drafts on the company, and of which amount Eskew only delivered to them 257,658 pounds, thus withholding 18,514 pounds which he should have delivered. Eskew answers this contention by saying that he did purchase the 276,172 pounds for which Friedberg & Co. furnished the money to pay, and that he delivered every pound of this to the company, and that the 18,514 pounds discrepancy, if it existed, was the result of shrinkage; that is to say, the tobacco, when he purchased it for Friedberg & Co. and weighed it, weighed 276,172 pounds, but on account of drying out it weighed only 257,658 pounds when it was received by the company at Louisville, but that the company was to bear all shrinkage, and therefore he says he is not responsible for the 18,514 pounds discrepancy. The company admits that it was to bear the shrinkage, but it says that the shrinkage in any event would not have amounted to 18,514 pounds; that a shrinkage of tobacco from that district would have amounted to only about one pound per hundred upon such a purchase. Proof was introduced upon this question, and one expert, claiming to have traded in tobacco in this district for a number of years and to have kept close account upon the shrinkage, stated that the shrinkage for that season amounted to only .0195 per cent.

A trial was had before a jury, and a verdict returned in favor of Friedberg & Co. for \$1,700 on the first item last discussed, and \$6,000 upon the second item, which is the failure of Eskew to deliver to Friedberg & Co. 226,300 pounds of tobacco which they claim he purchased under his contract with them, and which he refused to deliver, but sold on his own account; the total verdict being \$7,700 in favor of Friedberg & Co.

There are no difficult questions of law involved in this case, but there are numerous questions of fact, many of them involved in great doubt. The evidence for the company does not show with clearness exactly what the tobacco cost Eskew at Booneville, and, as the company had agreed to pay him cost plus a commission, it is necessary to know the cost before an intelligent conclusion can be reached. Taking all of the evidence for the company and disregarding wholly the evidence for Eskew, we are unable to figure

plaintiff's loss at any sum approximating the verdict of \$7,700. Indeed, on the first item, failure of Eskew to deliver 18,514 pounds of tobacco paid for by drafts on the company, the utmost sum from the evidence appears to be about \$1,400, while on the second item, where the verdict of \$6,000 was returned, we figure the company was not entitled to recover more than about \$2,200. If we accept the evidence of Eskew and his witnesses, the tobacco cost Eskew in Booneville a little more than \$9 per 100 pounds on an average. To this must be added \$1.10 on the 100 pounds, which would make it cost a little more than \$10.10 per 100 pounds to Friedberg & Co. If they had the tobacco sold at \$10.84 per 100 pounds, as appears from the evidence, then their loss was about 74 cents on the 100 pounds, and on 228,000 pounds their loss would have been \$1,672.40, and no more, assuming the cost figures to be correct. Friedberg, Phelps, Bright, and their witnesses are very indefinite on the subject of the cost of this tobacco. In all, the testimony for the plaintiffs is entirely too indefinite and uncertain to sustain a verdict to \$6,000 on the second item, or \$1,700 on the first item.

The instructions are complained of and are subject to some criticism, being much longer than were necessary, but upon the whole seem fairly to present the question of fact to the jury.

[1, 2] Upon another trial, after the introduction of such competent evidence as the parties may wish to offer on the subject of the verbal contract made January 3, 1917, the plaintiff should show with some certainty the actual cost of the tobacco to Eskew in Booneville and the amount of insurance, storage, and other expenses which the company agreed to bear. Of course, Eskew may show this also, and from this evidence the jury will determine (1) whether there was such a verbal contract and its contents, and, if it should decide that the verbal agreement bound Eskew to purchase tobacco only for the company, and not on his own account, (2) it will then be the duty of the jury to find the cost of the tobacco to Eskew in Booneville, together with such other expense as the company was to stand, and to this add the commission, \$1.10 on the 100 pounds, which Eskew was to receive, and take this sum from the proven price at which the company was selling the tobacco, and the difference will be the measure of damages to which the plaintiff is entitled. In the event the jury should conclude from the evidence, as contended by Eskew, that he was to buy only such tobacco for the company as he could obtain at the price fixed by the company, and that he had the right to purchase tobacco on his own account at a higher price, and that he did so purchase all or some material part of the tobacco which he resold, then the com-

pany is not entitled to recover anything of Eskew on this item to that extent; nor is it entitled to recover of him on item 1, if the jury should believe from the evidence that Eskew delivered to the company all of the tobacco which he purchased on its account and for which it paid—and which it now claims is short 18,514 pounds, if the shortage is the result of shrinkage or other natural loss, and not the result of Eskew's failure to deliver some part of the tobacco for which the company paid.

This case comes within the rule several times adhered to by this court that a recovery in damages cannot be sustained if, accepting the evidence of the plaintiff upon every point, the amount proven is materially less than the verdict returned. *Louisville Railway Co. v. Schwemmer*, 181 Ky. 641, 205 S. W. 685.

[3] As the amount of the verdict in this case is greatly in excess of the highest sum proven, the judgment entered thereon must be reversed for a new trial consistent with this opinion.

#### FIDELITY & COLUMBIA TRUST CO. v. GROMMES & ULLRICH.

PAXTON et al. v. HOFFMAN DISTILLING CO. et al.

(Court of Appeals of Kentucky. Dec. 19, 1919.)

#### 1. APPEAL AND ERROR $\S$ 1106(5)—REMAND FOR FINDINGS.

There being, in a suit for foreclosure of mortgage on the properties of a distilling company, no findings of fact, but only a general judgment in favor of purchasers of whisky in bond on their claim for shrinkage against storage charges, and evidence consisting of a report of receiver, of several hundred pages, without any summing up, the cause will be remanded for findings through a commissioner or otherwise.

#### 2. RECEIVERS $\S$ 99(2)—ALLOWANCE OF COUNSEL FEES ON COURT'S DETERMINATION.

While it is better practice for a receiver, before employing counsel, to obtain authority from the court, yet if, without it, he makes such employment, counsel fees are to be allowed on determination by the court that the employment was necessary and of the sum which should be allowed.

#### 3. RECEIVERS $\S$ 154(2)—COUNSEL FEES PART OF COSTS.

Counsel fees, when allowed, are a part of the costs of the receivership, and are entitled to priority in payment.

#### 4. RECEIVERS $\S$ 99(2)—SERVICES FOR WHICH COUNSEL FEES WILL BE ALLOWED.

An allowance of fees for counsel of receiver will be made only for such services as require legal knowledge and skill.

Appeal from Circuit Court, Anderson County.

Action by the Fidelity & Columbia Trust Company against the Hoffman Distilling Company and others for foreclosure of a deed of trust. Claim of Grommes & Ullrich against certain funds, covered by the deed of trust, was allowed, and the Trust Company appeals. Motion of J. R. Paxton, receiver of the distilling company, and J. R. Feland, his attorney, for allowance of counsel fees, was overruled, and they appeal. Cause remanded on appeal of the Trust Company for findings, and judgment reversed on appeal of Paxton and Feland.

Benjamin H. Sachs and M. A., D. A. & J. G. Sachs, all of Louisville, for appellant Fidelity & Columbia Trust Co.

J. R. Feland, of Lawrenceburg, for appellants Paxton and Feland.

Keith L. Bullitt, of Seattle, Wash., and Bruce & Bullitt, of Louisville, for appellees Grommes & Ullrich.

HURT, J. Reversed upon the appeal of Paxton and Feland, and remanding appeal of Fidelity & Columbia Trust Company against Grommes & Ullrich to the trial court for further original adjudications. The above two appeals have been heard and determined together.

The appeal of the Fidelity & Columbia Trust Company against Grommes & Ullrich will be first considered. Hoffman Distilling Company, was a corporation engaged in the general business of a distiller. It owned and operated a plant for distilling whisky and warehouse purposes, which consisted of several acres of land, upon which was situated a distillery, the warehouses, and the things usually appurtenant to the conduct of the business of a distiller. On June 21, 1904, it executed and delivered five bonds, for the aggregate sum of \$7,500, to the Fidelity & Columbia Trust Company, as a trustee for whoever might thereafter become the owner of the bonds, and, to secure the payment of the principal and interest which might accrue on the bonds, it on the same day executed a deed of trust or mortgage to the trustee, which embraced the grounds upon which the distillery was situated, and by its terms was made to cover, not only the grounds and distillery proper, with its appurtenances designed for use in connection with the making and handling of whisky, but also the "rents and profits" of the plant. Provisions were in the deed of mortgage which authorized the trustee, in certain contingencies, to take possession of the plant, or apply for the appointment of a receiver for it, and to collect and receive the "tolls, incomes, issues, profits, and earnings" of it, for the purposes of the trust and other provisions not necessary to be adverted to. This deed was lodged for record in the office of the clerk of the county court on June 25, 1904, and recorded on July 2, 1904.

On the 9th day of February, 1912, the ap-

pellant Fidelity & Columbia Trust Company, being the holder of the bonds, instituted this action against the distilling company for a judgment upon the bonds, and the enforcement of the provisions of the trust deed, and the lien which it had upon the property embraced in the deed, and asked for the appointment of a receiver for the property and business. A receiver was appointed on the 12th day of March, 1912, and took possession of the property and entered upon his duties. A great many other parties, who had subsequent liens upon the property, or had interests therein, were made parties to the action, among them the appellees, Grommes & Ullrich. The latter was a party to a contract with the distilling company, by which they became the purchasers of the entire whisky output of the distillery. Upon the entry of the whisky into bond, warehouse receipts were delivered to Grommes & Ullrich by the distilling company for the whisky. Each receipt was made to represent the ownership of 5 barrels of whisky, and Grommes & Ullrich received receipts for all the whisky which was made and placed in the warehouses, from the making of the contract between them and the distilling company on the 25th day of July, 1903, until the autumn of the year 1911, when the distillery ceased to operate, and they also seem to have been the owners of whisky in the warehouses at the time this contract was entered into. The storage, or the sum to be paid by Grommes & Ullrich to the distilling company for keeping the whisky in the warehouses, was five cents per barrel per month.

The contract between Grommes & Ullrich and the distilling company, which was executed on the 25th day of July, 1903, was put in writing, and provided that the storage to be paid by Grommes & Ullrich for the whisky then owned by them in the warehouses, or thereafter to be made and put into the warehouses, under the contract, was to be five cents per barrel per month, but that they should have the "storage" free on all whisky entered therein for one year from the date of its entry. It was further provided, that the distilling company should guarantee that the loss of whisky by shrinkage and evaporation "upon each and every barrel so manufactured and entered into bond" should not exceed by more than one gallon the allowance for shrinkage and evaporation by the act of Congress of March 3, 1899 (Act March 3, 1899, c. 435, 30 Stat. 1349 [U. S. Comp. St. §§ 6052, 6053]). An amendment of this contract was made and entered into on the 24th day of May, 1904, and on July 24, 1904, it was further amended, to the effect that on all whisky thereafter made under the contract, Grommes & Ullrich should be entitled to two years' "free storage."

The warehouse receipts, which were prepared under the directions of Grommes &

Ullrich, for the whisky, contained a provision to the effect that:

"If this receipt is returned to us for regauge and ascertainment of loss before the expiration of seven years from the date of original entry into bond as required in act of Congress of March 3, 1899, and the payment of all charges due at that time, we guarantee the loss by shrinkage and evaporation up to that time on each barrel covered by this warehouse receipt shall not exceed one gallon over and above the allowance for shrinkage provided for in said act"

—and further:

"No allowance for loss, occurring after the goods have been seven years in warehouses, will be made."

Grommes & Ullrich contended that they were not entitled to pay any "storage" for two years after the entry into bond of the whisky, and that they were entitled to have the "outage" as a whole, due them, set off against the "storage" as a whole, due to the distilling company, and were entitled to have the "outage" allowed them, when the whisky was taken out of bond, regardless of whether they had returned the receipts and paid all charges up to the time, within seven years from the date of entry of the whisky into bond, or not, and were entitled to the allowance for "outage" after seven years upon return of the receipts.

The appellant contended that, under its mortgage, it was entitled to receive the "storage" at five cents per barrel per month, to be applied upon its debt and the purpose of the trust; that Grommes & Ullrich were not entitled to any "free storage" upon the whisky, or at least not more than one year, and were only entitled to an allowance for "outage" by the distilling company when the warehouse receipts were returned within seven years from the date of the entry of the whisky covered by them into bond, and upon the payment of all "storage" thereon up to that time, and were not entitled to any "outage" under any state of case, more than was sufficient to offset the "storage" upon the particular barrel out of which the "outage" arose.

It appears from the evidence that Grommes & Ullrich stamped upon the warehouse receipts, when they would sell whisky to their customers, or when they presented it themselves, a declaration to the effect that all "storage" had been paid up to two years from the date of the entry into bond of the whisky embraced by the receipt.

At the time of the rendition of the judgment appealed from, the receiver had in his hands \$16,978.28, which he had collected from Grommes & Ullrich as "storage," but which, they claimed, had been wrongfully collected from them upon the whisky, and which they were entitled to have returned to them, be-

cause it should not have been collected at all, and that the "outage" to which they and their customers were entitled should have been set off against the claim for "storage" by the receiver. The court upheld their contention, and adjudged that the sum of it remaining after the payment of certain costs should be returned to them, and from this judgment the Fidelity & Columbia Trust Company has appealed.

[1] The judgment of the court does not show whether the court ever determined the question as to whether or not Grommes & Ullrich were entitled to one year's "free storage" upon whisky in the warehouses, or made under the contract of July 25, 1903, nor whether they were entitled to two years' "free storage" upon whisky made and put into the warehouses under the last amendment to that contract, nor whether they were entitled to be allowed the "outage" in excess of one gallon over the amount allowed under the act of 1899, when the receipts were not returned within seven years from the dates of the entry of the whisky into bond and charges paid up to that time, nor whether they were entitled to be allowed the "excess outage" after the whisky had been in bond for seven years, and, in other words, the judgment does not show of what the "outage" consists, which it was adjudged that Grommes & Ullrich were entitled to offset against the "storage" collected, nor whether, in the collection of the "storage" in the hands of the receiver, "free storage" for one year or two years was allowed Grommes & Ullrich.

The action was never referred to a commissioner, to find and report the facts upon which a judgment must rest, and the only evidence in the record from which such facts might be gathered is a report of the receiver, which consists of several hundred pages of figures, without any summing up of totals, and we, with our duties, have not the time to search through this record and make the additions, subtractions, and multiplications necessary to arrive at the facts upon which to determine the soundness of the chancellor's conclusions, if we should be able to do so at all. The report shows that in certain instances the receiver offsets "outage" against "storage," and shows an excess of "outage" over "storage"; but we cannot ascertain the rule upon which he based his action, or to what particular class of barrels of whisky he applied the rule of offsetting "outage" against "storage," and to what barrels he did not apply the rule upon which he acted.

The report does not show when any of the whisky was entered into bond in the warehouses, and hence whether the "outage" allowed to be set off by the judgment against "storage" was ascertained within seven years from the entry into bond of the whisky or

thereafter. Hence we have determined to remand the action to the trial court, with directions, through a commissioner or otherwise, to ascertain and determine:

(1) Whether in the collection of "storage" the receiver omitted to collect the "storage" for one year upon all whisky which Grommes & Ullrich and their customers had in the warehouses on July 25, 1903, and all manufactured thereafter, and which was withdrawn after the appointment of the receiver, and to what sum such "storage" amounted to.

(2) To ascertain whether in the collection of "storage" the receiver did or did not allow Grommes & Ullrich two years' "free storage" upon the whisky made and put into the warehouses after July 25, 1904, which was withdrawn after the receiver's appointment; and to what sum such "storage" amounted.

(3) The value of the "outage," in excess of one gallon over the amount allowed by the act of 1899, upon the whisky of Grommes & Ullrich and their customers, where the receipts were returned for regauge and ascertainment of the "outage," within seven years from the date of the entry into bond, and the total sum of the "storage" upon such whisky.

(4) The sum of the "storage" upon whisky of Grommes & Ullrich and their customers, where the warehouse receipts were not returned for regauge and ascertainment of "outage" within seven years from the date of entry into bond, and the value of the "outage" upon such whisky in excess of one gallon over the amount allowed by the act of 1899.

(5) The value of the "outage," in excess of one gallon over the amount allowed by the act of 1899, upon the whiskies of Grommes & Ullrich and their customers, where the receipts were not returned within seven years from the date of entry into bond, but where the receiver, at the end of seven years from its entry into bond, caused an ascertainment to be made by a regauge. The total amount of "storage" which the receiver did not collect, if any, but permitted it to be set off by "outage."

The court should determine the above-stated questions of fact, and whether or not Grommes & Ullrich were entitled to any "free storage," and whether or not they were entitled to recover for "outage" in excess of one gallon over the amount allowed by the act of 1899, where the warehouse receipts were not returned for regauge and ascertainment for loss within seven years after the date of the entry into bond of the whisky, and then determine the cause according to what he deems the rights of the parties.

[2-4] The appeal of J. R. Paxton, receiver, and J. R. Feland, his attorney, is from a judgment of the court overruling the motion

of the receiver and his attorney, for an allowance to be made, out of the assets of the trust estate in the hands of the receiver, for the payment for legal services rendered the receiver by his attorney, in the conduct of his duties as receiver. No application was ever made to the court by the receiver for authority to employ counsel, nor was any such order of the court ever made. While the receiver is an officer of the court, and is entitled, at all times, to apply to the court for advice and instruction, and the better rule is that a receiver, before employing counsel, should seek and receive authority of the court, yet, in the absence of such authority, it is held that a receiver may employ counsel for himself, and counsel fees are considered as just allowances, which may be made by the court. It is, however, uniformly held that a receiver cannot make any contract for employment of counsel, nor any agreement as to the amount of compensation for the attorney, which will be binding upon the court, as it is the duty and province of the court to determine in every instance whether the employment has been necessary, and, if necessary, the sum to be allowed for the compensation of the attorney. If, in exercise of good discretion, there was no necessity for the employment of counsel, the court may refuse any allowance therefor, and may determine from the evidence, and its own knowledge of the questions, the necessity for counsel and the amount of compensation due. 23 R. C. L. 138, 139; 34 Cyc. 290, IV, 464. The necessary counsel fees, when allowed, are a part of the costs of the receivership and are entitled to priority in payment. 34 Cyc. 352. An allowance will be made, however, for only such services as require legal skill. From the affidavits filed upon the motion, and the duties of the receiver, as appear from the entire record, it seems upon the record as it now stands that legal counsel was necessary to the receiver in the performance of certain of his duties, and that he did not abuse a wise discretion in the employment of counsel, and therefore was entitled to have an allowance made him for a reasonable sum to compensate an attorney for the necessary services, requiring legal knowledge and skill, which the attorney rendered him, and the court was in error in denying to him such an allowance.

The judgment overruling the motion of the receiver is therefore reversed, and the cause remanded, with directions to the court to hear such evidence as the parties may desire to offer, and to make such an allowance as will be a reasonable compensation for the attorney for the necessary legal services rendered the receiver in the performance of his duties as such, if it shall appear upon the hearing that the services claimed for were necessary.

The cause, as to the questions arising upon

the appeal of the Fidelity & Columbia Trust Company, is therefore remanded for further proceedings in the circuit court as in the opinion directed, and the judgment upon the motion of J. R. Paxton, receiver, etc., is reversed, and cause remanded for proceedings not inconsistent with this opinion.

### LANGHAN et al. v. CITY OF LOUISVILLE.

(Court of Appeals of Kentucky. Dec. 19, 1919.  
Rehearing Denied Jan. 13, 1920.)

#### 1. MUNICIPAL CORPORATIONS ⇨29(3)—CONDITIONS PREREQUISITE TO ANNEXATION OF TERRITORY TO MUNICIPALITY.

Under Ky. St. §§ 2761-2764, an annexation of territory to a city of the first class, where 75 per cent. of the freeholders of the territory sought to be annexed have not remonstrated, there can be no annexation, unless it appears that the annexation will be to the interest of the city, and also that it will cause no manifest injury to the persons who own real estate within the territory sought to be annexed.

#### 2. TRIAL ⇨233(1)—PARTIES ENTITLED TO INSTRUCTIONS ON GROUNDS OF DEFENSE OR CAUSE OF ACTION.

Every litigant on a trial by jury is entitled, when he requests it, to have his cause of action or ground of defense presented by instructions which would enable the jury to find, for him if the evidence warrants it; and if there are two grounds of defense or two causes of action, either one of which would entitle him to a verdict, the instruction must be so drawn as to permit the verdict to be in his favor if either ground is sustained by evidence.

#### 3. MUNICIPAL CORPORATIONS ⇨33(9)—INSTRUCTIONS IN ANNEXATION PROCEEDINGS ERRONEOUS.

In a proceeding to resist an annexation of territory to a city of the first class, under Ky. St. §§ 2761-2764, instructions for the petitioner, if the jury believed that the annexation will not be for the interest of the city "and" will cause injury to the territory sought to be annexed, held erroneous, since either ground would have been sufficient to defeat the annexation.

Appeal from Circuit Court, Jefferson County.

Proceeding by R. D. Langhan and others against the City of Louisville in resistance to an extension of the municipality's territory. From a judgment in favor of the city, dismissing plaintiff's petition, and a denial of new trial, plaintiffs appeal. Reversed and remanded.

Humphrey, Crawford, Middleton & Humphrey and Baskin & Vaughn, all of Louisville, for appellants.

Joseph S. Lawton, M. H. Thatcher, and Harry E. Tinscher, all of Louisville, for appellee.

HURT, J. The city of Louisville is a city of the first class, and the manner of reducing its limits, or extending them by the annexation of territory which is contiguous to its present boundaries, is governed by the provisions of sections 2761 to and including 2764, Ky. Stats. On the 5th day of October, 1918, in accordance with the provisions of the above-mentioned statutes, the general council of the city adopted an ordinance, providing for the annexation to the city of something in excess of 8,000 acres of land, which included two towns, one of which was of the fourth class, and the other of the fifth class, and each of which contained over 2,000 persons. The population of the entire territory proposed to be annexed is 40,000 persons, and the value of the property therein is \$11,025,843. The real estate embraced within the territory is divided among about 8,000 owners. The ordinance was duly published. Seventy-five per centum of the freeholders of the territory proposed to be annexed did not remonstrate against the annexation, but within 30 days after the enactment of the ordinance the appellant R. D. Langhan and 22 other residents of the territory embraced within the proposed annexation filed their petition in the circuit court, setting forth reasons why the territory, nor any part thereof, should be annexed to the city. The petition resisted the annexation of the territory as a whole. The answer of the city was a denial of the averments of the petition and its amendments. Upon the trial of the action the jury returned a verdict for the city. The court, upon the verdict, adjudged that the plaintiffs' petition be dismissed, and that the judgment be certified to the general council of the city. The plaintiffs filed grounds and moved the court to set aside the verdict and judgment and to grant them a new trial. The motion being overruled, the plaintiffs have appealed.

Several grounds are urged for the reversal of the judgment, but we deem it necessary to consider but one. The court, over the objections of the plaintiffs, gave to the jury two instructions, one of which is as follows:

(1) "If the jury shall believe, from the evidence, that the addition of the territory described in the evidence to the city will be for its interest, and will cause no manifest injury to the persons owning real estate in the territory sought to be annexed, they will find for the defendant, the city of Louisville, but that, if the jury shall believe from the evidence that the addition of the territory described in the evidence to the city will not be for its interest, and will cause manifest injury to the persons owning real estate in the territory sought to be annexed, they should find for the plaintiff."

The second instruction defined correctly the meaning of the term, "manifest injury to the persons owning real estate in the territory sought to be annexed."

[1] The statute (section 2762) which prescribed the method of an action of this kind, and defines the issues which must be submitted to the jury, where 75 per centum of the freeholders of the territory sought to be annexed have not remonstrated, as was the case in this action, is as follows:

"If the jury be satisfied, upon a hearing, that less than seventy-five per cent. of the freeholders of the territory to be annexed \* \* \* have remonstrated, and that the adding \* \* \* of such territory to the city will be for its interest, and will cause no manifest injury to the persons owning real estate in the territory, sought to be annexed, \* \* \* it shall so find, and said annexation \* \* \* shall be approved and become final."

It is very clear that, in accordance with the provisions of the statute, an annexation of territory to a city of the first class, and where 75 per centum of the freeholders of the territory sought to be annexed have not remonstrated, cannot lawfully be effectuated, unless two states of case exist. The one is that the annexation will be to the interest of the city, and the other is that the annexation will cause no manifest injury to the persons who own real estate within the territory sought to be annexed. Unless these two states of case concur, the annexation cannot be made. If the annexation will be to the interests of the city, but will cause manifest injury to the freeholders of the territory proposed to be annexed, the annexation cannot be made. Neither can it be made if it will cause no manifest injury to the freeholders of the territory proposed to be annexed, but will not be to the interest of the city. The purpose of the statute is to protect the interests of the city, and also those of the freeholders in the territory which is the subject of the proposed annexation. Hence the city was not entitled to succeed, unless the annexation would be both for its interests and would cause no manifest injury to the freeholders of the territory to be annexed, and hence the plaintiffs were entitled to defeat the annexation, if it was either not for the interests of the city or would work manifest injury to the freeholders of the territory proposed to be annexed. The instruction, as worded, correctly stated the city's rights to a recovery, if the evidence warranted it; that is, it was entitled to have the annexation made and confirmed, if it was to its interest, and did not cause manifest injury to the freeholders who resided in the territory proposed to be annexed. It, however, denied to the freeholders their grounds of defense to the pro-

posed annexation, or their causes of action, if they are to be deemed plaintiffs, by requiring the jury, before it could find a verdict for them, to believe both that the annexation would not cause manifest injury to the owners of real estate within the proposed annexation and would not be to the interest of the city, when they were entitled to a verdict in their favor if the annexation was either not to the interest of the city or would cause manifest injury to the owners of real estate within the territory proposed to be annexed. The owners of real estate within the territory proposed to be annexed were under the statute, and it was their right to defeat the annexation, if it would cause manifest injury to them, although the annexation might be for the interest of the city; but under the instruction the jury could not find for them, although it might believe that the annexation would work injury to the real estate owners in the territory to be annexed, unless it be believed also that the annexation would not be to the interest of the city.

[2, 3] Every litigant, upon a trial by jury, is entitled, when he requests it, to have his cause of action or ground of defense presented by instruction which would enable the jury to find for him, if the evidence warrants it, and if there are two grounds of defense, or two causes of action, either one of which being believed, will entitle him to a verdict in his favor. The instruction, to escape being prejudicial must be so drawn as to permit the verdict to be in his favor if either of the grounds is sustained by the evidence, and he should not suffer defeat and be deprived of his right because the jury is required to not only believe the grounds which will entitle him to the verdict, but in addition thereto to believe some other fact, which is not necessary to his defense, or to the support of his cause of action. The disjunctive "or" should have occupied the place of the conjunctive "and" in that part of the construction where it was undertaken to declare to the jury the state of case when its verdict should be for the plaintiff, so that the verdict could be for them in the event the jury believed either that the proposed annexation was not for the interest of the city or would cause manifest injury to the owners of real estate in the territory which was proposed to be annexed.

It might be suggested that the error arising from the use of so small a word was not prejudicial, but the effect of it was to take away the right of the plaintiffs, and it cannot be held that the error was not prejudicial upon the ground that the jury failed to heed, and disregarded, the instructions of the court, and it would not do to say that such an error is not prejudicial in a case where a jury is called upon to pass upon the

future welfare of 40,000 of their fellow citizens, where the instructions do not correctly define the rights of those citizens, and especially in a character of action which is unusual, and with which jurors have no experience. The learned trial judge was doubtless led into the error in giving the instructions by the opinion of this court in *Louisville v. Brown*, 119 S. W. 1197, wherein, in directing an instruction in a similar case, the same error appears as in the instruction

complained of in the instant case, and the error in that opinion was, perhaps, the result of inadvertence or oversight in the writing of the opinion, but it should no longer be permitted to remain a precedent for the guidance of trial courts.

The judgment is therefore reversed, and cause remanded for proceedings not inconsistent with this opinion.

All members of the court sitting, except Judge QUIN.



## WALKER v. STATE. (No. 5493.)

(Court of Criminal Appeals of Texas. Dec. 17, 1919.)

## 1. CRIMINAL LAW §958(6) — EVIDENCE RE-QUIRING NEW TRIAL ON ISSUE OF INSANITY.

In a prosecution for burglary, wherein an issue of insanity had been found against defendant, affidavits on a motion for new trial on that issue held to present evidence requiring a new trial to be granted notwithstanding that such evidence was, strictly speaking, not newly discovered evidence.

## 2. CRIMINAL LAW §938(1) — RULE AS TO NEWLY DISCOVERED EVIDENCE INAPPLICABLE TO ISSUE OF INSANITY.

The rule in Texas with reference to cumulative evidence and strict diligence does not apply to the question of insanity, viewed in the light of newly discovered testimony.

Appeal from District Court, Henderson County; John S. Prince, Judge.

Mose Walker was convicted of burglary, and he appeals. Reversed and remanded.

C. M. Cureton, Atty. Gen., and C. W. Taylor, Asst. Atty. Gen., for the State.

DAVIDSON, P. J. Appellant was convicted of burglary and allotted five years in the penitentiary.

The first bill of exceptions recites the fact that one of the jurors mentioned the fact that appellant did not testify. This was controverted, and the same juror who made the original affidavit filed a counter affidavit recanting what he had said with reference to it. The court passed upon this. We are of opinion the court was not in error in his ruling under this record.

[1, 2] The question of insanity was an issue in the case on the trial, and there was evidence introduced pro and con not of a very satisfactory nature, and the jury found against appellant. This issue arose under the general plea. Appellant in his motion for new trial attaches the affidavits of 35 or 40 people, who swear, nearly all of them, that appellant is crazy, and has been for a number of years, and is so regarded by all the people who knew him, and especially where he lived in Dallas and Dallas county. These affiants knew and had known him for years prior to the alleged burglary. They show that his father was insane, that a sister was in the insane asylum, that some of his aunts were crazy, and these seems to have been a streak of insanity running through his family. It would be entertaining to recount the statements of these witnesses, but of no practical value, to the mind of the writer; but a great many instances and occurrences and

scenes connected with his life, and what he did and said, are specified in the affidavits, which, if true, would show that the man's mind was thoroughly unbalanced. Nearly all of these affiants state that appellant is crazy and was so regarded. He imagined that he had a divine commission to preach and did preach, and where things did not go to suit him while he was delivering his sermon he would use violent profanity. He imagined that he was John the Baptist, and a great many things that were not true, and any rational mind would have known them to be untrue and not facts. Under the testimony the man's mind at the time of the facts enumerated was unquestionably unsound. No impartial mind could read these affidavits without reaching that conclusion. It is true that the matters enumerated happened prior to his removal to Henderson county; yet, in view of all the environments, we are of opinion that these facts should have been passed upon by the jury. Some of the witnesses, testifying before the jury in regard to the matter, stated that he would know right from wrong at times; but, in view of the facts and statements and the nature of the affidavits attached to the motion for new trial, we are of opinion the court should have granted him another trial before a jury and have these matters before the jury for their decision. This in a sense may not be said to be newly discovered testimony, because, if it was not known, it could have been known by reasonable diligence prior to the trial; but the rule in Texas with reference to cumulative evidence and strict diligence does not apply to the question of insanity, viewed in the light of newly discovered testimony. Mr. Branch lays down the rule, which seems to be supported by the authorities, that—

"Where the plea is insanity, the same strictness is not required as to newly discovered evidence of insanity as if some other fact was sought to be proved. A new trial should be granted for proof of facts which show insanity, although no diligence was used to obtain such evidence before the trial." *Schuessler v. State*, 19 Tex. App. 472; *Hill v. State*, 53 S. W. 845; *Horhouse v. State*, 50 S. W. 361.

It is not the policy of the law to punish criminally people whose minds are demented. There would scarcely come a case where an equitable showing is more strongly made, if not strictly a legal one, than in this case. In view of the overwhelming evidence of these affiants to the effect that appellant was insane, we are of opinion that the jury should pass on it in the light of this testimony, although it may not have been newly discovered.

For the reasons indicated, the judgment will be reversed, and the cause remanded.

**KENNEDY v. STATE.** (No. 5556.)

(Court of Criminal Appeals of Texas. Dec. 17, 1919.)

**1. INDICTMENT AND INFORMATION  $\S$  110(3)—  
"INDICTMENT" FOLLOWING STATUTE SUFFICIENT.**

The rule that it is sufficient if the indictment follows the language of the statute applies only where the indictment is framed under a statute which defines the acts constituting the offense in a manner that will inform accused of the nature of the charge, the test being, not that the indictment follows the statute, but that it is a compliance with the law prescribing the requisites of an indictment, an "indictment" being a written statement of the grand jury accusing person therein named of some act or omission which by law is declared to be an offense, such offense to be set forth in plain and intelligible words; in view of Code Cr. Proc. 1911, §§ 450, 451, and Const. art. 1, § 10.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Indictment.]

**2. INDICTMENT AND INFORMATION  $\S$  110(51)—  
INDICTMENT CHARGING PROCURING IN WORDS  
OF STATUTE INSUFFICIENT IN NOT DISCLOSING  
ACTS OF ACCUSED.**

An indictment charging that defendant "did then and there unlawfully and willfully attempt to procure, and did procure, and was concerned in procuring," a female named as an inmate of a house of prostitution, although following the words of the statute, held insufficient as not disclosing the acts or omissions of accused by which he was charged to have procured the female inmate in view of Code Cr. Proc. 1911, arts. 450 and 451, and Const. art. 1, § 10.

Appeal from District Court, Potter County; Henry S. Bishop, Judge.

Dave Kennedy was convicted of procuring, and he appeals. Reversed and remanded.

Veale & Lumpkin, of Amarillo, for appellant.

Alvin M. Owsley, Asst. Atty. Gen., for the State.

**MORROW, J.** The indictment contains several counts. The first, upon which the conviction was had, charged that—

"Dave Kennedy did then and there unlawfully and willfully attempt to procure, and did procure, and was concerned in procuring Fannie Doty, a female, as an inmate of and for a house of prostitution in a house and place in said county and state where prostitutes then and there resorted for the purpose of plying their vocation as such prostitutes, and were so kept, as the said Dave Kennedy then, and there well knew, contrary to the statutes in such cases made and provided and against the peace and dignity of the state."

[1] The sufficiency of this indictment was questioned in a motion to quash. The stat-

ute upon which it is founded makes it an offense to "procure, attempt to procure, or be concerned in procuring a female inmate for a house of prostitution." The complaint is that the "acts or omissions" of the appellant by which he is charged to have procured the female inmate are not disclosed by the pleading. To this the state answers that it is enough that the indictment followed the language of the statute. This rule applies in those instances only in which the indictment is framed under a statute which defines the act or acts constituting the offense in a manner that will inform the accused of the nature of the charge against him. The test is not that the indictment follows the statute, but that it is in compliance with the law prescribing the requisite of an indictment. An indictment under our statutes is "the written statement of a grand jury accusing a person therein named of some act or omission which, by law, is declared to be an offense," and "the offense must be set forth in plain and intelligible words." Texas Code Crim. Procedure, arts. 450 and 451. The bill of rights declares that one accused of crime "shall have the right to demand the nature and cause of the accusation against him, and to have a copy thereof. \* \* \* And no person shall be held to answer for a criminal offense, unless on indictment of a grand jury." Constitution, art. 1, § 10. The statute declaring the requisite of an indictment but confirms the law as it is contained in the Constitution. *Hewitt v. State*, 25 Tex. 722; *Williams v. State*, 12 Tex. App. 399; *State v. Duke*, 42 Tex. 462; *Huntsman v. State*, 12 Tex. App. 636; *Johnson v. State*, 42 Tex. Cr. R. 102, 58 S. W. 60, 51 L. R. A. 272; *Vernon's Texas Crim. Statutes*, vol. 2, p. 192; *Harris's Texas Constitution*, p. 86, note 41.

In *Gray v. State*, 7 Tex. App. 18, it is said in substance that, where following the language of the statute in charging the offense will fulfill the requirements of the indictment mentioned, the use of the language of the statute will be sufficient; but, where the language of the statute alone would be insufficient to set out the offense in compliance with the rule, it is essential that averments be made showing the existence of the additional facts necessary to constitute the offense. This principle is reaffirmed in many cases. See *Kerry v. State*, 17 Tex. App. 178, 50 Am. Rep. 122; *Bryan v. State*, 54 Tex. Cr. R. 18, 111 S. W. 744, 16 Ann. Cas. 515; *Huntsman v. State*, 12 Tex. App. 646; *Dunlap v. State*, 40 Tex. Cr. R. 590, 51 S. W. 392; *Hoskey v. State*, 9 Tex. App. 202; *Bigby v. State*, 5 Tex. App. 101; *McAfee v. State*, 38 Tex. Cr. R. 124, 41 S. W. 627; *Bishop's New Crim. Procedure*, vol. 2 p. 487.

It is stated in Bishop's New Crim. Procedure, vol. 2, § 623, as follows:

"The doctrine is that, since the indictment on a statute must follow, besides the special rules which govern it, those also which govern other indictments, when the statutory words come short of this, other appropriate ones expanding it further must be added."

The accused is entitled to a statement of the facts relied upon, and if these are not contained in the statute denouncing the offense, they must be supplemented by the pleader drawing the indictment. The statement of a legal conclusion or result will not suffice. Wharton's Crim. Procedure, vol. 1, § 196; Strickland v. State, 19 Tex. App. 519; Bryan v. State, 54 Tex. Cr. R. 59, 111 S. W. 1035; La Grone v. State, 12 Tex. App. 426.

There are numerous acts which might result in procuring a female inmate for a house of ill fame. They might be acts amounting to fraud, force, or persuasion. In the present instance, according to the theory of the state developed under the evidence, the female was procured by means of a contract or agreement under which she was to receive certain compensation. To charge procuring is but the conclusion of the pleader. It is not a statement in plain and intelligible language of the acts or omissions relied upon. One who willfully "imputes" a want of chastity to a female commits the offense of slander, but the indictment which charges the language quoted from the statute is fatally defective in failing to set out the language charged to have been used by the accused. La Grone v. State, 12 Tex. App. 427.

"Disturbing religious worship" is an offense, but the indictment must describe the means used. Merely charging that the accused "disturbed" the congregation, while following the statute, does not comply with the law. Lockett v. State, 40 Tex. 4; Thompson v. State, 16 Tex. App. 159.

So in the offense of bigamy (Bryan v. State, 54 Tex. Cr. R. 59, 111 S. W. 1035) and murder (Strickland v. State, 19 Tex. App. 519) and in numerous other instances the necessity to do more than follow the statute is illustrated. See Wharton's Crim. Procedure, vol. 1, § 196, and notes.

Pertaining to a statute framed in substantially the same language as ours, specific instances are furnished in which an indictment charging the offense of pandering in the language of the statute denouncing the offense have been condemned as insufficient in failing to designate the acts of the accused, instead of relying upon the conclusion that he procured the inmate, in Abrams v. State, 13 Okl. Cr. 11, 161 Pac. 332, and State v. Topham, 41 Utah, 39, 123 Pac. 888.

The case of McDowell v. State, 69 Tex. Cr. R. 548, 155 S. W. 521, without discussing the reason, declares an indictment drawn in the language of the statute mentioned sufficient, and a similar ruling was made in Baldwin v. State, 198 S. W. 305, though in that case the language in which the motion to quash was couched seems to have controlled. It is on account of these cases that we have gone into some detail in reviewing the principles applicable to indictments.

[2] Believing that the indictment in the present instance falls short of complying with the requisites of an indictment as defined in both the Constitution and the statute, and that to sustain it against a motion to quash would do violence to the rules followed by this court in the numerous cases cited above and uniformly followed in other jurisdictions, we deem it our duty to overrule the cases mentioned above which conflict with this conclusion. We think the motion to quash should have been sustained, and that the decisions of this court to the contrary are clearly wrong.

The judgment of the trial court is reversed, and the cause remanded.

#### DOLLAR v. STATE. (No. 5578.)

(Court of Criminal Appeals of Texas. Dec. 3, 1919.)

#### 1. CRIMINAL LAW §1097(1) — GROUNDS OF OBJECTION NOT STATEMENT OF FACT.

Grounds of objection in bill of exceptions will not take place of the necessary statement of facts to show that objection is well taken.

#### 2. CRIMINAL LAW §1169(1)—PROSTITUTION §4—EVIDENCE TO SHOW CHARACTER OF PLACE AS HOUSE OF ILL FAME.

In a prosecution for procuring a female to become an inmate of a house of ill fame, testimony that a prostitute occupied a room in the hotel was admissible to show the character of the place, and the fact that her conversation with a man in the lobby of accused's hotel relative to her occupying a room was or was not heard by accused was immaterial, where she in fact did occupy a room pointed out to her.

#### 3. CRIMINAL LAW §414—ADMISSIBILITY OF EVIDENCE OF ATTEMPT TO BRING FEMALE BACK TO HOUSE OF ILL FAME.

Where in prosecution for procuring a female to become an inmate of a house of ill fame it was shown that female left the house and went to the home of a Mr. L., testimony of the female that she heard a conversation between accused and Mrs. L. when she was about six feet away in another room with open door was a sufficient predicate to admit the conversation.

**4. PROSTITUTION** **§4—ADMISSIBILITY OF EVIDENCE OF ATTEMPT TO BRING FEMALE BACK TO HOUSE OF ILL FAME.**

Where in a prosecution for procuring a female to become an inmate of a house of ill fame, in which it was shown that she left place of accused and went to home of another, testimony that accused went to such home for purpose of bringing her back would be admissible regardless of whether he saw the female or whether she heard any conversation at such place to that effect.

**5. CRIMINAL LAW** **§338(3) — PROSTITUTION** **§4—ADMISSIBILITY OF EVIDENCE THAT FEMALE LEFT HOUSE OF ILL FAME.**

Where, in a prosecution for procuring a female to become an inmate of a house of ill fame, testimony that she left place of accused and went to home of another was admissible as a predicate for further testimony that he attempted to induce her to return, but her reason for going, such as that her child was sick, would be of no importance.

**6. PROSTITUTION** **§4—SUFFICIENCY OF EVIDENCE OF PANDERING.**

In a prosecution for procuring a female to become an inmate of a house of ill fame, evidence held sufficient to sustain a conviction.

Appeal from District Court, Potter County; Henry S. Bishop, Judge.

Rube Dollar was convicted of pandering, and he appeals. Affirmed.

Pearson & Monning, of Amarillo, for appellant.

Alvin M. Owsley, Asst. Atty. Gen., for the State.

DAVIDSON, P. J. Appellant was given 15 years in the penitentiary under a charge of pandering.

In substance, the state's case is that appellant was keeping and was the proprietor of a house of ill fame, and that he attempted to procure and was concerned in procuring Fannie Doty, a female person, to become and be an inmate of a house of ill fame and prostitution, in which said house of ill fame and prostitution prostitutes and lewd women were then and there permitted to resort and reside for the purpose of plying their vocation as prostitutes. It is further shown that Fannie Doty was an inmate of his house at his instigation and procurement; that he permitted men to make "dates" with other women than Fannie Doty and occupy rooms and have sexual intercourse with them in his house, which was known as the Star Hotel. It is also shown that he permitted other women to meet men in his house, and that he would furnish them rooms and other accommodations. It is also shown that the house was a house of ill fame, and that such was its general reputation. Some of the witnesses testified it was a "whore house"

and others that such was its general reputation. Appellant denied that he procured Fannie Doty or any other woman to visit his house and occupy a room with men. The testimony is voluminous.

[1,2] A bill of exceptions recites that while Mrs. Maggie A. Graham was testifying for the state, and when she had testified that she had a conversation with a man known as the "cripple-footed fellow" in the lobby of the Star Hotel, and after she had testified that she had a conversation with this man in an undertone, the conversation being about her going to a room in the hotel, and after she further testified that the defendant was in the lobby, but that she did not know whether he heard the conversation or not, she was asked this question:

"You don't know that he heard it? A. I don't know that he heard it."

The ground of objection is thus stated:

"Because it was not shown that the conversation was heard by the defendant, or that he had knowledge of it, and therefore could not be binding on the defendant."

The objections being overruled, she testified that the "cripple-footed fellow" had directed her to a room in the Star Hotel. The grounds of objection are not statements of fact.

The following bill of exceptions recites:

That while the same witness was testifying for the state, and "had undertaken to testify as to particular acts of intercourse with men in the Star Hotel, and while she was testifying as to a conversation between herself and a man known as 'the cripple-footed fellow,' she was asked this question by the defendant: 'You don't know that he heard it? A. I don't know that he heard it.'"

The objection urged in this bill is that the defendant could not be bound in any way by particular acts of intercourse which occurred in the Star Hotel without his knowledge or connivance, and that such evidence was not competent evidence to prove appellant's guilt. These objections being overruled, the witness testified that the "cripple-footed man" directed her to a room in the Star Hotel, and that she there had intercourse with a man. These grounds of objection, as stated in reference to the other bill, do not constitute a statement of facts. The bill is too meager, perhaps, for consideration, but in any event we are of opinion this testimony was admissible. Appellant was the proprietor of the hotel. The entire house, including the rooms, was under his control, and if Mrs. Graham occupied a room in the hotel, under the circumstances, it occurs to us it should be considered as a fact going to show appellant was keeping a house of ill fame where prostitutes plied their vocation. The

fact that he may or may not have heard what the "cripple-footed fellow" said to Mrs. Graham in the lobby of the hotel would be of no serious moment; she having occupied the room pointed out in the hotel. If this bill could be aided by going to the statement of facts, it would be discovered that Mrs. Graham was a prostitute. Her testimony as well as the testimony of others render this an indisputable fact. She went to this hotel, under her testimony, to meet a man and ply her vocation, and did so in a room in the hotel. We do not think this was a matter of sufficient importance to require a reversal, even if appellant did not hear the conversation between the "cripple-footed fellow" and Mrs. Graham which led her to occupy a room in the house and to ply her vocation. She testified at considerable length, and was sharply cross-examined. Not only Mrs. Graham herself, a woman beyond middle life and a mother of 13 children, testified that she occupied a room but one or more of her daughters plied the same vocation in the same hotel by meeting men and occupying rooms in the hotel. Her testimony was legitimate to show the character of the house and that the business of prostitution was carried on in it.

[3, 4] Fannie Doty, the woman alleged in the indictment to have been induced to follow her business in appellant's house, after remaining there for some time left and went to the home of a Mr. Lackey. It seems she left the hotel because her baby had pneumonia. Appellant objected to a conversation that occurred between Mrs. Lackey and appellant when he went to Lackey's house to secure the return of Fannie Doty to his house. The bill recites that Fannie Doty did not see the defendant at the time, and the conversation occurred between Mrs. Lackey and appellant, but the court certifies in his qualification that the witness had testified at that time that she was about six feet from Mrs. Lackey and appellant, but out of sight of appellant in another room, with an open door between witness and appellant and Mrs. Lackey, and that she heard the conversation between them that she testified about. This would be a sufficient predicate, we think, to admit the conversation, whatever it may have been, if it had any bearing upon the case; but it was a fact that he visited the Lackeys in order to induce this woman to return to his house, and whether Fannie Doty heard the conversation or not we think would not be of any particular moment. He went to the Lackeys to secure Fannie Doty's return to his house, and if the conversation was to that effect, or that he desired to see her for that purpose, it would be admissible, under the allegations of the indictment. She had been an inmate of his house, and had left, and his visit to her at

the Lackeys to secure her return would be a relevant fact.

[5, 6] Appellant also objected to the statement of Fannie Doty that when she left the hotel her child was sick with pneumonia. This is not an important matter one way or the other. Whether she left the hotel for one reason or another would be admissible as a sort of predicate for the further statement that he went to the Lackeys in order to induce her to return. If she left because the child might secure better attention at some other place, or if she left because she concluded to change her manner of life, would not be of pertinent force, except as an inducement to appellant seeking her with a view of inducing her return. The fact would remain that she left the place, and her reason may or may not be of any particular moment; but the fact that she did leave, and that appellant sought to induce her to return, would be legitimate and relevant. We are of opinion that the evidence is sufficient to support the conviction.

Finding no reversible error in the record, the judgment is affirmed.

#### DOLLAR v. STATE. (No. 5579.)

(Court of Criminal Appeals of Texas. Dec. 10, 1919.)

#### 1. WITNESSES $\S$ 269(12, 13)—CROSS-EXAMINATION GERMANE TO DIRECT EXAMINATION.

In prosecution for pandering, defined by Pen. Code, art. 506a, where defendant's husband testified that he did most of the housework because his wife was sickly, and gave date and locality of his meeting and marriage with his wife, *held*, that cross-examination of husband developing that defendant had been raised near San Angelo, and had been in Arizona and New Mexico, and that she was not ill all the time, was germane to the direct examination.

#### 2. CRIMINAL LAW $\S$ 1170½(5)—CROSS-EXAMINATION ON MATTERS NOT GERMANE HARMLESS.

In prosecution for offense of pandering, defined by Pen. Code, art. 506a, *held*, that cross-examination of defendant's husband developing that she had been raised near a certain town, and had been in Arizona and New Mexico, and that she was not ill all the time, if not germane to direct examination, was harmless.

#### 3. CRIMINAL LAW $\S$ 724(1), 1171(1)—IMPROPER ARGUMENT NOT AUTHORIZING REVERSAL.

In prosecution for pandering, defined by Pen. Code, art. 506a, remark by attorney for state in argument, "We want to get rid of such cattle as that," while improper, *held* not such as to authorize reversal, when the jury assessed the lowest penalty.

**4. CRIMINAL LAW §374 — TESTIMONY IN PROSECUTION FOR PANDERING AS TO KEEPING OF OTHER HOUSES OF ILL FAME ADMISSIBLE.**

In prosecution under Pen. Code, art. 506a, for inducing D. to become an inmate of a house of prostitution kept by defendant and her husband, testimony of D. that in May of the previous year she was staying at the McIntosh Hotel, and that defendant and her husband were in charge there, *held* not subject to objection that it was too remote.

**5. CRIMINAL LAW §1169(11)—ADMISSION OF TESTIMONY AS TO KEEPING OF OTHER HOUSE OF ILL FAME HARMLESS.**

In prosecution under Pen. Code, art. 506a, for inducing D. to become an inmate of a house of prostitution kept by defendant and her husband, permitting D. to testify that in May of the previous year she had stayed at the McIntosh Hotel, and that defendant and her husband were in charge there, if error, *held* not harmful.

**6. PROSTITUTION §4—EVIDENCE IN PROSECUTION FOR PANDERING THAT HOUSE KEPT WAS A RESORT OF PROSTITUTES ADMISSIBLE.**

In prosecution under Pen. Code, art. 506a, for inducing D. to become an inmate of a house of prostitution kept by defendant and her husband, testimony of P., a prostitute, that she went to house in question and registered and occupied a room therein for the purpose of prostitution was admissible, though defendant was not present in the lobby of the house when P. entered and defendant's husband assigned P. a room.

**7. CRIMINAL LAW §1144(12)—RULINGS ON EVIDENCE PRESUMED CORRECT WHERE BILL OF EXCEPTIONS MEAGER.**

Ruling of trial court in admitting testimony is presumed to have been correct; bill of exceptions being too meager to give any adequate information upon which to base a ruling adverse to that of trial court.

**8. CRIMINAL LAW §829(1)—REFUSAL OF INSTRUCTION COVERED BY CHARGE GIVEN PROPER.**

Where the main charge, together with the several special charges given at request of defendant, appellant, fully and fairly submitted the issues involved, there was no error in refusing other special charges requested by defendant.

Appeal from District Court, Potter County; Henry S. Bishop, Judge.

May Dollar was convicted of pandering, and appeals. Affirmed.

Pearson & Monning, of Amarillo, for appellant.

Alvin M. Owsley, Asst. Atty. Gen., for the State.

MORROW, J. The appellant was convicted of the offense of pandering, defined in

article 506a of the Texas Penal Code, the indictment containing the allegation that she did "unlawfully and wilfully procure, and attempt to procure, and was concerned in procuring Fannie Doty, a female person, to become an inmate of a house of ill fame and prostitution in said county and state, in which house of ill fame and prostitution prostitutes and lewd women were then and there permitted to resort and reside for the purpose of plying their vocation as prostitutes."

A review of the evidence is not necessary. Suffice it to say that there was ample evidence to sustain the charge. A companion case is *Rube Dollar v. State* (No. 5578) 216 S. W. 1087, affirmed at the present term.

[1, 2] The complaint that there was error in permitting the state to cross-examine the husband of the appellant in matters not germane to the direct examination is not sustained by the record. He testified on direct examination that he did most of the housework because his wife was sickly and unable to do it; that she was sick most of the time. He testified giving the date and locality of his meeting and his marriage with his wife, and the cross-examination complained of developed the fact that she had been raised near San Angelo, and had been in Arizona and New Mexico. It was developed on cross-examination that the appellant was not ill all of the time; that she had no disease, but had undergone an operation for some trouble in her side. The trial court, it appears from the bill, instructed the jury to disregard these matters. They appear to us to have been germane to the direct examination; and, even if they had not been so, they were harmless; at least the bill of exceptions wholly fails to suggest any specific manner in which they could have injured the appellant. Moreover, they are in accord with the testimony given by the appellant upon her direct examination.

[3] The attorney for the state in the course of his argument remarked to the jury, "We want to get rid of such cattle as that," referring to the appellant. Considering the evidence in the record and the fact that the verdict assesses the lowest penalty, we think the argument, while not calculated to maintain the decorum which should pervade the courtroom, nor to sustain the dignity which characterizes the prosecuting officer, is not in the present case such as to authorize a reversal. *Borror v. State*, 204 S. W. 1006, and authorities referred to.

[4, 5] Fannie Doty, while testifying for the state, said that in May of the previous year she was staying at the McIntosh Hotel. State's counsel asked whether the appellant and her husband were in charge there, to which she gave an affirmative answer. The bill of exceptions fails to show why this was inadmissible, or in what respect it was hurt-

ful. It says it was too remote to have any connection with the offense. From the statement of facts it appears that Fannie Doty was a prostitute, and it is the state's theory, supported by the evidence introduced by it, that, knowing this fact, the appellant induced her to become an inmate of the house which she was keeping, which the state's evidence discloses was a house of prostitution, and used for that purpose. The appellant testified that she had known Fannie Doty when she worked at the McIntosh Hotel, and also admitted that she knew her to be a common prostitute, and that with such knowledge she permitted her to become an inmate of her house. That the bill under discussion discloses no harmful error would seem obvious.

[6] Another complaint relates to testimony given by the witness Myrtle Potter, a prostitute who went to the State Hotel, which was the house occupied by appellant and her husband, and who registered at the hotel and occupied a room therein for the purpose of prostitution. The bill states that at the time Myrtle Potter registered the appellant was not present in the lobby of the hotel, but that her husband, Rube Dollar, showed the witness a room. It was permissible that the state prove that the house kept by appellant and her husband was made the resort of prostitutes, and the bill discloses a circumstance legitimately available to the state to establish the character of the premises and the use to which they were put. The fact that the appellant was not present in the lobby at the immediate time that her husband, who was acting with her in maintaining the house of prostitution, assigned the witness Potter a room, would not, in our judgment, preclude the state from proving the fact. *Clark v. State*, 76 Tex. Cr. R. 348, 174 S. W. 355; *Sprague v. State*, 44 S. W. 838.

[7] The remaining bill of exceptions deals with the admissibility of testimony showing the character of persons that registered at the place kept by appellant, and while the bill is too meager to give any adequate information upon which to base a ruling adverse to that of the trial judge in admitting the testimony, which is presumed to have been correct, an examination of the statement of facts discloses that the cross-examination of the witness Morgan, which was referred to in the bill, developed none but relevant and admissible evidence.

[8] There were special charges refused, but the main charge of the court, together with the several special charges given at the request of appellant, in our opinion fully and fairly submitted to the jury the issues involved.

The judgment of the trial court is affirmed.

## KING v. STATE. (No. 5460.)

(Court of Criminal Appeals of Texas. Dec. 10, 1919.)

1. INDICTMENT AND INFORMATION  $\S$  191(1)—CONSPIRACY TO COMMIT MURDER.

In view of Pen. Code, arts. 1433, 1434, 1435, and 1439, if a conspiracy was to kill another, it was included within conspiracy to commit murder.

2. CONSPIRACY  $\S$  27—NO NECESSITY TO CONSUMMATE OFFENSE CONTEMPLATED.

The offense of conspiracy to commit murder having been complete at the time of entering into the conspiracy, it was an independent offense for which the parties could be prosecuted and punished though the offense contemplated was not consummated.

3. CONSPIRACY  $\S$  47—EVIDENCE NOT SHOWING AGREEMENT TO COMMIT MURDER.

In a prosecution for conspiracy to commit murder, evidence held not to show a positive agreement, as required by the Penal Code, to commit the offense of murder upon the husband of a woman infatuated with defendant.

4. CRIMINAL LAW  $\S$  703, 764(1), 772(4)—INSTRUCTION ON VENUE ERRONEOUS AS ON WEIGHT OF EVIDENCE.

In a prosecution for conspiracy to commit murder, instruction on venue held erroneous as on the weight of the testimony and contrary to Code Cr. Proc. 1911, art. 253, providing the offense of conspiracy may be prosecuted in the county where the conspiracy was entered into or was agreed to be executed.

5. CRIMINAL LAW  $\S$  761(5)—ASSUMPTION OF FACT IN ISSUE BY INSTRUCTION ERRONEOUS.

In a prosecution for conspiracy to commit murder, instruction on venue held erroneous as assuming that, in an assault by defendant's coconspirators upon the husband of one of them against whom the alleged conspiracy to kill was directed, such coconspirators were in the wrong and were not acting in self-defense.

6. HOMICIDE  $\S$  109—RIGHT OF SELF-DEFENSE NOT LOST IF ATTACKED WHEN ACTING INOFFENSIVELY.

Whether or not the persons involved in an affray had previously conspired to kill the other person fought with, the mere fact that they may have conspired to kill him if they were attacked on their part by him when acting inoffensively did not debar them from the right of self-defense.

Appeal from District Court, Knox County;  
J. H. Milam, Judge.

Matthew King was convicted of conspiracy, and he appeals. Judgment reversed, and cause remanded.

Bert King, of Wichita Falls, and Stinson, Chambers & Brooks, of Abilene, for appellant.

Alvin M. Owsley, Asst. Atty. Gen., for the State.

DAVIDSON, P. J. Appellant was indicted in Baylor county under a charge of conspiracy, in that he confederated, agreed, and conspired with Beulah Owens and Gregg Breeland to kill and murder G. L. Owens, and the case was transferred on change of venue to Knox county.

The evidence discloses that G. L. Owens was the husband of Beulah Owens, and that Gregg Breeland was a brother of Mrs. Owens. It is further disclosed that the parties had known each other practically all their lives, and that Mrs. Owens had become infatuated with appellant, and that their relations had taken on a phase of criminal intimacy. There had been trouble between the husband, G. L. Owens, and appellant, in which Owens had fired several shots at appellant on one occasion, and that they had had a difficulty in Mart, McLennan county. There was considerable evidence with reference to this difficulty pro and con as to who was the aggressor. It is not shown or claimed that the other parties had any connection with the trouble in Mart between appellant and Owens, or that they had any knowledge of it until some time after the difficulty. There was also a shooting scrape in the town of Seymour in January, 1919, between Mrs. Owens and her brother, Gregg Breeland, on one side, and her husband, G. L. Owens, on the other. All three of the parties were pretty badly shot, two of them seriously. Mrs. Owens and Breeland were indicted for assault to murder upon G. L. Owens. The case was transferred to Cottle county, where, upon their trials, a verdict of acquittal was rendered. Appellant was not connected personally with the difficulty between Mrs. Owens and Breeland, and her husband, above mentioned. The state undertook to show by circumstances that he was placed in the relation of accomplice to that difficulty, though not present and participating. The evidence is very weak and inconclusive upon appellant's connection with it. There is no contention that he engaged in the shooting. Prior to this last difficulty, G. L. Owens had sued his wife for a divorce, asking custody of the children. This divorce suit was pending in the district court in Baylor county, and the parties had assembled at Seymour, the county seat, to try the case on Monday following the above shooting, which occurred on Saturday. A divorce was granted, the children awarded to the husband, and Mrs. Owens then married appellant. Subsequent to her marriage and prior to appellant's trial, she died. The alleged conspiracy is shown to have occurred in Cooke county. The evidence of this is found in the testimony of Lloyd Owens, a son of G. L. and Beulah Owens. He was a boy something like 11 or 12 years of age. These parties, appellant, Mrs. Owens, Gregg Breeland, and

Mrs. Owens' children, had gone from Baylor county to Cooke county and adjoining counties for the purpose of picking cotton. This seems to have been about November, 1917. Upon one occasion during this trip, he says they were occupying a room in which there were two or three beds. Gregg Breeland and appellant slept in one bed and his mother in another, and the children in another. That one evening, while they were occupying this room or house, they were all in the room, and he says the children were playing; himself being of them. Quoting now his testimony with reference to the conspiracy, he said:

"While we were living in that house, I heard a conversation between my mother, Gregg Breeland, and Matthew King about my father. When I heard it, me and my sisters and brother were playing up in that end of the house, and they were down at this end talking. All three of them were sitting on the bed. Mamma just said they would get him out of the way, and Matthew said he would help. Gregg was talking with them, and they had a right smart of a conversation there; talked about how they would get him out of the way. We picked cotton down there about two weeks, then came back to Baylor county in the wagon. My mamma, Gregg, and little sisters and brother came back with me. Matthew King did not come back. He did not come back because papa came to Seymour after his mules. They got a letter from Seymour. I heard them reading the letter and talking about it. Then defendant went on back to the little house, got his clothes, and mamma went down there and came back with him. Then he went to town. He left about 3 o'clock that evening after they got the letter."

On cross-examination he said:

"We stayed there about a week, and that is when I heard the conversation, all of them doing the talking. I was not doing any of it. The house wasn't very big. Two beds were in one end of the house and one at the other end. Matthew and Gregg slept in the bed at the other end. I think they were sitting on the two beds, and we were playing on the bed Matthew slept on at the time of this conversation; my little sisters and brother playing on the bed with me. I didn't play with them all the time. I heard my mother say something about fixing somebody. I heard her say, 'Matthew, we will get him out of our way.' Matthew says, 'I will help you.' I testified at Seymour last July. In that trial I said that Matthew did say something. I did not say on that trial that my mother said she would fix him or get him out of the way and that Matthew said nothing and Gregg said nothing. It is my testimony now that Matthew King said he would help her get him out of the way. \* \* \* When she said, 'We will get him out of the way,' Matthew King said he would help her. She said she would get my papa out of the way, because I knew what she was talking about. She just said, 'We will get him out of the way.' That is all I have to say about it."



The defendant introduced evidence to the effect that such conversation did not occur. Gregg Breeland so testified as did the defendant. Mrs. Owens, subsequently Mrs. King, had died, and was not a witness.

The case seems to present itself this way: That Matthew King and Mrs. Owens were infatuated with each other, even to the extent of criminal intimacy. That Owens, the husband of Mrs. Owens, was very much disturbed about it, to the extent of shooting at appellant on two occasions and engaging in a serious shooting affair with his brother-in-law, Gregg Breeland, and his wife, in which he wounded them seriously. He also previous to the last difficulty had killed one of his wife's brothers and a Mr. Palmer. This also grew out of troubles with and about his wife.

[1-3] One of the questions presented is: Taking the state's case in its strongest light as made by Lloyd Owens, the 12 year old boy, do the facts present a case of a positive agreement, as required by the statute, to commit the crime of murder? And it may be stated that, if the conspiracy was to kill, it would be included within the conspiracy to commit murder. See Branch's Ann. P. C. arts. 1433, 1434, 1435, and 1439. It is also provided by article 1486, Branch's Ann. P. C., that—

"A threat made by two or more persons acting in concert will not be sufficient to constitute conspiracy."

It is also provided by article 1434, supra, that the offense of conspiracy is complete, although the parties conspiring do not proceed to effect the object for which they have so unlawfully combined. To constitute the substantive and independent offense of conspiracy under the Penal Code, there must be a positive agreement, and this to commit a felony, and in this case the state charged that felony to be murder. The state therefore must prove its allegations in order to obtain a conviction. The offense being complete at the time of entering into the contract or conspiracy, it would be an independent offense for which the parties could be prosecuted and punished. It was not necessary to consummate the offense about which the conspiracy was formed. It was sufficient to constitute the offense that the positive agreement to kill was formed and agreed upon. If this is not shown by evidence, then a conspiracy was not shown, and the allegations were not proved or sustained. Taking the language of the witness Lloyd Owens in its most favorable light to the state, it showed an express desire on the part of his mother to get his father out of the way, in which appellant agreed to assist her. It may be fairly deduced from the testimony that it was the purpose of Mrs. Owens and appellant to assume the marital relations as soon as Owens, the husband, was no longer an impediment. We think this may

be fairly deduced from the facts. The further idea may be also indulged that, whether this was true or not, there was more or less danger from the husband of trouble between himself and defendant and the wife while the marital relation existed. The husband had already killed two men, and had shot at the defendant four or five times on one occasion. It may be as fairly deduced from this testimony that murder was not contemplated as that it was. The language used by the boy, placed in the mouth of his mother, that they would get him out of the way, does not show a positive agreement to kill. If his testimony be true, it does show that it was the purpose of his mother to get rid of his father. He was an impediment to her amours and her infatuation with appellant. We are of opinion, taking the testimony in its strongest light for the state, that it does not show a positive agreement as required by the statute, to commit the offense of murder. The statute provides that a threat to kill, if this testimony be given that construction, is not sufficient to justify a conspiracy.

[4-6] Perhaps we might rest the case here for reversal. Bills of exception were reserved to various rulings of the court; among others, to the instructions given the jury. On the question of venue, which is seriously attacked by appellant, the court gave the following instruction to the jury:

"If a conspiracy to murder is entered into in Baylor county, or if a conspiracy to murder is entered into in any county in this state, and that the agreement was to be carried out and executed in Baylor county, or if a conspiracy to murder is entered into in any county in this state, and that one or more of the conspirators made an assault in Baylor county upon the person that they had conspired to murder, with the purpose and intent of then and there carrying out and executing said conspiracy but failed in their purpose, Baylor county would have jurisdiction of the offense."

The statute, article 253, C. C. P., reads as follows:

"The offense of conspiracy may be prosecuted in the county where the conspiracy was entered into, or in the county where the same was agreed to be executed," etc.

The remainder of the article refers to conspiracy entered into in another state or territory.

Inasmuch as the state relied upon the testimony of Lloyd Owens to show the conspiracy in all its forms and phases as a basis, we would necessarily look to this testimony with reference to the question not only of conspiracy but venue. If his testimony is to be credited, the agreement entered into by the parties already discussed was had in Cooke county. Where it was to be executed is not shown or stated. We are of opinion that the court's charge was upon the weight of the testimony, and in violation of the article of

the procedure, *supra*. There must be some evidence that the conspiracy was to be executed in Baylor county, for this is required by the statute. This charge is also erroneous from another viewpoint. The jury was instructed that if one or more of the conspirators made an assault in Baylor county upon the person that they had conspired to murder, with the purpose of carrying out their previously formed design, this would confer jurisdiction upon Baylor county. This and the subsequent portions of the charge failed to instruct the jury that if the difficulty which occurred between Mrs. Owens and her brother on one side and her husband on the other was not an assault made by them, but made by him and they were acting in self-defense, this would not be in furtherance of the common design, nor in execution of their conspiracy, if one existed. Breeland and Mrs. Owens had been tried and acquitted on the theory of self-defense in regard to the difficulty above mentioned. All the details of the difficulty were before the jury, as well as the fact they had been tried and acquitted. The court in his charge throughout submits the case to the jury as to venue and as to defendant's responsibility upon the theory that Mrs. Owens and Gregg Breeland were in the wrong, and committed an assault, and this being true, or at least from that standpoint, this would make them responsible for the conspiracy and lodge venue in Baylor county. The law of conspiracy to kill would not deprive the parties of the right of self-defense. If it be conceded that their purpose was to kill the husband Owens, and they had made an attack upon him for that purpose, then the state must show in some way by proper and legal evidence that it was in furtherance of their conspiracy and with a view of executing it. This, as a basis by the court, would assume: First, that a conspiracy was established; and, second, that Breeland and Mrs. Owens were the aggressive parties upon the husband in the difficulty, and for the purpose of executing the previously formed conspiracy. If, however, as shown by the opposing facts as well as the acquittal of both by the verdict of the jury, they were acting in self-defense, then the court, having submitted the state's theory, should have submitted the opposing theory. Even had a conspiracy been formed as contended by the state through the testimony of the witness Lloyd Owens, yet if they did not execute it, or attempt so to do, this would not be evidence to bolster up the state's case on conspiracy, nor would it deprive the alleged conspirators of the right of self-defense if they were attacked by Owens. If he brought on the difficulty and was the aggressor, his wife and her brother had the right to defend their lives. Whether they had previously entered into a conspiracy or not, the mere fact that they

may have entered into a conspiracy under such circumstances would not debar them the right of self-defense, if they were not undertaking to carry out their conspiracy and the object of the conspiracy, and brought on the difficulty with a view of killing him. Under the charge of the court, this theory of the case was not submitted, nor was the defendant's legal right in any way guarded by the charge. The court assumed that Gregg Breeland and Mrs. Owens were the aggressors in this difficulty, and for the purpose of executing their designs under the supposed conspiracy, and also as a basis for venue in Baylor county of the offense of conspiracy which is shown to have been entered into, if at all, in Cooke county.

There are 20 bills of exception incorporated in the record as well as exceptions to the court's charge. It is not thought necessary to review these seriatim, but to treat the case in a general way, as we have done.

For the errors indicated, the judgment is reversed, and the cause remanded.

#### SINGLETON v. STATE. (No. 5596.)

(Court of Criminal Appeals of Texas. Dec. 10, 1919.)

##### 1. HOMICIDE $\S$ 116(2)—KILLING IN SELF-DEFENSE MUST BE DETERMINED FROM DEFENDANT'S STANDPOINT.

Where a plea of self-defense is interposed in a prosecution for homicide, it is fundamental that the killing must be viewed from the standpoint of defendant, as understood by him at the time he acted.

##### 2. HOMICIDE $\S$ 300(14) — INSTRUCTIONS ON SELF-DEFENSE INSUFFICIENT AS NOT BASED ON DEFENDANT'S STANDPOINT.

In a prosecution for manslaughter, an instruction as to self-defense held erroneous as not clearly stating that the act of defendant, alleged to have been in self-defense, must be viewed from defendant's standpoint at the time.

Appeal from District Court, El Paso County; W. D. Howe, Judge.

L. F. Singleton was convicted of manslaughter, and he appeals. Reversed and remanded.

Breedlove Smith and Jackson & Isaacks, all of El Paso, and Black & Smedley, of Austin, for appellant.

Alvin M. Owsley, Asst. Atty. Gen., for the State.

DAVIDSON, P. J. Appellant was convicted of manslaughter, and awarded five years in the penitentiary.

The question presented for revision is the

exceptions to the court's charge on self-defense and refusal to give special requested instructions on the same subject. In paragraph 11 of the charge the court gave an abstract definition of self-defense. Section 12 of the court's charge undertakes to submit that issue. The court therein instructed the jury that if they believed defendant killed deceased, but further believed at the time of so doing the deceased had made, or was about to make, an attack on him, or that it reasonably appeared to the defendant that deceased had made, or was about to make, an attack upon him, which from the manner and character of it and the relative strength of the parties and the defendant's knowledge of the character and the disposition of the deceased, caused him to have a reasonable fear or expectation of death or serious bodily injury, and that, acting under such reasonable expectation or fear, the defendant killed the deceased, or if they had a reasonable doubt thereof, then they will acquit the defendant. Then follows the presumption from the use of a deadly weapon. The exception was based upon the fact that it did not inform the jury that in passing on the defendant's right of self-defense they must view the matter from the standpoint of the defendant at the time. To meet this defect in the charge appellant requested the following:

"If at the time of the killing the conduct of the deceased, viewed in the light of all the circumstances, was such as to create in the mind of the defendant a reasonable apprehension of death or some serious bodily injury, although in fact no such danger existed, the defendant's right to kill the deceased or to prevent the apparent injury would be as complete as if the danger was real, and the appearances of indications of danger must be viewed and considered from the defendant's standpoint in determining whether or not they were reasonably calculated to produce, and did produce, in his mind the fear of death or some serious bodily harm."

[1] It is a fundamental proposition in self-defense that the killing must be viewed from the standpoint of the defendant as understood by him at the time he acted. The standpoint of defendant in self-defense is the essential and pivotal point of the doctrine of that phase of the law. The accused is not tried from the standpoint of the other side. It is not what the jury may think of the danger viewed in the light of subsequent events, or even at the time. It is what defendant thought and believed and which prompted his action. Any charge on self-defense of real or apparent danger that omits from the charge this theory of the law overlooks the fundamental proposition controlling and upon which it is based. See *Bennett v. State*, 80 Tex. Cr. R. 652, 194 S. W. 148; *Hays v. State*, 199 S. W. 621; *Alsip v. State*, 210 S. W. 195; *Stubbs v. State*, 81 Tex. Cr. R. 75, 193 S. W. 677; *Lee v. State*, 87 Tex. Cr. R. 137, 148 S. W. 706; *Welborn v. State*, 78

Tex. Cr. R. 45, 179 S. W. 1179; *Holmes v. State*, 69 Tex. Cr. R. 588, 155 S. W. 205; *Hudson v. State*, 59 Tex. Cr. R. 650, 129 S. W. 1125, Ann. Cas. 1912A, 1824; *Lundy v. State*, 59 Tex. Cr. R. 131, 127 S. W. 1032; *Best v. State*, 58 Tex. Cr. R. 327, 125 S. W. 909; *Standfield v. State*, 208 S. W. 532. See *Branch's Ann. P. C.* pp. 1074, 1075, 1077. Mr. Branch lays down this proposition:

"A charge on apparent danger is erroneous if it authorizes the jury to determine whether there was a reasonable appearance of danger. The theory of apparent danger should be submitted from the standpoint of the defendant"—citing *Jordan v. State*, 11 Tex. App. 449; *Adams v. State*, 47 Tex. Cr. R. 347, 84 S. W. 231; *Swain v. State*, 48 Tex. Cr. R. 103, 86 S. W. 335; *Lyons v. State*, 71 Tex. Cr. R. 189, 159 S. W. 1072.

Again he says:

"It is the belief of defendant as to the existence of facts, and not the truth of the facts, that should be submitted to the jury"—citing *Arthur v. State*, 46 Tex. Cr. R. 479, 80 S. W. 1017; *Stacy v. State*, 48 Tex. Cr. R. 95, 86 S. W. 327; *Swain v. State*, 48 Tex. Cr. R. 98, 86 S. W. 355; *Puryear v. State*, 50 Tex. Cr. R. 464, 98 S. W. 258; *Winn v. State*, 54 Tex. Cr. R. 538, 118 S. W. 918; *Williams v. State*, 61 Tex. Cr. R. 856, 136 S. W. 771; *Maclin v. State*, 65 Tex. Cr. R. 384, 144 S. W. 951; *Black v. State*, 65 Tex. Cr. R. 336, 145 S. W. 944; *Bussey v. State*, 69 Tex. Cr. R. 98, 153 S. W. 874; *Lyons v. State*, 71 Tex. Cr. R. 189, 159 S. W. 1072.

If at the time defendant fired the fatal shot it reasonably appeared to him from the circumstances of the case, viewed from his standpoint, that the deceased was about to kill him or inflict serious bodily injury upon him he was justified in killing the deceased, although in fact the jury might believe from the evidence that he was in no danger at the time of being killed or injured by deceased. *Jones v. State*, 17 Tex. App. 612; *Gonzales v. State*, 28 Tex. App. 135, 12 S. W. 733; *Nalley v. State*, 28 Tex. App. 391, 13 S. W. 670; *Reed v. State*, 32 Tex. Cr. R. 25, 22 S. W. 22; *Swain v. State*, 48 Tex. Cr. R. 98, 86 S. W. 335; *Johnson v. State*, 63 Tex. Cr. R. 50, 138 S. W. 1024.

Again Mr. Branch states this rule:

"If it reasonably appeared to the defendant from the circumstances of the case, viewed from his standpoint at the time, that the danger existed, and he acted under the reasonable belief that it did exist, he was justified in defending against it to the same extent and under the same rules permitted in case the danger had been real." *Jones v. State*, 17 Tex. App. 612; *Tillery v. State*, 24 Tex. App. 272, 5 S. W. 842, 5 Am. St. Rep. 882; *Meuly v. State*, 26 Tex. App. 305, 9 S. W. 563, 8 Am. St. Rep. 477; *Swanner v. State*, 58 S. W. 74; *Snowberger v. State*, 58 Tex. Cr. R. 530, 126 S. W. 885.

On page 1077 of Mr. Branch's *Ann. P. C.* § 1928, there are a great many authorities collated to the effect: Whether the danger is

real or apparent is to be determined from the defendant's standpoint. A charge on self-defense is erroneous if it falls to present the issue of self-defense from the standpoint of defendant and requires the jury to find that the danger in fact existed. The authorities cited under these propositions are numerous, commencing with *Jordan v. State*, 11 Tex. Cr. App. 448, *Lyons v. State*, 71 Tex. Cr. R. 189, 159 S. W. 1072, and *Knox v. State*, 74 Tex. Cr. R. 126, 167 S. W. 729. A charge on apparent danger should directly instruct the jury that the reasonableness of the apprehension of danger should be judged from defendant's standpoint. Under this proposition Mr. Branch cites a number of authorities on page 1078 of his Ann. P. O. It will be observed that it is a fundamental proposition under our Penal Code that the danger must be viewed from the standpoint of the defendant, and not from the standpoint of the jury or the opposing side. It is from his viewpoint of it that he acted. If he believed that his life was in danger or his body of serious bodily injury, he had a right to shoot. The court's charge does not embody the idea that it must be viewed from the defendant's standpoint as required by the law. It is said in one of these decisions:

"It is the belief of the accused which furnishes the criterion. This applies as well to the question of the acts of the deceased. It is the belief of the accused that his life was in danger, or his body of serious bodily injury, viewed from his standpoint, which is the basis of our law, under such circumstances. The acts and demonstrations, in view of threats by deceased, are viewed from the defendant's standpoint at the time he acted, and if defendant believed those things, he was entitled to act the same as if they were true."

This view of the case must, of course, be in light of the facts. The defendant cannot arbitrarily believe his life in danger. What the jury may believe about it in the light of testimony showing that the deceased was not purposing inflicting death or serious bodily injury is not the criterion. It is not their belief in the light of subsequent development that forms the criterion, or the basis of appellant's right of self-defense. It is the belief of the defendant, who is being tried for his life and liberty, under all the circumstances as they presented themselves to his mind at the time he acted, that should govern the jury in rendering their verdict. The jury may have believed, and the court may also have thought, that appellant was guilty of manslaughter under the charge given by the

court, and had an appropriate charge been given their verdict might or might not have been as was returned into court. Appellant was awarded five years, which is three years in advance of the minimum. But in any event, appellant had the legal right to have his case passed on from his standpoint as he viewed it at the time he acted.

[2] A statement of the facts in reference to this matter would be of little practical value, but the testimony does show that appellant testified that at the time he fired the deceased was pursuing or approaching him with an iron chair; that he shot to stop deceased, and that he believed at the time he so fired that if he did not shoot deceased would kill him. He also testified when deceased jumped up he grabbed the chair in which he was sitting, "and I broke and ran back by the stove, and began shooting. I could not tell you how far he had advanced toward me with that chair when I began shooting, because I was getting away from him in a hurry, when he grabbed that chair. I shot to stop him, because I most knew he was going to kill me. At the time I shot I certainly was scared of him. I would not ever have shot if I wasn't. I believed at the time, if I did not shoot him, he would kill me. He weighed about 200 pounds. I weigh 130 or 135." The witness Reynolds, an officer, stated that when he arrived upon the scene and saw the body of deceased, deceased had a chair clutched in his right hand. The witness Edwards, as did other state's witnesses, stated deceased had cursed defendant and called him a son of a bitch just prior to the shooting. There is some question as to the position deceased was occupying and what he was doing at the time the shot was fired. Appellant's testimony is stated. One of the witnesses stated deceased was sitting in a chair at the table, and defendant holloed, "Look out," and fired. Most of the witnesses testified there was no chair at the table, and that deceased was not sitting, but was standing, the chair being a few feet away from him and in the direction of the stove. The testimony for the defendant with reference to the exclamation, "Look out" was to the effect that when deceased grabbed the chair he holloed "Look out," and that he (defendant) did not hollo at all. It is unnecessary to go into the details of this testimony. This much of it is stated to show that the charge given by the court was defective, and the exception well taken, and there was error in refusing appellant's special requested instruction.

The judgment is reversed, and the cause remanded.

## DIXON v. STATE. (No. 5609.)

(Court of Criminal Appeals of Texas. Dec. 10, 1919.)

1. INDICTMENT AND INFORMATION  $\S$  87(3)—ALLEGATION THAT OFFENSE WAS COMMITTED ANTERIOR TO PRESENTATION OF INDICTMENT UNNECESSARY WHERE APPEARING FROM RECITALS.

Indictment charging burglary held sufficient without specific allegation that offense was committed anterior to presentation of indictment, where it appeared from recitals in the indictment that the date of the offense alleged was before indictment was filed.

2. INDICTMENT AND INFORMATION  $\S$  87(3)—ALLEGATION OF DATE ON WHICH OFFENSE WAS COMMITTED MUST BE ANTERIOR TO INDICTMENT.

The date on which the offense is alleged to have taken place must be a date anterior to the filing of the indictment.

3. CRIMINAL LAW  $\S$  1090(1)—ABSENCE OF STATEMENT OF FACTS AND BILL OF EXCEPTIONS, ONLY QUESTION SUFFICIENCY OF INDICTMENT.

Where there is neither statement of facts nor bill of exceptions accompanying the record, the only question raised on appeal is the sufficiency of indictment.

Appeal from District Court, Bexar County; W. S. Anderson, Judge.

George Dixon was convicted of burglary, and he appeals. Affirmed.

Alvin M. Owsley, Asst. Atty. Gen., for the State.

MORROW, J. The appellant, by a sufficient indictment, was charged with the offense of burglary, and on conviction his punishment was fixed at confinement in the penitentiary for a period of ten years.

[1, 2] In the motion for a new trial the sufficiency of the indictment is challenged upon the grounds that it does not contain a specific allegation that the offense was committed anterior to the presentation of the indictment. It does appear, however, that the indictment was filed April 17, 1919; and it is recited in the indictment that the presentation was made at the March term, 1919, and charged that the offense was committed on the 8th day of March, 1919. We understand that it is imperative that the date on which the offense is alleged to have taken place must at a date anterior to the filing of the indictment, but that this may appear otherwise than by an allegation in the indictment in terms stating that the date of the offense was anterior to the presentation of the indictment. In the instant case it does appear from the indictment that the date of the offense alleged was before the indictment was filed. We regard this as sufficient.

[3] The motion for a new trial raises some questions of fact which are not supported by any proof. We find neither statement of facts nor bill of exceptions accompanying the record; the only question in any sense raised is that to which we have adverted.

The judgment is affirmed.

## DIXON v. STATE. (No. 5610.)

(Court of Criminal Appeals of Texas. Dec. 10, 1919.)

- CRIMINAL LAW  $\S$  1097(6)—QUESTIONS AS TO EVIDENCE NOT REVIEWABLE IN ABSENCE OF STATEMENT OF FACTS.

The matters set up in the motion for new trial pertaining to the evidence cannot be considered, in the absence of statement of facts.

Appeal from District Court, Bexar County; W. S. Anderson, Judge.

George Dixon was convicted of assault with intent to murder, and he appeals. Affirmed.

Alvin M. Owsley, Asst. Atty. Gen., for the State.

DAVIDSON, P. J. Appellant was convicted of assault with intent to murder, his punishment being assessed at 15 years' confinement in the penitentiary.

The record is before us without a statement of facts or bills of exception. The matters set up in the motion for new trial pertaining to the evidence cannot be considered, in the absence of the statement of facts.

The judgment will be affirmed.

## DIXON v. STATE. (No. 5611.)

(Court of Criminal Appeals of Texas. Dec. 10, 1919.)

- CRIMINAL LAW  $\S$  1090(16), 1124(3)—RULING ON MOTION FOR NEW TRIAL NOT REVIEWABLE ON ABSENCE OF EVIDENCE AND BILLS OF EXCEPTION.

The matters set up in motion for new trial cannot be considered in the absence of the evidence and bills of exception.

Appeal from District Court, Bexar County; W. S. Anderson, Judge.

George Dixon was convicted of burglary, and he appeals. Affirmed.

Alvin M. Owsley, Asst. Atty. Gen., for the State.

DAVIDSON, P. J. Appellant was convicted of burglary and allotted five years in the penitentiary.

The matters set up in the motion for new trial cannot be considered in the absence of the evidence and bills of exception. The record does not contain a statement of facts, and if there were any exceptions reserved during the trial they are not incorporated in the record.

The judgment will be affirmed.

### SAUZEDA v. STATE. (No. 5570.)

(Court of Criminal Appeals of Texas. Dec. 17, 1919.)

#### 1. CRIMINAL LAW §1081, 1087(1)—NOTICE OF APPEAL MUST BE ENTERED IN MINUTES.

In order to perfect an appeal, it is imperative that a notice of appeal to the Court of Criminal Appeals be not only given by the appellant at the term at which his trial was had, but the same must also be entered in the minutes and so appear in the record sent to the appellate court.

#### 2. CRIMINAL LAW §1087(1)—NOTICE OF APPEAL NOT SHOWN TO HAVE BEEN GIVEN.

The statement, "Notice of appeal given," at the conclusion of the order overruling the motion for a new trial in the record, is insufficient to give the Court of Criminal Appeals jurisdiction, such entry not showing to what court notice was given, nor that any notice of appeal was entered of record or carried into the minutes of the trial court.

Appeal from District Court, Gonzales County; M. Kennon, Judge.

Augustin Sauzeda was convicted of murder, and appeals. Appeal dismissed.

J. T. Fly, of San Antonio, for appellant.

Alvin M. Owsley, Asst. Atty. Gen., for the State.

LATTIMORE, J. Appellant was convicted of murder in the district court of Gonzales county, and his punishment assessed at 50 years' confinement in the penitentiary.

[1] Our statutes and decisions plainly make it imperative, in order to perfect an appeal, that a notice of appeal to the Court of Criminal Appeals of Texas be not only given by the appellant at the term at which his trial was had, but the same must also be entered in the minutes, and so appear in the record sent to this court. *Lenox v. State*, 55 Tex. Cr. R. 259, 116 S. W. 816; *Raines v. State*, 68 Tex. Cr. R. 605, 151 S. W. 811; *Rios v. State*, 76 Tex. Cr. R. 364, 174 S. W. 1050.

[2] An examination of this record discloses that at the conclusion of the order overruling the motion for a new trial there appears the following statement: "Notice of appeal given." But whether such notice be

to this court, or to some other, does not appear; nor is it anywhere shown that any notice of appeal was entered of record or carried into the minutes of the trial court.

For such reason, this court is without jurisdiction, and this appeal must be dismissed.

### ARMSTRONG v. STATE. (No. 5524.)

(Court of Criminal Appeals of Texas. Dec. 17, 1919.)

#### WITNESSES §395—CORROBORATION BY SIMILAR STATEMENTS.

Where sister of prosecutrix had testified to having seen her father in bed with and on top of prosecutrix, and defendant, on cross-examination, endeavored to make sister admit that she had told other parties that she had not so seen him and prosecutrix, and had introduced witnesses who testified that sister had stated that she had not so seen them, it was proper for state to corroborate testimony of sister by evidence that sister had made statements to others similar to the testimony given by her.

Appeal from District Court, Navarro County; H. B. Daviss, Judge.

Dan Armstrong was convicted of incest, and he appeals. Affirmed.

Alvin M. Owsley, Asst. Atty. Gen., for the State.

LATTIMORE, J. Appellant was convicted of the crime of incest, alleged to have been committed with his daughter, and his punishment was fixed at five years' confinement in the penitentiary.

There is but one bill of exceptions in the record, and its contention is that the trial court erred in allowing the state to show by one Walter Price that at his house, and some time after the arrest of appellant, witness heard Dora Armstrong, the daughter of appellant, state that she "saw papa on the bed on top of Catherine the other day." The objection to this evidence was that it was hearsay. Dora Armstrong had been placed on the stand as a witness for the state, and had testified that on the occasion which is the basis of this prosecution against appellant he sent her mother away from home and her to the field, and that she (witness) came back to the house to get her shoes, and looked in at the window, and saw appellant in bed with her sister Catherine, and that he was on top of her. Upon cross-examination of this witness, the defendant endeavored to get her to admit that she had told other parties that she knew nothing against her father, and that she did not see him in bed with Catherine, or on top of her, and upon her denial of such statements, two

of those named to her were placed on the stand as witnesses for appellant, and each of them testified that Dora had told them, at the time and place inquired about, that she did not see her father in bed with Catherine or on top of her.

Under this state of the case, it is too well settled to call for discussion that the state may corroborate the witness whose testimony is thus attacked, by introducing evidence that at other times and places such witness had made statements similar to the testimony given on the instant trial. Branch's Annotated Penal Code, § 181, and authorities cited.

Exceptions were reserved to the court's charge on accomplice testimony, and we have examined same with a good deal of care. While the said charge is not in the usual form, we think it substantially correct, as applied to the facts of this case. The case was one of direct evidence; the daughter with whom the alleged incestuous intercourse was had testifying positively to the commission of the offense, and that, while same was in performance, the younger daughter, Dora, came up and looked through the window at herself and her father, and that appellant ordered Dora away. Dora testified that she saw the said performance through said window, and that appellant ordered her to go back to the field.

Finding no error in the record, the judgment of the trial court is affirmed.

#### CASSI v. STATE. (No. 5541.)

(Court of Criminal Appeals of Texas. Dec. 10, 1919.)

#### 1. WEAPONS §11(1/2)—EMPLOYÉ'S RIGHT TO CARRY WEAPON FROM ONE PLACE TO ANOTHER UPON ORDER OF EMPLOYER.

Employé who was directed by employer to carry a pistol from one place of business to another may lawfully execute such order with the bona fide intent of leaving it at place to which it is carried, provided the pistol is not carried habitually or in roundabout ways or while he is loitering along the streets or unnecessarily deviating from the route to the place to which it is being carried.

#### 2. CRIMINAL LAW §58—CRIME COMMITTED AT BEHEST OF EMPLOYER.

The behest of an employer furnishes no excuse for the commission of an offense.

#### 3. WEAPONS §7—CARRYING WEAPONS FROM ONE PLACE TO ANOTHER.

A person may carry a pistol from his home to his store or from one store to another with the bona fide intent of leaving it at the place to which it is carried, provided pistol is not carried habitually or in roundabout ways or

while loitering along streets or unnecessarily deviating from the route to the place to which it is being carried.

#### 4. CRIMINAL LAW §565—PROOF TO SUSTAIN CONVICTION FOR UNLAWFUL CARRYING OF WEAPONS.

In prosecution for unlawfully carrying a pistol, proof to sustain conviction must show that the unlawful carrying was before the filing of complaint.

Appeal from Tarrant County Court; Hugh L. Small, Judge.

John Cassi was convicted of unlawfully carrying a pistol, and he appeals. Reversed and remanded.

Poulter & Koenig, of Ft. Worth, for appellant.

Alvin M. Owsley, Asst. Atty. Gen., for the State.

LATTIMORE, J. Appellant was convicted in the county court of Tarrant county of the offense of unlawfully carrying a pistol, and was punished by a fine of \$100 and 30 days in jail.

[1] This case will have to be reversed, because of the refusal of the trial court to permit appellant himself to testify, and also to show by other witnesses, that he was employed by one Cerna, and was directed by his employer, or the wife of his employer, to carry the pistol in question from one of the places of business of said employer, to another, at which latter place it was purposed that said pistol should be kept. Under our decisions, one who is directed by such employer to carry a pistol one time from one place of business to another may lawfully execute said order, under the limitations further referred to. *Huff v. State*, 51 Tex. Cr. R. 441, 102 S. W. 407; *Campbell v. State*, 28 Tex. App. 44, 11 S. W. 832; *Mathonican v. State*, 51 Tex. Cr. R. 471, 102 S. W. 1123; *Waterhouse v. State*, 62 Tex. Cr. R. 551, 138 S. W. 386; *Ellias v. State*, 65 Tex. Cr. R. 479, 144 S. W. 1139.

[2, 3] The behest of an employer furnishes no excuse for the commission of an offense, but it is well settled that the employer himself might carry a pistol from his home to his store, or from one store to another, with the bona fide intent of leaving it at the place to which it was so carried, and that what one may lawfully do for himself he may do by an agent; but it is also well settled that such carrying, as above indicated, may not be habitual. *Chambers v. State*, 34 Tex. Cr. R. 293, 30 S. W. 357; *Skeen v. State*, 30 S. W. 218. Nor may said pistol be lawfully carried in roundabout ways, nor upon pretense that it is being carried from one place

of business to another. Nor can the person claiming to be carrying same from one place to another loiter along the streets, or unnecessarily deviate from the route from one of said places to the other. *Cordova v. State*, 50 Tex. Cr. R. 353, 97 S. W. 87.

It is not disclosed by this record whether the place at which appellant was arrested was on the usual and customary way from one of said employer's places of business to the other, or not; but there is some inference that it was not. If it be disclosed upon another trial that, at the time he was arrested with the pistol, appellant was loitering on the streets, or was not bona fide carrying said pistol from one place of business of his employer to another, then in such case appellant would be guilty, and the fact that he was ordered by his employer to take said pistol from one place to another would constitute no defense.

[4] We further observe that the complaint was filed on May 22d, and that the officer who arrested appellant, and was the only state witness, testified that he saw him with the pistol on or about May 21st, and nowhere states that it was before the complaint was filed. The proof should show that the unlawful carrying was before the complaint was filed.

Reversed and remanded.

#### MORROW et al. v. STATE. (No. 5590.)

(Court of Criminal Appeals of Texas. Dec. 3, 1919.)

#### 1. BAIL ~~48~~—SHERIFF UNAUTHORIZED TO TAKE BOND WHERE INDICTMENT IS FOR MURDER.

Where the indictment charged the offense of murder, which is a capital offense on its face, the sheriff is not authorized to fix and take bail himself, and, where the sheriff did take bail without authority, the bond is void and cannot be forfeited on scire facias.

#### 2. BAIL ~~77~~(1)—JURISDICTION OF COURT TO ADJUDGE FORFEITURE OF BOND.

Where defendant was indicted for murder on June 17th and on June 26th was arrested and released by the sheriff on bail bond, *held* that, where the indictment was found by the grand jury of the district court of Bowie county, the criminal district court of Bowie county, created by Acts 35th Leg. (4th Call. Sess.) c. 28, which went into effect June 26th, is without jurisdiction to adjudge a forfeiture of the bond taken by the sheriff without authority; the criminal district court having no incumbent for more than two months after the act went into effect.

#### 3. BAIL ~~48~~—RIGHT OF SHERIFF TO TAKE BOND.

Where defendant, who had been charged in justice court with murder, was remanded to jail without bail and on habeas corpus proceedings was released, *held*, that under Vernon's Ann. Code Cr. Proc. 1916, arts. 216 and 217, the sheriff was not authorized, where defendant was thereafter indicted for murder and arrested on *capias*, to accept bail, and a bond so accepted was without authority.

Appeal from Criminal District Court, Bowie County; P. A. Turner, Judge.

Scire facias by the State of Texas against Bob Morrow and others to declare forfeiture of bail bond. From a judgment of forfeiture, defendants appeal. Reversed and remanded.

Joe Hughes, of Texarkana, for appellants.

Alvin M. Owsley, Asst. Atty. Gen., for the State.

DAVIDSON, P. J. This is a scire facias proceeding. A brief history of the case may be thus stated: On April 16, 1918, appellant Morrow was charged in the justice court by complaint with killing Patterson. On the preliminary trial Morrow was remanded to jail without bail. On May 6th, on a habeas corpus trial before Hon. H. F. O'Neal, judge of the Fifth judicial district, he was admitted to bail in the sum of \$5,000 for his appearance before the district court of Bowie county to answer said complaint presented in the justice court, which bond was made by the defendant, and he was released pending action of the grand jury of the district court of Bowie county. On June 17th the grand jury of said district court returned a bill of indictment charging appellant Morrow with the offense of murder. On June 26th Morrow was arrested by the sheriff of Bowie county, on a *capias* issued out of the district court of Bowie county, and on June 26th entered into a bail bond with three sureties, Spear, Scherer, and Sins, which bound him to appear before the criminal district court of Bowie county.

[1] At the time the bond was executed and approved, no habeas corpus proceeding had been had after the indictment was found, and no order made by a judge or court granting the defendant bail, except the previous order of Judge O'Neal entered at the habeas corpus trial. This bond on December 9, 1918, was forfeited. Scire facias proceeding followed. A judgment was rendered against the principal and his bondsmen, and on April 8, 1919, this judgment was made final. We are of opinion that this bond was without authority of law. When the principal, Morrow was arrested under a *capias*, after the return of the indictment, the sheriff was not



authorized to take bond. This was a murder indictment, and, upon Morrow being arrested under the indictment, the bond taken theretofore under the writ of habeas corpus proceeding was of no effect. In a murder case the sheriff is not authorized to fix and take bond. The indictment charged a capital offense on its face. In order to authorize a bond in such case, it would take a proper and legal order of a court of competent jurisdiction.

[2] Another proposition we think is well taken; that is, that the criminal district court of Bowie county did not have jurisdiction at the time of the forfeiture to take such forfeiture. The act creating that district court (see Walker v. State, 214 S. W. 331) went into effect about the 26th of June (Acts 35th Leg. [4th Call. Sess.] c. 28). See, also, Durst v. State, 215 S. W. 221. The bond was approved on that day. There is no order by Judge O'Neal transferring the case from the Fifth judicial district, over which he presided, to the criminal district court created by the recent act of the Legislature. This was necessary to confer jurisdiction upon the criminal district court. While the criminal district court legally could be a court on the 26th of June, yet it had no jurisdiction and could acquire none until there had been a transfer of the case from the Fifth district to the criminal district court. From the record it appears that for more than two months after the act of the Legislature went into effect there was not an incumbent in the office of criminal district judge. We are therefore of opinion that the criminal district court did not have jurisdiction to enter the order or forfeiture. See Walker v. State, 214 S. W. 331; Durst v. State, 215 S. W. 221; Acts Fourth Called Session 35th Legislature, pp. 48 to 51, § 15; McGee v. State, 11 Tex. App. 520; General Bonding Casualty Co. v. State, 73 Tex. Cr. R. 649, 165 S. W. 615; Brown v. State, 6 Tex. App. 188; Cassaday v. State, 4 Tex. App. 96.

[3] Motion was made to quash the bond executed by appellant Morrow with his sureties and given to the sheriff under the circumstances above mentioned. We are of opinion this motion should have been sustained. The bond was without authority of law. See Harris' Ann. Constitution, § 11, pp. 106 and 389; Vernon's C. O. P. arts. 216 and 217; Ex parte Kirby, 63 Tex. Cr. R. 377, 140 S. W. 226; Ex parte Wilson, 20 Tex. App. 499.

There are other questions presented by the record which we think are well taken but unnecessary to discuss in view of what has been said.

The judgment will be reversed, and the cause remanded.

ARMSTRONG v. TURBEVILLE et ux.  
(No. 1026.)

(Court of Civil Appeals of Texas. El Paso.  
Nov. 28, 1919. Rehearing Denied  
Dec. 18, 1919.)

1. HUSBAND AND WIFE ⇨119(3) — CONVEYANCE FROM HUSBAND TO WIFE AS HER SEPARATE ESTATE.

Where deed of husband to wife upon its face discloses that the property is conveyed to her as her separate estate, this makes the property her separate estate.

2. HUSBAND AND WIFE ⇨262(1) — PRESUMPTION THAT MONEY BORROWED IS COMMUNITY PROPERTY.

Money borrowed by the husband or the wife, in the absence of agreement to the contrary, is presumed to be community property, even though the separate property of one of the spouses is mortgaged to secure the loan.

3. HUSBAND AND WIFE ⇨249 — BORROWED MONEY AS WIFE'S SEPARATE PROPERTY.

If the wife borrow money for the benefit of her separate property, intending to repay it out of her separate estate, and both she and her husband intend that the borrowed fund shall not be community property, but shall belong separately to the wife, such will be its status, though the husband has signed the note and pledged his separate property to secure the loan.

4. HUSBAND AND WIFE ⇨249 — BORROWED MONEY AS WIFE'S SEPARATE PROPERTY.

That there was an agreement between husband and wife that money borrowed on notes signed by them should be used in making improvements on her separate estate, and that the loan should be paid out of her separate estate, is sufficient to show an agreement that such money was to belong separately to the wife, and was not to be community property.

5. APPEAL AND ERROR ⇨931(3) — PRESUMPTION OF FINDING.

Under Rev. St. 1911, art. 1985, where the jury made no finding as to a certain matter, but the facts disclosed by the record warrant a finding thereon in support of the judgment, it will be presumed that the court made the necessary finding.

6. HUSBAND AND WIFE ⇨257 — RENTS FROM WIFE'S SEPARATE PROPERTY AS COMMUNITY PROPERTY.

Although the rule that rents arising from wife's separate realty become community property was not changed so as to make such rents the wife's separate property, by Act March 21, 1913 (Acts 1913, c. 32 [Vernon's Sayles' Ann. Civ. St. 1914, arts. 4621, 4622, 4624]), this statute made a great change in the law respecting such rents, in that the control, management, and disposition were vested in the wife alone, and were no longer subject to the payment of debts contracted by the husband, and so far as the husband's creditors are concerned they occupy the same status as property which is strictly the wife's separate property.

**7. HUSBAND AND WIFE ⇨249—BORROWED MONEY AS WIFE'S SEPARATE PROPERTY; EFFECT OF AGREEMENT THAT REPAYMENT BE OUT OF RENTS OF WIFE'S SEPARATE PROPERTY.**

Agreement between husband and wife that money borrowed on notes signed by them both should be repaid out of rents of her separate property had the same legal effect in making the borrowed money the wife's separate property as if it had been intended that repayment was to be made out of her separate property.

**8. HUSBAND AND WIFE ⇨266—POSTNUPTIAL AGREEMENT CHANGING COMMUNITY INTO SEPARATE PROPERTY.**

Husband and wife cannot, by mere post-nuptial agreement between themselves, change the character of their property to be thereafter acquired so as to convert community into separate property.

**9. HUSBAND AND WIFE ⇨266—GIFTS OF COMMUNITY PROPERTY TO WIFE.**

A husband may make to his wife a gift of his interest in the community property then in esse, when it can be done without injury to the rights of others.

**10. HUSBAND AND WIFE ⇨266—GIFTS OF COMMUNITY PROPERTY TO WIFE.**

While the community status of rents collected from wife's separate property could not be affected by the mere agreement between the husband and wife, made when he conveyed the property to her, that the rents that should thereafter accrue from the premises should be her separate property, yet if such agreement was thereafter observed and actually carried out by delivering the rents into her possession, such collected rents became her separate property, unless the gift was in fraud of creditors' rights.

**11. HUSBAND AND WIFE ⇨269—GIFT TO WIFE OF RENTS FROM HER SEPARATE PROPERTY.**

Since, under the act of March 21, 1913 (Acts 1913, c. 32 [Vernon's Sayles' Ann. Civ. St. 1914, arts. 4621, 4622, 4624]), rents from wife's separate property were not subject to the payment of debts contracted by the husband, the donation by a husband to his wife of his community interest in such rents was not in fraud of any rights of creditors, as they had no interest in such rents.

**12. HUSBAND AND WIFE ⇨256—CONVEYANCE TO WIFE AS CONVEYANCE TO HER SEPARATELY.**

The status as wife's separate property of property conveyed to wife is not affected by the fact that the deed does not on its face disclose that the property was conveyed to her as her separate property, where it appears that both husband and wife directed that the deed be made to her for the purpose and with the intent to make the conveyed property her separate property, and that at the time of the delivery of the deed it was their mutual intention that it should be her separate and not community property, and was to be taken in her name to effect that purpose.

**13. HUSBAND AND WIFE ⇨256—PROPERTY PURCHASED AS WIFE'S SEPARATE PROPERTY.**

Where property was acquired after marriage, and deeded by the vendor to his wife, in

consideration of separate property of the wife traded for it, the husband and wife also giving their note for a certain sum, and it was the mutual intention of husband and wife that the acquired property should be her separate property, and the title was taken in her name for that purpose, and they also intended that the note should be paid out of the wife's separate funds, and such payments thereon were made from rents accruing from the property subsequent to the taking effect of Act April 4, 1917 (Acts 1917, c. 194 [Vernon's Ann. Civ. St. Supp. 1918, art. 4621]), making rents derived from wife's separate realty her separate property, the acquired property became her separate property, and not community property, notwithstanding the fact that the husband joined in the note and that the deed, though made to the wife, did not disclose that the property was conveyed to her as her separate property.

Appeal from District Court, El Paso County; P. R. Price, Judge.

Trespass to try title by O. R. Armstrong, trustee, against J. K. Turbeville and wife. From judgment for defendants, plaintiff appeals. Affirmed.

Jones, Jones, Hardie & Grambling, of El Paso, for appellant.

C. A. Kinkel and Lea, McGrady, Thomason & Edwards, all of El Paso, for appellees.

HIGGINS, J. Appellant, Armstrong, trustee, brought this suit in trespass to try title against J. K. Turbeville and his wife, Nina Turbeville, to recover certain lots in block 100, Bassett's addition to the city of El Paso, situated on Bliss street; also certain lots in block 63, Franklin Heights addition to said city, known as the Boulevard property. The petition was in the ordinary form of trespass to try title. Defendants pleaded not guilty, and by cross-action Mrs. Turbeville claimed the property as her separate estate.

By supplemental petition the appellant alleged that on January 16, 1912, J. K. Turbeville was the owner of lot 25 in block 82, Magoffin addition to the City of El Paso; that it was the community property of himself and wife; that he was indebted to various parties, and at that time did not have property within the state subject to execution sufficient to satisfy his then existing debts; that said conveyance was voluntary, and made for the purpose of hindering, delaying, and defrauding his creditors; that on or about June 2, 1915, he made permanent and valuable improvements on the property out of the community estate of himself and his wife at a cost to the community estate of \$3,800 and of that value to the community; that on June 2, 1915, before the improvements were made, the property was of a value of \$4,200; that after the improvements were made it was of the value of \$8,000; that at and prior to placing said improvements on the property

Turbeville was indebted to various parties, naming them.

Wherefore appellant claimed that the aforesaid conveyance by Turbeville to his wife was in fraud of creditors and void. It was further alleged that if Turbeville gave to his wife the improvements placed upon the above-mentioned property on June 2, 1915, then at that time he did not have sufficient property within the state subject to execution sufficient to satisfy his then existing debts, and such gift was in fraud of creditors and void. It was further pleaded that if the property sued for was found not to be the community property of Turbeville and wife, then the said Turbeville exchanged the property in the Magoffin addition with George Pence for said lots in block 63 of the Franklin Heights addition and for two lots in the Cotton addition to the city of El Paso, and that subsequently the two lots in the Cotton addition were exchanged for the lots in block 100 of the Bassett addition, and that at the time of such exchange J. K. Turbeville was indebted on various unsecured claims to the extent of \$16,127.26.

By supplemental answer Mrs. Turbeville set up that the conveyance of January 16, 1912, by her husband of the lot in the Magoffin addition was in satisfaction of a pre-existing debt due to her, as her separate property, by her husband; that when the same was conveyed to her it was agreed that she should have all rents to accrue thereon, and that such agreement between herself and husband was observed and carried into execution, in consideration of which she paid all taxes and made all repairs; that the improvements which were placed thereon were paid for by mortgage which she gave upon the land; that the lands sued for were her separate property, and were conveyed to her with the agreement between herself and husband that it should be her separate property, and the same was paid for by property belonging to her separate estate. The foregoing statement of the pleadings shows the issues presented.

Upon the issues thus joined by the pleadings the case was submitted to a jury upon special issues, and upon the findings made judgment was rendered in Mrs. Turbeville's favor.

The Turbevilles were married in January, 1891. Mr. Turbeville was adjudged a bankrupt about October, 1918, and Armstrong became the trustee of his estate. In September, 1907, Turbeville acquired some property on San Antonio street in the city of El Paso. This was lot 25, in block 82, Magoffin addition. By deed dated January 16, 1912, Turbeville conveyed the Magoffin addition property to his wife, the deed stating that it was conveyed to her as her separate property. The lot then had a five-room house, with bath, on it. The deed was recorded January 19, 1912. Thereafter further improvements were added to the

Magoffin avenue property with funds obtained from the Texas Bank & Trust Company. The loan made by said bank was evidenced by four notes signed by Turbeville and wife, each in sum of \$750, and secured by deed of trust on the Magoffin addition property, dated June 2, 1915.

Thereafter the Magoffin addition property was traded to Geo. Pence. In this trade Pence conveyed to Mrs. Turbeville the Boulevard property in block 63, Franklin Heights addition, and two lots in block 67 of the Cotton addition. The two deeds from Pence to Mrs. Turbeville did not state that the property was conveyed to her as her separate property. The deeds from Pence to Mrs. Turbeville were dated July 31, 1917. Thereafter the Cotton addition property was traded to F. M. Miller for the property on Bliss street in block 100, Bassett's addition. In consummation of this trade Miller conveyed the Bliss street property to Mrs. Turbeville by deed dated March 20, 1918, the deed stating that it was conveyed to the grantee as her separate property.

In answer to the special issues the jury made the following findings:

On January 16, 1912, when Turbeville conveyed to his wife lot 25 in block 82 of the Magoffin addition, he was possessed of property within the state subject to execution sufficient to pay his existing debts, exclusive of the property so conveyed; that he did not so convey said property with intent to delay, hinder, or defraud his then existing creditors; that such property was conveyed by Turbeville to his wife in satisfaction of a pre-existing debt due by Turbeville to his wife, the said debt by Turbeville to his wife being Mrs. Turbeville's separate property; that said property was not more than reasonably sufficient to discharge such debt; that Mrs. Turbeville did not know of the intention of J. K. Turbeville to hinder, delay, or defraud his then existing creditors, if such intention he had; that Geo. Pence, in consideration of the deed to the Magoffin addition property by Turbeville and wife to him on July 31, 1917, deeded to Mrs. Turbeville the property in block 63, Franklin Heights addition, and the two lots in block 67 of the Cotton addition; that the reasonable market value of the lot in the Magoffin addition on July 31, 1917, with the improvements existing on the same, was \$7,600, and that its reasonable value on said date with only the improvements thereon existing on January 16, 1912, was \$4,600. At the time of the delivery of the deeds to said property by Pence it was the mutual intention of Turbeville and his wife that said property should be the separate property of Mrs. Turbeville, and was to be taken in her name to effect that purpose. On July 31, 1917, the date of the deeds from Pence to Mrs. Turbeville, J. K. Turbeville was not possessed of sufficient property within this state subject to execution to discharge the debts of his then

existing creditors. On June 2, 1915, the date of the deed of trust to the Texas Bank & Trust Company on the Magoffin addition property, J. K. Turbeville was possessed of property within this state subject to execution sufficient to pay his then existing debts. It was not the mutual agreement and intention of Turbeville and his wife, at the date of the conveyance of Pence to Mrs. Turbeville of the lots in the Franklin Heights addition and in the Cotton addition, that said property was to be the community property of Mrs. Turbeville and her husband. As a part of the consideration for the property conveyed to Mrs. Turbeville by Pence, the latter received in cash the sum of \$750. As a part of the consideration for the deed to the lots in block 63 of the Franklin Heights addition, Pence received a note in the sum of \$1,149.50, signed by Turbeville and wife. There was a mutual agreement or mutual intention on the part of Turbeville and wife at the time of signing said note that the same should be paid entirely out of the separate funds of Mrs. Turbeville.

"Plaintiff's Special Issue G. Do you find that any part of said cash consideration was derived from money received as rents on the Magoffin addition property? Answer: Yes.

"Plaintiff's Special Issue H. Do you find that any part of said cash consideration was derived from any other source? Answer: No.

"Plaintiff's Special Issue I. Do you find that Mrs. Turbeville so mixed the funds, if any, received as rents from the Magoffin addition property with funds received from other sources, if any, that it is impossible for you to determine from the evidence introduced what part, if any, of said cash consideration, if any, was rents, and what part was derived from other sources? Answer: All from rents.

"Plaintiff's Special Issue J. How much, if any, do you find from the evidence of said cash consideration, if any, was derived from rents, and how much, if any, was derived from other sources? Answer: All from rents."

At the time of the making of the \$3,000 loan on June 2, 1915, on the Magoffin addition property there was a mutual agreement or mutual intention on the part of Turbeville and his wife that the notes amounting to \$3,000 were to be paid entirely out of the separate property of Mrs. Turbeville; that J. K. Turbeville had property within this state subject to execution sufficient to satisfy his existing debts at the date upon which the improvements were placed upon the Magoffin addition property about June, 1915. Turbeville did not have property within this state subject to execution sufficient to satisfy his existing debts at the date of the deed of Geo. Pence on July 31, 1917, nor on March 20, 1918, the date of the deed from Filler to Mrs. Turbeville.

In executing the deed of trust for \$3,000 to the Texas Bank & Trust Company on June 2, 1915, there was an agreement between Turbeville and his wife that the money so secured

should be applied to making improvements on the land therein mortgaged, and the money so borrowed was applied to improving said mortgaged property, to wit, the property in the Magoffin addition. And at the time said deed of trust was executed and the \$3,000 borrowed from the Texas Bank & Trust Company, there was a mutual agreement or understanding between Turbeville and his wife that the loan should be repaid by Mrs. Turbeville out of the rents to accrue from the Magoffin addition property.

Turbeville and wife directed that the deeds from Pence to Mrs. Turbeville, dated July 31, 1917, be made to Mrs. Turbeville for the purpose and with the intent to make the property so deeded her separate property; that the money paid to Pence in the trade made with him on July 31, 1917, was paid from rents of the Magoffin addition property which accrued after July 1, 1913.

The reasonable value of the household and kitchen furniture sold to Pence on July 31, 1917, was \$400. When Turbeville conveyed the Magoffin addition property to his wife there was an agreement made between them that Mrs. Turbeville should thereafter receive and hold as her own separate property the rents that should thereafter accrue from the premises free from all claim and right of J. K. Turbeville in such rents, and that this agreement was observed and carried out until the land was conveyed to Pence on July 31, 1917.

#### Opinion.

We shall not attempt to discuss in detail all of appellant's various assignments of error and their supporting propositions.

The question which first logically arises is the status of the Magoffin addition property.

[1] The deed of Turbeville to his wife dated January 16, 1912, upon its face discloses that it was conveyed to her as her separate estate. This made the property her separate estate. *Kahn v. Kahn*, 94 Tex. 117, 58 S. W. 825. Especially is this true in view of the finding that at this time Turbeville was possessed of property within the state subject to execution sufficient to pay his existing debts exclusive of the property conveyed, and that it was not conveyed to delay, hinder, or defraud his then existing creditors, and the further finding that the conveyance was in satisfaction of a pre-existing debt by Turbeville to his wife for funds used by him belonging to her separate estate, and the evidence supports this finding. In the state of the record the conveyance to Mrs. Turbeville was valid, and vested title in her as her separate estate.

The question which next arises is the status of the property after the improvements were placed upon it in June, 1915, appellant contending these improvements were made with community funds, and enhanced its value \$3,000, and the community estate to that ex-

test acquired an interest in the property. It is shown by the evidence that these improvements were made with a loan of \$3,000 obtained from the Texas Bank & Trust Company evidenced by four notes of \$750 each, signed by Turbeville and wife and secured by lien upon the Magoffin avenue property.

[2, 3] Money borrowed by the husband or the wife, in the absence of an agreement to the contrary, is community property, and this is true though the separate property of one of the spouses is mortgaged to secure it. The presumption is that the borrowed fund belongs to the community. But the right of the wife to borrow money which will be her separate property has been recognized in a number of cases. If the wife borrow money for the benefit of her separate property, intending to repay it out of her separate estate, and both she and her husband intend that the borrowed fund shall belong separately to the wife, such will be its status, though the husband has signed the note and pledged his separate property to secure the loan. *Sparks v. Taylor*, 99 Tex. 411, 90 S. W. 485, 6 L. R. A. (N. S.) 381; *McClintic v. Midland, etc.*, 106 Tex. 32, 154 S. W. 1157; *Parker v. Fogarty*, 4 Tex. Civ. App. 615, 23 S. W. 700; *Evans v. Purinton*, 84 S. W. 350; *Speers Law of Marital Rights*, § 321.

[4] The jury has made no finding that it was agreed or intended between Turbeville and wife that the money obtained from the bank was to belong separately to Mrs. Turbeville, but in the light of all the facts and circumstances disclosed by the record such a finding, we think, would be warranted. *Sparks v. Taylor*, supra.

[5] In support of the judgment it will therefore be presumed that the court found such agreement or intention to exist. Article 1985, R. S. The jury has found there was an agreement that the money was to be used in making improvements on the separate estate of Mrs. Turbeville, and that the loan was to be repaid out of her separate estate. The facts indicated are therefore sufficient to make the money obtained from the bank the separate property of Mrs. Turbeville. *Sparks v. Taylor*, supra. This being true, the improvements placed upon the Magoffin avenue property with this money became her separate property, and the community had no interest therein.

[6, 7] But in this connection appellant contends there is no evidence to support the finding that it was the agreement and intention of Turbeville and wife that the loan should be repaid out of the separate property of Mrs. Turbeville. There is no evidence that Mrs. Turbeville had any property other than the Magoffin addition property, or any available source of income except the rents from this property. However, she pledged this property, which was her separate estate, to secure the payment of the

borrowed money, and joined in the notes, and possibly this would support the finding indicated. *Sparks v. Taylor*, supra. But we have concluded that, conceding the finding to be unsupported by the evidence, there is another finding which will support the judgment, namely, the finding that there was a mutual agreement or understanding between the Turbevilles at the time the loan was obtained that the same should be repaid by the wife out of the rents to accrue from the property. It is true that at the date of the loan rents arising from realty belonging separately to the wife become community property. *Hayden v. McMillan*, 4 Tex. Civ. App. 479, 23 S. W. 430; *Schepflin v. Small*, 4 Tex. Civ. App. 493, 23 S. W. 432.

And Act March 21, 1913, c. 82 (*Vernon's Sayles' Ann. Civ. St.* 1914, arts. 4621, 4622, 4624), did not change the character of such rents so as to make them the separate property of the wife. *Tannehill v. Tannehill*, 171 S. W. 1050. But this act did make a very great change in the law respecting such rents, in that the control, management, and disposition thereof was vested in the wife alone, and the same were no longer subject to the payment of debts contracted by the husband. After the passage of that act, creditors had no interest in rents accruing from realty owned separately by the wife. So far as creditors of the husband are concerned, they occupy the same status as property which is strictly the separate property of the wife. This being the status of the rents arising from the Magoffin avenue property at the time the loan was made by the bank on June 2, 1915, we think that the agreement and intention of the Turbevilles that the loan should be repaid out of the rents would have the same legal effect in making the borrowed money the separate property of the wife as if it had been intended that repayment was to be made out of her separate property. *Emerson, etc., v. Brothers*, 194 S. W. 608. Under this view it makes no difference if there is not evidence to support the finding that it was agreed that repayment was to be made out of Mrs. Turbeville's separate property.

When the trade was made with Pence, \$750 in cash was paid to him; he also acquired \$400 worth of furniture, then in the house on the Magoffin avenue lot. The evidence shows and the jury found that the cash payment represented rents on the Magoffin avenue property theretofore received by Mrs. Turbeville. The furniture had been acquired by Mrs. Turbeville from a former tenant, who became in arrears on the rent subsequently to July 1, 1915, and had turned over the furniture in payment therefor. It is insisted by appellant that this cash payment and furniture belonged to the community, and, having been traced into the

property sued for, the community had a pro tanto interest in such property.

The jury has found that when Turbeville conveyed the Magoffin addition property to his wife there was an agreement made between them that Mrs. Turbeville should thereafter receive and hold as her own separate property the rents that should thereafter accrue from the premises free from all claim and right of J. K. Turbeville in such rents, and that this agreement was observed and carried out until the land was conveyed to Pence on July 31, 1917. Turbeville testified that up until the time they conveyed to Pence he had been collecting the rents for his wife, and turned them over to her; that he did not know what she did with all the money; that she made improvements on the property, kept up repairs, and deposited some in bank in her own name.

[8] It is true, as asserted by appellant, that husband and wife cannot by mere post-nuptial agreement between themselves change the character of their property to be thereafter acquired so as to convey community into separate property. *Cox v. Miller*, 54 Tex. 16; *Engleman v. Deal*, 14 Tex. Civ. App. 1, 37 S. W. 652; *Suggs v. Singley*, 167 S. W. 241; *Speer's Law of Marital Rights*, §§ 50, 297, and cases there cited.

[9, 10] But this rule has no reference to the well-recognized right of the husband to make to his wife a gift of his interest in the community property then in esse, when it can be done without injury to the rights of others. *Jordan v. Marcantell*, 147 S. W. 357. This is simply doing with his property what he has the right to do. Hence, while it may be conceded that the community status of the rents collected was not affected by the mere agreement between Turbeville and his wife, made when he conveyed the property to her yet if this agreement was thereafter observed and actually carried out, and the rents delivered into possession of the wife, as the evidence discloses and the jury has found, then the collected rents became the separate property of Mrs. Turbeville, unless the gift was in fraud of the rights of creditors. *Jordan v. Marcantell*, supra; *Bruce v. Koch*, 40 S. W. 626.

[11] In this connection it may be noted that, under the act of April 4, 1917 (chapter 194, Acts 1917 [Vernon's Ann. Civ. St. Supp. 1918, art. 4621]), the rents accruing subsequent to the date that law became effective were the separate property of Mrs. Turbeville, so the inquiry narrows itself down to a consideration of the validity of the gift from Turbeville to his wife of the rents collected between June, 1915, and the date of the act of April 4, 1917, became effective. Under the ruling heretofore these rents were from the wife's separate property, and under the act of March 21, 1913, were not subject to the payment of debts contracted by the hus-

band. His creditors have no interest in these rents. Hence the donation by Turbeville to his wife of his community interest in such rents was not in fraud of any right of creditors, and as to them was valid. *Emerson v. Brothers*, supra; *Redlick v. Williams* (Sup.) 5 S. W. 376; *McDannell v. Ragsdale*, 71 Tex. 26, 8 S. W. 625, 10 Am. St. Rep. 729; *Hargadene v. Whitfield*, 71 Tex. 488, 9 S. W. 475; *Cameron v. Fay*, 55 Tex. 63; *Speer's Law of Marital Rights*, § 351.

[12] Another contention of the appellant arises out of the fact that the deeds from Pence to Mrs. Turbeville did not upon their face disclose that the property was conveyed to her as her separate property. This is immaterial, in view of the findings of the jury that the Turbevilles directed that the deeds be made to her for the purpose and with the intent to make the property conveyed her separate property, and that at the time of the delivery of the deeds it was their mutual intention that it should be her separate property, and was to be taken in her name to effect that purpose. *Oil Co. v. Choate*, 215 S. W. 118; *Higgins v. Johnson*, 20 Tex. 389, 70 Am. Dec. 394; *Kahn v. Kahn*, supra, and cases there cited.

The evidence supports these findings. It is asserted there is no evidence to support the finding that it was the mutual agreement or intention of Turbeville and wife at the time of signing the note given by them for \$1,149.50 in part payment for the Franklin Heights property acquired from Pence that the same should be paid entirely out of the separate funds of Mrs. Turbeville. This is overruled for the reason that Mrs. Turbeville testified that the agreement between her and her husband was that she was to pay the note; that she had gotten the rents off the property ever since she acquired it from Pence, and out of the rents had kept the interest paid up and paid for such repairs as had been made; and that her husband had paid nothing. In this connection it should be noted that prior to the conveyance by Pence the act of April 4, 1917, (chapter 194) had become effective, and under this law rents derived from real estate owned separately by the wife are her separate property.

[13] As to this property in the Franklin Heights addition acquired from Pence, by deed dated July 31, 1917, it thus appears that the Magoffin avenue property, the separate property of the wife, was traded for it, and in addition the Turbevilles gave their note for \$1,149.50; that it was the mutual intention of the Turbevilles that the property thus acquired should be the wife's separate property, and title was to be taken in her name to effect that purpose; that it was their intention that the note should be paid out of the wife's separate funds, and that such payments as have been made thereon

have been made out of the rents accruing from the property, subsequent to the date the act of April 4, 1917, became effective. Upon this state of facts we are of opinion that the Franklin Heights property became the separate property of the wife, although the husband joined in the note given to Pence, and the deed though made to the wife did not upon its face disclose that it was conveyed to her as her separate property. *Sparks v. Taylor*, supra; *McBride v. Banguss*, 65 Tex. 174; *McClintic v. Midland*, etc., 106 Tex. 32, 154 S. W. 1157; *Ullmann v. Jasper*, 70 Tex. 446, 7 S. W. 763; *Schuster v. Jewelry Co.*, 79 Tex. 179, 15 S. W. 259, 23 Am. St. Rep. 327; *McBride v. Witwer*, 60 Tex. Civ. App. 223, 127 S. W. 902; *Cavil v. Walker*, 7 Tex. Civ. App. 305, 26 S. W. 854; *Cobb v. Trammell*, 9 Tex. Civ. App. 527, 30 S. W. 482.

The views expressed dispose of all material questions of law presented by this appeal affecting the substantial rights of the parties.

Various assignments complain of rulings upon evidence, the submission and refusing of issues, alleged errors in the charge, and the sufficiency of the evidence to support findings made. These have all been duly considered, and the conclusion reached that they present no reversible error.

Affirmed.

# MISSOURI, K. & T. RY. CO. v. HUNTER. (No. 6132.)

(Court of Civil Appeals of Texas. Austin.  
Dec. 17, 1919.)

## 1. BAILMENT §35—RIGHT OF BAILEE TO RECOVER DAMAGES FOR INJURY TO PROPERTY.

Where property is damaged by a third person and the bailee brings an action for damages, the right to recover for damages beyond those suffered by him as bailee or lessee must rest upon the theory that he is the agent of the owner and is suing for his benefit, and, if the third party settles with the owner to the extent of his interest therein, the bailee can only recover the amount of his own damage.

## 2. LIMITATION OF ACTIONS §121(2)—AMENDMENT AS TO PARTIES NOT SETTING UP NEW CAUSE OF ACTION.

Where a lessee of a horse sued for injuries to the horse, and, without his consent, made the lessor a joint plaintiff, but on the owner's protest filed another petition and sued in his own name, the amended petition did not set up a new cause of action to which limitations would apply.

## 3. LIMITATION OF ACTIONS §24(2)—BILL OF LADING A CONTRACT IN WRITING WITHIN FOUR-YEAR STATUTE.

A bill of lading executed by a carrier is a contract in writing to which the four-year statute of limitation applies.

Appeal from District Court, Falls County; W. A. Patrick, Judge.

Action by C. T. Hunter against the Missouri, Kansas & Texas Railway Company. Judgment for plaintiff, and defendant appeals. Reversed and remanded.

Spivey, Bartlett & Carter, of Marlin, for appellant.

E. W. Bounds, of Marlin, for appellee.

KEY, C. J. Appellee brought this suit against appellant and recovered a judgment for \$1,500, for damages alleged to have resulted from injuries to two race horses, shipped by appellee from Nacogdoches to Lake Wichita, Tex.; and from that judgment this appeal is prosecuted.

Averments in appellant's answer, supported by clear and undisputed proof, show that one of the animals referred to did not belong to the plaintiff, but was the property of Dr. I. E. Clark; that without his consent Dr. Clark was made a joint plaintiff when suit was originally brought, but, after his protest and objection, the plaintiff Hunter filed another petition, and sued in his own name. The undisputed proof shows that appellant made a settlement with Dr. Clark, and paid him \$450, on account of the injuries complained of in the plaintiff's petition, and the plaintiff was aware of that fact before the case was tried. He alleged and proved that at the time the animal was injured he was entitled to possession of it, under a contract of lease with the owner, by which he was to have the animal for at least four months, and as much longer as he desired; and that he had incurred considerable expense in training the horse, and otherwise caring for it, so as to increase its value as a race horse; and he shipped him to Wichita Lake for the purpose of entering him in certain horse racing contests; and he testified that it was his intention to keep the horse for another year.

Among other things, the court instructed the jury as follows:

"If you should find for the plaintiff under the preceding section of this charge, then the measure of plaintiff's damages is the difference between the reasonable market value of the two horses at their destination in the condition in which they reached their destination and were delivered to the plaintiff, and their reasonable market value in the condition and at the time they would have reached their destination had they not been injured en route, provided that you find that said horses had a market value at said destination. But, if you find that there was no market at Lake Wichita for the horses in question, then the proper measure of damages is the difference between the reasonable intrinsic value or actual value of said horses at the time and in condition that they did reach their destination and their actual value at the time and in the condition that they would have reached their destination had they not been injured en route.

"It appears from the pleadings and the evidence that the plaintiff was not the owner of the horse called Celt, but it is undisputed that plaintiff was, at the time of the injury complained of, the bailee of said horse and had a special interest in the horse by reason of having leased the horse from his owner for a definite period of time and had expended more or less money on said horse preparing him for the purposes and uses intended and contemplated by both the owner and the plaintiff, and that the term of said lease had not expired at the time of alleged injury to said horse Celt. Therefore you are charged that the plaintiff had and has the right to maintain a suit for any damages to said horse which may have occurred during the time he had possession of said horse under said lease, and any settlement that the defendant may have made with the owner of said horse without the consent of the plaintiff, will not bar plaintiff's right to recover the damages sustained by him in the injury of said horse Celt. And if you find from the evidence that the plaintiff at the time of the alleged injury to the horse Celt was entitled to the exclusive possession of said horse, then you should find in favor of the plaintiff for all damages sustained by the horse Celt, if you find he was damaged, without regard to the settlement made by defendant with I. E. Clark."

[1] Appellant has assigned error upon both of these paragraphs of the court's charge, and we sustain the assignments. While there may be cases which hold that a bailee or lessee of personal property may recover damages for all the injury the property has sustained while in his possession as a result of wrongs committed by the defendant, the right of a recovery for damages, beyond those suffered by the bailee or lessee, must rest upon the theory that he is the agent of the owner, and is suing for his benefit, and that the latter will be estopped by the judgment. But the fact that the bailee has instituted a suit which might result in a judgment having that effect does not affect the right of the defendant to make a settlement with the owner of the property, and plead the same in bar of the plaintiff's right to recover damages for more than the injury which has resulted to him as a bailee in possession of the property. Hence we hold that in the case at bar the measure of the plaintiff's damage is limited to the amount of loss which he has sustained by reason of whatever injuries the defendant may have wrongfully inflicted upon the animal, but he is not entitled to recover the difference in value of the animal immediately before and immediately after the injury.

[2, 3] We rule against appellant upon the question of limitation, and hold that the plaintiff's original petition was so framed as that the damages sought to be recovered in the amended petition did not set up a new cause of action. Also, if it is made to appear upon another trial that appellee's cause of

action is based upon a written contract, the question of limitation will be eliminated, because it would be controlled by the four-year, and not the two-year, period of limitation. *Elder, Dempster & Co. v. St. Louis S. W. Ry. Co.*, 105 Tex. 628, 154 S. W. 976.

Some other questions are presented in appellant's brief, but they are not considered, because the bills of exception relating thereto were not filed in time, and we have sustained a motion to strike them out.

For the error pointed out, the judgment is reversed, and the cause remanded.

Reversed and remanded.

### TEXAS-MEXICAN RY. CO. et al. v. GARCIA. (No. 6281.)

(Court of Civil Appeals of Texas. San Antonio. Dec. 17, 1919.)

#### NEGLIGENCE — 33(3)—CHILD UNDER RAILROAD WAREHOUSE TRESPASSER.

A boy who of his own accord crawls under a railroad's warehouse to see animals unloaded from a circus train attracting him to the place is a trespasser, and the railroad is not liable for his death by the collapse of the building caused by its insecurity and the presence of people on top of it.

Appeal from District Court, Nueces County; W. B. Hopkins, Judge.

Suit by Eleuteria Garcia against the Texas-Mexican Railway Company and others. Judgment for plaintiff, and defendants appeal. Reversed and rendered.

Robt. W. Stayton and Pope & Sutherland, all of Corpus Christi, E. H. Crenshaw, Jr., of Kingsville, and Dodson & Smith, of Laredo, for appellants.

W. L. Dawson, of Mission, and Anderson & Smith, G. R. Scott, and Boone & Pope, all of Corpus Christi, for appellee.

FLY, C. J. Appellee instituted this suit against the Texas-Mexican Railway Company, Frank Andrews, receiver of the St. Louis, Brownsville & Mexico Railway Company, the last-named company, and W. G. Hines, Director General of Railroads, to recover damages for the death of her son, Vicente Garcia, who was killed by the collapse of a building alleged to be the property of the Texas-Mexican Railway Company. The negligence alleged was the insecurity and unsafe condition of the house, and the vibration caused by the passage of a train operated by the St. Louis, Brownsville & Mexico Railway Company, which caused the building to fall. The cause was tried by jury and resulted in a verdict and judgment for appellee against the two railway companies in the sum of \$1,200.



It appears from the evidence that on October 30, 1915, a train transporting a circus was being unloaded in Corpus Christi, and a large number of the inhabitants had gathered at the landing place along the railroad track to watch the unloading of the circus animals and other property. Where the property was to be unloaded, there was a frame building between two tracks, which had been erected, probably by lessee of the Texas-Mexican Railway Company, and its foundation consisted of posts or poles placed in the ground. Three or four engines were switching cars about on the tracks. The show train was on the south side of the track, when without warning the house, which was being used as a warehouse and was at the time filled with merchandise and covered by people, careened and fell towards the north away from the show train. Two Mexican boys, the sons of appellee, had crawled under the warehouse and were on the side next to the show train when the house fell and caught them. Vicente Garcia, one of the boys, was killed. He was 15 years old. The other boy was not injured. The boys went under the house to watch the circus train. The house was on posts about five feet high, and the posts were not large or heavy ones. There were seven or eight boys under the house when it fell, and two were killed. The boys had approached too close to an elephant, and they were told by some one connected with the circus to move off, and they then went under the house. The train was standing on the track south of the warehouse at the time the house fell. The circus train was being handled by the St. Louis, Brownsville & Mexico Railway Company. The train did not strike the building and was not moving at the time the house fell. At that time, the house was leased to and controlled by the Rankin, Crain & Hill Company, and had been for about five years. It was not used by the Texas-Mexican Railway Company. The evidence fails to show that deceased and the other boys were known by either of the appellants to be under the house or had held out any inducements for them to be there. The attraction for the boys was a circus, which was brought to Corpus Christi by a railway company which did not own the warehouse and which was not shown to be acquainted with its condition. The circus was very unusual for Corpus Christi, the testimony tending to show that nothing like it had ever before visited that place. Slat had been placed between the posts supporting the house, but the boys must have crawled between the slats. The evidence showed that the house was not struck by a car or locomotive. There was no evidence that under the warehouse was attractive or alluring to children, or that any child had ever before been under the house.

Under the earlier decisions in Texas, such

as *Evansich v. Railway*, 57 Tex. 123, 125, it was held that where a dangerous machine or appliance is erected in a public place, that children, with the knowledge of the owner, were accustomed to play on or about the dangerous structure, and one was injured by such structure while thereon or thereabout, the owner would be liable in damages. The ruling in that case and others that have followed it have been sharply criticized in several of the states, and it has been more fully explained in Texas. The rule is thus stated by Chief Judge Gaines in the case of *Railway v. Edwards*, 90 Tex. 65, 86 S. W. 430, 32 L. R. A. 825:

"Ordinarily the owner of property is not bound to keep it in such condition as to protect trespassers upon it from danger."

The court further showed that the turntable cases proceeded upon the ground that those appliances are attractive to children and that the use of them by children for purposes of play was known to the employees of the owners. The idea was that the attractiveness of the turntables was so great as to amount to an invitation to children to resort to them for purposes of amusement, or that unsecured they were so obviously dangerous to children that, with a knowledge of their use by children, it would be negligence on the part of the owner not to take steps to protect the children.

In the *Edwards Case*, the negligence alleged was the keeping of a yard in which children were accustomed to play and piling railroad ties in such a way that they fell upon and injured a child, and the court said:

"We do not see that a yard kept by a railroad company for the deposit of old ties and other rejected material, or new material for railroad repair and construction, possesses any greater attraction for children than any other place of deposit of any similar material kept by people pursuing other avocations. \* \* \* There was no peculiar allurement about the yard of the defendant company."

In the case now before this court, not only does the proof fail to show that there was anything under the house alluring, but it is clear that it was the elephant and not the house that attracted the boys, and they were making use of it merely to be in proximity to the animals along with the circus. It was not shown that any child had ever been under the house before, and there were no circumstances to give notice to the owner that children would crawl through the slats about the lower part of the house in order to get a view of the elephant. Men, women, and children do not usually crawl under houses to see a circus train, but frequent house tops and other high places.

In order to fix the liability of the owner of dangerous attractive machines or appliances which may entice and allure children to re-

sort to them, for injuries inflicted by such machines or appliances, there must be an invitation to use them either express or implied. If the child enters the premises without such invitation, he is a trespasser, and the owner owes him no duty except not to intentionally injure him. These rules were enunciated in the case of *Railway v. Morgan*, 92 Tex. 98, 46 S. W. 28, and it was held:

"In so far as the turntable case and other cases involving injuries upon dangerous machinery or private property may be considered to lay down the broad proposition that the owner can be held liable without proof of either an intent to injure or an invitation, as these have been above explained, we do not think them based upon sound principle."

It has never been asserted that an owner is liable to a trespasser for injuries received through defects of houses or other property on such owner's land, to which the injured person has not been invited expressly or impliedly but to which he has gone of his own accord. If, under the facts of this case, persons had come to the warehouse for the purpose of obtaining merchandise or for any other purpose connected with the business of the railroad company and the house had fallen and injured them, the owner of the house might be liable, for it is the duty of the owner who deals with the public to use ordinary care to make his premises safe for those invited to come to them to transact business; but this would not include parts of the premises where the public is not invited, such as under a house. *Stamford Oil Mill Co. v. Barnes*, 103 Tex. 409, 128 S. W. 375, 31 L. R. A. (N. S.) 1218, Ann. Cas. 1913A, 111. It is the settled law of Texas that the owner of premises is under no general duty to exercise care to make them safe for the use of those entering upon them without invitation, authority, or allurement. *City of Greenville v. Pitts*, 102 Tex. 1, 107 S. W. 50, 14 L. R. A. (N. S.) 979, 132 Am. St. Rep. 843; *Denison Light Co. v. Patton*, 105 Tex. 626, 154 S. W. 540, 45 L. R. A. (N. S.) 303.

The evidence clearly showed that Vicente Garcia was a trespasser when he went under the house. It did not appear that minors had ever been there before. The only duty the railroad company owed him was to do him no willful or wanton injury, and, while it might be the duty of the railroad company to keep a lookout for any one on its track, it could not be called upon to search for persons under its buildings or other out of the way places. Being a minor could not alter this rule, in the absence of any proof that he was invited, enticed, or allured into the place occupied by him when he was injured or killed. There was no testimony tending to show that either of the appellants had any knowledge that the boys were under the

house, and the evidence indicates that they crawled between slats to get under the house. No one testified to seeing the boys under the house before the house fell.

There was no evidence tending to show that the warehouse was struck by passing cars, but the evidence indicates that the collapse of the building was caused by a large number of persons getting on top of it and on the platform attached to it. The evidence utterly fails to show that the death of Vicente Garcia was the result of negligence upon the part of either of the appellants.

The judgment is reversed, and judgment here rendered that appellee take nothing by her suit and pay all costs in this behalf expended.

# NAVE v. CITY OF CLARENDON et al. (No. 1599.)

(Court of Civil Appeals of Texas. Amarillo.  
Dec. 17, 1919.)

## 1. DEDICATION $\Leftrightarrow$ 39—OWNER PLATTING LAND FOR RAILWAY PURPOSES ESTOPPED AS AGAINST PURCHASERS OF LOTS TO CHANGE SAME.

Where the owner of a town site sold lots with reference to the plat which designated lands adjacent to the railway tracks as reserved for railway purposes, the owner on reconveyance of a portion of said land from the railway company is estopped, as against persons who bought lots on faith of the dedication, from putting the property to any other use than that for which it was reserved.

## 2. EASEMENTS $\Leftrightarrow$ 8(1)—PRESCRIPTIVE WAY NOT ESTABLISHED BY MERE USER.

As there is no penal law against trespass and people are accustomed when it inflicts no apparent damage to pass at will over uninclosed and unoccupied lands, ordinary use of a way over such lands will not be deemed adverse so as to ripen into a prescriptive way.

## 3. EASEMENTS $\Leftrightarrow$ 10(3)—PRESCRIPTIVE WAY OVER LANDS DEDICATED FOR RAILWAY PURPOSES.

Where a landowner platted a town site which designated lands adjacent to the railway as reserved for railway purposes and sold lots according to the plat, a purchaser of a lot adjacent to the railway who constructed a cement sidewalk to give access to his hotel to patrons must be deemed to have evinced an intention to use the premises permanently for a way so that such use will ripen into a prescriptive title.

Appeal from District Court, Donley County; Henry S. Bishop, Judge.

Suit by the City of Clarendon and another against A. B. Nave. A temporary injunction was granted, and, from an order denying defendant's motion to dissolve the same, he appeals. Affirmed.

C. E. Gustavus and Miller & Guleke, all of Amarillo, for appellant.

A. T. Cole, of Clarendon, for appellees.

BOYCE, J. This is an injunction suit, brought by the city of Clarendon and a citizen, Herndon, in which the plaintiffs seek to restrain the defendant, Nave, from inclosing or in any way obstructing the passage of the public over a certain tract of land 100x115 feet, in the city of Clarendon. The court, upon application of the plaintiffs, granted a temporary injunction. The defendant moved to dissolve this injunction so granted, and this appeal is from the order of the court overruling the motion to dissolve.

It appears from the record that R. E. Montgomery, being the owner of the land upon which the city of Clarendon is situated, in the year 1888 platted such land into lots, blocks, streets, and alleys, and thereafter sold lots with respect to such plat, which was duly recorded. The land so platted lies across the line of the Ft. Worth & Denver City Railway Company, and the location of its depot tracks, roundhouses, etc., were shown on such plat. On that part of the plat with which we are concerned in this suit is shown a strip of land 200 feet on each side of the tracks of the railway company and extending for about 8 blocks with the depot shown on the tracks in about the central portion of this strip. On the plat of such strip of land is written the words, "Reserved for railway purposes." Along the north and south sides of such strip of land are shown streets designated as "North Front" and "South Front" streets, respectively. That part of the town along the line of the railway is platted so that the streets run parallel and at right angles to the main line track of the railway company. The streets are not platted across the railway property and the land to the north and south, are so platted that the center line of street from the south side of the railway tracks would, if extended, be the center line of an alley on the north side, and vice versa. A deed of dedication accompanied the record of the plat of the town, but there is nothing in it which in our opinion changes the effect of the dedication of the property as shown on the plat to railway purposes. In the year 1891, said R. E. Montgomery conveyed to the railway company the said strip of land which we have described as being shown on the plat as reserved for railway purposes; it being stated in said deed that said premises were to be used for railway purposes exclusively, and it was intended thereby to convey only an easement therein. In 1913, the Ft. Worth & Denver City Railway Company reconveyed to the said Montgomery the north 100 feet of this 400-foot strip, and the said Montgomery, on June 29, 1919, conveyed to the defendant, A. B. Nave, a parcel of this land, 100 feet wide by 115 feet long, lying to the

south of North Front street, and in front of block 4 of said town of Clarendon, as shown by said plat.

The plaintiff Herndon owns a part of said block 4, fronting on North Front street, having acquired it through conveyances emanating from the said R. E. Montgomery. There is situated on said property a building which has for more than 20 years been used as hotel property and is known as the "Denver Hotel." An extension of Kearney street, the principal street of the town, from the south, would cross the railway tracks just east of the depot, and a still further extension of the street would cross the eastern part of the said tract of land conveyed by Montgomery to the defendant, Nave. The railway company, upon the establishment of the town, constructed a crossing at the place where the extension of Kearney street would cross the tracks, and this crossing has been in continuous use ever since such time. The public, in going to and returning from the town from the northeast, using this crossing, has been accustomed, since it was established, to travel across the unoccupied portions of the strip of land described as being reserved for railway purposes, on the north side of said track, and well-defined roads have been established across the said strip of land conveyed to the defendant, Nave, and have been used by the public in approaching said crossing since it was first established. It is alleged that the city has caused the said roads to be worked as a public street, causing cinders to be placed thereon, to elevate the same and free it from mud and bog, though the evidence on the motion to dissolve in support of this allegation is rather meager. It is alleged and shown that persons going to and from the Denver Hotel, in the direction of the depot and the railway crossing just east of it, have, ever since said Denver Hotel was built, been accustomed to follow a footpath across said parcel of land deeded to Nave; that said path was later made more permanent by placing cinders thereon; and that, more than 10 years before the filing of the suit, the owner of the Denver Hotel at that time built a cement walk from the hotel to the depot, which extended across said land, and such walk has been continuously used without molestation from such time until the attempt of the said Nave to fence said land. The said defendant, Nave, just before filing suit, began preparations to fence said land conveyed to him so as to exclude all persons therefrom and was also making preparations to erect thereon a building to be used as a hotel.

Appellees claim that the facts are sufficient to authorize the issuance of a temporary injunction on any of the following grounds: (1) That the said R. E. Montgomery, and those claiming under him, is estopped, by reason of the platting of the land, in the manner indicated, from using the land there shown to be

reserved for railroad purposes for any other use, to the detriment of those purchasing adjoining property on the faith of such declaration in the map; (2) that the public has acquired an easement by prescription to use said land as a public highway; (3) that the right to use the cement walk across the premises as a way of access to the said Denver Hotel has been acquired by prescription; (4) that the public has a way of necessity across said land.

[1] It was held in the case of *Temple v. Sanborn*, 41 Tex. Civ. App. 65, 91 S. W. 1095, that where the owner of land platted property, as in this instance, and designated certain lands adjacent to the railway tracks shown on the plat as, "Reserved for railway purposes," and then sold adjacent lots to those who bought on faith of such reservation, he is estopped as against such persons from putting the property to any other use than that for which it was thus shown to be reserved. This case was supported by a decision of the Supreme Court in the case of *Harrison v. Boring*, 44 Tex. 255. It is apparent that the pleader in this case did not, at the time of the drawing of the petition, have a clear and distinct conception of the rights now asserted under the first claim as above stated, and as supported by the authorities referred to. We believe, however, that the pleading is, in the absence of exceptions, sufficient to sustain the right of the defendant Herndon to the injunction, on the principles announced in the said decisions, and this right is even more fully shown by the evidence introduced on the motion to dissolve.

[2,3] We are inclined to doubt whether the facts are sufficient to warrant a finding that the public had acquired a prescriptive right to use the land as a highway by reason of the use of the roads which had been traveled across it. The allegations as to the use of the roads, and that the city worked them and graded them by placing cinders thereon, would perhaps be sufficient to raise an issue of fact on the question of prescription; but the evidence hardly sustains the allegation as to the working of the road, and rather indicates that the use of the land is to be regarded as merely permissive. We have no penal law in this state against trespass, and the people are accustomed, when the act inflicts no apparent damage, to pass at will over uninclosed, uncultivated, and unoccupied lands,

so that ordinarily the passage over such land under such circumstances ought not to be attributed to the assertion of an adverse right to so use the land, and will not establish an easement by prescription, since it is necessary to the establishment of such right that the use be adverse and not permissive. *Cunningham v. San Saba County*, 1 Tex. Civ. App. 480, 20 S. W. 941; *I. & G. N. Ry. Co. v. Cuneo*, 47 Tex. Civ. App. 622, 108 S. W. 714; *Bryson v. Abney*, 171 S. W. 508; *Ft. Worth & Denver City Railway Co. v. Ayers*, 149 S. W. 1068. In cases of prescription there is usually no express assertion of an adverse right, and the character of the use itself usually determines whether it is to be regarded as merely permissive or adverse, and there are cases where the use of roads across uninclosed lands has been of such a nature as to indicate an intention on the part of the public to establish a permanent road thereby, so that a right thereto would be acquired by such use of the road for the period of prescription. *Hall v. Austin*, 20 Tex. Civ. App. 59, 48 S. W. 53; *G. H. & S. A. Ry. Co. v. Baudat*, 21 Tex. Civ. App. 236, 51 S. W. 543. We think the pleading and the evidence is sufficient to support a finding of an easement in favor of the owner of the Denver Hotel property in the maintenance of a way as defined by the cement walk across the land claimed by the defendant, Nave. The entry upon the land and building thereon of a cement walk is a very different act from that of one merely walking or driving across the premises, and manifests a different attitude toward the use of the land. It indicates a preparation for and intention to use such portion of the premises permanently for a passageway and is an open taking of the land for such purposes, excluding the use of the land occupied by the walk for any other purpose.

The facts do not support the claim to a way of necessity across the premises. *Hall v. City of Austin*, 20 Tex. Civ. App. 59, 48 S. W. 53; *Alley v. Carleton*, 29 Tex. 79, 94 Am. Dec. 260; *Williams v. Kuykendall*, 151 S. W. 629; *Schulenbarger v. Johnstone*, 64 Wash. 202, 116 Pac. 843, 35 L. R. A. (N. S.) 941; *R. C. L. vol. 21, p. 1214, § 10*.

We think the district judge was justified in refusing to dissolve the injunction, and the judgment entered on the motion will be affirmed.

## ZOELLER v. OFFER et al. (No. 6270.)

(Court of Civil Appeals of Texas. San Antonio. Nov. 19, 1919. Rehearing Denied Dec. 31, 1919.)

1. MUNICIPAL CORPORATIONS ⇨697(4)—DESCRIPTION OF STREETS OBSTRUCTED BY FENCE SUFFICIENT.

In a suit to enjoin defendants from maintaining fences or other obstructions in and upon certain streets in a named town, a petition, alleging that plaintiff was the owner of certain blocks forming part of a large body of land which had been dedicated to the public, and that all conveyances of lots had recognized the plan of dedication, and naming the streets alleged to be constructed, *held* sufficiently to identify the premises obstructed, since the map might be referred to, although not made a part of the petition.

2. DEEDS ⇨38(1)—SUFFICIENCY OF DESCRIPTION.

In determining the sufficiency of a description in a deed, whatever can be made certain is certain.

Appeal from District Court, Kendall County; R. H. Burney, Judge.

Suit by Lizzie Zoeller against August Offer and others. From a judgment sustaining a special exception to plaintiff's petition seeking to enjoin maintenance of certain fences, plaintiff appeals. Reversed and remanded.

George C. Altgelt, of San Antonio, for appellant.

George Powell, of San Antonio, for appellees.

FLY, C. J. This appeal is perfected from a judgment sustaining a special exception to a petition of appellant, in which she sought a writ, enjoining and restraining appellees from maintaining fences or other obstructions in and upon certain streets in the town of Waring, and commanding them to remove any such fences or other obstructions from such streets.

The court sustained the third special exception, which was as follows:

"Further excepting, defendants say that there is no description of the particular part of the premises, streets, and avenues claimed to have been so obstructed by them, and in particular the alleged Avenues A, B, and E, and of this the defendants pray judgment of the court."

It was alleged that appellant was the owner of blocks Nos. 9 and 10, each containing 12 lots of land, each shown on the plan of the town of Waring, and each having a frontage on Fredericksburg street, which is on the plan as a street 60 feet wide, and is one of the main thoroughfares; that there is also a street 60 feet wide between blocks 9 and 10, and that all the streets are public, and

included in the dedication of same made by Waring. It was alleged that a large body of land on which is situated the town of Waring was dedicated by R. P. M. Waring to the public; that in all the conveyances of lots the plan made by Waring is recognized. It was alleged that appellees had fenced and obstructed certain streets, naming them, and have deprived appellant of access to her lots.

[1, 2] We think there was a sufficient description in the petition by which the land could be identified. No more certain description is required in a petition than in a deed, and the rule is well established as to descriptions in deeds that whatever can be made certain is certain. The plat or plan of the town can be used, and will fully indicate the location of the streets alleged to be obstructed. This can be done, although the plan was not made a part of the petition. We do not believe appellees will experience any difficulty in ascertaining from the petition where they have fenced the streets, and if they have any defense can be prepared by the allegations of the petition to make it.

The judgment is reversed, and the cause remanded.

SCHKADE v. WESTERN UNION TELEGRAPH CO. (No. 6309.)

(Court of Civil Appeals of Texas. San Antonio. Dec. 17, 1919.)

1. APPEAL AND ERROR ⇨722(1)—ASSIGNMENTS NOT COPIED FROM RECORD NOT CONSIDERED.

Assignments not copied from the record cannot be considered.

2. APPEAL AND ERROR ⇨742(1)—ASSIGNMENT STATING NO PROPOSITION OF LAW INSUFFICIENT.

Assignment purporting to be a composite creation from first, second, third, and fourth assignments of error, but stating no proposition, furnishes nothing for consideration.

3. APPEAL AND ERROR ⇨742(7)—ASSIGNMENT CONTAINING NO PROPOSITION OF LAW OR FACT AS TO GROUND OF MOTION FOR NEW TRIAL INSUFFICIENT.

Assignment of error: "The fifth ground of motion for a new trial: In the third paragraph of the charge of the court the jury were instructed upon proximate cause, wherein they were told 'that it was that cause which in a continuous sequence unbroken by any new independent cause, and but for which the same would not have occurred'"—contains no proposition of law or fact.

4. APPEAL AND ERROR ⇨742(5)—ASSIGNMENT STATING NO PROPOSITION OF LAW INSUFFICIENT.

Assignment, "the jury, after reading paragraph 4 of the court's charge, wherein their

attention was specially called to paragraph 5, which was an instruction upon the weight of evidence and precluded the right of appellant to recover," contains nothing upon which a proposition of law can be founded and cannot be considered.

**5. APPEAL AND ERROR 4742(7)—ASSIGNMENT NOT FOLLOWED BY A PROPOSITION OR STATEMENT NOT CONSIDERED.**

Assignment of error, "The appellant insisted before court that he should have a new trial upon the ground of newly discovered evidence, to wit," etc., cannot be considered; it not being followed by a proposition or statement, but merely by what is styled an argument.

**6. NEW TRIAL 4102(5)—EVIDENCE PROCURABLE BY QUESTIONING WITNESS ON STAND NOT NEWLY DISCOVERED.**

Question as to time of closing post office should have been asked postmaster when he was on the stand, and motion for new trial based upon alleged newly discovered evidence as to time of closing is not supported by an affidavit of postmaster.

Appeal from District Court, Kleberg County; W. B. Hopkins, Judge.

Action by Gerald Schkade against the Western Union Telegraph Company. Verdict and judgment for defendant, and plaintiff appeals. Affirmed.

C. H. Reese, of Kingsville, for appellant.

E. H. Crenshaw, Jr., of Kingsville, for appellee.

**FLY, C. J.** Appellant sought to recover damages in the sum of \$2,500, alleged to have arisen from the negligence of appellee in not promptly delivering a telegram announcing the death of appellant's mother, and thereby depriving him of attendance on her funeral. The cause was submitted to a jury, resulting in a verdict and judgment for appellee.

[1, 2] The first assignment found in the brief is not copied from the record, and purports to be a composite creation from the first, second, third, and fourth assignments of error. It states no proposition and consists merely of a statement of facts. There is nothing in the assignment to form a basis for any proposition of law. It furnishes nothing for consideration.

[3] The second assignment of error contains no proposition of law or fact. It is as follows:

"The fifth ground of motion for a new trial: In the third paragraph of the charge of the court the jury were instructed upon proximate cause, wherein they were told 'that it was that cause which in a continuous sequence unbroken by any new independent cause, and but for which the same would not have occurred.'"

What the complaint against the charge is, if there is any, is not indicated by the assignment. The fifth ground of the motion

for new trial nor any part of it is copied into the brief, nor is the paragraph of the charge of the court copied, nor even the substance of it given.

[4] The third assignment of error is:

"The jury, after reading paragraph 4 of the court's charge, wherein their attention was specially called to paragraph 5, which was an instruction upon the weight of evidence and precluded the right of appellant to recover."

This matter was not copied from the motion for new trial nor any other part of the record. It contains nothing upon which a proposition of law can be founded. It cannot be considered.

The fifth and sixth assignments of error have no counterparts in the record and fail to furnish any basis for propositions of law, and cannot be considered.

[5, 6] The seventh assignment of error is as follows:

"The appellant insisted before court that he should have a new trial upon the ground of newly discovered evidence, to wit, that of M. J. Kivlin, postmaster, at Kingsville, Tex., in which he would state, if permitted to do so, that the post office at Kingsville, according to government regulations on December 14, 1917, closed at 6 o'clock p. m."

Had the assignment been copied from the record and contained any proposition to be considered, it is not followed by proposition or statement, but merely by what is styled an argument. The question as to time of closing should have been asked of the postmaster when he was on the stand, and the motion for new trial is not supported by the affidavit of the postmaster.

The judgment is affirmed.

**PETERSON v. APPLETON NAT. BANK.**  
(No. 6282.)

(Court of Civil Appeals of Texas. San Antonio.  
Nov. 19, 1919. Rehearing Denied  
Dec. 10, 1919.)

**SALES 4418(2)—DAMAGES FOR FAILURE TO DELIVER.**

The measure of damages for failure to deliver merchandise is the difference in value of the merchandise when contracted for and when it should have been delivered.

Appeal from District Court, Bexar County; J. T. Sluder, Judge.

Action by the Appleton National Bank against C. T. Peterson. Judgment for plaintiff, and defendant appeals. Affirmed.

O. M. Fitzhugh and McCollum Burnett, both of San Antonio, for appellant.

Emmett B. Cocke, of San Antonio, for appellee.

FLY, C. J. Appellee, as the assignee of accounts for three shipments of shoes made by Stover & Bean Company to appellant, who was conducting a retail shoe store in San Antonio, Tex., under the name of "Shoe Market," sued appellant to recover the sum of \$1,108.75. Appellee sought to offset the account with a claim for damages arising on two former orders for shoes, described as orders 97 and 98, which were not filled by Stover & Bean Company. The court, after hearing the evidence, gave a peremptory instruction to find for appellee, which was done.

It is unnecessary to consider the different assignments, as all of them must stand or fall on whether or not there was any evidence to sustain the damages claimed by appellant. The only evidence offered on the question of damages arising from failure to file the two orders for shoes, which were given at a time prior to the orders on which the suit is based and had no connection with them, was that of appellant. It is as follows:

"I bought a certain lot of shoes from Mr. Eaton, who represented the Marsh & Franklin Company, known as order 98 on April 29, 1916, and another order No. 97. These orders were both made about the same time. When I bought the shoes I was in the store; Mr. Eaton sold them to me. The order of goods for fall delivery, order 98, I received none of. I received part of the goods on order 97. Yes, sir; the amount of \$1,302 shown in the pleadings as being the contract price of the shoes on order No. 98 is correct. That is the full shipment. The total contract price of the goods on order 97 which I did not receive was \$127. Yes, sir; \$1,429 represents the contract price of the shoes which I purchased of the Marsh & Franklin people that were not delivered to me. I never received those shoes.

"It was, if I remember right, somewhere between the 15th of October and the 1st of November, 1916, that I was first notified by the Marsh & Franklin people that they would not comply with that sale. I believe it was August 1st that that fall order should have been delivered to me. \* \* \* The shoes on this order (No. 98) were to be delivered in August. It is hard to tell when the goods would have arrived; it was anywhere between three and sometimes four months in goods coming in in those days. Under ordinary conditions before the war two to three weeks was the ordinary time for a shipment to arrive from Lowell, before the conditions became abnormal. \* \* \* I have been buying goods from these people quite some time, in the same kind of business. \* \* \* I know what the reasonable market value of goods such as the goods enumerated in order 98 were in San Antonio, Tex., on or about August 20, 1916. \* \* \* They were worth at least 75 per cent. more than at the time they were bought." "What was the reasonable market value of the goods not shipped on order 97 in San Antonio, Tex., on or about the 15th day of August, 1916, with reference to

the contract price? A. They were worth at least 75 per cent. more. These goods on order No. 97 were to be shipped according to the order. These goods in the ordinary run of freight, ordinary times, with reasonable dispatch, should have arrived in San Antonio in two to three weeks. May 15th would be about right."

It will be noted that appellant swore that the small order, styled No. 97, should have reached San Antonio on May 15th, and yet there was no attempt to show what the shoes would have been worth on the market when they should have been received by appellant. The only time he endeavored to fix their value was for August 15th, three months after they should have arrived. He testified that order 98 should have been shipped on August 1st, and that it took from three to four months for them to reach their destination that is on November 1st or December 1st, and yet the value of those goods in San Antonio was fixed for August 20th. The measure of damages would be the difference in value of the shoes when contracted for and when they should have been delivered. That measure was not indicated by the evidence, and there was therefore no evidence upon which to base a judgment on the cross-action. It follows that it was not error to instruct a verdict for appellee.

The judgment is affirmed.

---

CAMP v. UNITED STATES TIRE CO.  
(No. 8232.)

(Court of Civil Appeals of Texas, Dallas.  
Nov. 15, 1919. Rehearing Denied  
Dec. 20, 1919.)

LANDLORD AND TENANT — 72 — CONSTRUCTION  
OF TERM OF LEASE.

Lease of storehouse at gross rental of \$12,900, payable in monthly payments for five years from April 1st, providing that if building was then incomplete the lessee would accept it when completed, but the lessor would refund such rent as might become due to such time as premises should be ready for occupancy, modified by letter to lessee that lease should stand canceled unless building was ready June 1st and, in lieu of refund, lessor should not begin payment of rent until building was ready, construed, and held that lease commenced on April 1st and terminated March 31st, five years later, although building was not ready nor occupied until July 15th.

Appeal from District Court, Dallas County; Kenneth Foree, Judge.

Action for rent by T. L. Camp against the United States Tire Company. Judgment for defendant, and plaintiff appeals. Affirmed.

J. N. Townsend, of Dallas, for appellant.  
Burgess, Burgess, Christman & Brundidge,  
of Dallas, for appellee.

**RASBURY, J.** The single question presented by the appeal is the construction to be placed upon a lease and an addendum thereto entered into in writing between T. L. Camp, the appellant, and United States Tire Company, appellee.

On January 25, 1913, appellant leased to appellee a two-story and basement brick building in the city of Dallas for a period of five years from April 1, 1913, to be occupied by appellee as a storehouse for its manufactured products. Appellee for said period agreed to pay a gross rental of \$12,900, payable \$200 per month in advance during the first two years of the lease and \$225 per month in advance during the remaining three years of the lease. At the time the lease was executed, there was in fact no building upon the premises described in the lease. In reference to that fact the parties agreed:

"It is \* \* \* understood that the demised premises will be erected. In the event the building is not completed by April 1, 1913, the lessee agrees to accept the said premises at such date after April 1, 1913, as it shall be ready for occupancy. The lessor agrees to refund such rent as may become due under this lease to such time as the said premises shall be ready for occupancy."

Subsequently, through the medium of a letter addressed by lessee to lessor on February 17, 1913, it was agreed that the lease should stand canceled unless the building was completed and ready for occupancy June 1, 1913, and that in lieu of the lessor refunding any rent accruing prior to the completion of the building and as its equivalent lessee should not begin paying rent until the building was ready for occupancy. The building was actually completed and ready for occupancy July 15, 1913, at which time appellee accepted and assumed possession of same. Appellee occupied the premises from said July 15, 1913, to March 31, 1918, at which time it vacated same and refused to pay any further rental. The total amount of rent paid by appellee was \$12,200, paid at the rate of \$200 per month from July 15, 1913, to March 31, 1915, and at the rate of \$225 per month from April 1, 1915, to March 31, 1918. From the time appellee vacated the premises to the date of trial appellant was

unable to rent or lease same and derived no revenue therefrom.

It will be observed from the facts related that appellee actually occupied the premises for a period of four years, eight months, and 15 days, and actually paid appellant as rental the gross sum of \$12,200. Appellant's contention is that by the lease provisions appellee bound itself to pay him the gross sum of \$12,900 for the use of the premises for a period of five years from and after accepting same, and having only paid \$12,200, and having vacated the building before the expiration of five years, and appellant being unable to secure any rental therefrom, appellee was due him \$700, the amount sued for.

We are constrained to disagree with the contention. By the plain provisions of the lease we have quoted, which are all that bear in any respect on that point, the lease commenced April 1, 1913, and ended five years thereafter, or March 31, 1918. It is true that the parties, aware that the storehouse had to be erected between the date of the lease or January 25, 1913, and the time in which the term commenced, did covenant that actual occupancy of the premises should commence at a time anterior to that specified in the lease. If that were all that had been agreed upon, the inference might reasonably be indulged that the time for the commencement of the term had been extended to the time when actual occupancy began. But it will be observed that, contained in the clause providing for occupancy later than the time set, is the other covenant which declares in substance that the lessor shall refund all rents which have matured before the actual use of the building is made possible. The language may not be misunderstood. Its import is plain. It contemplates, we are persuaded, no more nor less than that beginning April 1, 1913, lessees should commence paying rent at the rate specified, but if the building for any reason at that time was not ready for occupancy, it should be refunded to appellee. The addendum to the contract, which we have noted, did not add to or detract from that provision. It merely provided that in lieu of lessee paying the rent, and lessor in turn refunding it, the equivalent of that arrangement should be observed, that is, that no rent should be paid until the building actually was occupied.

The judgment of the lower court is affirmed.



## MEMORANDUM DECISIONS

**CHADWICK v. STATE.** (No. 5542.) (Court of Criminal Appeals of Texas. Nov. 12, 1919.) Appeal from Grayson County Court; Dayton B. Steed, Judge. W. E. Chadwick was convicted for keeping a bawdyhouse, and he appeals. Affirmed. Alvin M. Owsley, Asst. Atty. Gen., for the State.

**MORROW, J.** The appeal is from conviction for keeping a bawdyhouse. We find neither statement of facts nor bills of exceptions in the record. There is no matter presented in the motion for a new trial which we can review, in the absence of bills of exceptions or statement of facts. The judgment is affirmed.

**CLEVELAND v. STATE.** (No. 5488.) (Court of Criminal Appeals of Texas. Nov. 5, 1919.) Appeal from Criminal District Court, Travis County; James R. Hamilton, Judge. Andy Cleveland was convicted of assault to rape, and he appeals. Affirmed.

**LATTIMORE, J.** In this case appellant was convicted in the criminal district court of Travis county of the offense of assault to rape, and his punishment fixed at confinement in the state penitentiary for a period of 10 years. The case is before us without any statement of facts or bills of exception. We have examined the indictment and charge of the court, and the same appear to be in accordance with the law. There being no error shown by the record, the judgment of the lower court will be affirmed.

**COFFEE v. STATE.** (No. 5599.) (Court of Criminal Appeals of Texas. Dec. 8, 1919.) Appeal from Criminal District Court, Dallas County; C. A. Pippen, Judge. Charles Coffee, was convicted of theft, and he appeals. Affirmed. Alvin M. Owsley, Asst. Atty. Gen., for the State.

**DAVIDSON, P. J.** Appellant was convicted of theft; his punishment being assessed at two years in the penitentiary. The record is before us without a statement of facts or bill of exceptions. Without these there is no question presented that can be revised. The judgment will be affirmed.

**Ex parte COX.** (No. 5663.) (Court of Criminal Appeals of Texas. Dec. 17, 1919.) Appeal from Criminal District Court, Harris County; C. W. Robinson, Judge. Application by R. G. Cox for a writ of habeas corpus for admission to bail. From a judgment remanding petitioner to custody without bail, he appeals. Reversed, and bail granted. Jas A. Elkins, S. B. Ehrenwerth, and John H. Crooker, all of Houston, and E. A. Berry, of Austin, for appellant. Alvin M. Owsley, Asst. Atty. Gen., for the State.

**DAVIDSON, P. J.** Under habeas corpus proceeding the appellant was remanded to custody without bail. We are of opinion that in this there was error. A careful inspection of the facts leads us to this conclusion. We pretermitted

a discussion of the evidence, inasmuch as the case will go before a jury. The judgment is reversed, and bail is fixed in the sum of \$10,000; the bond to be taken and approved by the sheriff of Harris county. The judgment is reversed, and bail granted.

**GREEN v. STATE.** (No. 5531.) (Court of Criminal Appeals of Texas. Nov. 12, 1919.) Appeal from Tarrant County Court; Hugh L. Small, Judge. Mrs. Anna Green was convicted of simple assault, and she appeals. Affirmed. Alvin M. Owsley, Asst. Atty. Gen., for the State.

**MORROW, J.** The appeal is from conviction of simple assault. We find neither statement of facts nor bills of exceptions in the record. There is no matter presented in the motion for a new trial which we can review, in the absence of bills of exceptions or statement of facts. The judgment is affirmed.

**THOMPSON v. STATE.** (No. 5357.) (Court of Criminal Appeals of Texas. Oct. 15, 1919.) Appeal from District Court, El Paso County; W. D. Howe, Judge. Prince Thompson was convicted of a violation of the Ten Mile Zone Law, and he appeals. Affirmed. E. A. Berry, Asst. Atty. Gen., for the State.

**MORROW, J.** This is a conviction for violating the act of the Thirty-Fifth Legislature known as the Ten Mile Zone Law (Acts 4th Called Sess. 1918, c. 12), and the record comes without statement of facts or bill of exceptions, and presents no ruling of the trial court for review. The judgment is affirmed.

**AMERICAN FREEHOLD LAND MORTG. CO. OF LONDON, Limited, v. MORRIS et al.** (Supreme Court of Arkansas. Feb. 10, 1919.) Appeal from Ashley Chancery Court; Z. T. Wood, Chancellor.

**PER CURIAM.** Settled, and appeal dismissed on appellant's motion. See, also, 215 S. W. 696.

**BEATY v. STATE.** (Supreme Court of Arkansas. July 14, 1919.) Appeal from Circuit Court, Hempstead County; Geo. R. Haynie, Judge.

**PER CURIAM.** Appeal dismissed, on suggestion of appellant's pardon subsequent to lodgment of transcript.

**BISHOP v. WOODARD et al.** (Supreme Court of Arkansas. Oct. 13, 1919.) Appeal from Circuit Court, Miller County; Geo. R. Haynie, Judge.

**PER CURIAM.** Affirmed under rule 7 (120 S. W. v.).

**BOST v. JOHNSON COUNTY ex rel. RAGON, Proa. Atty.** (Supreme Court of Ar-

kansas. June 30, 1919.) Appeal from Circuit Court, Johnson County; A. B. Priddy, Judge.

PER CURIAM. Settled and appeal dismissed by consent. See, also, 213 S. W. 388.

CITY NAT. BANK OF FT. SMITH et al. v. ARKANSAS VALLEY TRUST CO. (Supreme Court of Arkansas. Oct. 13, 1919.) Appeal from Sebastian Chancery Court, Ft. Smith District; W. A. Falconer, Chancellor.

PER CURIAM. Settled and appeal dismissed on appellants' motion.

COCHRAN v. MATHENY et al., Com'rs of Road Improvement Dist. No. 1 of Sharp County. (Supreme Court of Arkansas. April 14, 1919.) Appeal from Sharp Chancery Court; Geo. T. Humphries, Chancellor.

PER CURIAM. Appeal dismissed for non-compliance with rule 9.

CBESS et al. v. ROGERS. (Supreme Court of Arkansas. Feb. 10, 1919.) Appeal from Circuit Court, Nevada County; George R. Haynie, Judge.

PER CURIAM. Settled and appeal dismissed on appellant's motion.

DE QUEEN LUMBER CO. v. HARVILLE et al. (Supreme Court of Arkansas. Sept. 22, 1919.) Appeal from Circuit Court, Sevier County; James S. Steel, Judge.

PER CURIAM. Appeal dismissed under rule 7 (120 S. W. v).

FRATERNAL AID UNION v. BARRINGER. (Supreme Court of Arkansas. June 9, 1919.) Appeal from Circuit Court, Ashley County; Turner Butler, Judge.

PER CURIAM. Settled and appeal dismissed in accordance with stipulations filed.

GLEGHORN v. State. (Supreme Court of Arkansas. May 26, 1919.) Appeal from Circuit Court, Lawrence County, Eastern District; Dene H. Coleman, Judge.

PER CURIAM. Affirmed for noncompliance with rule 10.

GOAD v. STATE. (Supreme Court of Arkansas. April 7, 1919.) Appeal from Circuit Court, Logan County, Northern District; James Cochran, Judge.

PER CURIAM. Appeal dismissed on suggestion of appellant's pardon subsequent to lodgment of transcript.

HARGER et al. v. GOWING. (Supreme Court of Arkansas. Oct. 13, 1919.) Appeal from Circuit Court, Franklin County; James Cochran, Judge.

PER CURIAM. Settled and appeal dismissed.

HENSLEY v. WOODS et al., Com'rs of Road Dist. No. 1 of Searcy County. (Supreme Court of Arkansas. Jan. 6, 1919.) Appeal from Searcy Chancery Court; B. F. McMahan, Chancellor.

PER CURIAM. Settled and appeal dismissed on appellant's motion.

HILL v. ELLIOTT, Chancellor. (Supreme Court of Arkansas. May 19, 1919.) Prohibition to Chancery Court, Jefferson County.

PER CURIAM. Dismissed on petitioner's motion.

HOLDEN et al. v. GREGG et al. (Supreme Court of Arkansas. March 3, 1919.) Appeal from Jackson Chancery Court; Geo. T. Humphries, Chancellor.

PER CURIAM. Appeal dismissed on appellant's motion.

HUNTER et al. v. McLEOD. (Supreme Court of Arkansas. March 24, 1919.) Appeal from Circuit Court, Columbia County; C. W. Smith, Judge.

PER CURIAM. Settled and appeal dismissed on appellants' motion.

MALONE et al. v. SEBASTIAN STATE BANK et al. (Supreme Court of Arkansas. June 16, 1919.) Appeal from Sebastian Chancery Court, Greenwood District; W. A. Falconer, Chancellor.

PER CURIAM. Settled and appeal dismissed on appellants' motion.

MISSOURI LUMBER CO. v. H. A. DOUGHERTY MOTOR CO. (Supreme Court of Arkansas. Sept. 22, 1919.) Appeal from Circuit Court, Sevier County; James S. Steel, Judge.

PER CURIAM. Appeal dismissed under rule 7 (120 S. W. v).

PARKS v. HELMER. (Supreme Court of Arkansas. Dec. 23, 1918.) Appeal from Circuit Court, Logan County, Northern District; James Cochran, Judge.

PER CURIAM. Affirmed with penalty as a delay case.

PEEBLES v. WALKER. (Supreme Court of Arkansas. June 9, 1919.) Appeal from White Chancery Court; J. E. Martineau, Chancellor.

PER CURIAM. Settled and appeal dismissed on appellant's motion.

RUSSELL et al. v. LOUDERMILK et al. (Supreme Court of Arkansas. Oct. 13, 1919.) Appeal from White Chancery Court; J. E. Martineau, Chancellor.

PER CURIAM. Appeal dismissed for non-compliance with rule 9.

**ST. LOUIS-SAN FRANCISCO RY. CO. v. STATE.** (Supreme Court of Arkansas. Oct. 13, 1919.) Appeal from Circuit Court, Benton County; W. A. Dickson, Judge.

**PER CURIAM.** Settled and appeal dismissed by consent.

**SMITH v. JACKSON.** (Supreme Court of Arkansas. Sept. 29, 1919.) Appeal from Circuit Court, Lafayette County; Geo. R. Haynie, Judge.

**PER CURIAM.** Appeal dismissed for non-compliance with rule 9. See, also, 133 Ark. 334, 202 S. W. 227.

**SPICER v. GARRISON.** (Supreme Court of Arkansas. March 10, 1919.) Appeal from Circuit Court, Sevier County; J. S. Lake, Judge.

**PER CURIAM.** Appeal dismissed under rule 7. (120 S. W. v).

**UNITED STATES ATTO CO. v. DE SHONG et al.** (Supreme Court of Arkansas. May 5, 1919.) Appeal from Pulaski Chancery Court; J. E. Martineau, Chancellor.

**PER CURIAM.** Appeal dismissed for non-compliance with rule 9. See, also, 134 Ark. 392, 204 S. W. 103.

**WALB v. TIPTON.** (Supreme Court of Arkansas. June 9, 1919.) Appeal from Circuit Court, Mississippi County, Chickasawba District; R. H. Dudley, Judge.

**PER CURIAM.** Reversed and remanded on confession of error.

**WILHELM v. LEYELS.** (Supreme Court of Arkansas. Jan. 6, 1919.) Appeal from Circuit Court, Cross County; R. H. Dudley, Judge.

**PER CURIAM.** Appeal dismissed under rule 7 (120 S. W. v).

**STARKS v. LUSK et al.** (No. 19884.) (Supreme Court of Missouri. In Banc. Nov. 17, 1919. Rehearing Denied Dec. 22, 1919.) Appeal from Circuit Court, Stoddard County; W. S. C. Walker, Judge. Action by Henry Louisa Starks against James W. Lusk and others, receivers of the St. Louis & San Francisco Railroad. Judgment for plaintiff was affirmed by the Court of Appeals (194 Mo. App. 250, 187 S. W. 586), and the case certified to Supreme Court. Opinion of Court of Appeals approved, and opinion of circuit court affirmed. W. F. Evans, E. T. Miller and A. P. Stewart, all of St. Louis, for appellants. K. O. Spence, of Bloomfield, for respondent.

**BOND, J.** This case is fully stated and elaborately discussed in the majority and dissenting opinions of the Springfield Court of Appeals. 194 Mo. App. 250, 187 S. W. 586, et seq. After a careful examination of the facts as shown in the record, we are satisfied that a correct conclusion was reached in the majority opinion. We therefore approve the majority opinion of the Springfield Court of Appeals. The judgment of the circuit court is therefore affirmed. It is so ordered. All concur, except GOODE and GRAVES, JJ., who dissent.

**WOODSON, J.,** absent.

END OF CASES IN VOL. 216

\*



# INDEX-DIGEST



## THIS IS A KEY-NUMBER INDEX

It Supplements the Decennial Digests, the Key-Number Series and  
Prior Reporter Volume Index-Digests

### ABANDONMENT.

See Appeal and Error, ⚡1078; Contracts, ⚡102; Eminent Domain, ⚡246; Homestead, ⚡182; Judgment, ⚡237; Mortgages, ⚡308; Railroads, ⚡82.

### ABATEMENT AND REVIVAL.

See Husband and Wife, ⚡273; Railroads, ⚡5½.

### I. OBJECTIONS TO JURISDICTION.

⚡3 (Mo.App.) If facts on which the objection of lack of jurisdiction is based appear on the face of the petition, such objection should be made by demurrer; but if the objection is based upon facts dehors the petition and return, it should be raised by a plea to the jurisdiction.—*Buddecke v. Garrels*, 216 S. W. 811.

### III. DEFECTS AND OBJECTIONS AS TO PARTIES AND PROCEEDINGS.

⚡39 (Ark.) Under Kirby's Dig. §§ 953, 954, dissolution of corporation did not abate pending suit against it based upon claim for unascertained and unliquidated damages; the claimant being a "creditor," and the damages claimed constituting a "debt" within the protection of the law.—*Des Arc Oil Mill Co. v. McLeod*, 216 S. W. 1040.

### ABBREVIATIONS.

See Frauds, Statute of, ⚡109.

### ABSTRACTS OF TITLE.

See Appeal and Error, ⚡586; Brokers, ⚡61.

### ACCOMMODATION PAPER.

See Bills and Notes, ⚡23.

### ACCOMPLICES.

See Larceny, ⚡27.

### ACCORD AND SATISFACTION.

See Compromise and Settlement.

### ACCOUNT.

See Appeal and Error, ⚡1022; Costs, ⚡32; Joint Adventures, ⚡5; Trusts, ⚡179, 308; Venue, ⚡5.

### ACCOUNT, ACTION ON.

See Evidence, ⚡376, 377.

### ACCOUNT STATED.

⚡4 (Mo.App.) To constitute an account stated, the statement rendered by the creditor  
216 S.W.—71

must be agreed to by the debtor, and the amount must be fixed.—*Locke v. Woodman*, 216 S. W. 1006.

⚡5 (Mo.App.) To constitute an account stated, the statement rendered by the creditor must be agreed to by the debtor.—*Locke v. Woodman*, 216 S. W. 1006.

⚡6(1) (Mo.App.) If clients by acquiescence or silence assented for a reasonable time to their attorneys' charge for services, the charge became an account stated, even though when rendered the clients considered it improper.—*Locke v. Woodman*, 216 S. W. 1006.

⚡20(1) (Mo.App.) Whether there was an account stated between the garnishees, attorneys at law, and defendants, their clients, *held* for the jury under proper instructions.—*Locke v. Woodman*, 216 S. W. 1006.

⚡20(2) (Mo.App.) In an action wherein the attorneys for defendants were garnisheed, and set up an account stated between them and their clients for their fees, instruction that the garnisheed attorneys had no right to apply any part of the money in their hands to the payment of their fees as attorneys, unless there was an "agreement made and entered into" by them and their clients, *held* erroneous in the particular case, as placing an unjust burden on the garnishees, and implying the agreement must have been in writing, particularly in view of a qualifying portion of the instruction.—*Locke v. Woodman*, 216 S. W. 1006.

In an action wherein the attorneys for defendants were garnisheed, and set up an account stated between them and their clients for their fees, instruction that agreement between the garnishees and their clients for the fees might be shown if the circumstances convinced the jury that defendant clients in fact recognized the charge as "proper" *held* erroneous.—*Id.*

### ACKNOWLEDGMENT.

See Husband and Wife, ⚡29.

### I. NATURE AND NECESSITY.

⚡5 (Ky.) A deed, duly signed and delivered by the grantors, even though not acknowledged or properly recordable, is valid, not only as between the parties, but as to all those having notice of it.—*Virginia Iron, Coal & Coke Co. v. Combs*, 216 S. W. 846.

### ACTION.

See Abatement and Revival; Dismissal and Nonsuit.

### III. JOINDER, SPLITTING, CONSOLIDATION, AND SEVERANCE.

⚡50(3) (Tex.Civ.App.) Where the members of a truck growers' association had contracted in the name of the association with defendant for a certain number of onion crates, without

(1121)

specifying how many crates each member was to receive, the members who suffered damages because of defendant's failure to furnish a sufficient number of crates could properly join their several causes of action, and also join in a joint cause of action in the name of the association.—*Mayhew & Isbell Lumber Co. v. Valley Wells Truck Growers' Ass'n*, 216 S. W. 225.

## ADJOINING LANDOWNERS.

See Boundaries.

## ADMINISTRATION.

See Executors and Administrators.

## ADMISSIONS.

See Criminal Law, ¶273.

## ADVERSE POSSESSION.

See Champerty and Maintenance, ¶7; Easements, ¶8, 10, 32, 36; Frauds, Statute of, ¶63; Highways, ¶6; Husband and Wife, ¶69½; Joint Tenancy, ¶9; Life Estates, ¶8; Municipal Corporations, ¶648, 654; Tenancy in Common, ¶15.

### I. NATURE AND REQUISITES.

#### (A) Acquisition of Rights by Prescription in General.

¶7(2) (Tex.Civ.App.) In trespass to try title based on adverse possession, it is no defense that state has refused to issue a patent to defendants, where defendants could at any time have obtained a patent by making a correction in field notes; there being no issue as to the boundaries to the land in controversy, the boundaries as existing on the ground being old recognized established surveys.—*Stark v. Rogers*, 216 S. W. 433.

#### (B) Duration and Continuity of Possession.

¶43(6) (Ky.) Where defendants' father's possession and claim of title was by written agreement relinquished by him to plaintiffs' vendor about seven years before suit was filed, and following the relinquishment the land was not inclosed, and grew up in bushes and second growth timber, defendants cannot tack the father's possession, even if adverse, to any possession of their own, because of the break in continuity within the statutory period.—*Osborn v. Roberts*, 216 S. W. 359.

¶47 (Ky.) The continuity of possession of land by owner's grandchildren, claiming under an alleged contract between their father and owner, was broken by the eviction, by owner, of the grandchild in possession, where it was from one to three years before one of the grandchildren again located on the land.—*Creech v. Creech*, 216 S. W. 127.

#### (C) Hostile Character of Possession.

¶60(6) (Tenn.) The owner of fee, subject to a railroad company's easement of right of way, can subject the land to any use, except railroad purposes, which does not interfere with the railroad company's use of such right of way, so that the owner's occupation for many years is not adverse, and is no bar to the railroad company's right to recover possession of the right of way.—*Southern Ry. Co. v. Vann*, 216 S. W. 727.

¶63(7) (Ky.) Vendee's possession under an executory contract of sale is not adverse to that of his vendor until he has performed the conditions thereof or repudiated the latter's title, whether contract is in writing or in parol.—*Creech v. Creech*, 216 S. W. 127.

¶64 (Mo.) When one is put into possession of lands under a parol gift, the possession of the donee is adverse from its inception.—*Reader v. Williams*, 216 S. W. 738.

¶66(2) (Tex.Com.App.) Where one claims only to the true boundary, wherever situate, his possession beyond such line through mistake is not adverse; but one claiming ownership of all the land within his marked boundaries, which are embraced in the description in a deed under which he claims, is claiming adversely, although he erroneously believes the marked boundary to be the true boundary.—*Tucker v. Angelina County Lumber Co.*, 216 S. W. 149.

¶80(3) (Tex.Com.App.) Description by metes and bounds in deed, together with actual possession, was notice to true owner of adverse claim, although deed erroneously referred generally to the land as being in a different survey.—*Tucker v. Angelina County Lumber Co.*, 216 S. W. 149.

¶85(3) (Tex.Civ.App.) In action to recover land in which defendants set up the five-year statute of limitations in bar of plaintiffs' right to recover, evidence held to support finding that defendants' predecessor occupied land under a recorded deed.—*Morris v. Moore*, 216 S. W. 890.

¶85(4) (Mo.) That one is put in possession of land under a parol gift is itself evidence of adverse possession.—*Reader v. Williams*, 216 S. W. 738.

#### (G) Payment of Taxes.

¶95 (Tex.Civ.App.) One who was in possession of land under claim of ownership and under deed duly recorded, and rendered it for taxation during 10-year period, will be presumed, in absence of a contrary showing, to have paid taxes when due; he being dead and the tax records destroyed.—*Morris v. Moore*, 216 S. W. 890.

In action to recover land in which defendants set up the five-year statute of limitations in bar of plaintiffs' right to recover evidence held to support finding that defendants' predecessor occupied land under a recorded deed and paid taxes thereon for more than five years.—*Id.*

### II. OPERATION AND EFFECT.

#### (B) Title or Right Acquired.

¶104 (Tex.Civ.App.) In action to recover land formerly owned by plaintiffs' ancestor wherein defendants claimed their predecessor had purchased land from ancestor prior to Act of Fourth Congress of Republic of Texas requiring sale of land to be evidenced by written instrument, evidence of continuous possession under claim of right by defendants and predecessors for more than 70 years, and of no claim being asserted thereto during such time by plaintiffs or ancestor, together with other facts and circumstances, held to raise presumption that such sale had been made.—*Morris v. Moore*, 216 S. W. 890.

¶109 (Mo.) Where title to realty has vested after 10 years, under the statute, a mere recognition of another's title thereafter cannot of itself revest it.—*Reader v. Williams*, 216 S. W. 738.

### III. PLEADING, EVIDENCE, TRIAL, AND REVIEW.

¶114(1) (Ky.) In suit under Ky. St. § 11, to quiet title to two adjoining tracts of land, defendants asserting title by adverse possession to portions of each tract, held, under the evidence, that plaintiffs were owners of and in possession of the land in controversy when the suit was filed and thereafter, and that defendants had neither title to nor possession of any portion thereof.—*Osborn v. Roberts*, 216 S. W. 359.

¶115(5) (Mo.) In a suit to quiet title based on adverse possession of land under a parol gift, the question whether there was a parol gift held, under the evidence, for the jury.—*Reader v. Williams*, 216 S. W. 738.

¶115(7) (Tex.Civ.App.) In trespass to try title, where plaintiff, among other things, relied on adverse possession, held, that the ques-

For cases in Dec.Dig. & Am.Dig. Key-No.Series & Indexes see same topic and KEY-NUMBER

tion whether he had perfected an adverse title to the entire premises, though he was only in possession of a portion, and did not render the whole for taxes, was for the jury.—*Martinez v. Bruni*, 216 S. W. 655.

## AFFIDAVITS.

See Appeal and Error, 1127; Attachment, 126, 254; Criminal Law, 958; Dismissal and Nonsuit, 71; Jury, 72; New Trial, 102; Sequestration, 17.

## AGENCY.

See Principal and Agent.

## AGISTMENT.

See Animals, 22, 23.

## ANIMALS.

See Appeal and Error, 1050; Carriers, 211-228; Damages, 131; Evidence, 123; Life Estates, 21; New Trial, 8; Replevin, 88; Sales, 189, 218½, 263; Statutes, 141.

22 (Mo.App.) One pasturing stock at a price per head per month owes the owner the duty of an agister or bailee for hire.—*Vaughn v. Jackson*, 216 S. W. 331.

23(2) (Mo.App.) One pasturing stock at a price per head per month owes the owner the duty of an agister or bailee for hire, and plaintiff owner's burden of pleading and proving negligence on loss of cattle by theft never shifts, but after he has made a prima facie case by proving delivery and failure to redeliver, defendant has the burden of producing evidence to excuse failure to redeliver, such as escape or theft not resulting from his negligence, but such evidence need not preponderate.—*Vaughn v. Jackson*, 216 S. W. 331.

34 (Ark.) Under the Tick Eradication Law, and the rules and regulations prescribed by the board of control of the Agricultural Experiment Station for its enforcement, giving a formula for the dipping mixture, it is the duty of persons owning cattle to provide the means for dipping them, and it is not incumbent on the county inspector or other public authority to furnish facilities.—*Teague v. State*, 216 S. W. 694.

It is no excuse to an owner of cattle required to dip them, as prescribed by the Tick Eradication Law, under the rules and regulations promulgated by the board of control of the Agricultural Experiment Station that it is dangerous so to dip, and that injuries frequently result.—*Id.*

36 (Ark.) In a prosecution for violation of the tick eradication law by failing to dip cattle, evidence that cattle dipped at the vat in question were killed and greatly damaged as the result of being dipped, and that dipping throughout the county had the same effect, was properly excluded; the efficacy of dipping not being a proper subject of inquiry.—*Boyer v. State*, 216 S. W. 17.

In a prosecution for violation of the tick eradication law, by failing to dip cattle, evidence that the mixture in which defendant was ordered to dip his cattle did not conform to the formula prescribed by the state board of control was improperly excluded.—*Id.*

50(2) (Tex.Cr.App.) Under *Vernon's Sayles' Ann. Civ. St. 1914*, art. 7211, it is imperative that a petition for a stock law election in a subdivision of a county shall particularly describe such subdivision and designate the boundaries thereof.—*Alsobrook v. State*, 216 S. W. 167.

A petition for a stock law election, describing a subdivision of a county as "beginning at a point on the west boundary line of Franklin county; the N. W. corner of general stock law district; thence east with the N. B. line general stock law to where same connects with,"

etc., was insufficient under *Vernon's Sayles' Ann. Civ. St. 1914*, art. 7211.—*Id.*

53 (Ark.) Kirby's Dig. § 7897, changes the law with respect to liability for damages committed by certain animals mentioned, when allowed to run at large, and to the extent of such animals only.—*Field v. Viraldo*, 216 S. W. 8.

55 (Tex.Civ.App.) Where plaintiff in suit for damages done to his crops by defendants' hogs did not allege or prove that his crops were protected by a good and lawful fence, he could not recover, where he failed to allege and prove that the county judge published or posted, as required by Rev. St. 1911, art. 7221, notice of result of election, putting the special stock law into effect; it being necessary to allege and prove each of steps required by article 7209 et seq., where special stock law is relied upon.—*Watkins v. Vaughn*, 216 S. W. 480.

57 (Tex.Cr.App.) A complaint and information, charging the offense of willfully permitting hogs to run at large in violation of *Vernon's Ann. Pen. Code*, 1916, art. 1241, are insufficient, where they do not allege a legal petition for an election by the commissioners' court for the election, the order by the county judge declaring the result of the election as provided by law, and a proclamation by publication or otherwise for 30 days of the result of the election.—*Alsobrook v. State*, 216 S. W. 167.

70 (Ark.) Plaintiff could recover from defendant, who had knowledge of the vicious propensities of his bull, for injuries inflicted upon her, on her own premises, whether or not defendant was negligent in the manner of keeping the bull; the general rule being that an owner is liable for damage by a trespassing animal whether or not he knows of its vicious propensities, and liable for injuries by a vicious animal not trespassing only if he knows of its propensities.—*Field v. Viraldo*, 216 S. W. 8.

74(5) (Ark.) In an action for injuries inflicted by defendant's bull, evidence held sufficient to sustain finding that the bull was vicious, and that its propensities were known to defendant.—*Field v. Viraldo*, 216 S. W. 8.

## ANTI-TRUST LAW.

See Monopolies, 23.

## APPEAL AND ERROR.

See Army and Navy, 34; Certiorari; Costs, 238, 264; Courts, 202, 231; Criminal Law, 1032-1186; Habeas Corpus, 3; Justices of the Peace, 164-180; Mandamus, 4.

For review of rulings in particular actions or proceedings, see also the various specific topics.

## I. NATURE AND FORM OF REMEDY.

1 (Mo.) An appeal lies only when the right is given by some statute, and only from such orders and judgment as the statute mentions.—*In re Wilhelmina Drainage Dist.*, 216 S. W. 530.

9 (Ark.) Where, in foreclosure proceedings, the commissioner is ordered to pay taxes due out of the purchase money on a sale, such order will not be reversed in the absence of a motion to correct it in view of Kirby's Dig. § 1233, providing that there shall be no reversal for errors which could be corrected on motion until such motion has been overruled.—*Miners' Bank of Joplin v. Churchill*, 216 S. W. 695.

## II. NATURE AND GROUNDS OF APPELLATE JURISDICTION.

19 (Tex.Civ.App.) The Court of Civil Appeals acquired jurisdiction of an appeal when appellant filed his supersedeas bond with the clerk of the county court, and settlement of the matters in dispute by the parties would not de-

feat such jurisdiction.—*Hedrick v. Matthews*, 216 S. W. 424.

### III. DECISIONS REVIEWABLE.

#### (B) Nature of Subject-Matter and Character of Parties.

⇒38 (Ky.) Under Ky. St. § 950, the Court of Appeals has jurisdiction of an appeal in an action to enforce a statutory lien on realty wherein plaintiff has been denied a lien for part of his claim, though the amount of money involved is only \$39.68.—*Wendt v. Tucker*, 216 S. W. 61.

⇒43 (Tex.) Ruling of Court of Civil Appeals that issues both of an entire forfeiture and a partial forfeiture of oil lease should have been submitted to jury *held*, even if erroneous, not so clearly wrong as to bring it properly within the Supreme Court's jurisdiction under Rev. St. 1911, art. 1521, subd. 6, as amended by Acts 1917, c. 75, § 1 (Vernon's Ann. Civ. St. Supp. 1918, art. 1521, subd. 6).—*Decker v. Kirlicks*, 216 S. W. 385.

A ruling of the Court of Civil Appeals in a particular case that there was some evidence warranting the submission of a given issue to the jury, or that there was no evidence justifying its submission, is not within Rev. St. 1911, art. 1521, subd. 6, as amended by Acts 1917, c. 75, § 1 (Vernon's Ann. Civ. St. Supp. 1918, art. 1521, subd. 6), as to appellate jurisdiction of the Supreme Court, unless it can be fairly regarded as so flagrantly wrong as to amount to a virtual denial and abrogation of established rules of law.—*Id.*

#### (C) Amount or Value in Controversy.

⇒52 (Ky.) Where consolidated actions were referred to a master, who found that defendant was entitled to the sum of \$511, and plaintiff specifically excepted only to that part of the report allowing defendant \$130, that was the only amount in controversy, and hence, under Ky. St. § 950, fixing the jurisdictional amounts for appeal, no appeal could be taken; the amount in controversy being less even than \$200, in which case the appellate court may in its discretion allow an appeal.—*Town of Highland Park v. Wilson*, 216 S. W. 370.

#### (D) Finality of Determination.

⇒66 (Mo.) The general rule is that an appeal lies only from final judgments, but statutory exceptions are made.—*In re Wilhelmina Drainage Dist.*, 216 S. W. 530.

⇒79(1) (Tex.Civ.App.) In a suit by the holder of a secured note and the trustee under the deed of trust, a judgment awarding foreclosure to the creditor only is a final judgment; the trustee being only a nominal party.—*Gregory v. South Texas Lumber Co.*, 216 S. W. 420.

⇒80(1) (Ark.) An order of a chancery court, on confirming a report of a commissioner in foreclosure proceedings, directing the commissioner to pay all costs and taxes due on the land out of the purchase money, *held* not final because it fails to adjudicate that any taxes were due, does not fix the amount, nor render judgment therefor.—*Miners' Bank of Joplin v. Churchill*, 216 S. W. 695.

### V. PRESENTATION AND RESERVATION IN LOWER COURT OF GROUNDS OF REVIEW.

#### (A) Issues and Questions in Lower Court.

⇒171(1) (Mo.App.) Plaintiffs, having tried case in lower court on theory that new contract was entered into during conversation testified to, are bound by such theory and cannot claim, on appeal, that the conversation was merely language interpreting the contract pleaded.—*Lorton v. Trail*, 216 S. W. 54.

⇒179(3) (Mo.) Plaintiff in her instructions having abandoned another charge of negligence,

that matter is not before the reviewing court.—*Krinard v. Westerman*, 216 S. W. 938.

#### (B) Objections and Motions, and Rulings Thereon.

⇒185(1) (Mo.) The objection that the trial court did not have jurisdiction may be raised for the first time on appeal.—*In re Wilhelmina Drainage Dist.*, 216 S. W. 530.

⇒212 (Mo.App.) A plaintiff appealing from an adverse judgment cannot complain that he is entitled to a verdict and that the court should have given a peremptory instruction to find for him, where no such instruction was asked for and no ruling of the trial court was made thereon.—*Hodges v. Ramsey*, 216 S. W. 568.

⇒212 (Tex.) The peremptory direction of a verdict was subject to challenge on appeal, though not objected to in the trial court before read to the jury.—*Decker v. Kirlicks*, 216 S. W. 385.

⇒216(2) (Tex.Civ.App.) In an action for price paid for stock on ground of fraud, objection to an instruction on false representations, because it gave jury no criterion for determining what was a misrepresentation of fact and what was a statement of opinion and what were mere promissory representations, will not be noticed on appeal; no request for explanatory charge having been made in trial court.—*Texas Co-operative Inv. Co. v. Clark*, 216 S. W. 220.

⇒216(2) (Tex.Civ.App.) A party cannot complain that an instruction was not as full and complete as might be desired, where he did not prepare and request one in proper form.—*Southwestern Portland Cement Co. v. Bustillos*, 216 S. W. 268.

⇒216(3) (Ark.) The instruction that if the jury found for plaintiffs, their verdict would be, "We, the jury, find for the plaintiffs (and write therein any sum which you may so find)," was in the usual form, and good against general objection; and defendant cannot complain on appeal for first time that he was prejudiced by the instruction, where he did not request the court to instruct that if the jury found for plaintiffs they should return verdict in the full sum of \$1,500 sued for.—*Wofford v. De Queen Real Estate Co.*, 216 S. W. 710.

⇒220 (Ky.) Objections to the report of the referee, commissioner, or master cannot be raised for the first time on appeal.—*Town of Highland Park v. Wilson*, 216 S. W. 370.

⇒232(3) (Mo.) Where an objection is made to an instruction and the point duly saved, the court on appeal may consider all reasons why the instruction should not have been given, including the reason, if it existed, that there was no evidence to justify the giving of any instructions or submitting the case to the jury at all.—*Doody v. California Woolen Mills Co.*, 216 S. W. 531.

⇒237(3) (Mo.) Where defendant did not ask an instruction in the nature of a demurrer to the evidence, and did not object to any instructions given by the court submitting the case to the jury, the court on appeal cannot pass upon the sufficiency of the evidence to take the case to the jury.—*Doody v. California Woolen Mills Co.*, 216 S. W. 531.

⇒242(4) (Ky.) Court on appeal will not consider alleged error in admission of evidence, where objection to answer of witness was waived by not requiring court to rule upon it.—*Tackitt v. Newsom*, 216 S. W. 376.

#### (D) Motions for New Trial.

⇒285 (Mo.App.) Objection to striking out plea to jurisdiction is waived by failing to make it ground of exception in motion for new trial, or rehearing, notwithstanding term bills of exceptions were properly saved.—*Buddecke v. Garrels*, 216 S. W. 811.

⇒301 (Ky.) No error committed during the trial is available on appeal, unless relied on in



For cases in Dec.Dig. & Am.Dig. Key-No.Series & Indexes see same topic and KEY-NUMBER

the motion and grounds for new trial; and this is true, though an objection was made and an exception taken to the ruling at the proper time.—*Clifton Land Co. v. Reister*, 216 S. W. 342.

⇒302(4) (Mo.) A complaint, in motion for new trial, that "the court erred in refusing instructions offered by defendant over the objections by plaintiff," was not too general to preclude review thereof on appeal.—*Doody v. California Woolen Mills Co.*, 216 S. W. 531.

⇒305 (Tex.Civ.App.) Though plaintiff, who was cast below, and whose motion for new trial was denied, did not formally except to overruling of her motion for new trial, held that, where it appeared that after such motion was overruled she gave notice of appeal in open court, the appeal may be considered.—*Allen v. Crutcher*, 216 S. W. 236.

## VII. REQUISITES AND PROCEEDINGS FOR TRANSFER OF CAUSE.

### (C) Payment of Fees or Costs, and Bonds or Other Securities.

⇒374(2) (Tex.) Though minors are the only children and heirs, and entitled to the whole of the estate of deceased, the duly qualified and acting administratrix of deceased's estate is entitled, in view of *Vernon's Sayles' Civ. St. 1914*, art. 3235, as to possession and holding of estate by administrator, to appeal as administratrix without bond from judgment withdrawing estate from administration.—*Drew v. Jarvis*, 216 S. W. 618.

## IX. SUPERSEDEAS OR STAY OF PROCEEDINGS.

⇒485(1) (Ark.) An appeal and supersedeas do not have the effect of vacating the judgment, but only stay proceedings thereunder.—*Sumpster v. Hot Springs Savings, Trust & Guaranty Co.*, 216 S. W. 311.

## X. RECORD AND PROCEEDINGS NOT IN RECORD.

### (A) Matters to be Shown by Record.

⇒496 (Tex.Civ.App.) There being no adequate basis shown for judgment within *Rev. St. 1911*, arts. 2108-2114, as to preparation and contents of transcript, judgment against garnishee containing no recitations that necessary statutory proceedings were had will be reversed, where record contains no writ in the nature of garnishment or a showing that one was issued and no answer to any purported writ or fact authorizing judgment against garnishee in the absence of answer under articles 271-300.—*Van Velzer v. Houston Installment Co.*, 216 S. W. 469.

⇒500(2) (Tex.Civ.App.) Where there is nothing in the transcript to show that the action of the court on special exceptions to the petition was ever invoked, such exceptions are presumed to have been waived.—*Southwestern Portland Cement Co. v. Bustillos*, 216 S. W. 268.

⇒511(1) (Mo.App.) Where the record proper does not show that the bill of exceptions was signed by the judge or filed or made a part of the record, the purported bill of exceptions will not be considered.—*Strong v. Strong*, 216 S. W. 543.

The words, "Marked filed, July 15, 1909," indorsed on the bill of exceptions itself are insufficient to show that the bill of exceptions was filed, since a bill of exceptions cannot prove itself.—Id.

### (B) Scope and Contents of Record.

⇒518(1) (Mo.App.) The petition is a part of the record proper, and not a matter of exception.—*Strong v. Strong*, 216 S. W. 543.

When petition is introduced in evidence, it is proper to show it in the bill of exceptions, which does not, however, dispense with the necessity of printing it as a part of the record proper.—Id.

⇒518(4) (Mo.App.) On filing an amended petition the original became an abandoned pleading, and was no longer a part of the record, but only evidentiary matter for consideration upon defendant's motion to strike out amended petition for departure, the overruling of which motion cannot be reviewed, where the original petition is not brought up by bill of exceptions.—*McCormick v. Warman*, 216 S. W. 330.

⇒524 (Ky.) In suits involving the right, title, and interest in real property, blueprints, diagrams, or sketches used in lower court should be transferred to Court of Appeals under Court of Appeals Rules, Rule 22 (191 S. W. vii).—*Burchett v. Leslie*, 216 S. W. 850.

⇒527(1) (Mo.) Where, in addition to writing a general verdict in the usual form, after the jury were dismissed and the court had adjourned, the foreman handed a memoranda to the judge, and stated that it might be of some benefit to the court in reviewing the verdict, such memoranda showing items of damage and the amount allowed on each, and the clerk inadvertently pasted the memoranda on the verdict, and later in the same term the court of its own motion expunged the same from the record, the losing party cannot complain that there was a discrepancy between the evidence and the amount of certain items of expense allowed by the jury as shown by the memoranda; such memoranda not being a part of the record in the case.—*Meeker v. Union Electric Light & Power Co.*, 216 S. W. 933.

### (C) Necessity of Bill of Exceptions, Case, or Statement of Facts.

⇒544(1) (Ark.) Correctness of ruling of court directing verdict for defendant depends on testimony introduced, and where there is no bill of exceptions judgment rendered on verdict for defendant must be affirmed.—*Dyer & Co. v. Delight Lumber Co.*, 216 S. W. 294.

⇒549(1) (Mo.App.) The appellate court has no means of knowing whether defendant appellant objected and excepted to the filing of the amended petition and also to the overruling of his motion to strike out, as he asserts, in the absence of a bill of exceptions.—*McCormick v. Warman*, 216 S. W. 330.

⇒553(2) (Ark.) A stenographer's certificate as to correctness of the record of the testimony taken down by him, unless approved by the presiding judge, cannot have the effect of making such evidence a part of the bill of exceptions, although such certificate may be found in the transcript of the record.—*Dyer & Co. v. Delight Lumber Co.*, 216 S. W. 294.

### (E) Abstracts of Record.

⇒584 (Mo.App.) Where matters of record proper and exceptions are so commingled in the abstract that the appellate court is not able to distinguish one from the other, the bill of exceptions will not be considered; the record being defective.—*Strong v. Strong*, 216 S. W. 543.

⇒586(3) (Mo.) In a suit to cancel a note and deed of trust given to a broker to secure a loan on land, where the broker's defense was that plaintiff, the borrower, failed to deliver an abstract showing good title, etc., the abstract of the record on appeal by the broker from an adverse judgment is sufficient if it sets out those parts of the abstract of title on which the controversy hinged. (Per Goode and Graves, JJ.).—*Crews v. Lombard*, 216 S. W. 512.

⇒590 (Mo.App.) Defects in the abstract of the record cannot be corrected by the filing of an additional abstract without consent of respondent.—*Strong v. Strong*, 216 S. W. 543.

### (G) Authentication and Certification.

⇒613(1) (Ark.) The facts which occur in the trial can only be brought to the Supreme Court for review by bill of exceptions, certified by the trial judge, or signed by the parties in the man-

ner provided by statute.—*Dyer & Co. v. Delight Lumber Co.*, 216 S. W. 294.

**(H) Transmission, Filing, Printing, and Service of Copies.**

⇨621(2) (Ky.) Civ. Code Prac. § 738, permitting one who has been granted an appeal by the lower court to file transcript in office of clerk of the Court of Appeals within 20 days before the first day of the second term of said court, does not deny to the appellant the right to file a transcript in the clerk's office at any time after the appeal has been granted him by the lower court.—*Wathen v. Wathen*, 216 S. W. 93.

**(I) Defects, Objections, Amendment, and Correction.**

⇨650 (Tex.Civ.App.) After decision on appeal, the record cannot be amended by certificate of the trial judge to show an agreement in open court that the court should allow a recovery for an admitted amount, and for such reason that matter was not submitted to the jury, to justify a judgment in excess of the verdict, reduced by the decision.—*Shotwell v. Crier*, 216 S. W. 262.

⇨655(2) (Tex.Civ.App.) Bills of exceptions filed more than 30 days after adjournment of term at which case was tried, where no order extending time for filing has been made, will be stricken from the record upon appellee's motion made within 30 days after filing of transcript in court of appeals, in view of Rev. St. art. 2073.—*Allen v. Berkmyer*, 216 S. W. 647.

**(J) Conclusiveness and Effect, Impeaching and Contradicting.**

⇨662(2) (Tex.Civ.App.) Where the transcript shows that on the day final judgment was rendered for plaintiff the trial court overruled defendants' general demurrer to the petition, but the record contains nothing to show that the order was not entered of record as indicated by the transcript on the date the case was tried and final judgment rendered, plaintiff's motion to dismiss defendants' writ of error cannot be successfully resisted on the ground that time for suing out the writ dates from the time a certain nunc pro tunc order overruling demurrer was subsequently made.—*Texas Power & Light Co. v. Healer*, 216 S. W. 241.

⇨664(1) (Tex.) Absolute verity attaches to judgment of district court on appeal from order appointing guardian as it appears on the minutes, and the judgment entry on the minutes cannot be controlled by what appears on the docket, unless and until the district court shall itself correct the minutes.—*Drew v. Jarvis*, 216 S. W. 618.

**(K) Questions Presented for Review.**

⇨679(2) (Mo.App.) Where petition was not shown as a part of the record proper, appellate court cannot consider contention that petition fails to state a cause of action.—*Strong v. Strong*, 216 S. W. 543.

⇨688(2) (Tex.Civ.App.) Assignment with reference to argument of counsel will be overruled, where there is nothing in the record to show any such argument as complained of, though there is a statement in motion for new trial that such argument was made.—*Southwestern Telegraph & Telephone Co. v. Riggs*, 216 S. W. 403.

⇨702(1) (Ark.) Refusal to give requested instruction will not be considered on appeal where appellant has failed to abstract all the instructions given, since court in such case cannot determine, without exploring record whether court had given other instruction covering same issue.—*Zenor v. Green*, 216 S. W. 697.

**(L) Matters Not Apparent of Record.**

⇨714(4) (Mo.App.) Counsel's mere statement on appeal as to when a certain deposition was taken cannot be accepted as true.—*Berkshire v. Holcker*, 216 S. W. 556.

**XI. ASSIGNMENT OF ERRORS.**

⇨722(1) (Tex.Civ.App.) It is a violation of Rule 29 for Courts of Civil Appeals (142 S. W. xiii) for an appellant to number assignments from 1 to 16, and then from 7 to 24, because that causes a duplication of assignments of the same number.—*Allen v. Crutcher*, 216 S. W. 236.

⇨722(1) (Tex.Civ.App.) Assignments not copied from the record cannot be considered.—*Schkade v. Western Union Telegraph Co.*, 216 S. W. 1113.

⇨742(1) (Tex.Civ.App.) Assignment purporting to be a composite creation from first, second, third, and fourth assignments of error, but stating no proposition, furnishes nothing for consideration.—*Schkade v. Western Union Telegraph Co.*, 216 S. W. 1113.

⇨742(5) (Tex.Civ.App.) Assignment, "The jury, after reading paragraph 4 of the court's charge, wherein their attention was specially called to paragraph 5, which was an instruction upon the weight of evidence and precluded the right of appellant to recover," contains nothing upon which a proposition of law can be founded and cannot be considered.—*Schkade v. Western Union Telegraph Co.*, 216 S. W. 1113.

⇨742(7) (Tex.Civ.App.) Assignment of error: "The fifth ground of motion for a new trial. In the third paragraph of the charge of the court the jury were instructed upon proximate cause, wherein they were told 'that it was that cause which in a continuous sequence unbroken by any new independent cause, and but for which the same would not have occurred'"—contains no proposition of law or fact.—*Schkade v. Western Union Telegraph Co.*, 216 S. W. 1113.

Assignment of error, "The appellant insisted before court that he should have a new trial upon the ground of newly discovered evidence, to wit," etc., cannot be considered; it not being followed by a proposition or statement, but merely by what is styled an argument.—*Id.*

**XII. BRIEFS.**

⇨770(1) (Tex.Civ.App.) Where briefs have not been filed by any of the parties on appeal, the reviewing court can consider only fundamental errors.—*Holguin v. Woodlawn Real Estate & Improvement Co.*, 216 S. W. 899.

**XIII. DISMISSAL, WITHDRAWAL, OR ABANDONMENT.**

⇨781(6) (Tex.Civ.App.) Where parties have actually settled or agreed on terms of settlement of the matters in dispute pending an appeal, and the fact is shown in the Court of Civil Appeals, the appeal should be dismissed, having become moot.—*Hedrick v. Matthews*, 216 S. W. 424.

⇨797(1) (Ky.) Civ. Code Prac. § 741, providing that appellee may file an authenticated copy of the record in the clerk's office of the Court of Appeals with the same effect as if filed by the appellant, does not authorize the appellee as a matter of right to demand a dismissal of the appeal on the ground that the Court of Appeals has no jurisdiction, or for any other reason, before the case has been regularly put upon the docket.—*Wathen v. Wathen*, 216 S. W. 93.

Civ. Code Prac. § 738, permitting one who has been granted an appeal by the lower court to file transcript in office of clerk of the Court of Appeals within 20 days before the first day of the second term of said court, does not deny to the appellant the right to file a transcript in the clerk's office at any time after the appeal has been granted him by the lower

For cases in Dec.Dig. & Am.Dig. Key-No.Series & Indexes see same topic and KEY-NUMBER

court, but if appellant does file his transcript before he is required to do so, such filing does not give the appellee the right immediately thereafter, or at any time until the case has been put on the docket, to have the appeal dismissed for want of jurisdiction, or any other cause.—Id.

§879(3) (Ky.) Where appellant has been granted an appeal by the lower court, and he fails to file the transcript in the office of the clerk of the Court of Appeals within the time given by Civ. Code Prac. § 738, the appellee may, after such time, bring a copy of the judgment and supersedeas bond, if one has been executed, and, after filing same in the clerk's office, move the court to dismiss the appeal and discharge the supersedeas bond.—*Wathen v. Wathen*, 216 S. W. 93.

§803 (Ky.) Where appellee, after the appellant has failed to file the transcript within the time given by Civ. Code Prac. § 738, brings a copy of the judgment and has the court dismiss the appeal and discharge the supersedeas bond, if one was executed, the dismissal of the appeal does not prevent the appellant from bringing his case to the Court of Appeals by filing with the clerk the record as provided in section 734.—*Wathen v. Wathen*, 216 S. W. 93.

#### XIV. DOCKETS, CALENDARS, AND PROCEEDINGS PRELIMINARY TO HEARING.

§811 (Ky.) Whether a case will be docketed, advanced, and submitted, or either advanced, docketed, or submitted, under Civ. Code Prac. § 753, subsec. 4, is entirely within the discretion of the Court of Appeals.—*Wathen v. Wathen*, 216 S. W. 93.

Where an appeal is docketed, advanced, and submitted by the Court of Appeals under Civ. Code Prac. § 753, subsec. 4, the case then stands as any other case that has been submitted.—Id.

The Court of Appeals will not docket, advance, and submit a case under Civ. Code Prac. § 753, subsec. 4, unless it appears that there is such an emergency as would authorize the case to be taken up out of the regular order.—Id.

#### XVI. REVIEW.

##### (A) Scope and Extent in General.

§837(7) (Mo.) Where a child injured by a street car pleaded the motorman failed to stop in the shortest time and space possible after he saw, or by vigilant watch could have seen, the first appearance of danger, and such ultimate fact is inferable from the facts shown by defendant as well as those attempted to be shown by plaintiff, and the jury accepts the former rather than the latter, plaintiff is entitled to the benefit and to recover.—*Esstman v. United Rys. Co.*, of St. Louis, 216 S. W. 528.

§837(12) (Mo.) It is the duty of the court on appeal in an equity case to examine the evidence for itself, with all due regard for the findings of the chancellor, considering all competent evidence admitted, but afterwards erroneously stricken out against objection duly brought into the record by exception.—*Hurst Automatic Switch & Signal Co. v. Trust Co.* of St. Louis, 216 S. W. 954.

§843(2) (Tex.Civ.App.) Where a tax sale of a minor ward's land is invalid, it becomes unnecessary on appeal to decide whether the general principle that one who owes the duty to pay the tax cannot acquire the title at a sale thereof is applicable to the guardian.—*Teat v. Perry*, 216 S. W. 650.

§843(2) (Tex.Com.App.) Question as to effect of Const. art. 12, § 6, on liability of a stock subscriber not being involved in the case under consideration, or necessary to its decision, motion to express an opinion on the

question will be overruled.—*Park v. Rich*, 216 S. W. 146.

§846(6) (Tex.Civ.App.) Where there is a statement of facts filed, but no findings of fact or conclusions of law, motion for new trial, or bill of exceptions, the judgment on trial before the court without a jury will be held conclusive on the facts, unless defeated by some testimony that shows that another judgment should have properly been rendered; no request to file findings of fact or conclusions of law having been made.—*Pittman & Harrison Co. v. Knowlan Machine & Supply Co.*, 216 S. W. 678.

§856(5) (Mo.App.) Advantage may be taken, on an appeal from an order granting a motion for a new trial, of any error in the trial of which complaint was made in the motion for a new trial, even though it was not mentioned by the trial court.—*Berkshire v. Holcker*, 216 S. W. 556.

##### (C) Parties Entitled to Allege Error.

§877(5) (Mo.) Demurrer to the evidence, sustained by the trial court at the close of the trial in favor of one of the two defendants, unappealed from by plaintiff, became res judicata, and marked the end of the litigation so far as such defendant was concerned.—*Reese v. City of St. Louis*, 216 S. W. 315.

§877(6) (Mo.) Where defendants were required to interplead, the subsequent proceedings were between them alone, so far as concerns the determination of their respective rights, and on a judgment being rendered in favor of either the other is entitled to appeal, and on appeal the rights of both are to be determined, so that the action is not divisible, and the judgment does not stand as to the one not appealing, as if no appeal had been taken.—*Matlack v. Kline*, 216 S. W. 323.

§882(8) (Mo.App.) Defendant cannot complain that plaintiff witness was allowed to detail her life at his house, where he first testified thereto fully.—*Hart v. Brown*, 216 S. W. 552.

§882(9) (Ky.) A party cannot complain on appeal of testimony which his counsel voluntarily called for in his cross-examination of witness.—*Tackitt v. Newsom*, 216 S. W. 376.

§882(12) (Ky.) Where a party exercised the right given by Civ. Code Prac. § 317, by requesting an instruction, he cannot complain of error in the instruction requested and given, though he excepted to the giving of it.—*Clifton Land Co. v. Reister*, 216 S. W. 342.

§882(12) (Mo.App.) Where court gives an instruction too general in its terms, but also gives a requested instruction for defendant just as general, defendant cannot complain.—*Ingle v. Sovereign Camp, Woodmen of the World*, 216 S. W. 787.

§882(14) (Ark.) Defendant appellant, who requested and obtained instructions submitting separately each allegation of negligence, is in no position to complain of an instruction on the ground that it submitted all the allegations of negligence, whether supported by the evidence or not.—*Bourland v. Baker*, 216 S. W. 707.

§882(14) (Mo.App.) A litigant who in the trial court asked that a certain question be submitted to the jury and made no objection to its submission to the jury, submitting instructions on the question, cannot on appeal assume a position directly contrary and claim that there was no question for the jury.—*Berkshire v. Holcker*, 216 S. W. 556.

§882(17) (Tex.Civ.App.) A party who requests jury to make finding on certain question will be estopped from asserting there was error in submitting the issue because there was no evidence authorizing its submission.—*Panhandle & S. F. Ry. Co. v. Huckabee*, 216 S. W. 666.

§883 (Ky.) Error cannot be predicated on the refusal of continuance to another term, it appearing that by consent of the counsel

asking the continuance the trial was fixed for a day certain in the present term, and that on such day trial was begun.—*Louisville & N. R. Co. v. Pugh's Adm'x*, 216 S. W. 69.

⚡884 (Mo.App.) In an action for compensation for drilling an oil well, where the driller's letters, setting forth his position, were improperly admitted in evidence, the admission of letters written by one of the defendants, rebutting the claims of the driller made in such letters, does not cure the error and render it harmless.—*Dietz v. Nix*, 216 S. W. 791.

#### (E) Presumptions.

⚡917(1) (Ky.) Appellate court, in reviewing action of lower court in sustaining demurrers to petition, will assume that the allegations of the petition are true.—*Louisville & N. R. Co. v. Nield*, 216 S. W. 62.

⚡927(7) (Tex.Civ.App.) Court of Appeals, in determining correctness of lower court's action in refusing to direct verdict for defendant, must take plaintiff's evidence as giving the true version of the matter at issue.—*Courchesne v. Brown*, 216 S. W. 674.

⚡930(1) (Mo.) Plaintiff's case on verdict for him is entitled to every reasonable inference of fact arising on all the proof.—*Eastman v. United Rys. Co. of St. Louis*, 216 S. W. 526.

⚡930(1) (Mo.App.) Where the verdict was for plaintiff, the appellate court will consider the facts in the light most favorable to plaintiff.—*Ingle v. Sovereign Camp, Woodmen of the World*, 216 S. W. 787.

⚡930(2) (Tex.Civ.App.) Court on appeal will presume that jury followed court's instruction to disregard improper remarks of counsel, unless the contrary is made to appear.—*Kansas City, M. & O. Ry. Co. of Texas v. Cliett*, 216 S. W. 682.

⚡930(4) (Ark.) Though evidence was not introduced in support of every allegation of negligence, where the trend of the evidence limited the issues, it will be presumed on appeal, in the absence of specific objection to the general terms in which allegations of negligence were submitted, that jury considered only such grounds as were supported by the evidence.—*Bourland v. Baker*, 216 S. W. 707.

⚡931(1) (Tex.Civ.App.) In the absence of conclusions of fact, the appellate court will impute to the trial court full verity to its findings, and, if there is any issue of fact sufficient to sustain the judgment, it will be done.—*Pittman & Harrison Co. v. Knowlan Machine & Supply Co.*, 216 S. W. 678.

⚡931(3) (Tex.Civ.App.) Under Rev. St. 1911, art. 1985, where the jury made no finding as to a certain matter, but the facts disclosed by the record warrant a finding thereon in support of the judgment, it will be presumed that the court made the necessary finding.—*Armstrong v. Tubeville*, 216 S. W. 1101.

#### (F) Discretion of Lower Court.

⚡979(1) (Mo.) Whether verdict of jury was against weight of evidence was a matter that lay wholly within the discretion of trial court on motion for new trial.—*Newell v. Boatmen's Bank*, 216 S. W. 918.

#### (G) Questions of Fact, Verdicts, and Findings.

⚡987(3) (Mo.App.) In an equity case the Court of Appeals has the right to weigh the evidence and find the facts for itself.—*Thornhill v. Masucci*, 216 S. W. 819.

⚡994(2) (Ark.) The jury, and not the appellate court, were the judges of the credibility of the witnesses.—*Yazoo & M. V. R. Co. v. Hill*, 216 S. W. 1054.

⚡994(3) (Mo.App.) The credibility of a witness is not within the province of the appellate court.—*Detroit Automatic Scale Co. v. Clinton*, 216 S. W. 814.

⚡994(3) (Tex.Civ.App.) In action tried without jury, credibility of witnesses is for the

court, who is not required to accept the version of interested parties, and whose determination on questions of credibility of witnesses will not be reviewed.—*Spivey v. Hooks*, 216 S. W. 486.

⚡995 (Mo.App.) It is not within the province of the Court of Appeals to pass on the weight of the evidence in a case of law.—*Sentney Wholesale Grocery Co. v. Thompson*, 216 S. W. 780.

⚡999(2) (Mo.App.) Where, taking all the facts and circumstances into consideration, the verdict shocks the judicial sense, and creates a firm conviction in the mind of the court that justice will be best subserved by a retrial before another jury, reversal will be ordered.—*Traw v. Heydt*, 216 S. W. 1009.

⚡1001(1) (Ark.) On appeal the verdict of a jury will be sustained if there is any substantial legal evidence to support it.—*Huggins v. Smith*, 216 S. W. 1.

⚡1001(1) (Tex.Civ.App.) To sustain the verdict on appeal, the evidence must amount to something more than inferences, and must be legally of a probative force, mere detached statements of witnesses which may positively furnish an argumentative basis not being controlling, and a jury is not authorized to arbitrarily reject testimony that is unimpeachable and without suspicion.—*Chicago, R. I. & G. Ry. Co. v. Wisdom*, 216 S. W. 241.

⚡1001(2) (Tex.Civ.App.) It is a matter of no moment what a judge of an appellate court may think of the sufficiency of evidence to establish a fact, in view of the principle that the sufficiency of the evidence to establish the fact is for the jury to determine.—*Southwestern Portland Cement Co. v. Bustillos*, 216 S. W. 268.

⚡1002 (Ark.) Verdict of the jury, rendered under correct instructions on an issue whereon the testimony was in sharp conflict, is conclusive on appeal.—*Wofford v. De Queen Real Estate Co.*, 216 S. W. 710.

⚡1002 (Tex.Civ.App.) Where all matters were dependent upon disputed issues of fact, and the jury has found against appellant, the court on appeal will not set aside the finding.—*Miller v. Bandera Independent Telephone Co.*, 216 S. W. 900.

⚡1003 (Ky.) Court of Appeals never overturns a verdict of a jury unless it is flagrantly and palpably against the weight of the evidence.—*Althoff v. Cull*, 216 S. W. 361.

⚡1003 (Ky.) While court on appeal would be compelled to uphold verdict for defendant, if case turned on credibility of plaintiff and defendant, it will not do so where defendant's evidence is not only vague and unsatisfactory, but utterly inconsistent with all the circumstances surrounding the transaction, as well as the ordinary course of dealing between business men.—*Ewing v. McClanahan*, 216 S. W. 592.

⚡1004(1) (Mo.App.) Grossly inadequate damages constitute an error which may be corrected on appeal.—*Meily v. Hill*, 216 S. W. 545.

⚡1004(1) (Mo.App.) The amount of actual damages for assault is not for appellate court to say, but purely and primarily for the jury and trial court, subject, of course, to appellate supervision.—*Traw v. Heydt*, 216 S. W. 1009.

⚡1005(3) (Tex.Civ.App.) Verdict approved by trial court will not be disturbed on appeal, on the ground that the testimony offered by appellant should be accepted as true, and that of appellees rejected as unworthy of belief; the credibility of witnesses and the weight to be given their testimony being a matter for the jury.—*Zucht v. Brooks*, 216 S. W. 684.

⚡1009(1) (Ky.) On appeal in an equitable action, a mere doubt in the minds of the appellate court of the correctness of the chancellor's findings is not sufficient to authorize a reversal.—*Groves v. Bryant*, 216 S. W. 364.

⚡1009(1) (Mo.) Deference will be given chancellor's finding to the extent of taking

For cases in Dec.Dig. & Am.Dig. Key-No.Series & Indexes see same topic and KEY-NUMBER

into consideration the trial judge's advantage in having heard and observed the witnesses.

—Wigginton v. Burns, 216 S. W. 756.

⇒1009(1) (Mo.) It is the duty of the court on appeal in an equity case to examine the evidence for itself, with all due regard for the findings of the chancellor.—Hurst Automatic Switch & Signal Co. v. Trust Co. of St. Louis, 216 S. W. 954.

⇒1009(3) (Ky.) The rule of the Court of Appeals, where the evidence is conflicting, is to sustain the chancellor unless his finding appears to be against its weight.—Wilson v. McCullough Bros., 216 S. W. 74.

⇒1009(3) (Ky.) Judgment of a chancellor should not be reversed, where the proof is contradictory, unless in the opinion of the appellate court the judgment is against the decided weight of the evidence; the views of the chancellor being entitled to considerable weight.—Perkins v. Harmon, 216 S. W. 90.

⇒1009(3) (Ky.) Where the evidence is conflicting, and questions of fact on that account are difficult of solution, if, on consideration of the whole case, the mind is left in doubt as to the correctness of the judgment, the findings of the chancellor will not be disturbed.—Ambrose v. Reece, 216 S. W. 341.

⇒1009(3) (Ky.) If the conflict in the testimony produced only a doubt in the minds of the Court of Appeals, it would be court's duty to resolve the doubt in favor of chancellor's finding, but if the finding is clearly against the preponderance of the testimony, it is the court's duty to determine the matter according to their convictions as to the facts which the testimony as an entirety establishes.—Tackitt v. Newsom, 216 S. W. 376.

⇒1009(4) (Ark.) Finding of chancellor which is not against the preponderance of the evidence will be accepted as correct on appeal.—Feibelman v. Hill, 216 S. W. 702.

⇒1010(1) (Mo.) In a law action a finding sustained by substantial evidence will not be disturbed on appeal.—Reader v. Williams, 216 S. W. 738.

⇒1015(1) (Mo.) Where court directed verdict for defendants, an order allowing a new trial must be affirmed if there is any evidence to uphold a verdict for plaintiff, but, if there is none, the order should be set aside and the verdict reinstated.—Baker v. Gates, 216 S. W. 775.

⇒1022(1) (Ky.) In the absence of some basis on which the Court of Appeals can accurately determine the state of defendant trustee's account as contained in a report of the master commissioner, the court is not inclined to disturb the judgment of the trial court confirming the account.—Wilson v. Smoot, 216 S. W. 129.

#### (H) Harmless Error.

⇒1026 (Ky.) The Court of Appeals is not warranted in reversing a judgment for an error which did not prejudice appellant's rights.—Owensboro City R. Co. v. Owensboro Fuel Co., 216 S. W. 72.

⇒1033(5) (Ark.) An instruction on the form of verdict, erroneous as permitting the jury if they returned verdict in favor of plaintiffs to find for them in a much less sum than they were entitled to under the undisputed evidence, was harmless to defendant.—Wofford v. De Queen Real Estate Co., 216 S. W. 710.

⇒1033(5) (Mo.) Even though instruction that defendant was required to exercise such skill and care as an ordinarily skillful and careful surgeon is accustomed to exercise in a like surgical operation did require too high a degree of skill for ordinary cases, yet, where plaintiff alleged in her petition charging malpractice that defendant represented himself to be a specialist in such operations, and proof accorded with averment, instruction requires a lesser degree of skill than required of de-

fendant, and defendant cannot complain.—Krinard v. Westerman, 216 S. W. 938.

⇒1033(5) (Tex.Civ.App.) In an action against a third party by an employee who had already received workmen's compensation, any error in an instruction that such compensation should be deducted from any damages found is favorable to defendant, and it cannot complain thereof on appeal.—Wm. Cameron & Co. v. Gamble, 216 S. W. 459.

⇒1033(7) (Tex.Civ.App.) The defendant railroad company, on appeal from a judgment for damages for destruction of grass by fire, has no just reason of complaint that the jury should have found from the evidence that the land had a market value for hay-making purposes, where the evidence of such value showed a larger damage than found by the jury.—Galveston, H. & S. A. Ry. Co. v. Harris, 216 S. W. 430.

⇒1033(9) (Ark.) The jury having found for realty brokers suing for commission on the issue whether or not they had procured a purchaser ready, able, and willing to buy on the terms specified by defendant owner, the latter cannot complain because the jury by their verdict gave plaintiff brokers only \$400, when they were entitled to full commission of \$1,500.—Wofford v. De Queen Real Estate Co., 216 S. W. 710.

⇒1033(9) (Mo.App.) Generally a party cannot complain because the verdict against him is not as large as it should have been.—Allen v. Jackson, 216 S. W. 539.

⇒1037 (Mo.App.) Error in overruling motion to quash return after hearing evidence on issue of nonresidence was not prejudicial, where motion should have been denied because the proper remedy was plea to jurisdiction.—Buddecke v. Garrels, 216 S. W. 811.

⇒1039(3) (Tex.Civ.App.) In an action by individual members of a truck growers' association, error, if any, in permitting members who suffer damages, because of the failure of defendant to furnish onion crates, to join their several causes of action, and to permit all members to join in with a joint cause of action, held harmless.—Mayhew & Isbell Lumber Co. v. Valley Wells Truck Growers' Ass'n, 216 S. W. 225.

⇒1040(4) (Tex.Civ.App.) Error, if any, in sustaining exception to a paragraph of the supplemental petition is not prejudicial to plaintiff, where all the evidence on that issue was admitted.—J. L. Collins Piano Co. v. Adams & Allcorn, 216 S. W. 420.

⇒1040(14) (Ky.) Where plaintiff, demurring to the three paragraphs of the answer, elects to stand on decision overruling the demurrer, the judgment will be affirmed, though one paragraph is bad; the other paragraphs being good.—Stuart v. Clements, 216 S. W. 136.

⇒1040(16) (Ky.) Though the petition did not aver the contract sued on with sufficient explicitness, where the amended petition and reply stated plaintiff's cause of action very clearly, issue having been joined by defendant, error of the trial court in overruling demurrer to the petition became harmless.—Owensboro City R. Co. v. Owensboro Fuel Co., 216 S. W. 72.

⇒1042(3) (Tex.Civ.App.) Error of the court in refusing to strike out a trial amendment on the ground that the record fails to disclose that any exception to the petition was sustained, or that any evidence was excluded on account of the insufficiency of the petition, could not be regarded as reversible error, in view of Court Rule 62a (149 S. W. x).—Southwestern Portland Cement Co. v. Bustillos, 216 S. W. 268.

⇒1043(7) (Ky.) That defendant was prejudiced by refusal to postpone or to allow reading of affidavit of what absent witness, defendant's only eyewitness, would testify, is indicated by reference, in closing argument of plaintiff's counsel, to his failure to testify.—

Louisville & N. R. Co. v. Pugh's Adm'x, 216 S. W. 69.

⇒1043(7) (Tex.Civ.App.) Where defendant railroad company requested a continuance on the ground that persons in its service were necessary witnesses, that it would cripple the operation of the road to take them from service, and that it was not practicable to take their depositions, the denial of the petition will not be reviewed where such witnesses in fact were present and testified.—El Paso & S. W. Ry. Co. v. Havens, 216 S. W. 444.

⇒1050(1) (Mo.App.) In a suit by plaintiff payee against her grandfather as maker of a note, the validity of which depended upon its being given in payment of damages, and not to stifle the prosecution of maker as the father of plaintiff's illegitimate child, and he testified, "I knew I wasn't guilty," the admission of plaintiff's rebuttal testimony that defendant had sexual intercourse with her and was her child's father could not have prejudiced the jury more than the necessary implications from other testimony and defendant's own admissions, and was not reversible error.—Hart v. Brown, 216 S. W. 552.

⇒1050(1) (Mo.App.) In an action for injuries suffered by plaintiff whose team was scared by defendant's jitney, the admission of declarations by defendant's driver after he had reached his destination and a considerable time after the accident is prejudicial error.—Fore v. Rodgers, 216 S. W. 566.

⇒1050(1) (Mo.App.) In an action by an oil driller, where letters written by him setting forth his position were improperly received in evidence, the fact that defendants did not object to the admission of another letter, which did not cover everything contained in the earlier ones, did not cure and render harmless the error in admitting the first letter.—Dietz v. Nix, 216 S. W. 791.

⇒1050(1) (Tex.Civ.App.) In a broker's action for commission on the sale of real estate, that appellant owner admitted or denied in a letter his liability for commission would be so remote to the real issues that the introduction of the letter would not be reversible error.—Varn v. Moeller, 216 S. W. 234.

⇒1050(1) (Tex.Civ.App.) In an action on a fire policy, the submission in evidence of data presented by insured, it appearing that the original inventory was burned because removed from an iron safe by some one without insured's knowledge or consent, held harmless, if erroneous, as it could not have affected the result.—Westchester Fire Ins. Co. v. Biggs, 216 S. W. 274.

⇒1051(2) (Tex.Civ.App.) The erroneous admission in evidence of a deposition is harmless where the testimony related to an issue proven by the undisputed evidence.—Martinez v. Bruni, 216 S. W. 655.

⇒1052(5) (Mo.App.) In an action for \$450 damages on account of lost earnings, and \$50 due as commission for goods sold, plaintiff's inadmissible testimony as to his earnings while employed as selling agent by a company in the same business as defendant held prejudicial; judgment having been given for plaintiff for \$500.—King v. Oklahoma Gypsum Co., 216 S. W. 992.

⇒1052(5) (Mo.App.) In an action for assault, error in admitting deed to defendant and her husband, to show defendant's financial status, was not rendered harmless by failure of jury to assess punitive damages, where instruction was liable to mislead jury to consider financial status in assessing actual damages.—Traw v. Heydt, 216 S. W. 1009.

⇒1053(3) (Mo.App.) In action against defendant, a married woman, for assault, error in admitting in evidence deed of realty to her and her husband to show financial condition, held not cured by instruction, at request of defendant, correctly defining defendant's inter-

est in the realty.—Traw v. Heydt, 216 S. W. 1009.

⇒1053(5) (Ky.) In action for damages for refusal to give plaintiff lessee possession, admission of testimony as to probable yield of leased premises and its possible market value, if erroneous, held, in view of all the facts and circumstances and instructions not submitting the issue of profits, not prejudicial.—Lawrence v. Fielder, 216 S. W. 1068.

⇒1058(1) (Ky.) Error in exclusion of testimony offered by defendant was cured by subsequent admission of same testimony.—Tackitt v. Newsom, 216 S. W. 376.

⇒1060(1) (Tex.Civ.App.) Remarks of plaintiff's counsel in argument, being in the verbiage of plaintiff, who as witness, without objection, explained why, after his injury, he sought work of others under an assumed name, even if objectionable, could not alone have influenced the jury.—Galveston, H. & S. A. Ry. Co. v. White, 216 S. W. 265.

⇒1061(4) (Tex.Civ.App.) If money was in fact used in the completion of a contract which one had obligated himself to perform, and which he must have performed in order to show himself entitled to any balance due in the amount of the money used, he cannot demand further payments from the other parties to the contract who so used the money, where they used more than the amount claimed by the contractor, and a peremptory charge against him on the point was harmless.—Leeper-Curd Lumber Co. v. Barbuza, 216 S. W. 216.

⇒1062(1) (Tex.Civ.App.) Where two issues of negligence were submitted to the jury, one of which was improperly submitted, and the appellate court is unable to tell upon which issue a verdict rested, judgment for plaintiff must be reversed.—Chicago, B. I. & G. Ry. Co. v. Wisdom, 216 S. W. 241.

⇒1062(2) (Tex.Civ.App.) In broker's action for commission, where evidence raised issue of fact as to whether plaintiff or a third party was procuring cause of sale, refusal to submit such issue to jury on defendant owner's request therefor held reversible error under Rev. St. 1911, art. 1985.—Moye v. Park, 216 S. W. 205.

⇒1064(1) (Ark.) The Supreme Court will not reverse a judgment because instructions single out circumstances established in the trial of a case, where the principles of law declared therein are correct.—Arkadelphia Milling Co. v. Campbell, 216 S. W. 20.

⇒1064(2) (Tex.) In action by state against railroad for penalties for failure to comply with Vernon's Sayles' Ann. Civ. St. 1914, art. 6592, an instruction to find for the state, if the railway company failed to maintain at its station or within its passenger depot suitable and separate water-closets, or if they found that the railroad company failed to maintain such closets within a reasonable and convenient distance from the depot, was erroneous and prejudicial, where the real issue was whether the closets were in a reasonable distance from the station, and the uncontradicted evidence showed that the railway did not have any closets within its passenger depot; the first part of the charge being virtually an instruction to find for the state, regardless of how the real issue in the case might be determined.—Galveston, H. & S. A. Ry. Co. v. State, 216 S. W. 393.

⇒1064(4) (Mo.App.) Plaintiff's instruction on assessment of damages, "subject to limitations of the other instructions given herein," where plaintiff requested no other instructions, was not reversible error, as other instructions were given, and each was subject to limitations of others.—Hoover v. St. Louis Electric Terminal Ry. Co., 216 S. W. 984.

⇒1066 (Ky.) In action for death on track, it was prejudicial to include, in an instruction presenting the last clear chance rule, "or could by the exercise of ordinary care, after being aware

For cases in Dec.Dig. & Am.Dig. Key-No.Series & Indexes see same topic and KEY-NUMBER

of decedent's presence on or in dangerous proximity to the track, have seen his peril," where there was no evidence decedent's peril existed or could have been discovered sooner than it was seen by the motorman.—*Kentucky Traction & Terminal Co. v. Roschi's Adm'r*, 218 S. W. 579.

⇒1066 (Tex.Civ.App.) It is error to submit an issue not made by the evidence, unless it clearly appears the jury were not misled.—*El Paso & S. W. Ry. Co. v. Havens*, 216 S. W. 444.

⇒1067 (Mo.App.) The giving of an instruction on effect of witness knowingly swearing falsely rests largely in the discretion of a trial court, and a refusal to give such an instruction is not reversible error; for it is nothing more than an affirmative declaration of the power possessed by the jury in determining the credibility of witnesses.—*Milton v. Holtzman*, 216 S. W. 828.

⇒1068(4) (Ky.) In an action by a coal company against a street railroad for breach of contract to haul coal, any error in an instruction through failure to limit the amount of recovery to the number of tons of coal plaintiff coal company might have produced and offered for shipment during the period in which the railroad declined to transport *held* harmless, in view of the evidence and verdict.—*Owensboro City R. Co. v. Owensboro Fuel Co.*, 216 S. W. 72.

⇒1068(4) (Tex.Civ.App.) In an action for personal injury to a wife resulting from a collision upon a highway, the court's error in eliminating damages for a miscarriage became immaterial, where the verdict found there was no liability on the part of defendant.—*Melton v. Manning*, 216 S. W. 488.

⇒1068(5) (Ky.) Refusal to give defendant's requested instruction on champerty was harmless, where plaintiff by the verdict did not recover any of the land to which the instruction on champerty was intended to refer.—*Tackitt v. Newsom*, 216 S. W. 376.

⇒1073(7) (Ark.) In purchaser's action for specific performance of land contract, excessive allowance by court by way of abatement to extent of dower interest of vendor's wife in event of wife's refusal to join in conveyance was immaterial, where vendor declared that his wife was ready to join in the deed if court decreed specific performance.—*Feibelman v. Hill*, 216 S. W. 702.

#### (I) Error Waived in Appellate Court.

⇒1078(4) (Mo.App.) Alleged error in excluding testimony need not be noticed, where rulings complained of are not shown nor referred to in appellant's points or authorities or argument in brief.—*Baldwin v. Hanley & Kinsella Coffee Co.*, 216 S. W. 998.

⇒1078(5) (Tex.Civ.App.) Claim of appellant in its motion for new trial that the verdict was excessive, not being brought forward in its brief, is to be considered abandoned.—*Dallas Power & Light Co. v. Edwards*, 216 S. W. 910.

### XVII. DETERMINATION AND DISPOSITION OF CAUSE.

#### (A) Decision in General.

⇒1106(5) (Ky.) There being, in a suit for foreclosure of mortgage on the properties of a distilling company, no findings of fact, but only a general judgment in favor of purchasers of whisky in bond on their claim for shrinkage against storage charges, and evidence consisting of a report of receiver, of several hundred pages, without any summing up, the cause will be remanded for findings through a commissioner or otherwise.—*Fidelity & Columbia Trust Co. v. Grommes & Ullrich*, 216 S. W. 1078.

#### (B) Affirmance.

⇒1127 (Tex.Civ.App.) If the issue made on the question of settlement by the parties af-

fecting the jurisdiction of the Court of Civil Appeals under *Vernon's Sayles' Ann. Civ. St. 1914*, art. 1593, it could consider, to determine the fact of jurisdiction only, the affidavits presented by appellant in opposition to appellee's motion to affirm on certificate.—*Hedrick v. Matthews*, 216 S. W. 424.

Jurisdiction of the Court of Civil Appeals having attached when appellant filed his supersedeas bond with the clerk of the county court, and the issues tried below being pending, the court will not consider the question whether there has been an agreement to settle between the parties, though appellant in his affidavits in opposition to appellee's motion to affirm on certificate states facts tending to show such an agreement.—*Id.*

⇒1140(4) (Mo.App.) On appeal a remittitur will be ordered, instead of reversal, only where the court has facts on which to base such order.—*Traw v. Heydt*, 216 S. W. 1009.

#### (D) Reversal.

⇒1170(3) (Tex.Civ.App.) Though supplemental petition is not to be considered in determining whether demurrer to petition should have been sustained, the error in overruling it, because petition did not allege authority conferred on defendant railroad company's president by its board of directors to execute the acceptance sued on, or estoppel or ratification, was harmless, within Court of Civil Appeals rule 62A (149 S. W.) as to grounds for reversal; estoppel and ratification being properly set up in the supplemental petition in avoidance of the defensive matter, of want of authority, set up in the answer.—*Midland & N. W. Ry. Co. v. Midland Mercantile Co.*, 216 S. W. 627.

⇒1171(2) (Tex.Civ.App.) In an action involving thousands of dollars, an error in calculation amounting to \$415 will not be considered on appeal, where complaint is made there for the first time, even though the doctrine of fundamental error is applied.—*Koger v. Clark*, 216 S. W. 434.

⇒1172(1) (Tex.Civ.App.) That plaintiff permitted court to prematurely try issue on a plea of privilege filed under *Rev. St. 1911*, art. 1903, as amended by *Acts 1917*, c. 176, § 1 (*Vernon's Ann. Civ. St. Supp. 1918*, art. 1903), and thus waived his controverting affidavit, would not require the court on appeal to render judgment sustaining the plea, where the judgment must be reversed for other reasons.—*Hurst v. Crawford*, 216 S. W. 284.

⇒1175(1) (Ark.) Where the error of chancellor in refusing a writ of assistance to a judicial purchaser cannot be remedied by restoration of the lands to the appellant, because the rental year has about closed, a technical reversal of the decree can only result in judgment in favor of the purchaser for rents and costs which judgment will be directed by appellate court.—*Smith v. Murphy*, 216 S. W. 719.

⇒1177(8) (Tex.Civ.App.) In action for injuries to horses in transit, where two issues of negligence were submitted to jury, one allowing recovery for an improper element of damage, and jury found for plaintiff on both, and in response to another special issue awarded lump sum as damages, there must be a reversal and a new trial.—*Gulf, C. & S. F. Ry. Co. v. Culwell*, 216 S. W. 457.

#### (F) Mandate and Proceedings in Lower Court.

⇒1195(1) (Mo.) A decision on a former appeal is, on retrial, conclusive as the law of the case.—*Drainage Dist. No. 1 of Bates County v. Bates County*, 216 S. W. 949.

### APPEARANCE.

See Dismissal and Nonsuit, ⇒60.



## APPOINTMENT.

See Inspection, ¶4.

## ARCHITECTS.

See Contracts, ¶229; Novation, ¶7; Schools and School Districts, ¶84.

## ARGUMENT OF COUNSEL.

See Criminal Law, ¶719-730; Trial, ¶121-133.

## ARMY AND NAVY.

See Sequestration, ¶21.

¶34 (Tex.Civ.App.) In view of Const. U. S. art. 1, § 8, relating to its war and military power, Congress had the power to pass the Soldiers' and Sailors' Civil Relief Act, title 16a, arts. 1, 2 (U. S. Comp. St. 1918, §§ 3078¼a-3078¼e), relating, among other things, to matters of procedure in the state courts.—*Kuehn v. Neugebauer*, 216 S. W. 259.

Soldiers' and Sailors' Civil Relief Act (U. S. Comp. St. 1918, § 3078¼d), authorizes the appellate court to grant a motion of an appellee, requesting it to instruct the clerk to issue a mandate, although costs had not been paid within one year from the reversal of a judgment in favor of appellee, it appearing that appellee entered the military service of the United States, before he became aware of reversal of his judgment, and served overseas until within three months of filing his motion, notwithstanding Rev. St. 1911, art. 1559, which leaves the appellate court without discretion to order the issuance of the mandate when costs are not paid within the year.—*Id.*

¶34 (Tex.Civ.App.) Soldier who was ejected from his premises by means of sequestration proceedings and was deprived of the protection to which he was entitled under Soldiers' & Sailors' Civil Relief Act (U. S. Comp. St. §§ 3078¼a-3078¼ss) could recover damages regardless of whether facts stated in affidavit for sequestration are true or false.—*Bassham v. Evans*, 216 S. W. 446.

Soldiers and Sailors' Civil Relief Act, art. 3, § 302 (U. S. Comp. St. § 3078¼ff), relating to proceeding to enforce obligations originating prior to approval of the act and secured by mortgage, trust deed or other security in the nature of a mortgage on property owned by person in military service has no application, in view of subdivision 1, to other obligations named in article 3 such as leases, rental contracts, or contracts for purchase of property which may at vendor's option be rescinded for nonpayment of purchase money installments.—*Id.*

Where vendor brought suit to foreclose his lien against maker of purchase money notes, even if he had made a party to the proceeding maker's grantee, who was in military service, the latter could not recover under Soldiers' and Sailors' Civil Relief Act, § 301 (U. S. Comp. St. § 3078¼f), prior payments of purchase money as damages for vendor's recovery of the property without proceeding under such act, since vendor by lien foreclosure elected to affirm contract and to treat grantee as owner and to assume the position of mortgagee, so that grantee's rights were governed by section 302 (U. S. Comp. St. § 3078¼ff), and not section 301.—*Id.*

Where vendor violated Soldiers' and Sailors' Civil Relief Act, § 302 (U. S. Comp. St. § 3078¼ff), in foreclosing lien on soldier's property because of nonpayment of notes which soldier had guaranteed to pay upon conveyance of property to him by the maker without making soldier a party to the proceedings, soldier's right to damages was not affected by fact that maker was a party, and that soldier's father who was made a party was his agent and in possession, or by the fact that soldier's

brother was a co-owner; the right under the statute being personal to the soldier in view of subdivision 3, and sections 208, 204 (U. S. Comp. St. §§ 3078¼d, 3078¼dd).—*Id.*

In action against defendants who had obtained possession of plaintiff's premises by means of sequestration proceedings without making plaintiff a party in violation of plaintiff's rights under Soldiers' and Sailors' Civil Relief Act (U. S. Comp. St. §§ 3078¼a-3078¼ss), evidence of sequestration proceedings held properly admitted.—*Id.*

## ARREST.

See Criminal Law, ¶369, 371; Homicide, ¶244, 300.

## ARSON.

See Criminal Law, ¶719, 940.

## ASSAULT AND BATTERY.

See Appeal and Error, ¶1004, 1052, 1063; Criminal Law, ¶829, 1087, 1172; Homicide; Indictment and Information, ¶191; Master and Servant, ¶31; Names, ¶16; Rape, ¶16, 59; Trial, ¶250, 252.

### I. CIVIL LIABILITY.

#### (B) Actions.

¶33 (Mo.App.) In action for damages for assault against a married woman, deed to defendant and her husband was inadmissible to show financial status of defendant in assessing damages, since defendant's interest in the property conveyed is not subject to judgment.—*Traw v. Heydt*, 216 S. W. 1009.

In estimating actual damages in an assault and battery case, the ability of the party to pay, his situation in life, or his social standing are not to be considered.—*Id.*

¶43(6) (Mo.App.) An instruction on punitive damages in action for assault and battery, which authorized jury to consider defendant's financial status "in assessing plaintiff's damages," was misleading, in not distinguishing between actual and punitive damages; the financial element entering only into the latter.—*Traw v. Heydt*, 216 S. W. 1009.

### II. CRIMINAL RESPONSIBILITY.

#### (A) Offenses.

¶48 (Tex.Cr.App.) A man's taking hold of a woman without her consent, and in such a way as to cause in her a sense of shame, or a disagreeable emotion of the mind, is sufficient to constitute an assault under Vernon's Ann. Pen. Code 1916, art. 1009, and the slightest degree of force would constitute a battery.—*Poldrack v. State*, 216 S. W. 170.

#### (B) Prosecution and Punishment.

¶91 (Tex.Cr.App.) Evidence that defendant grabbed the alleged injured female with one hand, and put his other hand on her body at or near her privates, accompanying such acts with an insulting proposal to her, if believed by the jury, would justify a verdict of guilty of assault and battery under Vernon's Ann. Pen. Code 1916, art. 1009.—*Poldrack v. State*, 216 S. W. 170.

¶91 (Tex.Cr.App.) In a prosecution for assault, evidence that defendants ordered prosecuting witness to desist in working upon a public road, one having in his possession a large rock and the other a stick, and threatening him with injury if he failed, held to show an offense, under Pen. Code 1911, art. 1008, providing that any attempt to commit a battery, or any threatening gesture showing in itself, or by words accompanying it, an immediate intention coupled with ability to commit a battery, is an "assault."—*Haverbekken v. State*, 216 S. W. 397, 398.



**ASSESSMENT.**

See Drains, ⚡70-90; Highways, ⚡135-148; Municipal Corporations, ⚡450-487; Taxation, ⚡338-421.

**ASSIGNMENTS.**

See Corporations, ⚡661; Dower, ⚡57; Garnishment, ⚡218; Insurance, ⚡90, 205, 587, 602; Specific Performance, ⚡106; Tender, ⚡14; Vendor and Purchaser, ⚡231.

**I. REQUISITES AND VALIDITY.****(B) Mode and Sufficiency of Assignment.**

⚡50(1) (Tex.) Where bridge building contractor, in consideration of execution of contractor's bond, agreed that all payments specified in bridge contract and withheld by the county should be paid to the surety company, and later gave a bank, to secure its advances of moneys used to pay wages of laborers, an order on the county to be paid out of money due on the bridge contract, *held* that each had merely an equitable assignment of money retained by the county.—Hess & Skinner Engineering Co. v. Turney, 216 S. W. 621.

⚡55 (Tex.) Assignments by bridge building contractor to surety on his bond of balance retained by county under bridge contract to secure surety against liability on its bond "in consideration of the execution of said bond" *held* supported by a valuable consideration.—Hess & Skinner Engineering Co. v. Turney, 216 S. W. 621.

**II. OPERATION AND EFFECT.**

⚡85 (Tex.) Where bridge building contractor in consideration of execution of contractor's bond agreed that all payments specified in bridge contract and withheld by the county should be paid to the surety company, and later gave a bank, to secure its advances of moneys used to pay wages of laborers, an order on the county to be paid out of money due on the bridge contract, *held* that each had merely an equitable assignment of money retained by the county, so that the surety company as the elder must prevail.—Hess & Skinner Engineering Co. v. Turney, 216 S. W. 621.

The rule is sound which gives priority in rank to equitable assignments in the order of their dates without regard to notice to the debtor.—Id.

**ASSISTANCE, WRIT OF.**

See Appeal and Error, ⚡1175; Judicial Sales, ⚡51.

**ASSOCIATIONS.**

See Action, ⚡50; Appeal and Error, ⚡1039; Contracts, ⚡10; Evidence, ⚡158; Insurance, ⚡665-819; Judgment, ⚡240; Sales, ⚡1, 23, 172, 179, 417.

⚡20(1) (Tex.Civ.App.) The statute which permits an unincorporated association to sue or be sued in its association name does not undertake to change the legal status of the association or in any way affect the law in so far as it relates to contract, but is intended merely to furnish a convenient method of conducting suits.—Mayhew & Isbell Lumber Co. v. Valley Wells Truck Growers' Ass'n, 216 S. W. 225.

**ASSUMPSIT, ACTION OF.**

See Work and Labor.

**ASSUMPTION OF RISK.**

See Master and Servant, ⚡205-226.

**ATTACHMENT.**

See Garnishment; Subrogation, ⚡3.

**I. NATURE AND GROUNDS.****(A) Nature of Remedy, Causes of Action, and Parties.**

⚡10 (Tex.Civ.App.) Where contingency was to take place at the expiration of the contract, and plaintiff set forth the contract, which showed that defendant had breached contract and rendered it terminated, *held*, that court erred in abating attachment on grounds that it was levied on a contingency, while affidavit stated that defendant was justly indebted.—Faxton v. Trabue, 216 S. W. 399.

**III. PROCEEDINGS TO PROCURE:****(B) Affidavits.**

⚡126 (Tex.Civ.App.) On motion to abate attachment on ground that demand at date of institution of suit was only a contingent one, allegation of affidavit for attachment that debt was due and owing is controlling.—Faxton v. Trabue, 216 S. W. 399.

**VI. PROCEEDINGS TO SUPPORT OR ENFORCE.**

⚡209(4) (Tex.Civ.App.) An attachment lien on land of a nonresident defendant, duly served personally by notice as provided by statute, can be foreclosed, though the defendant was not informed by the nonresident notice served on him that foreclosure was sought.—Lane v. First Nat. Bank, 216 S. W. 490.

**VII. QUASHING, VACATING, DISSOLUTION, OR ABANDONMENT.**

⚡254 (Tex.Civ.App.) A writ of attachment cannot be abated, because allegations of affidavit therefor falsely state causes for the attachment.—Faxton v. Trabue, 216 S. W. 399.

**XI. WRONGFUL ATTACHMENT.**

⚡368 (Tex.Civ.App.) When real or personal property had been levied on by attachment, to which the claimant or owner is not a party, he may resort to his common-law remedy for the damages inflicted by seizure thereunder.—Basham v. Evans, 216 S. W. 446.

**ATTORNEY AND CLIENT.**

See Account Stated, ⚡6, 20; Appeal and Error, ⚡688, 714; Bills and Notes, ⚡126, 534; Chattel Mortgages, ⚡153; Criminal Law, ⚡719, 730, 1171; Divorce, ⚡212, 227; Drains, ⚡90; Executors and Administrators, ⚡216, 435; Insurance, ⚡602; Judgment, ⚡747; Libel and Slander, ⚡9; Mortgages, ⚡206; Municipal Corporations, ⚡978, 980; Principal and Surety, ⚡185; Receivers, ⚡96, 154; Trial, ⚡121-133.

**II. RETAINER AND AUTHORITY.**

⚡71 (Ky.) The defendant in any suit may question by motion supported by affidavit the authority of counsel representing the plaintiff to institute or prosecute the action, and when such an affidavit is filed the court may issue a rule against plaintiff's attorneys of record to show by what authority, if any, they brought suit, and if they fail in responding to the rule to show sufficient authority therefor, the court may dismiss the cause without prejudice.—Commonwealth v. Roberta Coal Co., 216 S. W. 584.

**ATTORNEY GENERAL.**

See Dismissal and Nonsuit, ⚡71.

⚡2 (Ky.) Under Ky. St. § 112-15, subsecs. 1, 5, it is the Attorney General's duty to attend to all litigation and business in which the commonwealth or its officers may be officially interested, and they may not employ or be represented by other counsel at state expense, unless such counsel be appointed by the Governor upon request of the Attorney General, so that suits to escheat property can only be brought

by and in the name of the Attorney General, and a suit not brought by him, or by special counsel duly authorized by him, should be dismissed.—*Commonwealth v. Roberta Coal Co.*, 216 S. W. 584.

If a suit was brought for the state by the Attorney General, that other attorneys not connected with his office joined with him as counsel for the plaintiff would not authorize dismissal of the suit, as by unauthorized counsel, since such a suit would be by the Attorney General, although other counsel not employed in the manner authorized by Ky. St. § 112-15, subsec. 5, should be associated with him, since such statute does not prohibit other counsel from voluntarily serving the state without state expense.—*Id.*

Special counsel employed by the commonwealth under a contract with the Governor, whether the contract be valid or void, where they believe contract was valid, had the right to use the Attorney General's name in any legitimate way in connection with the litigation, and will not be censured for signing his name as relator.—*Id.*

Whether an emergency exists that will warrant employment of special counsel to institute suits to recover property, under Const. § 192, and Ky. St. § 567, as escheated, is to be determined by the Attorney General, and when his request falls within reasonable bounds of Ky. St. § 112-15, the court will not interfere with the employment, if it is legally made by the Governor.—*Id.*

Such emergency must arise in respect to some particularly named suit or proceeding, and does not contemplate the general employment of special counsel to perform general legal services, which in the opinion of the Attorney General might benefit the state, and the request for employment must specify the nature of the suit or proceeding; otherwise the employment will be declared void by the courts.—*Id.*

## AUTOMOBILES.

See Criminal Law, §372, 780, 792; Highways, §173, 184; Interest, §66; Judgment, §256; Larceny, §27; Licenses, §42; Municipal Corporations, §705, 706, 741, 807, 845; Negligence, §92; Partnership, §230; Trial, §296, 351.

## BAIL.

See Corporations, §484; Criminal Law, §1087; Judgment, §17.

## II. IN CRIMINAL PROSECUTIONS.

§48 (Tex.Cr.App.) Where the indictment charged the offense of murder, which is a capital offense on its face, the sheriff is not authorized to fix and take bail himself, and where the sheriff did take bail without authority, the bond is void and cannot be forfeited on scire facias.—*Morrow v. State*, 216 S. W. 1100.

Where defendant, who had been charged in justice court with murder, was remanded to jail without bail and on habeas corpus proceedings was released, *held*, that under Vernon's Ann. Code Cr. Prac. 1916, arts. 216 and 217, the sheriff was not authorized, where defendant was thereafter indicted for murder and arrested on capias, to accept bail, and a bond so accepted was without authority.—*Id.*

§58 (Tex.Cr.App.) A bail bond, reciting that principal stood charged "with offense of selling liquors in violation of the local option law," is not sufficient.—*Saunders v. State*, 216 S. W. 870.

§70 (Tex.Cr.App.) Under Code Cr. Proc. art. 918, as amended by Acts 36th Leg. (1919) p. 23, it is sufficient where the sheriff approves the bond given on appeal from conviction of misdemeanor.—*Howard v. State*, 216 S. W. 168.

§77(1) (Tex.Cr.App.) Where defendant was indicted for murder on June 17th and on June

26th was arrested and released by the sheriff on bail bond, *held* that, where the indictment was found by the grand jury of the district court of Bowie county, the criminal district court of Bowie county, created by Acts 35th Leg. (4th Call. Sess.) c. 28, which went into effect June 26th, is without jurisdiction to adjudicate a forfeiture of the bond taken by the sheriff without authority; the criminal district court having no incumbent for more than two months after the act went into effect.—*Morrow v. State*, 216 S. W. 1100.

§93 (Tex.Cr.App.) A judgment against sureties on bail bond must follow the statute and decree sureties jointly and severally liable, and it is not enough to render judgment only specifically against each surety for the amount stipulated in the bond.—*Saunders v. State*, 216 S. W. 870.

## BAILMENT.

See Animals, §22, 23; Limitation of Actions, §121; Pledges.

§35 (Tex.Civ.App.) Where property is damaged by a third person and the bailee brings an action for damages, the right to recover for damages beyond those suffered by him as bailee or lessee must rest upon the theory that he is the agent of the owner and is suing for his benefit, and, if the third party settles with the owner to the extent, of his interest therein, the bailee can only recover the amount of his own damage.—*Missouri, K. & T. Ry. Co. v. Hunter*, 216 S. W. 1107.

## BANKRUPTCY.

### III. ASSIGNMENT, ADMINISTRATION, AND DISTRIBUTION OF BANKRUPT'S ESTATE.

(B) Assignment, and Title, Rights, and Remedies of Trustee in General.

§141 (Tex.Civ.App.) The federal District Court of Kansas had jurisdiction in a bankruptcy proceeding over land in Texas belonging to the bankrupt.—*Koger v. Clark*, 216 S. W. 434.

(E) Actions by or Against Trustee.

§293(2) (Tex.Civ.App.) The federal District Court of Kansas had jurisdiction in a bankruptcy proceeding over land in Texas belonging to the bankrupt, and could render a decree canceling a preferential deed executed within 4 months before the filing of the petition in bankruptcy.—*Koger v. Clark*, 216 S. W. 434.

§295 (Tex.Civ.App.) In cases of transfers of property by a bankrupt within 4 months before the filing of the petition in bankruptcy, any state court, which would have jurisdiction, if bankruptcy had not intervened, can set aside the transfer.—*Koger v. Clark*, 216 S. W. 434.

## BANKS AND BANKING.

See Bills and Notes, §23; Estoppel, §69; Evidence, §443.

### III. FUNCTIONS AND DEALINGS.

(C) Deposits.

§148(1) (Ark.) Where plaintiff instructed his partner to deposit one-half of the proceeds of a certain cotton crop to plaintiff's credit in defendant bank, and the partner made such deposit, taking a passbook which he delivered to plaintiff, but afterwards, without authority, forged checks and drew out the money, the bank was liable to plaintiff for the money deposited; it not having been paid out on checks properly drawn.—*Robinson v. Security Bank & Trust Co.*, 216 S. W. 717.

§154(9) (Ark.) Where plaintiff instructed his partner to deposit one-half of the proceeds of a certain cotton crop to plaintiff's credit in defendant bank, which the partner did, taking,

a passbook, and delivering it to plaintiff, but subsequently drawing out the money on forged checks, and plaintiff, after having discovered such withdrawal waited eight or nine months before demanding payment from the bank, in an action against the bank for the deposit, evidence held not sufficient to show a ratification by plaintiff of his partner's unlawful act as a matter of law.—*Robinson v. Security Bank & Trust Co.*, 216 S. W. 717.

#### IV. NATIONAL BANKS.

§261(2) (Tex. Civ. App.) That a national bank, through the device of discounting accommodation paper of controlling stockholders of a company, exceeded its legal loaning capacity to such company is no defense to the makers of the accommodation paper when sued on one of their notes, the matter of overloan being solely between national government and bank.—*Goldstein v. Union Nat. Bank of Dallas*, 216 S. W. 409.

§266 (Tex. Civ. App.) Where a national bank agreed with defendants, its vice president, and another controlling stockholder in a company, to which the bank already had lent the legal limit, that deposits made by the company after the bank had discounted defendants' paper, executed for the accommodation of the company, would be applied only in payment of such paper, deposits made pursuant to the agreement were special deposits for a particular purpose, not creating the relation of debtor and creditor between the bank and the company.—*Goldstein v. Union Nat. Bank of Dallas*, 216 S. W. 409.

§269 (Tex. Civ. App.) Where a company solicited its controlling stockholders to execute a demand note to be discounted for its benefit with a national bank, agreeing to make deposits with the bank to be applied solely to payment of the note, to which the bank agreed, and subsequently sufficient deposits were made to pay off the note, though the bank wrongfully applied them to another debt, the bank cannot recover against the accommodation makers on the note, which, in legal contemplation, has been paid.—*Goldstein v. Union Nat. Bank of Dallas*, 216 S. W. 409.

In suit on an accommodation note executed by the controlling stockholders of a company and discounted by a national bank, which paid the proceeds to the company, defendants pleading an agreement whereby subsequent deposits of the company should be applied by the bank solely to extinguishment of the note, it was proper also to plead that a prior note, executed under the same agreement, had been discharged in such manner.—Id.

§280 (Tex. Civ. App.) In suit by a national bank on a note executed for accommodation purposes by controlling stockholders in a company to which the bank had already loaned the legal limit, allegations as to the fact of overloan to the company and the device adopted to enable the bank by discounting defendants' paper to exceed the legal limit held properly pleaded as matter of inducement leading up to the agreement of the bank to apply deposits by the company solely to any accommodation paper.—*Goldstein v. Union Nat. Bank of Dallas*, 216 S. W. 409.

In an action by a national bank on paper executed for the accommodation of a company by two controlling stockholders, defendants, under the allegations of defendants' answer pleading payment and setting up the agreement of the bank to apply subsequent deposits by the company solely to payment of the note, defendants were entitled to introduce in evidence entries made in the bank book of the company by the receiving teller of the bank.—Id.

#### BASTARDS.

See Slaves, §25.

#### BENEFICIAL ASSOCIATIONS.

See Insurance, §665-819.

#### BIDDING.

See Mortgages, §369.

#### BILL OF LADING.

See Limitation of Actions, §24.

#### BILL OF REVIEW.

See Equity, §442.

#### BILLS AND NOTES.

See Appeal and Error, §586, 882, 1050; Banks and Banking, §261, 269, 280; Brokers, §81, 86, 104; Compromise and Settlement, §6; Contracts, §128; Courts, §231; Equity, §72; Evidence, §99, 443, 448; Frauds, Statute of, §18; Homestead, §129; Husband and Wife, §249, 270; Insurance, §602; Judgment, §429, 744; Mortgages, §117, 235; Payment, §82; Pleading, §34; Pledges, §30; Principal and Agent, §105; Sales, §128; Sequestration, §17; Subscriptions, §21; Tender, §14; Usury, §102; Vendor and Purchaser, §261, 284; Venue, §5, 21.

#### I. REQUISITES AND VALIDITY.

(A) Form and Contents of Bills of Exchange, Drafts, Checks, and Orders.

§23 (Ark.) Where dispute between bank and indorser on check cashed by bank was compromised by return of check to indorser in consideration of third party executing check to bank, the third party, under Negotiable Instruments Act, § 29, was liable on his check, on which he had stopped payment, notwithstanding the fact that it was executed as an accommodation.—*First Nat. Bank v. Allen*, 216 S. W. 1039.

(B) Form and Contents of Promissory Notes and Duebills.

§52 (Mo. App.) In an action on promissory note given as a part of purchase price of a store building and secured by trust deed, although the evidence was sufficient to show a novation by which another was accepted in the place of defendants on the note, such defense cannot stand, where the renunciation of rights against defendants was not in writing nor was the note delivered to defendants, as required by Rev. St. 1909, § 10092.—*Engle v. Brown*, 216 S. W. 541.

(C) Execution and Delivery.

§64 (Tex. Civ. App.) Where notes and mortgage for purchase price of engine were delivered by defendant buyer on condition that they should not be effective until plaintiff seller demonstrated engine to defendant's satisfaction, and defendant accepted it in writing, held that notes and mortgage never became effective, where defendant did not accept the engine, but notified plaintiff that he would not do so.—*J. I. Case Threshing Mach. Co. v. Street*, 216 S. W. 426.

#### II. CONSTRUCTION AND OPERATION.

§126 (Mo. App.) Indorsee, suing indorser on note providing for payment of "attorney's fee" "in case suit is brought," could not recover attorney's fee and costs of prior unsuccessful suit against maker, since note confines recovery to a "suit," meaning one suit, and to an "attorney's fee."—*Highleyman v. McDowell Motor Car Co.*, 216 S. W. 52.

#### IV. NEGOTIABILITY AND TRANSFER.

(A) Instruments Negotiable.

§164 (Tex. Com. App.) Notes given as part payment of bonus to railroad and made condi-

tional upon completion of certain grade before certain time were nonnegotiable, and contractors to whom railroad had transferred notes had no greater rights against makers than railroad itself would have enjoyed.—*Wellington Railroad Committee v. Crawford*, 216 S. W. 151.

### V. RIGHTS AND LIABILITIES ON INDORSEMENT OR TRANSFER.

#### (A) Indorsement Before Delivery to or Transfer by Payee.

§266 (Ky.) Where defendant and others signed a note as indorsers for a corporation, *held*, under the pleadings and the evidence in an action for contribution, that an instruction that, unless defendant, who claimed that he signed as surety for the other indorsers, did so at their request, he was jointly liable with them was correct.—*McCulloch v. Field*, 216 S. W. 1071.

In an action by one of several indorsers who had paid more than his pro rata share against another indorser, who claimed that he was a surety, not only for the corporate maker but for the other indorsers, evidence that the note was executed under an agreement that all of the stockholders of certain corporations should be cosureties, etc., was admissible to show the history and origin of the indebtedness.—*Id.*

#### (B) Indorsement for Transfer.

§301 (Mo.App.) Judgment for maker in action by indorsee did not discharge payee indorser from liability to indorsee, under Rev. St. 1909, § 10090, cl. 3, providing that a person secondarily liable on the instrument is discharged by "discharge of a prior party, except when such discharge is had in bankruptcy proceedings," such statute referring to a discharge by some act or neglect of the creditor, and not a discharge by operation of law.—*Highleyman v. McDowell Motor Car Co.*, 216 S. W. 52.

Judgment for maker in action by indorsee did not discharge payee indorser from liability to indorsee under Rev. St. 1909, § 10090, cl. 5, providing that a party secondarily liable on the instrument is discharged by a "release of the principal debtor, unless holder's right of recourse against the party secondarily liable is expressly reserved"; such statute referring to a release by creditor and not by operation of law.—*Id.*

### VIII. ACTIONS.

§443(2) (Mo.) Where a payee indorsed and delivered a note, payee could subsequently, on obtaining possession of the note, have stricken out the indorsement so as to make a proper title to the notes for purposes of suit, but without such possession payee had no such right.—*American Forest Co. v. Hall*, 216 S. W. 740.

Where payee indorsed notes to creditors who held them as collateral, and such creditors consented to payee's suit upon the notes, such consent was not sufficient to authorize payee to sue on the notes so long as such creditors held possession.—*Id.*

In view of Rev. St. 1909, §§ 10002-10004, relating to indorsement of negotiable instruments, and section 10001, making indorsement and delivery constitute a negotiation, where payee lost all title to notes by a general indorsement and delivery to payee's creditors, the notes were unconditionally negotiated, and payee lost all title to them and all right to sue upon them, notwithstanding their face value was in excess of payee's debt to holding creditors.—*Id.*

Where payee's indorsements and delivery of notes placed not only the title but the right to sue thereon in payee's creditors, in the absence of payee having become a trustee of an express trust for such creditors, payee cannot sue thereon, not being the real party in interest, and the loaning of the notes to payee for the purpose of protest did not entitle payee to sue.—*Id.*

§443(4) (Mo.) In an action upon notes, facts as to payee's indorsement and delivery and alleged redelivery *held* not to bring the case within the rule that the assignee of commercial paper may place the same in the hands of assignor and direct him to bring suit, and thus authorize a suit by assignor as trustee of an express trust without joining beneficiaries. Rev. St. 1909, § 1730.—*American Forest Co. v. Hall*, 216 S. W. 740.

§467(2) (Mo.App.) In action on note, petition, alleging that defendant "sold the said note to this plaintiff, and duly assigned same on the back thereof," and that "defendant is liable to this plaintiff as indorser on said note," *held*, as against contention that plaintiff was a mere assignee, to allege that notes were indorsed to plaintiff for value and without notice; the inference being, since no date of indorsement was alleged, that indorsement was before maturity.—*Highleyman v. McDowell Motor Car Co.*, 216 S. W. 52.

§527(1) (Ky.) In action on note executed to plaintiff by defendant, principal on prior note, defense being that note was executed for stock, which, with other stock owned by defendant and turned over to plaintiff, was accepted by plaintiff in full satisfaction of the note, verdict for defendant *held* flagrantly against the evidence.—*Ewing v. McClanahan*, 216 S. W. 592.

§534 (Mo.App.) In indorsee's action on note against indorser, attorney's fee, paid by indorsee in unsuccessful suit against maker, cannot be recovered on strength of agreement whereby indorsee, who had been made party to former action, had been dismissed; the instant action being on note and not such agreement.—*Highleyman v. McDowell Motor Car Co.*, 216 S. W. 52.

### BLUE PRINTS.

See Appeal and Error, §524.

### BONDS.

See Appeal and Error, §19, 374, 803, 1127; Bail, §70; Bridges, §20; Constitutional Law, §281, 296; Corporations, §484; Deeds, §100; Eminent Domain, §75; Guardian and Ward, §15; Highways, §1; Husband and Wife, §273, 276; Inspection, §4; Mortgages, §524; Municipal Corporations, §347; Pawnbrokers and Money Lenders, §2; Principal and Surety, §6, 28, 78, 82; Schools and School Districts, §84; Sequestration, §15; Statutes, §75, 283; Subrogation, §23.

### BONUS.

See Bills and Notes, §164.

### BOUNDARIES.

See Adverse Possession, §7, 66, 80; Animals, §50; Deeds, §114; Taxation, §421.

### I. DESCRIPTION.

§3(8) (Mo.) Section lines and corners in a government survey are fixed and determined, whether marked by visible monuments or not.—*Eversmeyer v. Broyles*, 216 S. W. 317.

### II. EVIDENCE, ASCERTAINMENT, AND ESTABLISHMENT.

§32 (Tex.Com.App.) In trespass to try title to land in Lacey league, defendants, claiming part of the land through adverse possession, did not limit their claim to the Moses Hill survey by generally describing the land as being in the latter survey in their pleadings, where they also described the land by metes and bounds.—*Tucker v. Angelina County Lumber Co.*, 216 S. W. 149.

§37(1) (Tex.Civ.App.) Where a deed called for 640 acres, located by course and distance,

For cases in Dec.Dig. & Am.Dig. Key-No.Series & Indexes see same topic and KEY-NUMBER

but no marks were called for or identified, in a suit to recover an excess which plaintiff grantee supposed to be contained in the tract bought as shown by certain marked corners, with reference to which he purchased, evidence held not sufficient to show an estoppel upon grantor to deny the corners as claimed by plaintiff.—Buie v. Miller, 216 S. W. 630.

⚡40(3) (Tex.Civ.App.) Acquiescence in boundary line is a question of fact for the jury.—Buie v. Miller, 216 S. W. 630.

⚡48(4) (Tex.Civ.App.) While acquiescence in a boundary line raises a strong presumption that the line is correct, acquiescence is a question of fact for the jury, and, where there is no room to doubt the true location, a mere acquiescence in another line will not support a verdict based thereon.—Buie v. Miller, 216 S. W. 630.

## BREACH OF THE PEACE.

⚡1 (Mo.App.) Breach of the peace includes all violations of public peace or order and acts tending to disturbance thereof, and may consist of such acts as tend to excite violent resentment; the use of improper language or the making of an indecent proposal to a woman may constitute a breach of the peace, amounting to a violation of an ordinance of a municipality, which was authorized to enact ordinances to prohibit disturbances of the peace.—City of Plattsburg v. Smarr, 216 S. W. 538.

## BRIDGES.

See Assignments, ⚡50, 55, 85; Highways, ⚡184; Subrogation, ⚡23; Taxation, ⚡37, 40, 47.

## I. ESTABLISHMENT, CONSTRUCTION, AND MAINTENANCE.

⚡20(2) (Tex.) That bridge company did not require one-half of the cost of steel furnished to contractor to be paid in cash at point of shipment, when its contract with contractor would have entitled it to such cash payment, and, when it held an assignment of the contract from contractor to secure purchase price of steel, consented to application of money due under construction contract to payment of claims of local merchants and laborers for which surety was liable on bond, did not change the contract guaranteed by the surety on contractor's bond, nor relieve surety from liability to the bridge company.—Hess & Skinner Engineering Co. v. Turney, 216 S. W. 621.

Bank which advanced money to bridge building contractor to pay wages of laborers and later secured an order on county which retained balance due under bridge contract held not protected by contractor's bond as to the debt.—Id.

## BRIEFS.

See Appeal and Error, ⚡770.

## BROKERS.

See Appeal and Error, ⚡586, 1033, 1050, 1062; Evidence, ⚡317; Executors and Administrators, ⚡221; Pawnbrokers and Money Lenders; Pleading, ⚡248; Trial, ⚡273, 350, 351, 352.

## IV. COMPENSATION AND LIEN.

⚡46 (Mo.App.) Where land was not sold to procured purchaser by brokers' principal, but was sold to third party and by third party to procured purchaser, brokers cannot recover commission without showing that brokers' principal, after having actually sold land to procured purchaser, fraudulently conveyed it to third party as a mere blind to deprive brokers of their commission.—Lorton v. Trail, 216 S. W. 54.

216 S.W.—72

⚡49(2) (Tex.Civ.App.) A mere option to buy was not a contract of purchase, procurement of which of itself entitled the broker to his commission, even though the vendor failed to enforce it.—Dodge v. Lacey, 216 S. W. 400.

⚡53 (Mo.App.) Before an agent is entitled to his commission, his endeavors must have been the procuring cause of the sale.—Lorton v. Trail, 216 S. W. 54.

⚡53 (Mo.App.) A broker is entitled to his commission, where he was the means of finding a purchaser and bringing about negotiations leading up to the sale of land, though he was not present or partaking in the actual sale.—Hodges v. Ramsey, 216 S. W. 568.

⚡56(3) (Mo.App.) Where broker took a prospective buyer to his principal, and the prospective buyer decided that he would not purchase and thereafter approached the principal and entered into an agreement with him to furnish a purchaser, and returned the next day with a friend as purchaser, and disclosed that he had been bargaining for this friend instead of himself from the beginning, and a sale was made, the broker was entitled to his commission.—Hodges v. Ramsey, 216 S. W. 568.

⚡57(2) (Tex.Civ.App.) A real estate broker having furnished the purchaser, ready, able, and willing to buy and on the proposed terms, and who was accepted by the seller, was entitled to recover his commission, although the sale was finally made by the seller on terms satisfactory to himself and different from those originally agreed upon between purchaser and broker, and particularly where the purchaser insisted that he bought through the broker, and must close the deal through him.—Varn v. Moeller, 216 S. W. 234.

⚡61(2) (Mo.) In an action to cancel a note and deed of trust given a broker to procure a loan on farm land, where the application signed by the plaintiff, the prospective borrower, required him to furnish an abstract showing perfect title, to the satisfaction of the prospective lender, held that objections by lender to the abstract tendered were reasonable and in good faith, and plaintiff was bound to supply such deficiencies before he was entitled to a return of the commission note, etc. (Per Goode and Graves, JJ.)—Crews v. Lombard, 216 S. W. 512.

⚡65(1) (Mo.App.) A broker who was the means of finding a purchaser and bringing about negotiations leading up to a sale of land was entitled to recover compensation, although he told his principal that he would not claim his commission; such statement having been made after the sale had in effect been closed, and the principal not having been prejudiced or led to act differently than he would otherwise have acted by reason of such statement.—Hodges v. Ramsey, 216 S. W. 568.

## V. ACTIONS FOR COMPENSATION.

⚡82(4) (Mo.App.) Brokers suing for commission, having pleaded a contract, could not recover on another contract, entered into subsequently to that pleaded.—Lorton v. Trail, 216 S. W. 54.

⚡86(3) (Mo.) In an action by a prospective borrower to cancel a note given as commission to a loanbroker, evidence held to show that the borrower did not comply with his agreement that the land should have access to the public road, while the lender procured by the broker was ready, able, and willing to make the loan whenever the borrower would comply with the requirements. (Per Goode and Graves, JJ.)—Crews v. Lombard, 216 S. W. 512.

⚡86(5) (Mo.) In an action by a prospective borrower to cancel a note given as commission to a loanbroker, evidence held to show that the lender procured by the broker was ready, able,

and willing to make the loan whenever the borrower would comply with the requirements. (Per Goode and Graves, JJ.)—*Crews v. Lombard*, 216 S. W. 512.

—88(3) (Mo.App.) In brokers' action for commission against owner, who instead of selling land to procured purchaser had sold it to third party, who in turn sold it to such procured purchaser, evidence held insufficient to warrant submission to jury of question of whether owner fraudulently sold land to third party as blind to deprive brokers of commissions.—*Lorton v. Trail*, 216 S. W. 54.

—88(3) (Tex.Civ.App.) Question of whether real estate broker, suing for commission, was procuring cause of sale, held for jury.—*Moye v. Park*, 216 S. W. 205.

## VI. RIGHTS, POWERS, AND LIABILITIES AS TO THIRD PERSONS.

—104 (Mo.App.) Where real estate broker representing payee negotiated loan secured by a deed of trust on maker's real estate, and thereafter collected interest on note for payee and granted an extension, which payee ratified, and where broker and payee had frequent business dealings with each other, payee frequently being in broker's office, payee will be estopped from denying, four years after payment of note and release of deed of trust—upon margin of record obtained by production of forged note, where during such time he had made no effort to ascertain if note had been paid, or who was owing note and owning property, though he knew property had been sold, that broker had authority to collect principal.—*Thornhill v. Masucci*, 216 S. W. 819.

## BUILDING CONTRACTS.

See Contracts, —159.

## BULLS.

See Animals, —70, 74.

## BURGLARY.

See Criminal Law, —369, 507, 537, 780, 792, 815, 968, 1144, 1172; Indictment and Information, —87.

## I. OFFENSES AND RESPONSIBILITY THEREFOR.

—4 (Tex.Cr.App.) Under Pen. Code 1911, art. 1314, defining private residence as any building or room occupied and actually used by any person or persons as a place of residence, a kitchen about 16 feet from bedrooms which were used by the family and connected therewith by plank walk, used both as a kitchen and dining room, must be deemed a part of a private residence.—*Hornbuckle v. State*, 216 S. W. 880.

—6 (Tex.Cr.App.) Where owner left his dwelling closed up and went to a distant state, leaving his household goods stored in one room of his house, his stock in the pasture, feed in the crib, etc., the house was "occupied" within the meaning of the burglary statute; the actual corporeal presence of the alleged occupant not being necessary.—*Davidson v. State*, 216 S. W. 624.

—6 (Tex.Cr.App.) It is not necessary that there should be some one actually living in the house in order to constitute "occupancy."—*Carneal v. State*, 216 S. W. 626.

—9(3) (Tex.Cr.App.) Burglary may be committed by entering a room which is closed, although the outer doors of the house are open.—*Davidson v. State*, 216 S. W. 624.

—16 (Ark.) One who stayed outside of building and watched while his accomplice entered the building and carried away the stolen goods was guilty of burglary.—*Bartlett v. State*, 216 S. W. 33.

## II. PROSECUTION AND PUNISHMENT.

—22 (Tex.Cr.App.) When one leaves the state and asks another to look after his house and property, an indictment may allege ownership in the one left to care for the house.—*Davidson v. State*, 216 S. W. 624.

—26 (Tex.Cr.App.) Under an indictment charging an attempt to enter a private residence with intent to commit the crime of theft, both allegation and proof of intent as to theft are necessary.—*Freeman v. State*, 216 S. W. 878.

—28(2) (Tex.Cr.App.) Under an indictment charging an attempt to enter a private residence with intent to commit the crime of theft, both allegation and proof of intent as to theft is necessary.—*Freeman v. State*, 216 S. W. 878.

—28(6) (Ark.) In a prosecution for burglary, where proof showed that building was owned by an improvement district, an entity capable of owning or possessing property, a conviction was sustained, although the indictment described the improvement district as a corporation, and the evidence failed to show that it was a corporation.—*Long v. State*, 216 S. W. 306.

—38 (Tex.Cr.App.) In a prosecution for burglary, there was no error in permitting proof that accused was in possession of a rope stolen from an outhouse at the same time the property described in the indictment was taken from the house.—*Carneal v. State*, 216 S. W. 626.

—41(6) (Ark.) In a prosecution for burglary, evidence held sufficient to connect defendant with the crime.—*Long v. State*, 216 S. W. 306.

—41(10) (Tex.Cr.App.) Evidence that owner of residence, who died previous to trial of indictment charging attempt to enter private residence with intent to commit theft, was notified by his sister that a man was on the porch trying to pry off a screen from window opposite her room, and that he called the police, is sufficient to show his want of consent.—*Freeman v. State*, 216 S. W. 878.

Evidence that accused climbed the porch of a private residence, and while attempting to pry off the screen on a window the occupant of the room opposite screamed and accused ran away, is not sufficient to convict under indictment charging, under Pen. Code 1911, art. 1305, an attempt to enter a private residence with intent to commit theft.—Id.

## CANCELLATION OF INSTRUMENTS.

See Appeal and Error, —586; Brokers, —61, 86; Corporations, —83; Insurance, —247.

## CARRIERS.

See Appeal and Error, —1068, 1177; Constitutional Law, —299; Damages, —131; Evidence, —6, 20, 43, 383, 471; Frauds, Statute of, —45; Limitation of Actions, —24, 127; Municipal Corporations, —706, 706; Negligence, —92; Railroads, —5½; Trial, —240, 260, 351.

## I. CONTROL AND REGULATION OF COMMON CARRIERS.

### (A) In General.

—13(1) (Mo.App.) It was unlawful for a carrier to charge or for a consignee to pay any less than the lawful rate published pursuant to Act June 29, 1906, § 2 (U. S. Comp. St. § 8569); neither rebates, concessions, or other deviations from such approved and published tariff rates being allowed, in view of Act Feb. 19, 1903 (U. S. Comp. St. §§ 8597-8599).—*Mobile & O. R. Co. v. Laclede Lumber Co.*, 216 S. W. 798.

A consignee of an interstate shipment is charged with knowledge of the legal published tariff rates, and that rates fixed in a schedule of rates filed and published under acts of Con-

For cases in Dec.Dig. & Am.Dig. Key-No.Series & Indexes see same topic and KEY-NUMBER

gress are the only lawful rates; all persons being charged with knowledge of the law.—Id.

(B) Interstate and International Transportation.

☞30 (Mo.App.) When a railroad's freight rate has been filed for the required length of time with the Interstate Commerce Commission, and authorized and adopted by that commission, it becomes effective, though not filed with the station agents or posted in the different stations.—Bush v. Miller, 216 S. W. 989.

If a railroad violated the law with reference to publication and posting of a new tariff at stations affected, such violation did not nullify the rate or tariff as approved by the Interstate Commerce Commission after filing with it, but merely subjected the railroad to the penalty provided by the Interstate Commerce Act.—Id.

## II. CARRIAGE OF GOODS.

(C) Custody and Control of Goods.

☞72 (Ark.) Title to goods delivered to carrier remained in consignor, where there had been no sale to consignee.—Southern Express Co. v. Freeze, 216 S. W. 303.

(D) Transportation and Delivery by Carrier.

☞82 (Ark.) Carrier should have delivered shipment to consignee only, where there was nothing about shipment to indicate that a party other than the consignee had the right to receive it.—Southern Express Co. v. Freeze, 216 S. W. 303.

☞94(3) (Ark.) In action against express company for wrongful delivery, evidence held insufficient to constitute person to whom shipment was delivered an agent for consignee to receive shipments without consignee's knowledge or consent.—Southern Express Co. v. Freeze, 216 S. W. 303.

(E) Delay in Transportation or Delivery.

☞104 (Mo.App.) In an action against an express company for delay in delivery of a shipment of eggs, evidence held insufficient to show that the delay was caused by giving preference to governmental shipments.—Edwards v. American Ry. Express Co., 216 S. W. 781.

In an action against an express company for damages for delay in delivery of shipment of eggs which the shipper asserted resulted from a fall in market, evidence held not to conclusively show that the broker to whom the eggs were assigned by promptness could have obtained the same price as had the shipment been delivered seasonably and thus avoided the fall in market.—Id.

(F) Loss of or Injury to Goods.

☞134 (Ark.) Where a shipper introduced evidence tending to show that cotton seed weighed a certain amount when loaded for shipment, but also showed a smaller weight secured at destination before delivery to the consignee, held, that there was a conflict as to the weight of the cotton seed shipped supporting a directed verdict for defendant.—Oil Trough Gin Co. v. Director General of Railroads, 216 S. W. 310.

(J) Charges and Liens.

☞194 (Mo.App.) The consignee, and not the consignor, is prima facie liable for the payment of undercharges of freight.—Mobile & O. R. Co. v. Laclede Lumber Co., 216 S. W. 798.

There need not be an express promise on his part to pay freight charges or an implied promise arising from his acts in inducing delivery to him without payment of the charges to render a consignee liable for freight charges; the mere acceptance and removal of the goods by the consignee with knowledge that the carrier is giving up his lien for his charges being alone sufficient to create an obligation to pay such charges.—Id.

Where the consignor has agreed to deliver goods to the consignee f. o. b. at the place of destination, and the consignee has paid freight rates for the carriage of the same less than those fixed by law, the consignee is liable for the difference between the amount paid and the amount fixed by law, and it is immaterial that the consignor has become insolvent.—Id.

## III. CARRIAGE OF LIVE STOCK.

☞211 (Tex.Civ.App.) Where railroad's agents, knowing that train was delayed, refused to permit shipper to unload stock for feed and water, and where because of such refusal the stock stood in cars at certain station for about 17 hours without water, the railroad was negligent, even though the delay was unavoidable.—Kansas City, M. & O. Ry. Co. of Texas v. Cliett, 216 S. W. 682.

☞215(1) (Tex.Civ.App.) Where injury to live stock is produced by negligence of the carrier concurring with another cause from which it is exempt from liability by law, as the act of God, or by contract, and there is no negligence on the part of the shipper contributing to such injury, the carrier is liable in damages for its full amount.—Gulf, C. & S. F. Ry. Co. v. Culwell, 216 S. W. 457.

If part of the injury to a shipment of horses arose solely from the shipment being in a box car, and part solely from the condition of the shipping pens, the risk from the use of a box car being assumed by the shipper, while the improper condition of the pens was negligence of the railroad for which it was liable, the damage from each cause should be apportioned, and the shipper given recovery only for the part caused by the condition of the pens.—Id.

☞215(2) (Tex.Civ.App.) A railroad company is under duty to exercise ordinary care to provide suitable pens for loading and unloading live stock; and where horses to be shipped were overheated in a "cutting out" process made necessary by the railroad's negligence in permitting water troughs to overflow, rendering the pen muddy, such road was liable for consequent injuries to the horses in transit.—Gulf, C. & S. F. Ry. Co. v. Culwell, 216 S. W. 457.

☞228(5) (Tex.Civ.App.) Evidence held insufficient to show that defendant railroad was negligent in failing properly to ventilate the box car in which plaintiff's horses were shipped because it failed to nail strips across the open north door of the car through which the horses were loaded, but instead shut the door.—Gulf, C. & S. F. Ry. Co. v. Culwell, 216 S. W. 457.

☞228(5) (Tex.Civ.App.) In live stock shipper's action against railroad to recover charge for extra feed necessitated by railroad keeping stock confined in cars pending delay in transportation, evidence held insufficient to show that the feed was an extra feed, or that the charge was a reasonable charge for the feed.—Kansas City, M. & O. Ry. Co. of Texas v. Cliett, 216 S. W. 682.

In action for damages from shrinkage in live stock because of negligence of railroad in keeping stock confined in cars without water pending delay in transportation, evidence held not to justify finding of an increased market value during the delay.—Id.

## IV. CARRIAGE OF PASSENGERS.

(C) Performance of Contract of Transportation.

☞271 (Tex.Civ.App.) A railroad company has the right to make reasonable rules and regulations for the operation of its trains, and to provide schedules and determine at what stations passenger trains shall stop, and it is the duty of a person proposing to become a passenger to ascertain before boarding a train whether it stops at his destination, and he cannot recover damages for failure of the conductor to stop where the train was not sched-



uled.—Gulf, C. & S. F. Ry. Co. v. Sanderson, 216 S. W. 286.

Where, when plaintiff requested the conductor to stop the train at a station at which it was not scheduled to stop, the conductor informed him that he was riding on a stock pass, and that he would not stop the train, and plaintiff, while the train was stopped at an intermediate station, procured a ticket to the station at which he desired to alight, *held* that, as the ticket notified him the train in question did not stop there, the conductor was justified in refusing to stop the train, though plaintiff had procured such ticket.—Id.

#### (D) Personal Injuries.

⚡283(2) (Tex.) A carrier is liable for its servant's violation of its duty to protect a passenger in all cases, and also in cases where the servant's own act, even though beyond the scope of his authority, as a conductor's act in exhibiting an automatic pistol, injures the passenger.—Texas Midland R. R. v. Monroe, 216 S. W. 388.

⚡286(4) (Ark.) It is the duty of a railroad company to use ordinary care to provide passengers with a safe and convenient method of ingress and egress to and from its cars, and the company is liable for damages by reason of neglect of such duty.—Yazoo & M. V. R. Co. v. Hill, 216 S. W. 1054.

⚡303(8) (Tex.Civ.App.) Ordinarily a carrier is not burdened with the duty of extending personal assistance to a passenger alighting from a train.—Chicago, R. I. & G. Ry. Co. v. Wisdom, 216 S. W. 241.

Employés of a carrier were not negligent in failing to assist a healthy young woman, carrying a small traveling bag, to alight from a train, where she did not request assistance and the step was in good order, except that rubber covering was worn smooth.—Id.

⚡304(3) (Tex.) A railroad company's duty to a passenger's escort alighting from a moving train and falling on its track used by a switch engine does not arise from its license to pedestrians to use a foot path in crossing its track, but its operatives owe him the duty to use ordinary care to discover his presence and to avoid injuring him, and failure to do so is negligence.—St. Louis Southwestern Ry. Co. of Texas v. Watts, 216 S. W. 391.

⚡314(2) (Mo.App.) Second amended petition, alleging relation of passenger and carrier, and injury of plaintiff in collision caused by negligence of defendant, in general terms, sufficiently alleged defendant's negligence, in view of presumption arising from fact of collision.—Hoover v. St. Louis Electric Terminal Ry. Co., 216 S. W. 984.

⚡318(2) (Ark.) While custom of others under like conditions was evidence tending to show that defendant railroad was not negligent in providing a safe and suitable place for the passage of its passengers from its coaches to a transfer boat, it was not conclusive evidence of that fact.—Yazoo & M. V. R. Co. v. Hill, 216 S. W. 1054.

⚡318(9) (Tex.Civ.App.) In an action by a passenger who fell while alighting from a train, evidence *held* insufficient to sustain a finding that slippery condition of steps was proximate cause of fall.—Chicago, R. I. & G. Ry. Co. v. Wisdom, 216 S. W. 241.

Where it was as reasonable to conclude from the evidence that a passenger fell while alighting by reason of her three-inch heel catching on the edge of the steps as that she slipped because of smooth condition of the steps, verdict in her favor cannot be sustained.—Id.

⚡320(24) (Ky.) In an action against a railroad for injuries to a girl passenger who got a hot cinder in her eye while passing through a tunnel, the issue of negligence *held* for the jury.—Lexington & E. Ry. Co. v. Robinson, 216 S. W. 86.

⚡320(28) (Ark.) In an action by plaintiff for damages for the death of her husband, caused by his attempting to jump from a stage plank provided by the defendant railroad for him and other passengers being transferred from coaches to transfer boat, which was to carry them across river, *held*, that question of negligence was for the jury.—Yazoo & M. V. R. Co. v. Hill, 216 S. W. 1054.

⚡320(30) (Tex.) In an action against a railroad for injuries to a woman passenger shot during an altercation between two other negro passengers, whether any negligence of the railroad, in failing to eject from the car the aggressor of such other passengers, was the proximate cause of injury to plaintiff from a shot fired in self-defense by the attacked one of the fighting passengers, *held* a question for the jury.—Galveston, H. & S. A. Ry. Co. v. Bell, 216 S. W. 390.

#### (E) Contributory Negligence of Person Injured.

⚡338 (Ark.) Where a passenger is suddenly confronted by imminent danger, he cannot reasonably be expected to calculate chances or to deliberate upon the means of escape, and, if he acts as a man of ordinary prudence placed in similar circumstances, and in doing so makes an effort to escape injury, and is injured, the carrier is responsible for damages.—Yazoo & M. V. R. Co. v. Hill, 216 S. W. 1054.

⚡347(1) (Tex.) In an action against a railroad for injuries to a passenger when its conductor exhibited an automatic pistol, issue of contributory negligence *held* for the jury, under evidence tending to show that the conductor's action was induced by plaintiff passenger's request.—Texas Midland R. R. v. Monroe, 216 S. W. 388.

⚡347(9) (Ark.) In an action by plaintiff for damages for the death of her husband, caused by his attempting to jump from a stage plank provided by the defendant railroad for him and other passengers being transferred from coaches to transfer boat, question of contributory negligence *held* for the jury.—Yazoo & M. V. R. Co. v. Hill, 216 S. W. 1054.

⚡347(9) (Tex.) Contributory negligence of one run over by a switch engine while on the track on which he had fallen in alighting from a train which he had boarded as a passenger's escort *held* a question for the jury.—St. Louis Southwestern Ry. Co. of Texas v. Watts, 216 S. W. 391.

⚡347(15) (Ark.) That result showed that deceased, whose death resulted from injury caused by his attempt, when emergency arose, to jump from stage plank to transfer boat provided by defendant company for him and other passengers could have escaped mortal injury by jumping on the sand, did not make his act negligent as a matter of law.—Yazoo & M. V. R. Co. v. Hill, 216 S. W. 1054.

### CATTLE TICK.

See Animals, ⚡34.

### CENSUS.

See Schools and School Districts, ⚡48.

### CERTIFICATE.

See Criminal Law, ⚡1092.

### CERTIORARI.

See Courts, ⚡231; Justices of the Peace, ⚡174, 208.

### II. PROCEEDINGS AND DETERMINATION.

⚡42(4) (Mo.) On certiorari to quash the opinion and judgment of a Court of Appeals as in conflict with previous decisions of the Supreme Court, relator assumes the burden to point out



For cases in Dec.Dig. & Am.Dig. Key-No.Series & Indexes see same topic and KEY-NUMBER

previous opinions of the Supreme Court impugned by the alleged conflicting decision of the Court of Appeals.—State ex rel. Kansas City Theological Seminary v. Ellison, 216 S. W. 967.

## CHAMPERTY AND MAINTENANCE.

See Appeal and Error, ¶1068.

¶7(2) (Ky.) Father's mineral deed was not champertous as to son, to whom father and his grantors, who had conveyed land to father by improperly certified and recorded deed, subsequently jointly executed deed, where son lived on land with father, and there was nothing to justify conclusion that his possession was hostile to father.—Virginia Iron, Coal & Coke Co. v. Combs, 216 S. W. 846.

## CHANCERY.

See Equity.

## CHARACTER.

See Criminal Law, ¶982; Malicious Prosecution, ¶59, 63.

## CHattel MORTGAGES.

See Appeal and Error, ¶1106; Sales, ¶284; Sequestration, ¶17.

### I. REQUISITES AND VALIDITY.

#### (B) Form and Contents of Instruments.

¶43 (Tex.Civ.App.) A note reciting the consideration to be the sale of certain personal property and certain crops to be raised on a designated farm, and that title was not to pass from the payee until payment in full, held to constitute a chattel mortgage under Rev. St. 1911, art. 5654, when recorded under article 5655, as the recitation of reservation of title might be treated as surplusage.—Fourmentin v. Scott, 216 S. W. 901.

No particular form is necessary to constitute a mortgage a chattel mortgage if it fairly indicates the creation of a lien specifying the debt and the property on which it rests, and when it is so drawn that a person reading cannot understand it otherwise than as a lien on the property described, and where it has been properly registered, it may be received in evidence as a mortgage.—Id.

### II. FILING, RECORDING, AND REGISTRATION.

#### (A) Original.

¶84 (Mo.App.) Conveyances, including chattel mortgages, are good between the parties, regardless of any recording.—Emerson-Brantingham Implement Co. v. Rogers, 216 S. W. 994.

¶90 (Mo.App.) Recorder's failure to make a proper index of chattel mortgage, as required by Rev. St. 1909, §§ 2861, 10384, 10387, did not affect validity of mortgage.—Emerson-Brantingham Implement Co. v. Rogers, 216 S. W. 994.

Recording of chattel mortgage in book for recording of miscellaneous conveyances affecting real estate, instead of in separate chattel mortgage book, as required by Rev. St. 1909, § 10383, through neglect or oversight of recorder, did not affect validity of mortgage or the imparting of notice under section 2861.—Id.

### III. CONSTRUCTION AND OPERATION.

#### (D) Lien and Priority.

¶139 (Mo.App.) Where the purchaser of chattels bought under a false name, giving a note and mortgage, and after obtaining possession transferred the property by chattel mortgage to innocent persons, the seller was entitled to judgment in replevin against such transferees of the fraudulent buyer.—Windle v. Citizens' Nat. Bank, 216 S. W. 1023.

¶150(1) (Mo.App.) A mortgage of personalty made by the owner in a fictitious name and

placed on record is not constructive notice to one dealing with the owner in his true name.—Windle v. Citizens' Nat. Bank, 216 S. W. 1020.

Where horses and harnesses were sold to a person under a false name, and mortgages taken back by the sellers in the same name, such a mortgage on record is constructive notice to a person dealing with the buyer under such name.—Id.

¶153 (Mo.App.) If by reason of defective recording, purchaser acquires title free from the mortgage lien, he could convey such unincumbered title, though at time of last conveyance the record of the mortgage was perfect, and imparted notice.—Emerson-Brantingham Implement Co. v. Rogers, 216 S. W. 994.

Lawyer who procured bill of sale from mortgagor for purpose of enabling him to defend against the collection of the notes and mortgage, under agreement to share equally with mortgagor whatever he could save out of the property, was not an innocent purchaser, or any kind of purchaser, but was merely the agent and attorney of mortgagor.—Id.

An alleged purchaser is not entitled to the protection of the recording act, unless he has parted with something of value.—Id.

¶155 (Mo.App.) Where chattel mortgage is void under Rev. St. 1909, § 2861, making chattel mortgages not recorded void as to third parties, where mortgagor retains possession, purchaser takes a clear title, though he has actual knowledge of the unrecorded mortgage, the parties being in pari delicto, since the statute regards the party failing to record mortgage as a wrongdoer, not to be protected against purchaser with actual notice.—Emerson-Brantingham Implement Co. v. Rogers, 216 S. W. 994.

Chattel mortgage, recorded in wrong book, with no index, even if it should be considered void as against innocent purchaser, was valid as against purchaser with actual notice, who did not, until after purchase, discover defect in recordation, where mortgagee had done his duty in filing instrument for record and paying recording fee.—Id.

## CHATELS REAL.

See Taxation, ¶347.

## CHECKS.

See Compromise and Settlement, ¶6.

## CHILDREN.

See Habeas Corpus, ¶3, 46, 85; Highways, ¶184; Infants; Negligence, ¶136; Parent and Child.

## CINDERS.

See Carriers, ¶320.

## CIRCUMSTANTIAL EVIDENCE.

See Principal and Agent, ¶23; Railroads, ¶397.

## CITIES.

See Municipal Corporations.

## CITY MANAGER.

See Municipal Corporations, ¶123, 124; Statutes, ¶64.

## CIVIL RELIEF ACT.

See Army and Navy, ¶34.

## CLOSETS.

See Railroads, ¶254.

## COLORED PERSONS.

See Criminal Law, ¶730; Schools and School Districts, ¶13, 25, 90, 103.

## COMMERCE.

See Carriers, ¶13.

### II. SUBJECTS OF REGULATION.

¶40(1) (Ark.) A transaction between a foreign corporation and a dealer in the state, whereby the corporation undertook to carry on for the dealer's benefit what was designated as a "trade campaign," the amount of compensation to be received by the corporation being dependent on the amount of increase in the dealer's sale, constituted the doing of business within the state, and not interstate commerce, although the sale of certain articles of merchandise, as premiums, was an incident.—Dean v. Caldwell, 216 S. W. 31.

### III. MEANS AND METHODS OF REGULATION.

¶72 (Mo.) Assessment and taxation by the state board of equalization, under Rev. St. 1909, §§ 11551, 11552, of thirty-six hundredths of a mile of railroad on a bridge between Missouri and Illinois, lying wholly in Missouri, and owned and operated by an electric railway, as well as money on deposit in banks, the franchise of operating its road, etc., held not to impose a direct burden on interstate commerce, in violation of Const. U. S. art. 1, § 8.—State ex rel. Hagerman v. St. Louis & E. St. L. Electric Ry. Co., 216 S. W. 763.

## COMMERCIAL PAPER.

See Bills and Notes.

## COMMISSIONERS.

See Highways, ¶71; Mandamus, ¶10; Public Service Commissions.

## COMMON LAW.

See Contracts, ¶116.

## COMMUNITY PROPERTY.

See Husband and Wife, ¶249-276.

## COMPETITION.

See Mortgages, ¶529.

## COMPOUNDING FELONY.

See Deeds, ¶73.

## COMPROMISE AND SETTLEMENT.

See Appeal and Error, ¶19, 781, 1127; Bills and Notes, ¶23.

¶6(2) (Ark.) Transferee of \$50 check, who received and disposed of check as one for 50 cents, was liable to drawee bank, which had cashed check without drawer being a depositor therein, where transferee and bank had settled their dispute by bank surrendering check to transferee for another check to bank drawn by third party as an accommodation party, though third party subsequently stopped payment on his check; the compromise being a sufficient consideration to make transferee liable, notwithstanding stopping of payment on third party's check.—First Nat. Bank v. Allen, 216 S. W. 1039.

¶6(4) (Ark.) The compromise of a disputed claim furnishes sufficient consideration to uphold the terms of a compromise, even though the asserted claim is without merit and could not have been sustained in the courts.—First Nat. Bank v. Allen, 216 S. W. 1039.

¶23(3) (Ky.) In suit by a partnership to recover overpayments of money on loans made by a decedent to the firm to finance its business, in view of a receipt of some years back, stating that on settlement in full for money furnished the partnership business the firm found a balance due decedent of \$97.75, the

trial court properly confined the right of the firm to recover to a period subsequent to the receipt.—Wilson v. McCullough Bros., 216 S. W. 74.

## CONDEMNATION.

See Eminent Domain.

## CONFLICT OF LAWS.

See Guardian and Ward, ¶15.

## CONSPIRACY.

See Criminal Law, ¶59, 761, 763, 764, 772; Homicide, ¶109; Indictment and Information, ¶191.

### II. CRIMINAL RESPONSIBILITY.

#### (A) Offenses.

¶27 (Tex. Cr. App.) The offense of conspiracy to commit murder having been complete at the time of entering into the conspiracy, it was an independent offense for which the parties could be prosecuted and punished though the offense contemplated was not consummated.—King v. State, 216 S. W. 1091.

#### (B) Prosecution and Punishment.

¶47 (Tex. Cr. App.) In a prosecution for conspiracy to commit murder, evidence held not to show a positive agreement, as required by the Penal Code, to commit the offense of murder upon the husband of a woman infatuated with defendant.—King v. State, 216 S. W. 1091.

## CONSTITUTIONAL LAW.

See Statutes, ¶5-75.

For validity of statutes relating to particular subjects, see also the various specific topics.

### II. CONSTRUCTION, OPERATION, AND ENFORCEMENT OF CONSTITUTIONAL PROVISIONS.

¶12 (Ky.) Where a provision of the Constitution is so plainly expressed that all difficulty or ambiguity as to its meaning is removed, there is no occasion for resorting to assisting rules of construction or interpretation.—Pinkston v. Watkins, 216 S. W. 852.

¶15 (Ky.) Different sections of the Constitution relating to the same subject, but making different provisions concerning it, should be read together and construed so as to reconcile the provisions.—Pinkston v. Watkins, 216 S. W. 852.

¶35 (Ark.) The language of Const. art. 5, § 25, providing that notice of intention to apply to General Assembly for passage of a special law shall be given at least 30 days prior to introduction of bill, is mandatory.—Booe v. Road Improvement Dist. No. 4, Prairie County, 216 S. W. 500.

¶45 (Ark.) It would not do to relegate to the courts the ascertainment of a jurisdictional fact for the Legislature on admissions in pleadings, by agreement of the parties or by proof introduced of facts not required to be made a matter of record by the Constitution.—Booe v. Road Improvement Dist. No. 4, Prairie County, 216 S. W. 500.

¶48 (Ky.) The lawmaking power of the state is entitled to at least as strong a presumption in favor of the validity of its acts as a criminal on trial in favor of his innocence.—Gilbert v. Greene, 216 S. W. 105.

### III. DISTRIBUTION OF GOVERNMENTAL POWERS AND FUNCTIONS.

#### (B) Judicial Powers and Functions.

¶70(1) (Ark.) In Road Acts 1919, vol. 1, p. 706, the inclusion of the property within the boundaries of the road district created was an exercise of legislative power which the court

For cases in Dec.Dig. & Am.Dig. Key-No, Series & Indexes see same topic and KEY-NUMBER

cannot set aside.—*Bush v. Delta Road Improvement Dist. of Lee County*, 216 S. W. 690.   
 ⚡70(3) (Ky.) The legal policy of exempting domestic co-operative or assessment fire insurance companies from the payment of the tax levied upon other companies is a matter for the Legislature, and not for the courts.—*Thomas v. Hurst Home Ins. Co.*, 216 S. W. 368.

#### IV. POLICE POWER IN GENERAL.

⚡81 (Tex.Cr.App.) While the courts do not undertake to catalogue the subjects on which police power may operate, such power, which is not arbitrary, is commensurate with the duty to provide for the people in their health, safety, comfort, and convenience, as consistently as may be with private property rights.—*Juhan v. State*, 216 S. W. 873.

The state under its police power has the right to regulate the conduct of business to protect the public health, morals, and welfare, observing constitutional limitations, reasonable classification, and terms of control.—Id.

#### VI. VESTED RIGHTS.

⚡106 (Mo.) A party litigant has no vested rights in mere matters of procedure.—*City of St. Louis v. Cooper Carriage Woodwork Co.*, 216 S. W. 944.

⚡107 (Mo.App.) Judgment debtor whose judgment was rendered prior to enactment of Laws 1895, p. 221, changing period within which action on judgment is required to be brought from 20 to 10 years, had no vested right in the 20-year statute of limitations under Rev. St. 1889, § 6796; his only vested right being not to have his cause of action cut off until a reasonable time should expire after enactment of former statute.—*Chenault v. Yates*, 216 S. W. 817.

#### IX. PRIVILEGES OR IMMUNITIES, AND CLASS LEGISLATION.

⚡205(7) (Ky.) Under second Ky. Const., the Legislature did not have authority to confer upon a city the power to exempt property from taxation in view of Bill of Rights, § 1, providing against special privileges.—*Purcell v. City of Lexington*, 216 S. W. 599.

#### X. EQUAL PROTECTION OF LAWS.

⚡228 (Tenn.) Acts 1919, c. 149, § 9, empowering highway commission immediately upon filing of condemnation suit to take possession of the property designated, is not subject to the objection that it is a suspension of general law for the benefit of particular individuals inconsistent with the law of the land, and therefore in violation of Const. U. S. Amend. 14.—*State Highway Department v. Mitchell's Heirs*, 216 S. W. 336.

Acts 1917, c. 74, § 5, authorizing condemnation suits for acquisition of right of way for highways to be prosecuted without cost bond, is not subject to objection that it is a suspension of general law, for the benefit of particular individuals, inconsistent with the law of the land, and therefore in violation of Const. U. S. Amend. 14.—Id.

#### XI. DUE PROCESS OF LAW.

⚡281 (Tenn.) Acts 1919, c. 149, § 9, empowering highway commission, immediately upon filing of condemnation suit, to take possession of the property designated, is not subject to the objection that it is a suspension of general law for the benefit of particular individuals inconsistent with the law of the land, and therefore in violation of Const. U. S. Amend. 14.—*State Highway Department v. Mitchell's Heirs*, 216 S. W. 336.

Acts 1917, c. 74, § 5, authorizing condemnation suits for acquisition of right of way for highways to be prosecuted without cost bond, is not subject to objection that it is a suspension of general law, for the benefit of particular in-

dividuals, inconsistent with the law of the land, and therefore in violation of Const. U. S. Amend. 14.—Id.

⚡283 (Mo.) Assessment by the state board of equalization, under Rev. St. 1909, §§ 11551, 11552, of the tangible property and franchises of an electric railroad owning and operating thirty-six hundredths of a mile of track on a bridge between Missouri and Illinois at the city of St. Louis, held constitutional as against objection that it takes the property of the railroad without due process.—*State ex rel. Hagerman v. St. Louis & E. St. L. Electric Ry. Co.*, 216 S. W. 763.

⚡296(1) (Tex.Cr.App.) Acts 34th Leg. 1915, c. 28 (Vernon's Ann. Civ. St. Supp. 1918, arts. 6171a-6171f), defining loan brokers, providing regulations therefor, and punishment for violation thereof, which requires every private citizen engaged in such business not only to give a bond, but to file a written irrevocable power of attorney, naming the county judge of the county as his duly authorized agent, for the purpose of accepting service and consenting that service of any civil process upon such judge shall be valid, is unconstitutional, the unreasonable and discriminatory provisions as to service, coupled with the further provision that judgments against persons engaged in the loan business shall be collectible out of the required bond, denying persons engaged in such business of their property and privileges without due process of law.—*Juhan v. State*, 216 S. W. 873.

⚡299 (Ark.) Act Cong. March 21, 1918 (U. S. Comp. St. 1918, §§ 3115½a-3115½p), making carriers, while under federal control, subject to all laws and liabilities as common carriers, is not unconstitutional upon ground that it authorizes the taking of private property without due process of law in authorizing judgment to be rendered against the corporation for a liability incurred by an act of the federal authorities operating the road since under Act March 21, 1918, the corporation is guaranteed immunity from loss and a reasonable return upon investment.—*Missouri Pac. R. Co. v. Ault*, 216 S. W. 3.

#### CONTEMPT.

See Habeas Corpus, ⚡28.

#### I. ACTS OR CONDUCT CONSTITUTING CONTEMPT OF COURT.

⚡14 (Tex.Cr.App.) If conversation between relator and a brother-in-law of a juror summoned on jury for week, relative to corrupting such juror, occurred after the juror had been actually discharged by the court, there would have been no contempt.—*Ex parte Kemper*, 216 S. W. 172.

Though relator approached a brother-in-law of a juror summoned on jury for week and sought to have juror corrupted, yet where corruptive matters were never communicated to the juror, who was discharged from service, the district court had no jurisdiction to punish relator for contempt.—Id.

#### CONTINGENT CLAIM.

See Attachment, ⚡126.

#### CONTINUANCE.

See Appeal and Error, ⚡883, 1043; Criminal Law, ⚡594-600, 649, 1090, 1166.

#### CONTRACTS.

See Appeal and Error, ⚡1040, 1061, 1068; Assignments; Attachment, ⚡10; Bills and Notes; Bridges, ⚡20; Champerty and Maintenance; Compromise and Settlement; Corporations, ⚡79, 80, 83; Covenants; Customs and Usages, ⚡18; Damages, ⚡40, 140; Deeds, ⚡73; Divorce, ⚡310; Elec-

tion of Remedies, ¶3; Estoppel, ¶78; Evidence, ¶420, 450; Executors and Administrators, ¶221; Frauds, Statute of; Guaranty; Landlord and Tenant, ¶288; Master and Servant, ¶83; Mortgages, ¶309; Municipal Corporations, ¶244, 339, 344, 350; Novation; Partnership, ¶230; Payment, ¶82; Pleading, ¶64, 369, 428; Principal and Agent, ¶175; Railroads, ¶46, 68; Receivers, ¶142; Reformation of Instruments, ¶18; Release; Sales; Schools and School Districts, ¶84; Specific Performance; Vendor and Purchaser; Waters and Water Courses, ¶263; Wills, ¶740.

## I. REQUISITES AND VALIDITY.

### (A) Nature and Essentials in General.

¶10(2) (Ark.) Written contract for removal and use by firm of all trash and garbage accumulating at hotel, so long as firm "handle satisfactory to the" hotel company, held lacking in mutuality, in that no time for performance was specified, and to be terminable at the will of either party.—Marion Hotel Co. v. Dickinson, 216 S. W. 1049.

Subsequent oral addition to contract for the giving of year's notice by hotel company before revoking written contract for removal of trash and garbage from hotel implied a reciprocal obligation of the other party to continue the services at least the full period of the notice, so that the later contract was not lacking in mutuality.—Id.

¶10(2) (Tex. Civ. App.) A written contract for the construction of a house was not unilateral and unenforceable because signed only by the person for whom the house was to be constructed, where it was accepted by the other party and acted upon by him by building the house.—Benson v. Ashford, 216 S. W. 283.

¶10(4) (Tex. Civ. App.) Where members of a truck growers' association entered into a contract for the purchase of onion crates, whereby the first consignment of crates was paid for in cash, additional crates to be paid for at a named figure, the contract, not being separable, and the cash payment being not merely the payment of a pre-existing obligation but a consideration supporting the entire order, was not void for want of consideration and lack of mutuality, regardless of whether it was optional with the truck growers to take additional crates.—Mayhew & Isbell Lumber Co. v. Valley Wells Truck Growers' Ass'n, 216 S. W. 225.

### (B) Validity of Assent.

¶95(3) (Mo.) Duress per minas is ordinarily not predicable of a mere threat to exercise a clear legal right.—McCoy v. James T. McMahon Const. Co., 216 S. W. 770.

¶97(2) (Mo. App.) There can be no ratification of a contract, where the one who has the power of ratification is ignorant of the facts, and in such case the doctrine of constructive knowledge has no application.—Berkshire v. Holcker, 216 S. W. 556.

¶98 (Mo.) Ordinarily duress renders a contract voidable, not void.—McCoy v. James T. McMahon Const. Co., 216 S. W. 770.

### (F) Legality of Object and of Consideration.

¶102 (Ky.) The mere intention of a party to a legal contract, formed after the making of the contract not accompanied by any obligation to do so to appropriate the property to be received under the contract, when it should be performed, to an illegal purpose, will not make invalid the contract, where the intention is abandoned before the performance and never put into execution.—Scobee v. Brent, 216 S. W. 76.

¶116(1) (Ky.) The common law applying to contracts in restraint of trade is in force in Kentucky.—Scobee v. Brent, 216 S. W. 76.

¶116(1) (Ky.) A contract not to re-engage in a certain business is enforceable, providing the restraint of trade involved is reasonable and not so extensive as to affect the public interest.—Keen v. Ross, 216 S. W. 605.

¶116(3) (Ky.) Contract, whereby plaintiff agreed to sell to defendant a large quantity of blue grass seed, held independent of agreement between defendant and others to suppress and restrain competition in trade of buying and selling blue grass seed, so that, where plaintiff before date fixed for performance confessed breach and agreed on the amount of damages and paid the same, he cannot recover payments made; the contract of sale not being in restraint of trade either at common law or under Ky. St. § 3918.—Scobee v. Brent, 216 S. W. 76.

¶128(1) (Mo. App.) A principal, upon ratification of agent's contract, is bound by whatever promises, frauds, or representations the agent made to obtain the contract, whether or not authorized by or known to the principal, so that, if payee's father or the prosecuting attorney, who, as her agents, procured the note, had an express or implied understanding with the maker that the latter should not be prosecuted for her seduction, then the note would not be collectible, even though the prosecution was started and dropped before they became her agents, since it might be started again.—Hart v. Brown, 216 S. W. 552.

¶137(1) (Tex. Civ. App.) A promise made upon several considerations, one of which is unlawful, no matter whether the illegality be at common law or by statute, is void.—Hanes v. Hanes, 216 S. W. 272.

¶138(1) (Ky.) A contract made with an illegal combination or association of persons in restraint of trade will not be enforced when the enforcement will be in furtherance of the illegal purpose of the combination.—Scobee v. Brent, 216 S. W. 76.

¶140 (Ky.) At common law an illegal combination or trust is not prohibited from maintaining actions upon contracts, which are collateral to and independent of the illegal contract by which the trust or monopoly was created, and which are not in furtherance of the purposes of the combination.—Scobee v. Brent, 216 S. W. 76.

A member of an illegal combination is not precluded from right of recovery upon contract which is independent of the contract by which illegal combination is formed and is not in furtherance of its purpose.—Id.

## II. CONSTRUCTION AND OPERATION.

### (A) General Rules of Construction.

¶147(1) (Ky.) The fundamental rule in interpreting contracts is to ascertain the expressed intent of the parties, and give such a construction as will carry out that intention.—Keen v. Ross, 216 S. W. 605.

¶147(1) (Tex. Civ. App.) In construing a contract, the expressed intention of the parties must control.—McGregor & Henger v. Escajeda, 216 S. W. 398.

¶159 (Mo. App.) In specifications of building contract, the word "premises" held to mean the lot on which building was erected, and not to include an adjoining lot on which plaintiff filled a railroad right of way under alleged separate contract.—Godfrey v. Martha Inv. Co., 216 S. W. 822.

¶169 (Ky.) In construing contracts, the court may consider the situation and circumstances surrounding the parties at the time they made the contract, in order to determine their intent.—Keen v. Ross, 216 S. W. 605.

¶169 (Tex. Com. App.) The rule that the contract must be read in the light of surrounding circumstances in arriving at a just interpretation of the terms does not admit of a violation of the express language which the parties have employed in defining their obligations, nor the reading into the contract of terms which its

For cases in Dec. Dig. & Am. Dig. Key-No. Series & Indexes see same topic and KEY-NUMBER

express provisions exclude.—Southern Gas & Gasoline Engine Co. v. Richolson, 216 S. W. 158.

#### (F) Compensation.

§229(3) (Ky.) Contract between architect and prospective builders held not open to construction, as covering only preliminary drawings by the architect, and payment therefor by the builders; it providing as plainly as possible for completed plans, and payment for them on one basis if a contract was awarded for construction of the building, and on a different basis if the building was not erected within two years.—O'Kain v. Davis, 216 S. W. 354.

Where an architect contracted to prepare plans for a building, to receive only \$250 for all services if the building was not erected, but a larger amount if it was, and the contract for the building was never awarded, and it was not constructed within the specified time, or at all, the architect is limited in his recovery for preparation of plans to \$250.—Id.

§232(1) (Tex. Civ. App.) A contractor claiming extras must show, not only that he performed the services, furnished material, and did work outside of and in addition to the specifications agreed upon, but that such additions and alterations necessitated an expense in excess of the contract price.—Leeper-Curd Lumber Co. v. Barbuzza, 216 S. W. 218.

#### IV. RESCISSION AND ABANDONMENT.

§265 (Mo.) Ordinarily duress renders a contract voidable, not void, and the same duty arises to put the other party in statu quo before avoiding the contract as exists in cases of fraud in the treaty.—McCoy v. James T. McMahon Const. Co., 216 S. W. 770.

§265 (Tex. Com. App.) The rule that one who seeks rescission of a contract for fraud must be able to place the other party in statu quo only requires that the other shall be placed in substantially his original situation, and that the rescinding party shall derive no unconscionable advantage from his conduct.—Cator v. Commonwealth Bonding & Casualty Ins. Co., 216 S. W. 140.

§274 (Tex. Civ. App.) To rescind a contract is not merely to terminate it, but to abrogate and undo it from the beginning, and rescission necessarily involves a repudiation of the contract and a refusal of the moving party to be further bound by it.—J. I. Case Threshing Mach. Co. v. Street, 216 S. W. 426.

#### V. PERFORMANCE OR BREACH.

§304(2) (Ark.) Slips signed by steward of defendant's hotel for driver of each garbage wagon, reciting that garbage had been removed "to my entire satisfaction," held to preclude defendant from showing affirmatively that garbage had not been handled "satisfactorily to the" defendant, since the execution of these slips contributed a binding acceptance by defendant.—Marion Hotel Co. v. Dickinson, 216 S. W. 1049.

§305(1) (Mo.) Where an application for loan on farm land provided that the applicant should accept the loan, if application was approved within 30 days, yet, if the parties continued to deal thereafter without objection from either side, such dealing constituted a waiver of the provision. Per Goode and Graves, JJ.—Crews v. Lombard, 216 S. W. 512.

§318 (Tex.) An ambiguous and uncertain forfeiture provision in a contract will not be enforced.—Decker v. Kirlicks, 216 S. W. 385.

#### VI. ACTIONS FOR BREACH.

§325 (Ark.) When a party comes into court to enforce his remedy on a contract, that remedy will be enforced in accordance with the laws of this state regulating the remedy, and not according to the remedy of state where con-

tract was made.—Shores-Mueller Co. v. Palmer, 216 S. W. 295.

§346(1) (Mo. App.) Plaintiff cannot plead one contract and recover on another, and cannot recover on a contract, an essential part of which is omitted in pleading.—Wamsanz v. Blanke-Wenneker Candy Co., 216 S. W. 1025.

#### CONTRIBUTION.

See Bills and Notes, §266.

#### CONVERSION.

See Trover and Conversion.

#### CORPORATIONS.

See Appeal and Error, §216, 848; Banks and Banking; Bills and Notes, §266; Burglary, §23; Carriers; Commerce, §40; Electricity; Fraud, §11; Garnishment, §218; Husband and Wife, §86; Libel and Slander, §141; Master and Servant, §361; Municipal Corporations; Principal and Surety, §59; Public Service Commissions; Railroads; Statutes, §283; Street Railroads; Telegraphs and Telephones.

#### I. INCORPORATION AND ORGANIZATION.

§30(1) (Tex. Com. App.) The promoter of a corporation to be formed stands in a fiduciary relation toward it, and to the subscribers to its stock.—Cator v. Commonwealth Bonding & Casualty Ins. Co., 216 S. W. 140.

#### IV. CAPITAL, STOCK, AND DIVIDENDS.

(A) Nature and Amount of Capital and Shares.

§66 (Ky.) Where the whole authorized capital stock of a corporation had been issued, and was then outstanding and held by its officers, an issue of additional shares without compliance with Ky. St. § 553, requiring the signing of the minutes on the books, the vote, or consent of the stockholders representing two-thirds of the capital stock after notice, of proposed increase, etc., was void.—Leffingwell v. Evans, 216 S. W. 58.

(B) Subscription to Stock.

§79 (Tex. Com. App.) A contract by a promoter in which he attempts to bind the future corporation, without a present existence, and to create a liability against it, cannot be enforced against the corporation unless and until adopted by it.—Cator v. Commonwealth Bonding & Casualty Ins. Co., 216 S. W. 140.

§80(2) (Tex. Com. App.) A corporation is chargeable with the fraudulent representations of its agents made for the purpose of procuring subscriptions, the rule applying to subscription contracts entered into between the subscriber and promoter prior to incorporation, when such contracts have been adopted by the corporation.—Cator v. Commonwealth Bonding & Casualty Ins. Co., 216 S. W. 140.

Where one company acted as promoter of another, and procured by misrepresentations a subscription to the latter's stock, as between the promoting company and the subscriber the fraud of the company was ground for rescission, and the organized company for whose benefit the subscription contract to its stock was made through its acceptance or adoption acquired no higher right than that of the promoting company.—Id.

A company accepting a subscription to its capital stock, procured by one technically not its agent through fraudulent misrepresentations made without its authority, not only adopts the act of such a one in receiving the subscription, but also impliedly adopts and becomes responsible for any fraudulent representations made to induce the subscription, whether or not it is

without knowledge or notice of the fraud, and cannot defend the stockholder's suit for rescission.—*Id.*

§80(10) (Tex.Com.App.) Though the organization of a corporation under the laws of Arizona, instead of under the laws of Texas, as provided in a stockholder's contract, was a departure from the terms of the contract sufficient to warrant its cancellation at the suit of the stockholder, the transfer of his stock after he had acquired knowledge of such departure was a waiver by him of his right of cancellation on such ground.—*Cator v. Commonwealth Bonding & Casualty Ins. Co.*, 216 S. W. 140.

Where a stockholder, induced to subscribe by fraudulent misrepresentations of the promoter, had no knowledge of the fraud when he transferred his stock, he did not thereby waive his right to rescind his subscription.—*Id.*

§80(12) (Tex.Com.App.) Where a contract to subscribe to corporate stock stipulated that an amount was paid the promoters in consideration of their agreement to organize and incorporate the company free from expense to stockholders, and none of the amount was paid or received by the company, on rescinding his subscription for misrepresentations a stockholder was not entitled to recover the amount from the organized company.—*Cator v. Commonwealth Bonding & Casualty Ins. Co.*, 216 S. W. 140.

§83 (Tex.Civ.App.) Where plaintiff, after having subscribed for corporate stock on installments, gave a further subscription to defendant's agent, paying the price of the stock, but defendant refused to issue the stock, such failure of defendant warranted plaintiff in refusing to pay installments on her earlier subscriptions, and excused her from provisions of the contract that payments made should be forfeited in case of default.—*Texas Co-operative Inv. Co. v. Clark*, 216 S. W. 220.

§83 (Tex.Com.App.) In suit to rescind a stock subscription, where the company to which plaintiff had assigned his certificate was made a party defendant, judgment ordering surrender of the certificate for cancellation held effectually to protect the main defendant, the company whose stock was sought to be canceled, being tantamount to a tender and return by plaintiff of the certificate.—*Cator v. Commonwealth Bonding & Casualty Ins. Co.*, 216 S. W. 140.

#### (C) Issue of Certificates.

§108 (Ky.) Shares of corporate stock are choses in action, and one who receives and transfers them in good faith warrants only his own title, and not the legality of their issue, and the holder in good faith, whether immediate or remote, may maintain an action against the corporation or its officers for damages sustained by the wrongful issuance of the stock, but cannot recover from his bona fide transferor.—*Lefingwell v. Evans*, 216 S. W. 58.

The amount of recovery against a corporation or its officers by a bona fide purchaser of corporate stock, void because an overissue, will depend upon the amount plaintiff had received in dividends or from other sources as the result of his purchasing the stock and upon the value of stock in the corporation at the time of purchase.—*Id.*

A bona fide purchaser of corporate stock, void because an overissue, must not unreasonably delay bringing of an action against the corporation or its officers for relief on account of loss, or his laches will bar his right of recovery.—*Id.*

### V. MEMBERS AND STOCKHOLDERS.

#### (D) Liability for Corporate Debts and Acts.

§252 (Ky.) Generally a creditor of a corporation cannot have equitable relief against its shareholders until he has prosecuted his de-

mand to a judgment at law against the corporation, unless circumstances existed excusing him from doing so.—*Louisville & N. R. Co. v. Nield*, 216 S. W. 62.

Corporation's creditor cannot establish equitable liability of stockholder without showing that a suit at law against the corporation would be futile.—*Id.*

Where there is only one creditor of a corporation and only one stockholder, and the stockholder has by his fraudulent act made an independent action against the corporation an impracticable and vain undertaking, involving circuity of action and unnecessary delay and expense, creditor may sue stockholder on his equitable liability without first bringing action against the corporation.—*Id.*

§254 (Ky.) A de facto dissolution of a corporation will excuse creditor from exhausting legal remedies and recovering a judgment at law against the corporation before maintaining suit upon the equitable liability of stockholder; a de jure dissolution being unnecessary.—*Louisville & N. R. Co. v. Nield*, 216 S. W. 62.

§265(6) (Ky.) In suit by corporation's creditor to establish stockholders' equitable liability, where plaintiff was the only creditor and where defendant, who was the only stockholder, had sold all the assets of the corporation and had converted proceeds to his own use, and by his fraudulent act had rendered corporation incapable of doing business or satisfying obligation, or functioning at all except at behest and in interest of defendant, judgment could be rendered against defendant, in view of Civ. Code Prac. §§ 23, 371, though corporation was not made a party; it not being a necessary party under the circumstances.—*Louisville & N. R. Co. v. Nield*, 216 S. W. 62.

### VII. CORPORATE POWERS AND LIABILITIES.

#### (A) Extent and Exercise of Powers in General.

§374 (Tex.Com.App.) The doctrine of ultra vires ought to be reasonably understood and applied, and whatever may fairly be regarded as incidental to, or consequential upon, those things which a corporation has been authorized to do ought not, unless expressly prohibited, be held by judicial construction to be ultra vires.—*Texas Fidelity & Bonding Co. v. General Bonding & Casualty Ins. Co.*, 216 S. W. 144.

#### (D) Contracts and Indebtedness.

§484(2) (Tex.Com.App.) A corporation, having the power in its charter to act as surety on any bond required in the course of any judicial proceeding may enter into an indemnity agreement to indemnify a surety on a bail bond, the character of the instrument by which the corporation binds itself being immaterial, where it in fact furnished security on the bond.—*Texas Fidelity & Bonding Co. v. General Bonding & Casualty Ins. Co.*, 216 S. W. 144.

#### (E) Torts.

§494 (Tex.Civ.App.) Though under Rev. St. 1911, art. 4694, a private corporation engaged in the manufacture and sale of cement is not liable for the death of a person caused by negligence of its agents or employees, it is liable for injuries resulting in the death from its own wrongful acts or omissions as distinguished from the acts or omissions of servants or agents.—*Southwestern Portland Cement Co. v. Bustillos*, 216 S. W. 268.

In action against private corporation for death, the fact that negligent dumping of burning coal and slag into a pit was being done under orders given by a superintendent and vice principal who had been succeeded by another as superintendent and vice principal did not relieve defendant of liability simply by reason of the fact that the superintendent at the

For cases in Dec.Dig. & Am.Dig. Key-No.Series & Indexes see same topic and KEY-NUMBER

time of the accident had not reiterated the orders theretofore given.—Id.

A pit filled with live coals and hot ashes was an intrinsically and affirmatively dangerous agency, and it was the absolute and nondelegable duty of a private corporation to protect and guard against its dangers those rightfully upon the company's premises; failure to guard being negligence of the company itself, as distinguished from negligence of an employé or servant.—Id.

## XI. DISSOLUTION AND FORFEITURE OF FRANCHISE.

⚡617(5) (Ark.) Dissolution of corporation, for which receiver has been appointed under Kirby's Dig. § 964, did not require that law action pending against corporation at time of dissolution be transferred to the court of equity having jurisdiction over receivership proceedings; but the demand will be reduced to judgment in the law court, and the judgment enforced in court of equity under such statute.—Des Arc Oil Mill Co. v. McLeod, 216 S. W. 1040.

## XII. FOREIGN CORPORATIONS.

⚡642(1) (Ark.) A transaction between a foreign corporation and a dealer in the state whereby the corporation undertook to carry on for the dealer's benefit what was designated as a "trade campaign," the amount of compensation to be received by the corporation being dependent on the amount of increase in the dealer's sales, constituted the doing of business within the state.—Dean v. Caldwell, 216 S. W. 31.

⚡642(4½) (Ark.) Contract, whereby manufacturer sold certain goods to so-called "salesman" to be resold by the "salesman," was a contract for the sale of goods, and not a contract of agency; and, where it was entered into in manufacturer's state, it did not require manufacturer to comply with regulations concerning foreign corporations doing business in state in which salesman was to resell goods.—Shores-Mueller Co. v. Palmer, 216 S. W. 295.

⚡656 (Mo.) A foreign corporation may own real property in the state before qualifying, under Rev. St. 1909, § 3037, to do business in the state.—Hurst Automatic Switch & Signal Co. v. Trust Co. of St. Louis, 216 S. W. 954.

⚡661(2) (Mo.) A foreign corporation may sue in the state for a wrong committed in derogation of its title to property in the state before it qualified to transact business in the state in its corporate capacity.—Hurst Automatic Switch & Signal Co. v. Trust Co. of St. Louis, 216 S. W. 954.

⚡661(3) (Ark.) Where a foreign corporation doing business within the state fails to file its articles of incorporation, not only the offending corporation, but its assignee is prohibited from maintaining suit in the state without having first complied with the laws of the state.—Dean v. Caldwell, 216 S. W. 31.

## COSTS.

See Appeal and Error, ⚡80; Army and Navy, ⚡34; Constitutional Law, ⚡228, 281; Municipal Corporations, ⚡980; Statutes, ⚡75; Taxation, ⚡668.

## I. NATURE, GROUNDS, AND EXTENT OF RIGHT IN GENERAL.

⚡32(1) (Ky.) In action under Ky. St. § 1786, to compel adjoining owner who has joined his fence to that of plaintiff to pay his share of the cost of plaintiff's fence or detach his fence from that of plaintiff, plaintiff held entitled to costs under section 889, relating to costs to successful party in equity upon rendition of judgment requiring defendant to detach fence.—Burchett v. Lealie, 216 S. W. 850.

⚡32(3) (Ky.) In a daughter's suit to compel her father, trustee under her mother's will for the benefit of children, to account, the trial court did not abuse its discretion in requiring the daughter to pay her part of the costs, though she succeeded in the suit to the extent of requiring her father to make an accounting, where she failed to obtain any other relief.—Wilson v. Smoot, 216 S. W. 129.

## VII. ON APPEAL OR ERROR, AND ON NEW TRIAL OR MOTION THEREFOR.

⚡238(2) (Tex.Civ.App.) Where a judgment for \$16,660 was too large by \$415 by reason of error in calculation, the appellate court, though it reduces the judgment, will not relieve appellants of the payment of the costs in the appellate court, where such error in calculation was raised for the first time on appeal.—Koger v. Clark, 216 S. W. 434.

⚡264 (Tex.Civ.App.) Where a cause is reversed and remanded, a motion by appellees filed at a subsequent term of Court of Civil Appeals to retax the costs so as to include an item representing stenographic fees incurred in preparing a statement of facts will be overruled, where it appears from the motion that such item of costs was not taxed in the district court and was not included in the bill of costs in the transcript, mandate having issued and been filed below prior to the making of the motion, although the error in omitting the item was not discovered until after the adjournment of the appellate court.—Brady v. Cobbs & Bonner, 216 S. W. 420.

## COUNTIES.

See Assignments, ⚡50, 85; Bridges, ⚡20; Drains, ⚡90; Election of Remedies, ⚡3; Inspection, ⚡4; Officers, ⚡100; Private Roads, ⚡2; Quo Warranto, ⚡11; Subrogation, ⚡28.

## II. GOVERNMENT AND OFFICERS.

(C) County Board.

⚡47 (Tex.Civ.App.) A commissioners' court is not a court of general, but of limited, jurisdiction, having no authority except as expressly or impliedly conferred by law.—Miller v. Brown, 216 S. W. 452.

## COURTS.

See Appeal and Error, ⚡43, 185; Bail, ⚡77; Bankruptcy, ⚡141, 293; Certiorari, ⚡42; Contempt; Execution, ⚡327; Executors and Administrators, ⚡435; Guardian and Ward, ⚡8; Judges; Justices of the Peace; Private Roads, ⚡2; Railroads, ⚡43.

## I. NATURE, EXTENT, AND EXERCISE OF JURISDICTION IN GENERAL.

⚡37(2) (Mo.) If a court takes cognizance of a matter whereof it has no jurisdiction, an objection may be raised in the proper mode at any stage of the proceeding.—In re Wilhelmina Drainage Dist., 216 S. W. 530.

⚡39 (Mo.App.) A petition in an action in the circuit court against an administratrix and her sureties held not one in conversion, but rather one whose purpose was to discover assets, a matter within the exclusive original jurisdiction of the probate court.—State ex rel. Lamm v. Lamm, 216 S. W. 332.

## II. ESTABLISHMENT, ORGANIZATION, AND PROCEDURE IN GENERAL.

(A) Creation and Constitution, and Court Officers.

⚡42(3) (Tex.Civ.App.) Rev. St. 1911, arts. 2184-2190, defining the jurisdiction of juvenile courts and prescribing the procedure as to



dependent or neglected children, are not in violation of Const. art. 5, § 8, conferring on the district court original jurisdiction over guardians and minors and general jurisdiction over all causes of action for which a remedy or jurisdiction is not provided by law or Constitution, when considered in connection with section 16, giving the county court a power to appoint guardians of minors.—*Ex parte Grimes*, 216 S. W. 251.

**(D) Rules of Decision, Adjudications, Opinions, and Records.**

⚡92 (Tex.Civ.App.) The law of the case controlling the decision becomes authority, and is not obiter dicta, though the court was mistaken in the assumption of the premise of the decision upon which the law was announced.—*Allen v. Berkmler*, 216 S. W. 647.

⚡107 (Ark.) The language of an opinion, like that of any other writing, must be given its plain and natural meaning, except when used in a technical sense.—*Booe v. Road Improvement Dist. No. 4, Prairie County*, 216 S. W. 500.

**IV. COURTS OF LIMITED OR INFERIOR JURISDICTION.**

⚡183 (Mo.) The county court is bound by the general rule that court of limited jurisdiction cannot act unless its records affirmatively show all jurisdictional facts, though this rule may be altered by statute.—*Drainage Dist. No. 1 of Bates County v. Bates County*, 216 S. W. 949.

**V. COURTS OF PROBATE JURISDICTION.**

⚡201 (Mo.App.) The probate court has no jurisdiction over contests of heirs, after the decease of the intestate, not relating to acts of the deceased.—*McClure v. Baker*, 216 S. W. 1018.

⚡202(5) (Tex.) It was the duty of the county court to enter upon its minutes as its judgment that which appears on the minutes of the district court as the judgment rendered on appeal from order appointing guardian, and thereby such order is as effectually vacated as though it had never been rendered, in view of *Vernon's Sayles' Civ. St. 1914*, art. 4297.—*Drew v. Jarvis*, 216 S. W. 618.

Though application of guardian of minor heirs for withdrawal of estate from administration did not state that applicant was guardian of estates as well as of persons of minors, the defect was curable by amendment or new pleading in the county court, and could be cured in like manner in the district court on appeal.—*Id.*

**VI. COURTS OF APPELLATE JURISDICTION.**

**(B) Courts of Particular States.**

⚡231 (4) (Mo.) On certiorari directed to the judges of one of the Courts of Appeals for examination with reference to the jurisdiction of such court, in that its judgment is in conflict with and fails to follow the last and controlling decisions of the Supreme Court, the Supreme Court cannot determine whether the judgment was right or wrong, but can only decide whether or not the judgment contravenes a previous decision of the Supreme Court upon the same point. (Per Goode, J.)—*State ex rel. Smith v. Reynolds*, 216 S. W. 773.

Decision of Court of Appeals relating to the interpretation of Rev. St. 1909, §§ 9999, 10022, 10024-10026, in regard to the burden of proof in an action on a note, where it is questioned whether the plaintiff is a holder in due course, held not in conflict with another decision on that subject, so as to confer jurisdiction on the Supreme Court.—*Id.*

⚡231(4) (Mo.) On certiorari to quash the opinion and judgment of a Court of Appeals as in conflict with previous decisions of the Supreme Court, it is not within the scope of the

Supreme Court's duty or prerogative to decide whether the holding of the Court of Appeals was right or wrong; such court having jurisdiction to decide wrong as well as right.—*State ex rel. Kansas City Theological Seminary v. Ellison*, 216 S. W. 967.

Opinion and judgment of a Court of Appeals relative to the revocation of a power of attorney not coupled with an interest held not in conflict with prior decisions of the Supreme Court so as to be quashed by the latter court on certiorari.—*Id.*

⚡231(52) (Mo.) Where an examination of the pleadings alone does not suffice to determine satisfactorily the pecuniary jurisdiction, a review of the record is authorized, and where the agreed statement of facts fixes the amount in excess of the minimum necessary, the Supreme Court will take jurisdiction for final review.—*Matlack v. Kline*, 216 S. W. 323.

**VIII. CONCURRENT AND CONFLICTING JURISDICTION, AND COMITY.**

**(A) Courts of Same State, and Transfer of Causes.**

⚡472(4) (Mo.App.) The probate court has exclusive jurisdiction in all cases involving the concealment or wrongful withholding of assets of an estate, except in instances of purely equitable cognizance, and the circuit court will not take original jurisdiction of cases which in reality involve the question of the proper administration and settlement of the estates of deceased persons, in view of Rev. St. 1909, §§ 70-74.—*State ex rel. Lamm v. Lamm*, 216 S. W. 332.

⚡475(1) (Tex.Civ.App.) When a court of competent jurisdiction has obtained jurisdiction of a cause, such jurisdiction cannot be ousted by a proceeding as to the same cause subsequently instituted in a court of concurrent jurisdiction.—*Ex parte Grimes*, 216 S. W. 251.

**COVENANTS.**

**III. PERFORMANCE OR BREACH.**

⚡102(1) (Tex.Civ.App.) Where a vendor of a riparian right does not warrant title to the submerged land, but merely the title and right necessary to acquisition of title by the purchaser, it being conceded that title to the fee is in the state, no recovery by the purchaser can be had for breach of warranty in the absence of any evidence of eviction or threatened suit by the state.—*Westervelt v. Meuly*, 216 S. W. 680.

**IV. ACTIONS FOR BREACH.**

⚡122 (Tex.Civ.App.) In counterclaim for damages for breach of warranty in a sale of riparian rights, evidence that 95 per cent. of the land sold was submerged and 5 per cent. was not submerged did not afford any basis for estimating damages, as there could be no presumption that the unsubmerged land was worth only 5 per cent. of the purchase price, as a basis for estimating damages.—*Westervelt v. Meuly*, 216 S. W. 680.

⚡125(4) (Ark.) Measure of liability of landowner on her warranty, arising from the fact that she had no title to the part of the land conveyed, would be the proportionate value of the part of the land to which title had failed.—*Cannon v. Foster*, 216 S. W. 698.

**CRIMINAL LAW.**

See *Animals*, ⚡34, 36, 57; *Assault and Battery*, ⚡48-91; *Bail*, ⚡48-93; *Breach of the Peace*; *Burglary*; *Conspiracy*, ⚡27-47; *Extradition*; *Fences*, ⚡28; *Forgery*; *Highways*, ⚡79, 164; *Homicide*; *Indictment and Information*; *Infants*, ⚡16; *Intoxicating Liquors*; *Jury*, ⚡72; *Larceny*; *Lewdness*; *Libel and Slander*, ⚡141-152; *Licenses*, ⚡42; *Municipal Corporations*, ⚡639, 641,



For cases in Dec.Dig. & Am.Dig. Key-No.Series & Indexes see same topic and KEY-NUMBER

642; Physicians and Surgeons, 6; Prosecution; Rape, 16-59; Weapons, 6, 7, 11, 11½, 17.

## II. CAPACITY TO COMMIT AND RESPONSIBILITY FOR CRIME.

658 (Tex.Cr.App.) The behest of an employer furnishes no excuse for the commission of an offense.—*Cassi v. State*, 216 S. W. 1099.

## III. PARTIES TO OFFENSES.

59(5) (Tex.Cr.App.) The mere agreement to commit a crime would not constitute one an accomplice, unless the crime was subsequently committed in pursuance to the conspiracy or agreement.—*Cone v. State*, 216 S. W. 190.

A positive agreement to commit a felony constitutes a conspiracy, whether the felony is afterwards executed or not; but, where the party is charged as an accomplice, there must be a crime in pursuance to the agreement, and the accomplice must advise, commend, or agree to furnish means or aid in order to connect him with it.—*Id.*

## VII. FORMER JEOPARDY.

198 (Ark.) In prosecution for offense of selling intoxicating liquor, the fact that in a former prosecution of defendant for a similar offense based upon another sale at another time and place the principal witness was cross-examined as to his testimony in the mayor's court about the sale charged in subsequent prosecution, for the purpose of contradiction, did not make out a case of former conviction; such latter sale not having been made an issue in the former trial.—*Beck v. State*, 216 S. W. 497.

## IX. ARRAIGNMENT AND PLEAS, AND NOLLE PROSEQUI OR DISCONTINUANCE.

273 (Tex.Cr.App.) A plea of guilty under the Texas practice admits all the criminalizing facts alleged, and evidence is admitted only to enable the jury to determine the penalty.—*Gipson v. State*, 216 S. W. 870; *Bell v. State*, *Id.* 879; *Williams v. State*, *Id.* 881.

295 (Ark.) In a prosecution for sale of intoxicating liquors, defendant, setting up former conviction, had burden of showing that the sale which formed the basis of the charge in the subsequent prosecution was made an issue in the former trial.—*Beck v. State*, 216 S. W. 497.

In a prosecution for offense of selling intoxicating liquor, where defendant set up plea of former conviction, evidence of jurors in the former trial that they had not considered the sale forming the basis of a subsequent prosecution held incompetent; it being unimportant what the jury actually considered.—*Id.*

295 (Tex.Cr.App.) A plea of former jeopardy, setting out that after a trial had begun, defendant's plea entered, and evidence heard, the jury were wrongfully dismissed, raised a question of fact, and while the burden was on defendant to show an abuse of the court's discretion in discharging the jury, he had the right to show that the court erred therein, if possible.—*Chadwick v. State*, 216 S. W. 397.

## X. EVIDENCE.

(A) Judicial Notice, Presumptions, and Burden of Proof.

304(9) (Mo.App.) The court will not take judicial notice of the adoption of the local option law by Laclede county, which is necessary to put it into force there.—*State v. Wright*, 216 S. W. 545.

304(20) (Tex.Cr.App.) In a prosecution for the unlawful manufacture of intoxicating liquor, where defendant admitted that he made whisky, no further proof was required to show that the liquor was intoxicating.—*Grandberry v. State*, 216 S. W. 164.

(B) Facts in Issue and Relevant to Issues, and Res Gestæ.

338(8) (Tex.Cr.App.) Where in a prosecution for procuring a female to become an inmate of a house of ill fame, testimony that she left place of accused and went to home of another was admissible as a predicate for further testimony that he attempted to induce her to return.—*Dollar v. State*, 216 S. W. 1087.

338(4, 5) (Tex.Cr.App.) In a prosecution for murder committed after a quarrel between defendant and deceased over a statement made by deceased that defendant had been out in a pasture with a woman, evidence that such woman was not present at the trial, although the state had applied for process for her appearance, and the return of the officer that she could not be found, was wrongly admitted, where no effort was made to connect defendant with the witness' failure to appear.—*Parker v. State*, 216 S. W. 178.

359 (Tex.Cr.App.) Where circumstantial evidence is relied on to prove the guilt of defendant, he may introduce evidence tending to show that another having motive to commit the offense was in such proximity that he might have been the author.—*Kelley v. State*, 216 S. W. 183.

(C) Other Offenses, and Character of Accused.

369(1) (Ky.) Evidence of rape months after alleged seduction is inadmissible on a prosecution for the seduction, being within no exception to the general rule against evidence of another crime wholly independent of that for which defendant is being tried.—*Cline v. Com.*, 216 S. W. 594.

369(2) (Ky.) Evidence of other crimes is competent to show identity, guilty knowledge, intent, or motive, and may be admitted where the offense charged is so interwoven with other offenses that they cannot be separated.—*Music v. Commonwealth*, 216 S. W. 116.

369(3) (Ky.) In prosecution for murder of policeman attempting to arrest defendant following a robbery, evidence relating to the robbery was properly admitted for purpose of showing that defendant had committed recent felonies which would authorize policeman to arrest him, and for purpose of showing that defendant's motive in killing the policeman was to avoid arrest for such felonies, where court admonished jury as to purpose for which such testimony might be used.—*Music v. Commonwealth*, 216 S. W. 116.

369(7) (Tex.Cr.App.) In a burglary case, it was not error to permit the owner of the house to show where he found the property taken from his house; such testimony not tending to show a separate and distinct crime or transaction, there being nothing in the evidence to suggest more than one burglary, or tending to raise the question of the connection of any one therewith save accused and those indicted with him.—*Davidson v. State*, 216 S. W. 624.

369(15) (Ky.) Evidence of other crimes is competent to show identity.—*Music v. Commonwealth*, 216 S. W. 116.

370 (Ky.) Evidence of other crimes is competent to show guilty knowledge.—*Music v. Commonwealth*, 216 S. W. 116.

371(1) (Ky.) Evidence of other crimes is competent to show intent.—*Music v. Commonwealth*, 216 S. W. 116.

371(12) (Ky.) Evidence of other crimes is competent to show motive.—*Music v. Commonwealth*, 216 S. W. 116.

In prosecution for murder of policeman attempting to arrest defendant following a robbery, evidence relating to the robbery was properly admitted for purpose of showing that defendant's motive in killing the policeman was to avoid arrest for such felonies, where court admonished jury as to purpose for which such testimony might be used.—*Id.*

⇒372(5) (Tex.Cr.App.) In prosecution of defendant as an accomplice to the theft of an automobile, it was error to admit testimony, that the principal committed the theft of perhaps as many as three additional autos at intervals covering several months, and that three of these reached defendant, on the theory of showing systematic thefts.—Cone v. State, 216 S. W. 190.

⇒374 (Ark.) In prosecution for offense of selling intoxicating liquor, evidence as to sales by accused made many years before sale upon which the prosecution was based held incompetent; the sales being too remote in point of time.—Beck v. State, 216 S. W. 497.

⇒374 (Tex.Cr.App.) In prosecution under Pen. Code, art. 506a, for inducing D. to become an inmate of a house of prostitution kept by defendant and her husband, testimony of D. that in May of the previous year she was staying at the McIntosh Hotel, and that defendant and her husband were in charge there, held not subject to objection that it was too remote.—Dollar v. State, 216 S. W. 1089.

(D) Materiality and Competency in General.

⇒388 (Tex.Cr.App.) In murder prosecution, evidence of experiment on body of deceased, to determine whether blows on his face could have been made with a pistol, held improper.—Dugan v. State, 216 S. W. 161.

⇒396(2) (Tex.Cr.App.) In a murder trial, a conversation between a witness and another out of the presence and hearing of the defendant was inadmissible as hearsay, and that the defendant asked a question of such witness which might have elicited the same matters, but was withdrawn before it was answered, was no reason for permitting the state to bring out such hearsay testimony over defendant's objections.—Parker v. State, 216 S. W. 178.

(E) Best and Secondary and Demonstrative Evidence.

⇒402(1) (Tex.Cr.App.) Court was within its discretion in overruling objection that testimony of grand juror as to incriminating statements of accused was not the best evidence, where two witnesses swore that statement of accused was not reduced to writing and another witness thought it was but was not certain.—Webb v. State, 216 S. W. 865.

(F) Admissions, Declarations, and Hearsay.

⇒406(4) (Tex.Cr.App.) Incriminating statements of accused voluntarily appearing before grand jury and making the statements after having been duly warned in terms of law are admissible against him.—Webb v. State, 216 S. W. 865.

⇒407(2) (Ark.) A statement in the presence of accused calling for a denial is admissible in evidence, although it does not show that accused actually heard the statement, where the natural thing would have been for him to hear it.—Davis v. State, 216 S. W. 292.

In a homicide case, a statement of one jointly indicted that he and accused were cutting wood and saw a team coming down the road, and that he jumped over a fence and caught the team and saw deceased lying in the wagon bed, was a statement which was admissible as calling for a denial when made in the presence of accused, as such statement tended to show that accused was present at such time.—Id.

⇒413(1) (Tex.Cr.App.) One being prosecuted for homicide cannot rebut evidence of threats or malice, or show who was the aggressor in the fatal encounter, by proof that he had previously stated to officers that he owed deceased no ill will and would have been friends with him if deceased would permit him to be so, and that he would like to have deceased put under a peace bond; such statements being self-serving, and unaccompanied by any acts

of which they would be explanatory.—Medford v. State, 216 S. W. 175.

⇒414 (Tex.Cr.App.) Where in a prosecution for procuring a female to become an inmate of a house of ill fame it was shown that female left the house and went to the home of a Mr. L., testimony of the female that she heard a conversation between accused and Mrs. L. when she was about six feet away in another room with open door was a sufficient predicate to admit the conversation.—Dollar v. State, 216 S. W. 1087.

⇒419, 420(11) (Tex.Cr.App.) In a murder trial, a conversation between a witness and another out of the presence and hearing of the defendant was inadmissible as hearsay.—Parker v. State, 216 S. W. 178.

(G) Acts and Declarations of Conspirators and Codefendants.

⇒424(3) (Ark.) Where several persons were charged with murder, a statement made by one of them some time after the murder, in the absence of the other, was not admissible on the theory that it was the statement of a coconspirator; statements made by coconspirators after the conspiracy has been completed not being admissible.—Davis v. State, 216 S. W. 292.

⇒424(3) (Tex.Cr.App.) Acts and conduct of defendant's brother and P., the principal, in the absence of defendant and after stolen car had been delivered to defendant as claimed by P., were inadmissible unless defendant was in some way a party to the same or had knowledge or assented thereto.—Cone v. State, 216 S. W. 190.

⇒424(5) (Ark.) A statement by a codefendant in the absence of appellant, made an hour after a killing, was not admissible as res gestæ in a prosecution for murder arising out of the killing.—Davis v. State, 216 S. W. 292.

(J) Testimony of Accomplices and Codefendants.

⇒507(1) (Ark.) Where one party gave another money wherewith to buy intoxicating liquor, and the latter took money and procured liquor and returned it to former, the latter was himself guilty of the sale, unless he acted only as former's agent and as an accomplice of seller; if he was not such agent, his testimony was not sufficient to convict seller of offense of selling intoxicating liquor, unless corroborated.—Beck v. State, 216 S. W. 497.

⇒507(1) (Ky.) The fact that a witness was jointly indicted with defendant does not make him an accomplice if the testimony shows that he was not one.—Music v. Commonwealth, 216 S. W. 118.

⇒507(2) (Tex.Cr.App.) In a prosecution for nighttime burglary of a private residence, where it was contended that defendant stole therefrom a can of lard, a witness whose testimony showed that on the night of the burglary he learned of defendant's possession of the lard, and after hearing of the burglary he received and hid it, is an accomplice witness.—Hornbuckle v. State, 216 S. W. 880.

⇒507(7) (Tex.Cr.App.) Prosecutrix in statutory rape case is not an accomplice, so conviction may be had on her uncorroborated testimony.—Lucas v. State, 216 S. W. 396.

(K) Confessions.

⇒537 (Tex.Cr.App.) In a prosecution for burglary of a private residence, a confession obtained by force is admissible if in connection therewith defendant made statements which led to the finding of the stolen property, the fruits of the crime.—Washington v. State, 216 S. W. 869.

(M) Weight and Sufficiency.

⇒552(3) (Ark.) Guilt of accused is not required to be established to exclusion of every other hypothesis than that accused committed

the charged offense, even if testimony is circumstantial.—*Bartlett v. State*, 216 S. W. 33.  
 ⚡556 (Tex.Cr.App.) Where the state through its own witnesses introduced defendant's declarations showing that defendant had killed deceased, and detailing in a manner in substantial harmony with defendant's own testimony the incidents and causes of the homicide, by the introduction of such statements the state became bound to the truth of all of them not disproved by evidence before the jury.—*Richards v. State*, 216 S. W. 388.

⚡561(1) (Tex.Cr.App.) In a criminal prosecution, where there is a doubt as to the testimony, the defendant is entitled to the benefit thereof.—*Jones v. State*, 216 S. W. 884.

⚡565 (Tex.Cr.App.) In prosecution for unlawfully carrying a pistol, proof to sustain conviction must show that the unlawful carrying was before the filing of complaint.—*Cassi v. State*, 216 S. W. 1009.

## XI. TIME OF TRIAL AND CONTINUANCE.

⚡594(1) (Tex.Cr.App.) The court did not err in refusing a continuance on the ground of absence of witnesses, where diligence as to one witness was insufficient, and the court states that it was not shown that witnesses would give alleged testimony, and it was evident that the absent testimony would not, if present, have brought about a different result.—*Carneal v. State*, 216 S. W. 628.

⚡594(4) (Tex.Cr.App.) Where defendant duly subpoenaed his wife to testify in his behalf, and at the time of trial moved for a continuance on account of her absence, and it appeared that the sheriff, when he attempted to bring her in by attachment, found her in bed in an advanced condition of pregnancy, defendant's motion for continuance on the ground of absence of his wife, who was a material witness, should have been granted.—*McDonald v. State*, 216 S. W. 166.

⚡596(2) (Ky.) In murder prosecution, where there were three eyewitnesses for state in support of theory that defendant was aggressor, and where only testimony, other than by affidavit, in support of defendant's theory that deceased was aggressor was that of defendant himself, court's refusal, upon disappearance of witness who would have corroborated defendant's testimony, and who had been sworn and placed under the rule as a witness for defendant, to discharge jury or postpone trial until it could be ascertained that witness could not be produced and then to discharge jury was prejudicial error.—*Lay v. Commonwealth*, 216 S. W. 123.

⚡597(1) (Tex.Cr.App.) In a prosecution for murder, denial of continuance for the absence of the witness stabbed by defendant at the time of the killing held not error, the facts expected to be proved by such witness on the face of the record not probably being his testimony.—*Johnson v. State*, 216 S. W. 192.

⚡598(2) (Tex.Cr.App.) Continuance was properly denied on account of the absence of witnesses to procure whose attendance or depositions defendant did not exercise sufficient diligence.—*Johnson v. State*, 216 S. W. 192.

⚡598(5) (Tex.Cr.App.) The court did not err in refusing a motion for continuance, in that all but five of the jurors on the bench disqualified; Code Cr. Proc. 1911, tit. 8, c. 4, providing for the formation of juries in cases less than capital, specifically taking care of any case where, from any cause, the number of jurors in the box or in the panel is reduced below the number required.—*Davidson v. State*, 216 S. W. 624.

⚡598(6) (Tex.Cr.App.) Where indictment was filed on January 4, 1919, and soon afterwards subpoenas were issued for a number of witnesses, but one for L. was not procured until February 8th, and was returned not served, witness not being found within the county, and the case was called for trial February 15th, a motion for

continuance on account of the absence of L. was properly overruled, where no reason or excuse was shown for failure to sooner secure the issuance of the subpoena for L.—*Davidson v. State*, 216 S. W. 624.

⚡600(1) (Tex.Cr.App.) Defendant's motion for continuance on the ground of the absence of a female witness, who, though duly subpoenaed, was unable to attend on account of her physical condition, cannot be denied because of the offer of the state to merely admit that, if she were present, she would testify as claimed by defendant.—*McDonald v. State*, 216 S. W. 166.

⚡600(2) (Ky.) Ordinarily it would not be reversible error for court to compel defendant to go to trial in the absence of a witness who did not appear in answer to a summons, or who absented himself after trial had commenced, if an affidavit of what he would testify to if present was permitted to be read as his deposition.—*Lay v. Commonwealth*, 216 S. W. 123.

## XII. TRIAL.

### (B) Course and Conduct of Trial in General.

⚡649(1) (Tex.Cr.App.) The granting of a postponement is a matter resting largely in the discretion of the trial court.—*Minor v. State*, 216 S. W. 864.

Where defendant answered ready, and after the introduction of testimony asked for a postponement on the ground that his wife was ill with typhoid-malarial fever, but it appeared that she had been sick for two weeks before beginning of trial, which did not occupy more than 2½ hours, held, that the trial court's denial of postponement was not an abuse of discretion.—*Id.*

⚡656(2) (Mo.App.) In prosecution for selling intoxicating liquor, where witness who had suggested prosecuting witness to prosecuting attorney as a good man to help him ferret out liquor violations testified as to bad reputation of prosecuting witness, and on examination by the court as to purpose in suggesting such a man stated that the witness' bad reputation had been acquired since, the court's remark, "So he has acquired that since," held not ground for reversal.—*State v. Stephens*, 216 S. W. 550.

### (C) Reception of Evidence.

⚡665(1) (Ky.) Civ. Code Prac. § 601, authorizing the court to exclude witnesses for adverse party not under examination if either party "requires" it, is not mandatory, and merely gives the party the right to ask for the separation, and the court the power to grant it subject to the exercise of his sound discretion.—*Music v. Commonwealth*, 216 S. W. 116.

⚡673(3) (Ky.) If evidence is introduced impeaching the credibility or the moral character of any witness, the court may, on his own motion, and should, if so requested, give the usual admonition of the purpose for which such impeaching or attacking evidence is allowed.—*Lay v. Commonwealth*, 216 S. W. 123.

### (E) Arguments and Conduct of Counsel.

⚡719(1) (Ky.) Inappropriate remarks of counsel during the argument to the jury will not justify reversal, unless altogether unfounded from any fact or circumstance appearing in the case, and manifest such a wide departure from legitimate deductions as to be at once poisonous and prejudicial; but, where remarks are foreign to anything appearing in the case, and made for purpose of taking an undue advantage, and such was the probable effect, it is the court's duty to reverse the judgment.—*Music v. Commonwealth*, 216 S. W. 116.

⚡719(1) (Tex.Cr.App.) In a prosecution for arson by burning defendant's own ties and lumber yard, in the total absence of evidence to show that the lumber market was bad at the

time, and that defendant would have profited by collecting the fire insurance, statement of a prosecuting attorney in closing argument that just before the fire the lumber market was bad, etc., *held* an infringement of defendant's rights.—*Kelley v. State*, 216 S. W. 188.

⇒722½ (Tex.Cr.App.) Argument of prosecuting officer, to the effect that defendant's former conviction and suspended sentence offered strong reasons why he might falsify his testimony, *held* justifiable.—*Gordon v. State*, 216 S. W. 184.

⇒724(1) (Tex.Cr.App.) In prosecution for pandering, defined by Pen. Code, art. 506a, remark by attorney for state in argument, "We want to get rid of such cattle as that," was improper.—*Dollar v. State*, 216 S. W. 1089.

⇒729 (Mo.App.) Where prosecuting attorney, in commenting upon testimony of defendant's witness from city of S., who had impeached reputation of prosecuting witness, and who had testified that he had got out of a sick bed to testify, said, "I wonder if S. is so small that they were unable to find any other man than one who was sick in bed and who had to be brought from a sick bed down here to testify," but upon objection withdrew remark, and where court stated that "the remark is withdrawn," there was no ground for reversal.—*State v. Stephens*, 216 S. W. 550.

⇒730(8) (Ky.) Counsel's argument to jury, which assumed facts to which there was no express testimony, but which were fairly deducible from the circumstances, *held* not ground for reversal, where jury was directed by the court to try case on the law and the evidence alone.—*Music v. Commonwealth*, 216 S. W. 116.

⇒730(15) (Tex.Cr.App.) A statement by the district attorney that defendant was a burr-headed nigger *held* not prejudicial, the same having been withdrawn by the instructions of the court.—*Adams v. State*, 216 S. W. 863.

#### (F) Province of Court and Jury in General.

⇒736(2) (Tex.Cr.App.) In a prosecution for murder, it was not error to submit to the jury question whether certain admissions by defendant, when brought from jail to execute his appearance bond, were made while he was under arrest, the jury to disregard such statements if they should find that he was under arrest, but to consider them if he was not then under arrest; the question being a close one as to the facts.—*Jones v. State*, 216 S. W. 884.

⇒737 (Ky.) Evidence as to venue on prosecution for seduction *held* sufficient to justify refusal of peremptory instruction asked by defendant.—*Cline v. Com.*, 216 S. W. 594.

⇒743 (Tex.Cr.App.) Whether the evidence of the accused be true or false is a question for the jury under proper instructions.—*McCormick v. State*, 216 S. W. 871.

⇒759(4) (Ark.) In a larceny case an instruction that "the possession of property recently stolen affords presumptive evidence of guilt" was erroneous, as being upon the weight of the evidence; the unexplained possession of recently stolen property being only a fact from which an inference of guilt may be drawn.—*Long v. State*, 216 S. W. 306.

⇒761(5) (Tex.Cr.App.) In a prosecution for conspiracy to commit murder, instruction on venue *held* erroneous as assuming that, in an assault by defendant's coconspirators upon the husband of one of them against whom the alleged conspiracy to kill was directed, such coconspirators were in the wrong and were not acting in self-defense.—*King v. State*, 216 S. W. 1091.

⇒763, 764(1) (Tex.Cr.App.) In a prosecution for conspiracy to commit murder, instruction on venue *held* erroneous as on the weight of the testimony.—*King v. State*, 216 S. W. 1091.

#### (G) Necessity, Requisites, and Sufficiency of Instructions.

⇒770(2) (Tex.Cr.App.) It is a duty of the trial court to charge on all the issues made by the testimony, no matter whether the same are raised by the testimony of the accused or some other witness.—*Medford v. State*, 216 S. W. 175.

⇒770(2) (Tex.Cr.App.) In a criminal prosecution wherever the evidence presents an issue or theory favorable to the accused, the trial court should fairly and freely submit such issue for the consideration of the jury under appropriate instructions.—*Jones v. State*, 216 S. W. 384.

⇒772(4) (Tex.Cr.App.) In a prosecution for conspiracy to commit murder, instruction on venue *held* erroneous as on the weight of the testimony and contrary to Code Cr. Proc. 1911, art. 253, providing the offense of conspiracy may be prosecuted in the county where the conspiracy was entered into or was agreed to be executed.—*King v. State*, 216 S. W. 1091.

⇒773(3) (Tex.Cr.App.) Charge on presumption of innocence is necessary in every case.—*Dugan v. State*, 216 S. W. 161.

⇒780(2) (Ark.) In a prosecution for sale of intoxicating liquor, where there was a sharp conflict between testimony of accomplice and testimony for state, court's refusal to instruct that there could be no conviction upon testimony of accomplice unless corroborated by other testimony *held* reversible error.—*Beck v. State*, 216 S. W. 497.

⇒780(2) (Tex.Cr.App.) Where it appeared that defendant, while in the presence of the witness for the prosecution, wrote a check, signing the name of a third person, and that such witness carried the check to the bank, where it was cashed, etc., the failure of the court to charge on accomplice testimony *held* error.—*Flores v. State*, 216 S. W. 185.

⇒780(2) (Tex.Cr.App.) In a prosecution for theft, *held*, that defendant was entitled to have given an instruction submitting the issue of whether state's witness was an accomplice.—*McCormick v. State*, 216 S. W. 871.

That defendant in his alleged confession, which was introduced by the state, contradicted his testimony as a witness on the trial, could only affect his credibility as a witness, or his guilt, and in no wise justified ignoring the right of the jury to pass on the question of accomplice's testimony, by refusing requested instruction relating thereto.—*Id.*

⇒780(2) (Tex.Cr.App.) In a prosecution for nighttime burglary of a private residence, where it was contended that defendant stole therefrom a can of lard, a witness whose testimony showed that on the night of the burglary he learned of defendant's possession of the lard, and after hearing of the burglary he received and hid it, is an accomplice witness, and defendant's request for charge on accomplice testimony was improperly denied.—*Hornbuckle v. State*, 216 S. W. 880.

⇒780(3) (Ark.) In burglary prosecution, instruction as to corroboration of testimony of accomplice *held* to meet requirement of statute.—*Bartlett v. State*, 216 S. W. 33.

⇒780(3) (Tex.Cr.App.) In prosecution of defendant as an accomplice to theft of automobile, *held*, that jury should have been instructed that the state must prove, first, that P. was a principal and committed the theft, and that he must be corroborated as to that issue, and, second, that defendant was an accomplice as charged, and that P.'s testimony was not sufficient to prove that fact, but must be corroborated.—*Cone v. State*, 216 S. W. 190.

⇒784(7) (Ark.) In a prosecution for incest, requested instruction on circumstantial evidence that the state must prove beyond a reasonable doubt that the commission of the crime could not be explained away on any hypothesis other than that of defendant's guilt *held* improper, as

For cases in Dec.Dig. & Am.Dig. Key-No.Series & Indexes see same topic and KEY-NUMBER

omitting the word "reasonable" before "hypothesis."—*Griffin v. State*, 216 S. W. 34.

—8785(16) (Ark.) In a prosecution for incest, instruction on the jury's right to disregard in whole or in part the testimony of a witness who had testified falsely to any material fact *held* not so inherently defective as to be erroneous and misleading.—*Griffin v. State*, 216 S. W. 34.

—792(1) (Tex.Cr.App.) In prosecution of defendant as an accomplice to theft of automobile, *held*, that jury should have been instructed that the state must prove first that P. was a principal and committed the theft.—*Cone v. State*, 216 S. W. 190.

—792(3) (Ark.) In burglary prosecution, instruction to convict if accomplice entered the building and stole the property, and "defendant was present, aiding and abetting, or ready and willing to aid and abet," *held* proper as against objection that it authorized conviction under testimony constituting defendant an accessory, since defendant, if present, aiding and abetting, or ready and willing to aid and abet, was in fact a principal under Kirby's Dig. § 1563.—*Bartlett v. State*, 216 S. W. 33.

—795(1) (Tex.Cr.App.) In criminal prosecutions, where there are any circumstances that would mitigate or reduce the offense to a lower grade than that of which accused was convicted, he is entitled to the benefit of such circumstances under appropriate instructions from the court as to the law applicable thereto.—*Jones v. State*, 216 S. W. 884.

—800(6) (Tex.Cr.App.) In a prosecution for obstructing a public road, the definition of "wilful" by the court in his charge that by the term it was meant that defendant knew at the time of the alleged obstruction that the road was public, and that the obstruction was placed, if it was obstructed, with an evil intent, *held* sufficient.—*Howard v. State*, 216 S. W. 168.

—811(2) (Ky.) In a homicide case, an instruction admonishing the jury to decide the case on the evidence, including the dying declaration of deceased, etc., *held* improper because giving undue prominence to the dying declaration.—*Jones v. Com.*, 216 S. W. 607.

—814(1) (Mo.App.) When there is no substantial evidence to support a material issue of fact, such issue should not be submitted to the jury.—*State v. Eslick*, 216 S. W. 974.

—814(2) (Tex.Cr.App.) Where there is any evidence raising an issue, it becomes the duty of the trial court to submit the issue.—*McCormick v. State*, 216 S. W. 871.

—814(17) (Ark.) Guilt of accused is not required to be established to exclusion of every other hypothesis than that accused committed the charged offense, even if testimony is circumstantial and instruction as to circumstantial evidence was properly refused, where testimony was not wholly or chiefly of circumstantial character.—*Bartlett v. State*, 216 S. W. 33.

—814(17) (Ark.) In a prosecution for incest, there was no error in refusing a requested instruction on circumstantial evidence, where the state did not rely wholly on circumstantial evidence.—*Griffin v. State*, 216 S. W. 34.

—815(4) (Tex.Cr.App.) In a burglary case, court properly refused to give a special charge with reference to whether the doors were open or not, instruction only mentioning "doors of the house," omitting entirely the submission of the question as to whether the "doors of the room, in which the property was stored, were open."—*Davidson v. State*, 216 S. W. 624.

—822(14) (Ark.) In a prosecution for incest, an instruction that if the jury believed that any witness had willfully sworn falsely to any material fact they were at liberty to disregard his testimony in whole or in part, or to believe it in part and disregard it in part, *held* not erroneous, taking instruction as a whole, as authorizing the jury to disregard any part of a

witness' testimony, though believing it to be true, if they also believed he had sworn falsely to some other fact.—*Griffin v. State*, 216 S. W. 34.

—822(17) (Tex.Cr.App.) A whole charge, as one on manslaughter in a prosecution for murder, must be looked to in determining whether it is erroneous on account of a particular part.—*Johnson v. State*, 216 S. W. 192.

In a prosecution for murder, defendant seeking to reduce the offense to manslaughter on the theory that he was attacked by decedent and another, one or both, general charge on manslaughter, construed as a whole, *held* to present the issue in such manner as not to injure defendant by limiting reduction of the offense to manslaughter only if defendant was attacked by both decedent and the other, not by one alone; the parts complained of not fairly presenting their relation to the general charge.—*Id.*

#### (H) Requests for Instructions.

—829(1) (Tex.Cr.App.) There was no error in refusing special requested charges, where point raised was covered by the main charge.—*McCormick v. State*, 216 S. W. 871.

—829(1) (Tex. Cr. App.) Where the main charge, together with the several special charges given at request of defendant, appellant, fully and fairly submitted the issues involved, there was no error in refusing other special charges requested by defendant.—*Dollar v. State*, 216 S. W. 1039.

—829(3) (Tex.Cr.App.) In a prosecution for an assault upon a woman, an instruction that before they could convict the jury must believe that the assault was committed "as alleged in the indictment" was sufficient, and justified refusal of requested charges thereon.—*Poldrack v. State*, 216 S. W. 170.

#### (J) Custody, Conduct, and Deliberations of Jury.

—857(2) (Tex.Cr.App.) In homicide prosecution, juror's discussion of fact that accused had been indicted for another killing, and of fact that a codefendant had been previously tried and convicted, *held* misconduct justifying reversal, where such facts were not in evidence and were unknown to some of the jurors before such discussion, and where, on first ballot cast before such discussion, jurors were evenly divided for and against conviction.—*Luman v. State*, 216 S. W. 395.

—867 (Ky.) In murder prosecution, where there were three eyewitnesses for state in support of theory that defendant was aggressor, and where only testimony, other than by affidavit, in support of defendant's theory that deceased was aggressor, was that of defendant himself, court's refusal, upon disappearance of witness who would have corroborated defendant's testimony, and who had been sworn and placed under the rule as a witness for defendant, to discharge jury, was prejudicial error.—*Lay v. Commonwealth*, 216 S. W. 123.

#### (K) Verdict.

—878(2) (Tex.Cr.App.) Where there was a general verdict of guilty, without special reference to either of two counts of an indictment, the court on appeal may apply the verdict to either of the two counts.—*Davidson v. State*, 216 S. W. 624.

—878(2) (Tex.Cr.App.) Where indictment was in two counts, one charging theft, and the other receiving and concealing the property, and a general verdict of guilty was returned, and the trial court properly applied the verdict to the count charging theft, and rendered judgment accordingly.—*McCormick v. State*, 216 S. W. 871.

### XIII. MOTIONS FOR NEW TRIAL AND IN ARREST.

¶915 (Tex.Cr.App.) Where defendant in a criminal case does not complain that his name is incorrectly stated or spelled in the indictment until a motion for new trial is filed, he has waived such point under the express provisions of Vernon's Ann. Code Cr. Proc. 1916, art. 559.—*Bargas v. State*, 216 S. W. 172.

¶921 (Tex.Cr.App.) In a prosecution for violation of the local option law, where the court erroneously excluded testimony offered to show motive of the state's witness, defendant should have been granted a new trial, where it further appeared that the jury, upon inquiry by the judge as to whether they had reached a verdict, assumed that if verdict was not shortly reached they would be confined over Sunday, and that the jury rendered a verdict of guilty within a few hours, although at the time of the inquiry a majority were in favor of acquittal.—*West v. State*, 216 S. W. 186.

¶928 (Tex.Cr.App.) In a prosecution for violation of the local option law, where the court erroneously excluded testimony offered to show motive of the state's witness, defendant should have been granted a new trial, where it further appeared that the jury, upon inquiry by the judge as to whether they had reached a verdict, assumed that if verdict was not shortly reached they would be confined over Sunday, and that the jury rendered a verdict of guilty within a few hours, although at the time of the inquiry a majority were in favor of acquittal.—*West v. State*, 216 S. W. 186.

¶938(1) (Tex.Cr.App.) The rule in Texas with reference to cumulative evidence and strict diligence does not apply to the question of insanity, viewed in the light of newly discovered testimony.—*Walker v. State*, 216 S. W. 1085.

¶938(3) (Tex.Cr.App.) In a prosecution for murder of defendant's mistress, new trial was properly refused when asked on account of newly discovered evidence of the city marshal that decedent was a mean and vicious woman, who had previously attacked defendant two or three times, as such evidence could not be newly discovered so far as defendant was concerned.—*Johnson v. State*, 216 S. W. 192.

¶939(1) (Tex.Cr.App.) On motion for a new trial on the ground of newly discovered evidence, defendant should show why the evidence was not offered on the trial, or that it was unknown to defendant or his attorney and could not have been discovered by the use of reasonable diligence.—*Gerlich v. State*, 216 S. W. 164.

¶940 (Tex.Cr.App.) In a prosecution for arson, defendant's motion for new trial on the ground of newly discovered evidence, consisting of testimony of two farmers, residents in the community, should have been granted, where circumstances were relied on to prove defendant's guilt, and the farmers' testimony tended to show that when defendant was in his house another person, admittedly at least an accomplice, and one of the incendiaries, was in proximity to the destroyed property under suspicious circumstances.—*Kelley v. State*, 216 S. W. 188.

¶958(6) (Tex.Cr.App.) An affidavit of only one witness to the effect that the main witness was hostile to accused was not sufficient to require the granting of a motion for a new trial on the ground of newly discovered evidence.—*Gerlich v. State*, 216 S. W. 164.

¶958(6) (Tex.Cr.App.) In a prosecution for burglary, wherein an issue of insanity had been found against defendant, affidavits on a motion for new trial on that issue held to present evidence requiring a new trial to be granted notwithstanding that such evidence was, strictly speaking, not newly discovered evidence.—*Walker v. State*, 216 S. W. 1085.

### XIV. JUDGMENT, SENTENCE, AND FINAL COMMITMENT.

¶981(2) (Tex.Cr.App.) If it be claimed that defendant's mind is of such a character as

to render him legally insane, the matter can be inquired into after as well as before trial for a criminal offense, and, on adjudication of the question in a lunacy proceeding, defendant can be sent to an institution for the insane, and not to the penitentiary.—*Hunter v. State*, 216 S. W. 871.

¶982 (Tex.Cr.App.) Defendant, being prosecuted for theft, by asking for a suspended sentence, put his reputation in issue, and there was no error in allowing the state to prove that he had been convicted for playing poker.—*McCormick v. State*, 216 S. W. 871.

¶992 (Ark.) Verdict, "We, the jury, find the defendant guilty and assess his punishment at one year's imprisonment," was sufficient to support judgment and sentence to one year's imprisonment in the penitentiary; Acts 1915, p. 98, upon which prosecution was based, providing for but one punishment, namely, imprisonment in the penitentiary for one year.—*Pinkerton v. State*, 216 S. W. 716.

### XV. APPEAL AND ERROR, AND CERTIORARI.

(B) Presentation and Reservation in Lower Court of Grounds of Review.

¶1032(7) (Tex.Cr.App.) Where defendant in a prosecution for cattle theft was indicted under the name of "Bargas," to which he pleaded without objection, he could not on appeal contend that his true name was "Vargas," and that hence there was a variance.—*Bargas v. State*, 216 S. W. 173.

¶1036(1) (Ky.) Refusal to admit testimony will not be considered on appeal, where there was no avowal as to what the witness would have testified to had he been permitted to answer question.—*Music v. Commonwealth*, 216 S. W. 116.

¶1036(2) (Mo.App.) Defendant, who did not object or except to alleged improper questions asked witness by court, cannot rely thereon on appeal.—*State v. Stephens*, 216 S. W. 550.

¶1043(2) (Ark.) If counsel for defendant conceived on trial that an instruction was erroneous in a certain respect urged against it on appeal, he should have called the attention of the trial judge to such construction of the charge by a specific objection.—*Griffin v. State*, 216 S. W. 34.

¶1054(1) (Mo.App.) Defendant, who did not except to alleged improper question asked witness by court, cannot rely thereon on appeal.—*State v. Stephens*, 216 S. W. 550.

¶1056(2) (Tex.Cr.App.) Under Vernon's Ann. Code Cr. Proc. 1916, arts. 735-737, errors in charges, not properly excepted to, will not be considered by the Court of Criminal Appeals, unless fundamental.—*Flores v. State*, 216 S. W. 170.

In a prosecution for cutting fences, misdirection of the jury as to the punishment to be awarded, resulting in infliction of a penalty of two years, greater than the minimum of one year fixed by law, held fundamental error, reviewable despite the absence of proper exception to the charge.—*Id.*

¶1058(2) (Ark.) An exception "to the entire oral charge" was in gross and availed nothing, where the oral charge contained several instructions and part of them were correct.—*Long v. State*, 216 S. W. 306.

¶1059(2) (Tex.Cr.App.) The ground of exception that the court did not allow defendant sufficient time to review a charge after it was written and before being read to the jury, reciting that the charge was handed to defendant's counsel at 11 o'clock in the evening, and that they were given until 8:45 the next morning to examine it, held insufficient, as too general.—*Johnson v. State*, 216 S. W. 192.

¶1064(1) (Tex.Cr.App.) The Court of Criminal Appeals cannot consider a motion for new trial, not signed or sworn to, nor stating its facts in such a way as to make their truth a question to be considered, either by the trial

For cases in Dec.Dig. & Am.Dig. Key-No.Series & Indexes see same topic and KEY-NUMBER

court or the Court of Criminal Appeals.—*Hunter v. State*, 216 S. W. 871.

**(C) Proceedings for Transfer of Cause, and Effect Thereof.**

⇒1081 (Tex.Cr.App.) In order to perfect an appeal, it is imperative that a notice of appeal to the Court of Criminal Appeals be not only given by the appellant at the term at which his trial was had, but the same must also be entered in the minutes and so appear in the record sent to the appellate court.—*Sauzeda v. State*, 216 S. W. 1098.

**(D) Record and Proceedings Not in Record.**

⇒1087(1) (Tex.Cr.App.) Under Vernon's Ann. Code Cr. Proc. 1916, art. 920, the Court of Criminal Appeals cannot entertain an appeal from a conviction of aggravated assault, a misdemeanor, where the only record entry relative to the recognizance reads: "Recognizance fixed at \$1,000.00. Made and executed by G. J. [defendant], N. A. J., and G. T. S."—not a compliance with article 919, prescribing the form of recognizance in misdemeanor cases.—*Jenkins v. State*, 216 S. W. 183.

⇒1087(1) (Tex.Cr.App.) In order to perfect an appeal, it is imperative that a notice of appeal to the Court of Criminal Appeals be not only given by the appellant at the term at which his trial was had, but the same must also be entered in the minutes and so appear in the record sent to the appellate court.—*Sauzeda v. State*, 216 S. W. 1098.

The statement, "Notice of appeal given," at the conclusion of the order overruling the motion for a new trial in the record, is insufficient to give the Court of Criminal Appeals jurisdiction, such entry not showing to what court notice was given, nor that any notice of appeal was entered of record or carried into the minutes of the trial court.—Id.

⇒1088(20) (Mo.) Where the indictment in a murder case has been lost, on appeal it is defendant's duty to perfect his appeal during the 12 months provided by Rev. St. 1909, § 5313, by supplying such lost indictment, and if he fails to do so, the appeal will be dismissed because of the appellant's failure to furnish a complete transcript of the records, as required by section 5309.—*State v. Cantrell*, 216 S. W. 48.

⇒1090(1) (Tex.Cr.App.) Where there is neither statement of facts nor bill of exceptions accompanying the record, the only question raised on appeal is the sufficiency of indictment.—*Dixon v. State*, 216 S. W. 1097.

⇒1090(7) (Tex.Cr.App.) Where a bill of exceptions was not reserved to the refusal of a continuance in a criminal prosecution, it will not be considered on appeal.—*Bargas v. State*, 216 S. W. 173.

⇒1090(7) (Tex.Cr.App.) There was no error shown in refusal of continuance because of the absence of an alibi witness for whom no process had issued, where no bill of exceptions was reserved to the overruling of the application.—*Jones v. State*, 216 S. W. 183.

⇒1090(16) (Tex.Cr.App.) The matters set up in motion for new trial cannot be considered in the absence of the evidence and bills of exception.—*Dixon v. State*, 216 S. W. 1097.

⇒1090(19) (Tex.Cr.App.) One dissatisfied with the rulings of the court in a criminal case as to the receipt or rejection of evidence must, to obtain review, bring the matter before the Court of Criminal Appeals in a bill of exceptions, certified in the manner provided by law, and it is not sufficient to complain of the court's rulings on motion for new trial.—*Bargas v. State*, 216 S. W. 172.

⇒1090(19) (Tex.Cr.App.) A purported transcript of what occurred on the trial as shown by the stenographer's notes and certified to by the stenographer, but not presented to or approved by the judge, cannot be considered.—*Bargas v. State*, 216 S. W. 173.

⇒1091(5) (Tex.Cr.App.) A bill of exceptions complaining of the exclusion of the question asked by defendant does not show harmful error where the bill stated that, had the witness been permitted to testify, the answer would have been in the negative, and hence not in favor of defendant.—*Jackson v. State*, 216 S. W. 866.

A bill of exceptions complaining of the refusal of the court in prosecution for theft of hogs to permit witness to answer a question framed to show that the witness to whom defendant sold hogs failed to deliver them to claimant because of the uncertain description given of them by claimant is insufficient where it does not disclose what objection was made by the state or point out the materiality or relevancy of the inquiry.—Id.

⇒1091(8) (Tex.Cr.App.) Where bill of exceptions shows objections to argument of counsel as commenting on failure of accused to testify, but does not show as a fact that accused did not testify, it is insufficient, as grounds of objections are not statement of facts.—*Quinney v. State*, 216 S. W. 882.

⇒1091(9) (Tex.Cr.App.) The appellate court will not search the entire record, to ascertain if a bill of exceptions is well founded, and a bill to the court's charge, stating no grounds of exception and no facts, is insufficient.—*Davidson v. State*, 216 S. W. 624.

⇒1091(10) (Tex.Cr.App.) A bill of exceptions complaining of the refusal of the court in prosecution for theft of hogs to permit witness to answer a question framed to show that the witness to whom defendant sold hogs failed to deliver them to claimant because of the uncertain description given of them by claimant is insufficient where it does not disclose what objection was made by the state.—*Jackson v. State*, 216 S. W. 866.

⇒1091(11) (Tex.Cr.App.) The mere statement of the grounds of objections in a bill of exceptions is not a certificate of the judge that the facts stated are true, and defendant must incorporate sufficient evidence in the bill, to verify the truth of the objections.—*Quinney v. State*, 216 S. W. 882.

⇒1092(4) (Tex.Cr.App.) To constitute a bill of exceptions, it must be filed, either in term time or within such time as may be authorized by law.—*Bargas v. State*, 216 S. W. 173.

⇒1092(11) (Tex.Cr.App.) It is in serious doubt whether the court intended to approve exceptions where the exceptions and special charges are all included in the same document indorsed "refused" by the court.—*Howard v. State*, 216 S. W. 168.

⇒1092(11) (Tex.Cr.App.) In a prosecution for murder, denial of defendant's motion to quash the venire on various grounds held not to present error or require revision in view of the bill of exceptions merely repeating some of the grounds of the motion, but containing no facts and not showing what evidence was introduced in regard to the matter and in qualification thereto by the court.—*Johnson v. State*, 216 S. W. 192.

⇒1092(14) (Tex.Cr.App.) A purported transcript of what occurred on the trial as shown by the stenographer's notes and certified to by the stenographer, but not presented to or approved by the judge, cannot be considered; since to constitute a bill of exceptions it must be first approved by the court certifying its correctness, and must be filed, either in term time or within such time as may be authorized by law.—*Bargas v. State*, 216 S. W. 173.

⇒1092(14) (Tex.Cr.App.) The mere statement of the grounds of objections in a bill of exceptions is not a certificate of the judge that the facts stated are true.—*Quinney v. State*, 216 S. W. 882.

⇒1097(1) (Tex.Cr.App.) Grounds of objection in bill of exceptions will not take place of the necessary statement of facts to show that ob-



jection is well taken.—*Dollar v. State*, 216 S. W. 1087.

☞1097(4) (Tex.Cr.App.) Without a statement of facts appellate court cannot determine whether confession was obtained by force.—*Washington v. State*, 216 S. W. 869.

☞1097(6) (Tex.Cr.App.) The matters set up in the motion for new trial pertaining to the evidence cannot be considered, in the absence of statement of facts.—*Dixon v. State*, 216 S. W. 1097.

☞1099(5) (Tex.Cr.App.) A statement of facts filed more than 90 days after adjournment of the term at which conviction was had, contrary to Code Cr. Proc. art. 845, cannot be considered.—*Washington v. State*, 216 S. W. 869.

☞1099(6) (Tex. Cr. App.) Where the court which tried a prosecution for misdemeanor entered an order allowing 60 days after adjournment in which to file statement of facts and such statement was in fact filed within the 60 days, it will not be stricken out because filed more than 20 days after adjournment, the same rule applying in regard to statements of fact and bills of exception in misdemeanor as in felony cases.—*Howard v. State*, 216 S. W. 168.

☞1099(11) (Tex.Cr.App.) Under the statute, the judge trying the case must approve the statement of facts, though he has ceased to hold office, and approval by his successor is insufficient.—*Quinney v. State*, 216 S. W. 882.

☞1106(2) (Mo.App.) Under Rev. St. 1909, § 5308, requiring a full transcript of record in a criminal cause, including a bill of exceptions, to be filed "without delay," such filing is sufficient, if made within six months, and although section 5309 provides that the transcript be made out, certified, and returned "as in Civil Cases," and section 2048 provides civil appeals may be taken by short form of transcript, if the short form is used in a criminal cause, then within the six months for perfecting appeal a full transcript must be filed.—*State v. Dolan*, 216 S. W. 334.

Where a judgment of conviction was had March 6, 1918, motion for new trial was overruled April 4th following, and bill of exceptions signed February 25, 1919, a full transcript, filed October 4, 1919, was filed more than six months after proper time, whether counting from date of overruling motion for new trial or of filing bill of exceptions.—*Id.*

☞1106(2) (Tex.Cr.App.) A transcript, filed nearly 150 days after adjournment of trial court, is in plain violation of the duty enjoined on the district clerk by statute, requiring that transcripts be made out "at once" after adjournment, and forwarded to Court of Criminal Appeals.—*Washington v. State*, 216 S. W. 869.

☞1109(2) (Mo.App.) The state's objection that defendant had used the short form of transcript, instead of the full transcript required by Rev. St. 1909, § 5308, is properly raised for the first time in the state's brief, and the state is not estopped because of not moving to dismiss appeal, and defendant's attempt to amend transcript and preparation for review on the merits.—*State v. Dolan*, 216 S. W. 334.

☞1110(5) (Mo.App.) Where defendant has appealed from a conviction by using a short form transcript, he cannot, after lapse of the six months allowed for perfecting the appeal, and after the state's objection to the transcript amend or alter it to make a full transcript as required by Rev. St. 1909, § 5308.—*State v. Dolan*, 216 S. W. 334.

☞1115(2) (Tex.Cr.App.) In a prosecution for murder, denial of defendant's motion to quash the venire on various grounds held not to present error or require revision, in view of the bill of exceptions merely repeating some of the grounds of the motion but containing no facts and not showing what evidence was introduced in regard to the matter, and in qualification

thereto by the court.—*Johnson v. State*, 216 S. W. 192.

☞1120(4) (Tex.Cr.App.) A bill of exceptions, complaining that prosecutrix in the statutory rape case was allowed to answer questions as to the relations between herself and defendant at a previous time, held insufficient to present the complaint that the state was allowed to introduce evidence of criminal acts barred by limitations not showing what was the answer of the prosecutrix.—*Lucas v. State*, 216 S. W. 396.

☞1120(8) (Tex.Cr.App.) In a prosecution for theft, a bill of exceptions against the admission of testimony claimed to have been in the nature of a confession made while under arrest, unaccompanied by the statutory formalities, which fails to show that defendant was under arrest at the time, and does not sufficiently show the surrounding facts to advise the Court of Criminal Appeals of the materiality of the evidence sought to be excluded, presents no error.—*Petterson v. State*, 216 S. W. 186.

☞1122(6) (Tex.Cr.App.) On appeal in a criminal case, to authorize the consideration of objections to the charge, or the refusal of special charges, the record must disclose that the requirements of Vernon's Ann. Code Cr. Proc. 1916, arts. 735, 737, 737a, and 743, providing for presentation of charges to the court, were fulfilled.—*Bargas v. State*, 216 S. W. 172.

☞1124(3) (Tex.Cr.App.) The matters set up in motion for new trial cannot be considered in the absence of the evidence and bills of exception.—*Dixon v. State*, 216 S. W. 1097.

#### (E) Assignment of Errors and Briefs.

☞1129(1) (Mo.App.) Under Rev. St. 1909, § 5312, no assignment of error is necessary in a criminal case, and it is the duty of the appellate court to proceed upon the return and render judgment upon the record before it.—*State v. Asher*, 216 S. W. 1013.

#### (G) Review.

☞1134(3) (Mo.) Since there is no sufficient information, assignment of error concerning sufficiency of evidence and admissibility of certain evidence will not be discussed, since discussion of points other than sufficiency of information would rise to no higher standard than mere dictum.—*State v. Crayne*, 216 S. W. 47.

☞1137(5) (Ark.) In a prosecution for selling intoxicating liquors, where defendant, in response to question by his own counsel, stated that he had never at any time sold whisky, the admission of testimony as to sales made many years before that upon which prosecution was based held an error invited by defendant himself.—*Reck v. State*, 216 S. W. 497.

☞1137(7) (Tex.Cr.App.) One charged with the unlawful manufacture of intoxicating liquors who has entered a plea of guilty and has been assessed the lowest penalty is not in position to urge on appeal as a ground for reversal the insufficiency of the evidence to prove his guilt.—*Grandberry v. State*, 216 S. W. 164.

☞1144(1/2) (Tex.Cr.App.) Court on appeal must indulge the presumption that the rulings of the trial court are correct.—*Quinney v. State*, 216 S. W. 882.

☞1144(3) (Ark.) In burglary prosecution where variance, if any, between allegation that building broken into, and property defendant had intended to steal belonged to M. Railway Company, and proof showing owner to be M. Railroad Company was waived by defendant's counsel, it will be assumed on appeal, as against objection that only defendant himself could have waived objection, that if point had not been waived proof could and would have been offered that the two companies would have been recognized as the same corporation in the community.—*Bartlett v. State*, 216 S. W. 33.

☞1144(6) (Tex.Cr.App.) Where, on appeal in a criminal case, it does not appear that an issue was made upon the failure to prove venue, venue will be presumed under the provisions of Ver-



For cases in Dec.Dig. & Am.Dig. Key-No.Series & Indexes see same topic and KEY-NUMBER

non's Ann. Code Cr. Proc. 1916, art. 938.—*Bargas v. State*, 216 S. W. 172.

—§1144(12) (Tex.Cr.App.) Ruling of trial court in admitting testimony is presumed to have been correct; bill of exceptions being too meager to give any adequate information upon which to base a ruling adverse to that of trial court.—*Dollar v. State*, 216 S. W. 1089.

—§1149 (Tex.Cr.App.) A plea of former jeopardy, setting out that after a trial had begun, defendant's plea, entered, and evidence heard, the jury were wrongfully dismissed, raised a question of fact; and, while the burden was on defendant to show an abuse of the court's discretion in discharging the jury, he had the right to show that the court erred therein, if possible and, if not satisfied with the ruling, to bring the matter up for review.—*Chadwick v. State*, 216 S. W. 397.

—§1159(2) (Mo.App.) Appellate courts cannot permit verdicts of conviction to stand, where the proof introduced by the state flatly contradicts such finding, which is based merely on a refusal of the jury to believe every witness that the state introduced who was in a position to, and did, know the actual facts as they existed.—*State v. Osborne*, 216 S. W. 970.

—§1159(6) (Tex.Cr.App.) The case being one of circumstantial evidence, and the jury having found against defendant, the court on appeal will not set aside the verdict based on conflicting evidence, though alibi was strongly proven.—*Gordon v. State*, 216 S. W. 184.

—§1166(9) (Tex.Cr.App.) Complaint cannot be made of the overruling of a motion for continuance on the ground of absence of a witness, where the witness appeared and testified.—*Davidson v. State*, 216 S. W. 624.

—§1168(2) (Ky.) The court's refusal to separate witnesses upon defendant's request therefor, under Civ. Code Prac. § 601, where nearly all of the witnesses testified to different facts and there could be no occasion for collusion or conspiracy to verify each other or give false testimony, if error, was harmless.—*Music v. Commonwealth*, 216 S. W. 116.

—§1169(1) (Ark.) In prosecution for offense of selling intoxicating liquor, where there was not sufficient evidence to warrant submission of question of former conviction, evidence of jurors in the former trial could not have been prejudicial.—*Beck v. State*, 216 S. W. 497.

—§1169(1) (Tex.Cr.App.) In a prosecution for procuring a female to become an inmate of a house of ill fame, testimony that a prostitute occupied a room in the hotel was admissible to show the character of the place, and the fact that her conversation with a man in the lobby of accused's hotel relative to her occupying a room was or was not heard by accused was immaterial, where she in fact did occupy a room pointed out to her.—*Dollar v. State*, 216 S. W. 1087.

—§1169(7) (Ark.) Admission in evidence of a declaration of a codefendant to the effect that accused was near the place of the killing at the time thereof, made in the absence of accused, was not rendered harmless because there was other testimony that the same declaration was made by the same person in the presence of accused and was not denied, accused not testifying or introducing any evidence, as a denial of guilt challenges truth of state's evidence, so that it cannot be said that state's testimony is undisputed though uncontradicted by testimony on the part of accused.—*Davis v. State*, 216 S. W. 292.

—§1169(11) (Ky.) Admission on trial for seduction of evidence of subsequent rape held prejudicial, in view of argument of commonwealth's counsel and conflicting evidence as to seduction.—*Cline v. Com.*, 216 S. W. 594.

—§1169(11) (Tex.Cr.App.) In prosecution under Pen. Code, art. 506a, for inducing D. to become an inmate of a house of prostitution kept by defendant and her husband, permitting D. to testify that in May of the previous year she

had stayed at the McIntosh Hotel, and that defendant and her husband were in charge there, if error, held not harmful.—*Dollar v. State*, 216 S. W. 1089.

—§1170(1) (Ky.) In murder prosecution, refusal to permit defendant to state where he was reared, and as to whether his parents were living or dead, was not prejudicial.—*Music v. Commonwealth*, 216 S. W. 116.

—§1170(2) (Ark.) Exclusion of testimony as to statement by defendant's accomplice to officers at time of his arrest was harmless, where the accomplice himself testified to what he had told the officers, giving substantially same testimony as that excluded.—*Bartlett v. State*, 216 S. W. 35.

—§1170(4) (Tex.Cr.App.) In prosecution for theft of a hog, the sustaining of an objection to question asked purchaser from defendant as to whether he refused to surrender the hogs to claimant because of uncertainty of claimant's description cannot be considered as disclosing error where the purchaser elsewhere testified he did not delay the surrendering of the hogs because of any uncertainty or insufficiency of description.—*Jackson v. State*, 216 S. W. 866.

—§1170½(5) (Tex.Cr.App.) In prosecution for offense of pandering, defined by Pen. Code, art. 506a, held, that cross-examination of defendant's husband developing that she had been raised near a certain town, and had been in Arizona and New Mexico, and that she was not ill all the time, if not germane to direct examination, was harmless.—*Dollar v. State*, 216 S. W. 1089.

—§1171(1) (Tex.Cr.App.) In prosecution for pandering, defined by Pen. Code, art. 506a, remark by attorney for state in argument, "We want to get rid of such cattle as that," while improper, held not such as to authorize reversal, when the jury assessed the lowest penalty.—*Dollar v. State*, 216 S. W. 1089.

—§1171(6) (Tex.Cr.App.) Argument by the district attorney that defendant threatened the prosecuting witness with a pistol, having been withdrawn by the instructions of the court, cannot be deemed prejudicial, where the evidence was such as to at least raise an inference of the threat.—*Adams v. State*, 216 S. W. 863.

—§1172(1) (Ark.) In a prosecution for incest, where defendant was asked when he was married, to which he gave the date, and as to what his family consisted of, to which he specified his wife and children, an instruction, stating that the only issues were whether defendant physically had committed the offense in the county within the statutory period, was not prejudicially erroneous, as ignoring the issue whether he was a married man.—*Griffin v. State*, 216 S. W. 34.

—§1172(1) (Ark.) In prosecution for offense of selling intoxicating liquor, where there was not sufficient evidence to warrant a submission of the question of former conviction, an instruction on former conviction could not have been prejudicial to defendant.—*Beck v. State*, 216 S. W. 497.

—§1172(1) (Tex.Cr.App.) In a prosecution for burglary, exceptions to a charge based upon the submission of want of consent of the occupant are not tenable, where it is affirmatively shown that the property was taken without consent.—*Carneal v. State*, 216 S. W. 626.

—§1172(3) (Ark.) In a prosecution for incest, instruction that the only issues were whether defendant physically committed the offense in the county within the statutory period held harmless, if in effect assuming that defendant was a married man; his own testimony having proved so conclusively.—*Griffin v. State*, 216 S. W. 34.

—§1172(8) (Mo.App.) In a prosecution for rape, held prejudicial error to submit to the jury the charge of assault with intent to rape,

although defendant was only convicted of common assault.—*State v. Eslick*, 216 S. W. 974.  
 ⚡1173(2) (Ky.) Where accused testifies to substantially the same facts as his alleged accomplice, he is not prejudiced if the court fail to give instruction concerning testimony of accomplices.—*Music v. Commonwealth*, 216 S. W. 116.

#### (H) Determination and Disposition of Cause.

⚡1186(1) (Mo.App.) Where the evidence is before the appellate court, which holds the information insufficient, and such court believes that there is reasonable ground that defendant can be convicted upon the filing of a new and proper information, the court will, under Rev. St. 1909, § 5290, remand the cause; but where the clerk has not made out a transcript of the testimony, as required by section 5308, the accused must be given the benefit of the doubt, and the conviction must be reversed, and the accused discharged.—*State v. Asher*, 216 S. W. 1013.

### CROPS.

See Animals, ⚡55; Evidence, ⚡6; Landlord and Tenant, ⚡252, 331.

### CUSTOMS AND USAGES.

See Landlord and Tenant, ⚡188; Master and Servant, ⚡274.

⚡13 (Ky.) A lawful custom, which is permitted to enter into contracts made with reference to it, becomes a part of the contract, the same as if incorporated therein, so that the rights of the parties to the contract are governed by the provisions of such custom or usage.—*Stuart v. Clements*, 216 S. W. 136.

⚡18 (Mo.App.) In an action on the quantum meruit for the reasonable value of services in drilling an oil well, plaintiff, who relied on the custom of the locality for the owner to compensate the driller for the loss of any tools, must plead the custom; and, if not having been pleaded, evidence thereof is inadmissible to sustain plaintiff's claim for compensation for loss of tools.—*Diets v. Nix*, 216 S. W. 791.

### DAMAGES.

See Appeal and Error, ⚡1004, 1177; Assault and Battery, ⚡33, 43; Carriers, ⚡215; Covenants, ⚡122; Death, ⚡77, 78, 95, 99, 104; Eminent Domain, ⚡262, 298, 300; Fraud, ⚡62; Interest, ⚡66; Judgment, ⚡256; Landlord and Tenant, ⚡129, 288, 291, 331; Malicious Prosecution, ⚡63; Master and Servant, ⚡341; Payment, ⚡82; Principal and Agent, ⚡78; Sales, ⚡417, 418; Sequestration, ⚡21; Telegraphs and Telephones, ⚡65, 67, 71; Trial, ⚡250, 252; Trover and Conversion, ⚡44; Vendor and Purchaser, ⚡351.

### III. GROUNDS AND SUBJECTS OF COMPENSATORY DAMAGES.

#### (A) Direct or Remote, Contingent, or Prospective, Consequences or Losses.

⚡40(2) (Ark.) Where defendant breached contract whereby plaintiff was given right to remove all garbage from defendant's hotel and use it for feeding hogs, plaintiff was not compelled to continue to purchase or raise hogs for the purpose of carrying out the contract, but was entitled to recover the estimated profits which he would have realized if the contract had not been breached.—*Marion Hotel Co. v. Dickinson*, 216 S. W. 1049.

#### (B) Aggravation, Mitigation, and Reduction of Loss.

⚡62(4) (Ky.) It being admitted that defendant joint owner declined to be bound by lease made by her sister and joint owner, and refused to deliver possession, defendants cannot com-

plain of exclusion of a letter written to plaintiff lessee, informing him of such fact, though the letter was notice to plaintiff soon enough to enable him to arrange for other premises; plaintiff not being required to minimize his damages by procuring other premises.—*Lawrence v. Fielder*, 216 S. W. 1068.

### V. EXEMPLARY DAMAGES.

⚡91(1) (Tex.Civ.App.) In order to recover exemplary damages, the act which constituted the cause of action must be actuated by or accompanied with some evil intent or must be the result of such gross negligence, such disregard of another's rights, as is deemed equivalent to such intent.—*Bassham v. Evans*, 216 S. W. 446.

### VI. MEASURE OF DAMAGES.

#### (A) Injuries to the Person.

⚡101 (Mo.App.) In personal injury action, measure of damages for medical and surgical expenses is the reasonable value of such medical and surgical attention as the plaintiff has paid for, and the reasonable value of such services, if any, which plaintiff is reasonably certain to incur in the future, directly caused by the injuries, resulting from defendant's negligence.—*Hoover v. St. Louis Electric Terminal Ry. Co.*, 216 S. W. 984.

#### (B) Injuries to Property.

⚡112 (Tex.Civ.App.) The measure of damages for the negligent burning of grass by a railroad company is its market value for any use or purpose for which it may be valuable to its owner, but in the event that it has no market value then the measure of damages is its value to its owner for any uses to which he may put it.—*Galveston, H. & S. A. Ry. Co. v. Harris*, 216 S. W. 430.

#### (C) Breach of Contract.

⚡120(1) (Ark.) Where plaintiff notified defendant that he had 275 hogs on hand, and would suffer damages if contract to allow plaintiff to remove all garbage from defendant's hotel was breached, but defendant nevertheless breached the contract; plaintiff was, as regards the 275 hogs on hand, entitled to recover for all loss sustained by his being unable to prepare them for the market.—*Marion Hotel Co. v. Dickinson*, 216 S. W. 1049.

### VII. INADEQUATE AND EXCESSIVE DAMAGES.

⚡131(1) (Ark.) Where plaintiff was knocked down and rendered unconscious by defendant's bull, and suffered pain and inconvenience for a considerable time, verdict in her favor for \$300 was warranted.—*Field v. Viraldo*, 216 S. W. 8.

⚡131(1) (Ky.) In an action against a railroad for injuries to eye of a girl passenger from a cinder, an award to plaintiff of \$5,000 damages held grossly excessive, and given under the influence of passion or prejudice within Civ. Code Prac. § 340; it appearing reasonably certain that the injury was not permanent, but correctible in some degree at least through the use of glasses.—*Lexington & E. Ry. Co. v. Robinson*, 216 S. W. 86.

⚡132(1) (Mo.) A verdict of \$50,000, reduced to \$35,000 by the court, was not excessive for a boy 14 years of age, whose arms and chest were burned to the bone by electricity.—*Meeker v. Union Electric Light & Power Co.*, 216 S. W. 923.

⚡132(7) (Mo.App.) Verdict for \$5,000 held not excessive for injuries to plaintiff, 23 years old, in good physical condition, and earning \$9 per week, where his chin and lip were split, his nose and forehead cut open, a tooth knocked out, neck of right femur fractured, and he was left unconscious for several days, confined to hospital bed for more than six weeks and to crutches for eight months, his leg permanently shortened five-eighths inch, necessitating treat-

For cases in Dec.Dig. & Am.Dig. Key-No.Series & Indexes see same topic and KEY-NUMBER

ment nearly 2½ years after injury, and he was crippled for life.—*Baldwin v. Hanley & Kinsella Coffee Co.*, 216 S. W. 998.

☞133 (Mo.) In an action by a parent for loss of services of a minor child, totally disabled through the defendant's negligence, when 14 years of age, and for medical expenses, etc., a verdict of \$9,500 held not excessive.—*Meeker v. Union Electric Light & Power Co.*, 216 S. W. 933.

☞140 (Ky.) Where verdict for damages for breach of contract is greatly in excess of highest sum proved, the judgment entered thereon must be reversed for new trial.—*Eskew v. H. Friedberg & Co.*, 216 S. W. 1076.

## VIII. PLEADING, EVIDENCE, AND ASSESSMENT.

### (A) Pleading.

☞144 (Mo.App.) In personal injury action, damages for loss of time and loss of earnings cannot be recovered unless specially pleaded.—*Francis v. City of West Plains*, 216 S. W. 808.

☞151 (Tex.Civ.App.) In order to recover exemplary damages, the act which constituted the cause of action must be actuated by or accompanied with some evil intent, or must be the result of such gross negligence, such disregard of another's rights, as is deemed equivalent to such intent; and, when the bad intent is not a necessary inference from the act charged, it must be alleged.—*Bassham v. Evans*, 216 S. W. 446.

### (B) Evidence.

☞174(3) (Tex.Civ.App.) In an action against a railroad company for damages for the burning of grass, proof that plaintiff had to spend 10 cents per head per day to feed his cattle, which he would not have been required to feed had the grass not been destroyed, was admissible and could be considered in arriving at the value to him of the grass for the purpose for which he leased the land.—*Galveston, H. & S. A. Ry. Co. v. Harris*, 216 S. W. 430.

In an action against a railroad company for damages resulting from the burning of grass, evidence as to the amount of hay plaintiff could have cut from the land had the grass not been burned and the turf destroyed was admissible, since plaintiff was entitled to have the damages measured by the extent of the injury to the grass and land for any lawful purpose.—*Id.*

☞186 (Mo.) In action by parent for damages for the loss of services of a minor, evidence of minor's age, previous health, and condition in life was sufficient to enable the jury to determine the minor's earning capacity, aided by their own knowledge and experience.—*Meeker v. Union Electric Light & Power Co.*, 216 S. W. 933.

☞188(2) (Tex.Civ.App.) In an action against a railroad company for burning grass, evidence held to support finding that the grass burned had no market value.—*Galveston, H. & S. A. Ry. Co. v. Harris*, 216 S. W. 430.

### (C) Proceedings for Assessment.

☞208(2) (Tex.Civ.App.) Conflicting testimony held to make a question for the jury whether plaintiff's skull had been injured, causing pressure on the brain.—*Galveston, H. & S. A. Ry. Co. v. White*, 216 S. W. 265.

☞210(2) (Mo.) In an action by a parent for damages for loss of services of an injured minor child, and medical expenses, etc., an instruction, limiting the amount of the several items recoverable to not exceeding the amount claimed for such items in the petition, was proper.—*Meeker v. Union Electric Light & Power Co.*, 216 S. W. 933.

## DEATH.

See Appeal and Error, ☞1066; Carriers, ☞320; Corporations, ☞494; Evidence, ☞59, 359; Food, ☞25; Insurance, ☞452; Landlord and Tenant, ☞160; Master and

Servant, ☞180, 264, 286; Pleading, ☞360; Railroads, ☞397, 400, 401; Telegraphs and Telephones, ☞15; Trial, ☞181.

## IX. ACTIONS FOR CAUSING DEATH.

### (A) Right of Action and Defenses.

☞18(3) (Mo.App.) In an action for wrongful death under Rev. St. 1909, §§ 5426, 5427, the question whether there was such dependency by those to whom the recovery would accrue under the laws of descent as to justify recovery, is not to be determined by strict legal dependency making deceased legally liable to furnish support, for the phrase "necessary injury" is broad enough to include any damages.—*McCullough v. W. H. Powell Lumber Co.*, 216 S. W. 803.

The fact of pecuniary benefit does not require definite and exact proof in an action for death under Rev. St. 1909, §§ 5426, 5427; but whenever there is a reasonable probability of pecuniary benefits to one from the continuing life of another, however arising, the untimely extinguishment of that life raises a presumption of pecuniary injury.—*Id.*

☞31(3) (Mo.App.) An administrator, suing under Rev. St. 1909, §§ 5426, 5427, for the wrongful death of his intestate, sues merely as trustee for those who would be entitled to the proceeds of the judgment, and not on behalf of the estate.—*McCullough v. W. H. Powell Lumber Co.*, 216 S. W. 803.

### (D) Pleading and Evidence.

☞58(2) (Mo.) In father's action for the death of his son, plaintiff in making out his case must prove the donations made by the son for support of his parents.—*McCord v. Schaff*, 216 S. W. 320.

☞64 (Mo.App.) In an action by an administrator under Rev. St. 1909, §§ 5426, 5427, for the benefit of the surviving father, mother, brothers, and sisters of deceased, an unmarried adult, evidence of deceased's indebtedness is inadmissible to show necessary injury, although evidence that a brother was surety on deceased's obligations is admissible to show the brother's loss.—*McCullough v. W. H. Powell Lumber Co.*, 216 S. W. 803.

☞77 (Ark.) In an action by a wife for the death of her husband, 61 years old, her testimony that he gave her from \$150 to \$175 per month for the support of the family, though contradicted, held to warrant a verdict for \$12,000.—*Yazoo & M. V. R. Co. v. Hill*, 216 S. W. 1054.

### (E) Damages, Forfeiture, or Fine.

☞78 (Mo.App.) The amount recoverable under Rev. St. 1909, §§ 5426, 5427, for wrongful death, is compensatory damages.—*McCullough v. W. H. Powell Lumber Co.*, 216 S. W. 803.

☞84 (Mo.App.) In an action by an administrator, under Rev. St. 1909, §§ 5426, 5427, for wrongful death of his intestate, brought for the benefit of the father, mother, brothers, and sisters of deceased, evidence of the expenses for burial incurred by the beneficiary, as well as expenses incurred in attempting to relieve deceased of his injury, is inadmissible to show damages, for the beneficiaries were under no legal liability to incur such expenses.—*McCullough v. W. H. Powell Lumber Co.*, 216 S. W. 803.

☞95(1) (Tex.Civ.App.) The amount of damages for death rests largely in the judgment of the jury, based on facts of the particular case.—*Panhandle & S. F. Ry. Co. v. Huckabee*, 216 S. W. 666.

☞95(4) (Tex.Civ.App.) The measure of damages recoverable by a mother for death of minor son is the pecuniary loss resulting from his death including any pecuniary benefit she would probably have received from him during his minority, and the value of any aid she may have had reasonable expectation of receiving

from him after reaching majority.—*Southwestern Portland Cement Co. v. Bustillos*, 216 S. W. 268.

⚖99(1) (Tex.Civ.App.) Verdict of \$1,750 given parents for death of son who at time of death was contributing \$250 per year to support of parents over and above expenses they were out on him; and in all reasonable probability would have continued to do so for next seven years, *held* not excessive.—*Panhandle & S. F. Ry. Co. v. Huckabee*, 216 S. W. 666.

#### (F) Trial, Judgment, and Review.

⚖103(1) (Mo.App.) In an action under Rev. St. 1909, §§ 5426, 5427, for wrongful death of an unmarried adult, brought by an administrator for the benefit of the surviving father, mother, brothers, and sisters, evidence of the pecuniary loss *held* sufficient to carry the case to the jury.—*McCullough v. W. H. Powell Lumber Co.*, 216 S. W. 803.

⚖104(3) (Mo.) In a father's action for the death of his son, it is error to give an instruction authorizing damages based solely on the expectancy in life of deceased, ignoring consideration of the expectancy in life of the plaintiff who, according to the course of nature, would die first.—*McCord v. Schaff*, 216 S. W. 320.

⚖104(5) (Tex.Civ.App.) An instruction on the measure of damages for the death of child, allowing the jury to assess a fair compensation for the pecuniary loss sustained, *held* not improper because it did not specifically authorize a deduction for his maintenance during the remainder of his minority.—*Southwestern Portland Cement Co. v. Bustillos*, 216 S. W. 268.

## DEDICATION.

### I. NATURE AND REQUISITES.

⚖39 (Tex.Civ.App.) Where the owner of a town site sold lots with reference to the plat which designated lands adjacent to the railway tracks as reserved for railway purposes, the owner on reconveyance of a portion of said land from the railway company is estopped, as against persons who bought lots on faith of the dedication, from putting the property to any other use than that for which it was reserved.—*Nave v. City of Clarendon*, 216 S. W. 1110.

## DEEDS.

See Acknowledgment, ⚖5; Assault and Battery, ⚖33; Champerty and Maintenance, ⚖7; Estoppel, ⚖30; Evidence, ⚖182, 183, 187, 383, 419, 460; Husband and Wife, ⚖14, 29, 119, 256, 273; Insane Persons, ⚖61; Judgment, ⚖256, 713; Limitation of Actions, ⚖60; Mines and Minerals, ⚖55; Mortgages; Navigable Waters, ⚖46; Pleading, ⚖8; Railroads, ⚖68, 69; Reformation of Instruments, ⚖17, 18, 32; Remainders, ⚖6; Trial, ⚖75, 249, 352; Vendor and Purchaser, ⚖351; Wills, ⚖88.

### I. REQUISITES AND VALIDITY.

#### (A) Nature and Essentials of Conveyances in General.

⚖8 (Ky.) Under deed reading, "In consideration of debt of gratitude due F., \* \* \* I hereby deed to her" described land, "to be legally hers and her descendants," and containing provision that, "should she at any time see proper to sell the place and invest the proceeds for the benefit of herself, her children or husband M., who is so broken down in health as to be of but little service in supporting family," *held* F.'s deed conveyed the fee, whether her title was in fee simple, or only a life estate coupled with a power of sale.—*Martin v. Price's Admr.*, 216 S. W. 362.

⚖17(2) (Mo.) Where parties to a transaction stand upon equality with each other, equity will not dictate the price of real estate sold

nor exercise extraordinary powers to give vendor a season for repentance.—*Wigginton v. Burns*, 216 S. W. 756.

⚖17(3) (Tex.Civ.App.) A conveyance of land may be supported upon marriage contracted by the grantee and the grantor's son.—*Hanes v. Hanes*, 216 S. W. 272.

#### (B) Form and Contents of Instruments.

⚖31 (Mo.App.) If real estate is purchased by a person under a fictitious name, the recorded deed being in such name, a mortgage or other conveyance in such name is good.—*Windle v. Citizens' Nat. Bank*, 216 S. W. 1020.

⚖38(1) (Ky.) The test as to sufficiency of description in deed is whether the land can be located therefrom.—*Virginia Iron, Coal & Coke Co. v. Combs*, 216 S. W. 846.

⚖38(1) (Tex.Civ.App.) In determining the sufficiency of a description in a deed, whatever can be made certain is certain.—*Zoeller v. Offer*, 216 S. W. 1113.

#### (E) Validity.

⚖68(4) (Mo.) Where parties to a transaction stand upon equality with each other, equity will not dictate the price of real estate sold nor exercise extraordinary powers to give vendor a season for repentance, but equity recognizes that all men are not equal in strength, and that all commercial transactions would be subject to revision by equity courts were the strong not permitted to deal fairly and honestly with the weak.—*Wigginton v. Burns*, 216 S. W. 756.

⚖73 (Tex.Civ.App.) A conveyance of realty by defendant to plaintiff in consideration of dismissal of criminal proceedings based upon the seduction of plaintiff by defendant's son, and of the marriage of defendant's son and plaintiff, is void, and will not form the basis of a suit in trespass to try title.—*Hanes v. Hanes*, 216 S. W. 272.

Where a grantor conveyed real property to grantee in consideration of the dismissal of criminal proceedings for seduction of grantee by grantor's son, and of the marriage of the son to grantee, the contract was not divisible, and the conveyance was vitiated by the illegal consideration relative to dismissal of the criminal proceeding.—*Id.*

## II. RECORDING AND REGISTRATION.

⚖82 (Ky.) A deed duly signed and delivered by the grantors, even though not properly recordable, is valid, not only as between the parties, but as to all those having notice of it.—*Virginia Iron, Coal & Coke Co. v. Combs*, 216 S. W. 846.

## III. CONSTRUCTION AND OPERATION.

#### (A) General Rules of Construction.

⚖90 (Ark.) In construing a deed, the court must ascertain, if possible, the intention of the parties, especially the grantor, looking to the whole deed, harmonizing all parts, and favoring the grantee.—*Jackson v. Lady*, 216 S. W. 505.

⚖93 (Ark.) In ascertaining the intentions of the parties to a deed, the court will consider the relations of the grantor to the property conveyed.—*Jackson v. Lady*, 216 S. W. 505.

⚖94 (Ark.) A deed, made in execution of a contract for the sale of land, merges the provisions of the contract and all prior negotiations in the deed.—*Jackson v. Lady*, 216 S. W. 505.

⚖94 (Mo.App.) In action for fraud and deceit inducing plaintiff to enter into farm exchange contract with defendant, where the suit was not on the contract itself nor upon defendant's deed, but on the fraudulent representations, the doctrine of merger of all prior and contemporaneous oral agreements in the deed has no application.—*Messerli v. Bantrup*, 216 S. W. 825.

For cases in Dec. Dig. & Am. Dig. Key-No. Series & Indexes see same topic and KEY-NUMBER

⌚95 (Tex. Civ. App.) Parties making and accepting a deed to realty are bound by its terms.—*Buie v. Miller*, 216 S. W. 630.

⌚97 (Ark.) If there is a repugnancy between the granting clause of a deed and the habendum, the former will control the latter so as not to defeat the grant.—*Jackson v. Lady*, 216 S. W. 505.

The rule that, where the granting clause of a deed cannot be misunderstood, there is no room for construction, never applies where reconciliation between it and other clauses is possible upon consideration of the whole instrument so as to carry out grantor's intention.—*Id.*

⌚97 (Ark.) Where instrument has been ascertained to be a deed, and not a will, the rule that in construing repugnant clauses effect will be given to last expression of grantors is inapplicable.—*Sutton v. Sutton*, 216 S. W. 1052.

Where there is an irreconcilable conflict between the granting and habendum clauses of a deed, the habendum is rejected and full effect given to the granting clause.—*Id.*

⌚100 (Ark.) If there is any ambiguity or uncertainty as to the intention of the parties to a deed when considered as a whole, where the deed itself or extraneous facts show that it was executed in compliance with a bond for title, such bond may be considered.—*Jackson v. Lady*, 216 S. W. 505.

In construing a deed, the court must place itself as nearly as possible in the position of the parties when the instrument was executed, to construe its origin and source and all the attendant circumstances.—*Id.*

#### (B) Property Conveyed.

⌚111 (Tex. Civ. App.) Nothing passes by deed except what is described in it, whatever the intention of the parties thereto may have been.—*Buie v. Miller*, 216 S. W. 630.

⌚111 (Tex. Com. App.) There being a repugnance between the general and particular descriptions in a deed, the latter will prevail.—*Tucker v. Angelina County Lumber Co.*, 216 S. W. 149.

⌚114(1) (Ky.) Deed with description running from beginning corner along fence to "top of ridge, thence a straight line to the back line of" designated survey, "thence with the meanders of lines and marked corners of said survey back to the beginning so as to include twenty acres, more or less, include survey," where beginning corner was within survey and not on any line thereof, *held* to convey only a 21-acre tract inclosed by leaving line of survey upon again reaching fence and proceeding along fence to beginning corner, and not to convey entire survey of 53 acres, notwithstanding words "include survey"; such words merely referring to portion of survey within boundary beginning and ending at designated beginning corner.—*Yonts v. Adams*, 216 S. W. 82.

⌚115 (Tex. Civ. App.) A grant of 640 acres, located by course and distance, with no marks called for or identified, will not embrace lands not included in the 640 acres, or take the grant of conveyance to lines and corners not called for, merely because the parties may have believed that the survey would embrace such lines and corners.—*Buie v. Miller*, 216 S. W. 630.

⌚118 (Ark.) In a suit to quiet title to land, based upon a deed describing it as "part of the S.E.N.W. 9.23 A., sec. 21, township 16 north, range 1 west," evidence *held* to sustain a finding that grantors intended thereby to convey certain described lands, justifying a decree covering such lands.—*Jackson v. Lady*, 216 S. W. 505.

⌚118 (Tex. Civ. App.) In trespass to try title, where plaintiff claimed under a deed conveying 87½ acres, evidence *held* to sustain findings that the deed did not convey a 100-acre tract previously sold to another.—*Delta Land & Timber Co. v. Spiller*, 216 S. W. 414.

#### (C) Estates and Interests Created.

⌚120 (Ark.) A deed executed by an heir in a family settlement, joined in by grantor's husband, conveying "whatever interest" grantor might have, but reciting that such property was the sole property of the grantor, *held* a warranty deed conveying the grantor's title to the premises described, in view of Kirby's Dig. § 734.—*Jackson v. Lady*, 216 S. W. 505.

⌚128 (Tex. Civ. App.) Despite the rule in Shelley's Case, a deed with the provision that, if the grantee dies first, title shall pass to another, is valid.—*Runge v. Freshman*, 216 S. W. 254.

#### IV. PLEADING AND EVIDENCE.

⌚203 (Mo.) In husband's action to set aside deed from husband and wife to third party and from third party to wife, upon the ground that deed to third party had been fraudulently procured upon the representation that it was necessary to procure a loan, pursuant to conspiracy between wife and third party to divest husband of title, evidence as to the motives that may have actuated the wife, and the husband's susceptibility to the deceit alleged to have been practiced by her, *held* pertinent.—*Johnson v. Johnson*, 216 S. W. 913.

⌚210 (Mo.) In a suit to set aside a deed on ground of mental incapacity of grantor, evidence *held* sufficient to support chancellor's finding that the consideration shown by the evidence was a fair and adequate price for the land.—*Wigginton v. Burns*, 216 S. W. 756.

⌚211(1) (Mo.) In a suit to set aside a deed because of grantor's mental incapacity, evidence *held* to show that grantor understood what he was doing and acted within his rights in the execution of the deed.—*Wigginton v. Burns*, 216 S. W. 756.

In a suit to set aside a deed on ground of grantor's mental incapacity, evidence *held* insufficient to show that the deed was the product of grantor's insane delusion.—*Id.*

⌚211(3) (Ark.) In a suit to cancel on the ground of fraud a deed given in exchange of property, evidence that defendant misrepresented the quantity and condition of the land *held* sufficient to warrant rescission of the contract.—*Cannon v. Foster*, 216 S. W. 698.

⌚211(3) (Mo.) In husband's action to set aside deed to third person and from third person to wife, evidence *held* to support finding that deed to third person was procured by representation that it was necessary to obtain loan, pursuant to fraudulent conspiracy between third party and wife, to divest husband of title and invest wife therewith, and had not been executed pursuant to husband's agreement to convey land to wife.—*Johnson v. Johnson*, 216 S. W. 913.

#### DELINQUENT CHILDREN.

See Infants, ⌚19.

#### DEPENDENT CHILDREN.

See Habeas Corpus, ⌚3.

#### DEPOSITIONS.

See Appeal and Error, ⌚714, 1051; Criminal Law, ⌚600; Witnesses, ⌚286.

⌚88 (Tex. Civ. App.) Defendants' assurance that a witness who had testified by deposition would be available in person at the trial, if plaintiffs desired to examine him, in reliance on which plaintiffs announced ready for trial, though entitling plaintiffs to withdraw the case from the jury, if the witness was not present in court, did not entitle them to an exclusion of the deposition from evidence.—*Cook v. Denike*, 216 S. W. 437.

Introduction by defendants of testimony of witness given at a former trial does not en-

title plaintiffs to exclude from evidence a deposition of the same witness.—Id.

Under Rev. St. art. 3675, entitling either party to use depositions whether presence of the witness was obtainable or not, the fact that the witness had been subpoenaed by the opposite party, but not placed on the stand so as to be available for cross-examination, is no ground for excluding the deposition.—Id.

⚡90 (Tex.Civ.App.) It is within the discretion of the trial judge to permit a deposition to be used at the trial, though the witness is present in court.—Cook v. Denike, 216 S. W. 437.

⚡99 (Tex.Civ.App.) A deposition taken by plaintiff in a different action which was not filed among the papers in the suit until the day on which the case was called for trial cannot be read in evidence; no notice that it would be offered having been given.—Martinez v. Bruni, 216 S. W. 655.

⚡107(9) (Tex.Civ.App.) The objection that an answer of witness in a deposition is not responsive to the question can only be raised by motion before announcement of ready for trial.—Cook v. Denike, 216 S. W. 437.

### DESCENT AND DISTRIBUTION.

See Deeds, ⚡120; Executors and Administrators; Husband and Wife, ⚡14, 29; Slaves, ⚡14, 25; Wills.

### III. RIGHTS AND LIABILITIES OF HEIRS AND DISTRIBUTUTES.

(A) Nature and Establishment of Rights in General.

⚡68 (Tex.Civ.App.) The laws of descent and distribution govern only what the person owns at his death, and cannot touch what he has disposed of during his life, so that a person has heirs only as to property which he holds at his death, and not as conveyed away during his lifetime.—Runge v. Freshman, 216 S. W. 254.

### DEVIATION.

See Highways, ⚡71.

### DIAGRAMS.

See Appeal and Error, ⚡524.

### DIPPING.

See Animals, ⚡36.

### DIRECTOR GENERAL OF RAILROADS.

See Constitutional Law, ⚡299; Evidence, ⚡43; Railroads, ⚡5½.

### DISCOVERY.

See Executors and Administrators, ⚡85.

### DISCRETION OF COURT.

See Criminal Law, ⚡665; Depositions, ⚡90.

### DISMISSAL AND NONSUIT.

See Appeal and Error, ⚡662, 781-803; Attorney General, ⚡2, 71; Criminal Law, ⚡1088, 1100; Elections, ⚡305; Justices of the Peace, ⚡164; Parties, ⚡6.

### I. VOLUNTARY.

⚡24 (Tex.Civ.App.) Error is not shown by the fact that, after verdict was returned in favor of plaintiff, plaintiff was permitted to dismiss his suit as to one of the defendants as to whom the jury made no finding, where such defendant was disposed of by the judgment; plaintiff having the right to dismiss as to him at any time before the judgment was rendered.—Buchanan v. Gribble, 216 S. W. 899.

### II. INVOLUNTARY.

⚡60(9) (Tex.Civ.App.) Notwithstanding Vernon's Sayles' Ann. Civ. St. 1914, art. 1944, that every suit shall be tried when called, unless continued, postponed, or be placed at the end of the docket, a suit in which there is no pleading for affirmative relief by defendants should be dismissed for want of prosecution if plaintiff fails to appear at time set for trial, not tried in plaintiff's absence, and judgment on the merits rendered for defendants.—Chittim v. Parr, 216 S. W. 638.

⚡71 (Ky.) Where defendant's counsel by affidavit charged upon information and belief that suit was instituted for the commonwealth by attorneys, without the authority or direction of the Attorney General, the court should have permitted special counsel for the commonwealth to file counteraffidavit; but where the court, for reasons that do not appear in the record, refused to grant time to prepare and file such affidavits, held that, on the uncontroverted affidavit of defendant's counsel, the action was properly dismissed.—Commonwealth v. Roberts Coal Co., 216 S. W. 584.

### DISORDERLY HOUSE.

See Prostitution, ⚡4; Witnesses, ⚡406.

⚡20 (Tex.Cr.App.) In a prosecution for keeping or permitting to be kept a bawdyhouse on premises leased and controlled by defendant, the charge of the court should submit to the jury the question whether or not defendant in fact occupied that relation to said premises.—Chadwick v. State, 216 S. W. 397.

### DISTRICT AND PROSECUTING ATTORNEYS.

See Criminal Law, ⚡719, 722½, 724, 729, 730, 1171.

### DISTURBANCE OF PUBLIC ASSEMBLAGE.

See Indictment and Information, ⚡202.

### DIVORCE.

See Execution, ⚡327.

### IV. JURISDICTION, PROCEEDINGS, AND RELIEF.

(C) Pleading.

⚡108 (Ky.) In husband's divorce suit, denial in wife's answer of the jurisdictional facts with reference to the county of the residence of the parties, under Ky. St. § 2120, was in effect a plea to the jurisdiction, and required proof of such facts under Civ. Code Prac. § 422, though wife did not in terms object to court's jurisdiction.—Kinser v. Kinser, 216 S. W. 121.

(D) Evidence.

⚡124 (Ky.) In husband's divorce suit against nonresident wife, evidence held insufficient to prove husband's residence in county in which action was brought, required by Ky. St. § 2120, and Civ. Code Prac. § 422.—Kinser v. Kinser, 216 S. W. 121.

(F) Judgment or Decree.

⚡167 (Mo.App.) Where, after husband and wife had each obtained a separate domicile in another state, husband came into the state of matrimonial domicile, and by fraud obtained a judgment of divorce, a suit by the wife in the same court to set aside the judgment may be maintained upon notice and service by delivery of copy of petition and summons in state of separate domicile pursuant to Rev. St. 1909, § 1778; the marital status or relation being a "property right."—Cates v. Cates, 216 S. W. 573.

For cases in Dec. Dig. & Am. Dig. Key-No. Series & Indexes see same topic and KEY-NUMBER

## V. ALIMONY, ALLOWANCES, AND DISPOSITION OF PROPERTY.

⚡203 (Mo.App.) In order for the court to allow temporary alimony and suit money, the petition must state a cause of action.—Strong v. Strong, 216 S. W. 543.

⚡212 (Mo.App.) Under Rev. St. 1909, § 2375, allowance of temporary alimony may be made, although husband in defense offers matter that might make prima facie showing of invalidity of the marriage, the plaintiff being entitled to hearing in court, reasonable attorney's fees, and alimony pendente lite in such sum as court deems proper.—Ascher v. Ascher, 216 S. W. 576.

⚡215 (Mo.App.) Allowance of \$60 per month alimony pendente lite held not excessive, in view of defendant's financial resources, where wife was without means of her own.—Ascher v. Ascher, 216 S. W. 576.

⚡227(2) (Mo.App.) Allowance of \$60 per month alimony pendente lite and \$350 suit money, \$250 of which was for counsel fees, held not excessive in view of defendant's financial resources, where wife was without means of her own.—Ascher v. Ascher, 216 S. W. 576.

## VI. CUSTODY AND SUPPORT OF CHILDREN.

⚡298(1) (Mo.App.) There is a presumption in the law that it is to the best interest of the child to be in the custody of its parents, and the law imposes upon the parents the duty of care and protection.—Tines v. Tines, 216 S. W. 563.

To justify a court, which granted divorce to parents, in awarding the custody of minor child of the marriage to its maternal grandparents, it must appear that neither parent is competent or able to care for the child.—Id.

⚡298(6) (Mo.App.) Where mother of an infant child had obtained a divorce, and thereafter to support herself became a waitress in a hotel, held that, on the father's remarriage to a woman of refined character, it was improper to award custody of the child to the maternal grandparents, who were aged and impoverished; it appearing that father was able to care for the child, and that the mother was not and it also not being to the child's best interest, as it had reached school age, to award custody alternately to each parent, as had previously been done.—Tines v. Tines, 216 S. W. 563.

⚡310 (Mo.App.) On divorced wife's motion for modification of divorce decree under Rev. St. 1909, § 2375, so as to require husband to support children the custody of whom had been awarded to wife, it was no defense that wife had, under section 8304, made property settlement with husband whereby she "agrees to keep, maintain and care for said children, heretofore named, until they arrive at the age of maturity"; such agreement being merely wife's personal agreement, not affecting children's right to father's support.—Kershner v. Kershner, 216 S. W. 547.

## VII. OPERATION AND EFFECT OF DIVORCE, AND RIGHTS OF DIVORCED PERSONS.

⚡324 (Mo.App.) It is the primary duty of a father to support the children, and, where a decree of divorce does no more than award the custody and care of them to the mother, that duty is not absolved.—Kershner v. Kershner, 216 S. W. 547.

## DOMICILE.

See Divorce, ⚡124, 167.

## DONATION CERTIFICATES.

See Public Lands, ⚡178; Records, ⚡6; Vendor and Purchaser, ⚡231.

## DORMITORIES.

See Health, ⚡32.

## DOWER.

See Executors and Administrators, ⚡334; Husband and Wife, ⚡69½; Partition, ⚡81.

### I. NATURE AND REQUISITES.

⚡20 (Mo.) Where a husband on the eve of his marriage conveyed eight-tenths of his property to a daughter by a former marriage, in fraud of the dower rights of his prospective wife, the wife may maintain a suit in equity to place all the parties in statu quo, notwithstanding that the conveyances may have been valid as between grantor and his daughter.—Vordick v. Kirsch, 216 S. W. 519.

Where a husband, in anticipation of marriage and to defraud his prospective wife of her dower rights, executed two trust deeds to a daughter by a former marriage, equity may set aside both deeds, and is not limited to setting aside so much of the fraudulent transaction as would cover plaintiff's interest; the dower being dower initiate, and not dower consummate.—Id.

### III. RIGHTS AND REMEDIES OF WIDOW.

⚡55 (Ky.) The only right of possession given the widow prior to the assignment of homestead or dower is that conferred by Ky. St. § 2138, declaring that she shall hold the mansion house, etc., until dower is assigned, and her possession is that of a tenant at will of the heirs.—Consolidation Coal Co. v. Grayson, 216 S. W. 848.

⚡56(4) (Ky.) Where a widow, in the absence of a previous assignment to her of dower or homestead, executes a lease on an entire tract and all of the land of which her husband was owner at the time of his death, such lease embraces no more than her dower interest.—Consolidation Coal Co. v. Grayson, 216 S. W. 848.

⚡57(4) (Ky.) A widow's dower before assignment can only be assigned, conveyed, or released by way of extinguishment to the owner of the fee or to a party in possession or in privity of the estate from which it accrues.—Consolidation Coal Co. v. Grayson, 216 S. W. 848.

## DRAINS.

See Evidence, ⚡5; Levees, ⚡5; Limitation of Actions, ⚡34; Municipal Corporations, ⚡460; Statutes, ⚡141.

### I. ESTABLISHMENT AND MAINTENANCE.

⚡2(3) (Mo.) Drainage acts being highly remedial, statutes designed to accomplish a great and beneficial public purpose must be liberally construed.—Drainage Dist. No. 1 of Bates County v. Bates County, 216 S. W. 949.

⚡14(3) (Mo.) Under Laws 1913, p. 241, § 16, no appeal lies from a preliminary order to incorporate a drainage district, even though the jurisdiction of the court to make such an order is in question.—In re Wilhelmina Drainage Dist., 216 S. W. 530.

⚡35 (Mo.) While under Rev. St. 1909, § 5578, drainage improvements cannot be ordered by the county court unless necessary, etc., held that under section 5584, relating to the records of the county court, a judgment providing for a drainage project is not open to attack because the order therefor did not contain recitals as to its necessity; the provisions in the latter section making no provision for recital of such matter in the record.—Drainage Dist. No. 1 of Bates County v. Bates County, 216 S. W. 949.



## II. ASSESSMENTS AND SPECIAL TAXES.

§70 (Mo.) Under Rev. St. 1909, § 5591, providing for assessments for drainage districts against public or corporate roads, whether county, state, or free turnpike roads, etc., a township road is a public road, and benefits thereto are properly assessed or apportioned to the county.—*Drainage Dist. No. 1 of Bates County v. Bates County*, 216 S. W. 949.

Under Rev. St. 1909, § 5614, providing for assessments for additional work, the cost of such additional work may be apportioned against the county on account of public roads within the district; section 5591 providing for apportionment of costs against such roads in the first instance.—*Id.*

§71 (Mo.) Under Rev. St. 1909, § 5578, providing for the creation of drainage districts to drain "any lands, or any roads, or any railroads," the cost of the improvement may be apportioned against public roads or lands in the districts, although drainage is not necessary for the roads or lands so assessed, where the general project is beneficial to all of the property, public and private, in the district; the word "any" not meaning "all," and "or" not meaning "and."—*Drainage Dist. No. 1 of Bates County v. Bates County*, 216 S. W. 949.

§79 (Mo.) An order of the county court relating to assessments or apportionments against the county for public roads *held*, regardless of a clerical omission, to divide the apportionment or assessment into installments.—*Drainage Dist. No. 1 of Bates County v. Bates County*, 216 S. W. 949.

Rev. St. 1909, § 5601, providing for division of assessments into installments, is broad enough to include apportionments against counties for public roads provided for section 5591, and hence it was not error for the county court in creating a drainage district to divide the apportionment against the county into installments.—*Id.*

As the state can tax itself or a county without any proceedings, a county cannot defeat an apportionment against it for expenses for a drainage project based on the extent of public roads within the district, on the ground that it was not given special notice of the proceedings furnishing the basis for the apportionment.—*Id.*

§90 (Mo.) In a suit against a county to collect installments of apportionments made against the county on account of public roads pursuant to Rev. St. 1909, § 5591, *held*, in view of section 5573, the interest and attorney's fees provided for by section 5599 in an action to enforce drainage assessments may be allowed.—*Drainage Dist. No. 1 of Bates County v. Bates County*, 216 S. W. 949.

## DRAMSHOPS.

See Intoxicating Liquors.

## DRUGGISTS.

See Intoxicating Liquors, §146.

## DUE PROCESS OF LAW.

See Constitutional Law, §281-299.

## DUPLICATE NOTES.

See Equity, §72; Mortgages, §235.

## DURESS.

See Contracts, §98, 265.

## EASEMENTS.

See Eminent Domain, §237; Private Roads, §2; Railroads, §69; Specific Performance, §130.

## I. CREATION, EXISTENCE, AND TERMINATION.

§5 (Ky.) It is as competent for one to acquire a prescriptive easement of passway burdened with gates as to acquire one unburdened.—*Brookshire v. Harp*, 216 S. W. 379.

§8(1) (Tex.Civ.App.) As there is no penal law against trespass and people are accustomed when it inflicts no apparent damage to pass at will over uninclosed and unoccupied lands, ordinary use of a way over such lands will not be deemed adverse so as to ripen into a prescriptive way.—*Nave v. City of Clarendon*, 216 S. W. 1110.

§8(2, 3) (Ky.) Permissive use, however long, of a passway, cannot ripen into a right.—*Brookshire v. Harp*, 216 S. W. 379.

That during all the years a passway was used gates were across it is not conclusive that its use was permissive; but their erection and maintenance by the owner of the servient estate is merely a circumstance indicating the use was permissive.—*Id.*

§9(1) (Ky.) That a tenant on the dominant estate repaired the passway under arrangement with the owner of the servient estate is as consistent with the use of the passway being under a claim of right as it is evidence of a permissive use only.—*Brookshire v. Harp*, 216 S. W. 379.

§10(3) (Tex.Civ.App.) Where a landowner platted a town site which designated lands adjacent to the railway as reserved for railway purposes and sold lots according to the plat, a purchaser of a lot adjacent to the railway who constructed a cement sidewalk to give access to his hotel to patrons must be deemed to have evinced an intention to use the premises permanently for a way so that such use will ripen into a prescriptive title.—*Nave v. City of Clarendon*, 216 S. W. 1110.

§13(1) (Ky.) The owner of two adjoining tracts, conveying one of them, impliedly grants the use of the passway over the other, an apparent easement then and for a long time before used for the benefit of the tract conveyed, and reasonably, if not absolutely, necessary for the use of it.—*Brookshire v. Harp*, 216 S. W. 379.

§26(3) (Ky.) An easement of passway by implied grant is not lost by the owner of the dominant estate acquiring other lands furnishing an outlet.—*Brookshire v. Harp*, 216 S. W. 379.

§32 (Ky.) To destroy an easement of passway by an alleged adverse user, such user must be of the same character required to obtain title to real estate; and an occasional locking of gates across it during wet seasons is not enough.—*Brookshire v. Harp*, 216 S. W. 379.

§36(1) (Ky.) After a continuous, uninterrupted use of a passway for 15 years, there is a presumption, requiring evidence to overcome it, that the right is exercised under a grant.—*Brookshire v. Harp*, 216 S. W. 379.

## EJECTMENT.

See Evidence, §82, 83; Judgment, §518, 521, 527.

## I. RIGHT OF ACTION AND DEFENSES.

§23 (Ark.) In ejectment by a purchaser of land at execution sale, defendant could properly set up invalidity of the sale as a defense.—*Sumpter v. Hot Springs Savings, Trust & Guaranty Co.*, 216 S. W. 311.

## IV. TRIAL, JUDGMENT, ENFORCEMENT OF JUDGMENT, AND REVIEW.

§114 (Mo.) In an action of ejectment, where a government survey of a line or corner is in dispute, and the issue in the case turns upon its location, the judgment must determine and state in some manner just where it is, so that



it can be located.—*Eversmeyer v. Broyles*, 216 S. W. 317.

Description of land by judgment for plaintiff in ejectment held not so vague and uncertain as to render the judgment void, in that it could not be determined from the description whether the land was or lay within the northeast fractional quarter of a section, as alleged in the petition, or in a survey mentioned in the judgment and entirely without such fractional quarter.—Id.

## ELECTION OF REMEDIES.

§3(1) (Tex.Civ.App.) Where a contract for roadwork between county and plaintiffs was an indivisible contract, although providing for estimates as the work progressed and for the issuance of time warrants upon such estimates, plaintiffs, by presenting a claim for the final and full amount due under the contract and obtaining action thereon by certain commissioners, acting as the county court or attempting to so act, allowing a certain amount as balance due settlement in full, and subsequently instituting and prosecuting to judgment a claim for this particular amount as the balance due under the contract, whether they had success in recovering such amount or not, made an election to claim such sum as the balance due, and they cannot again sue to compel the county court to issue warrants applied for upon certain estimates made as the work progressed.—*Cobb & Gregory v. Parker*, 216 S. W. 214.

## ELECTIONS.

See Animals, §50, 55, 57; Evidence, §158; Intoxicating Liquors, §89.

## X. CONTESTS.

§293(1) (Tex.Civ.App.) In view of *Vernon's Sayles' Ann. Civ. St. 1914*, arts. 2994, 3024, and 3031, relating to counting and canvassing of election returns, the admission in evidence of papers designated as tally sheets and election returns for the purpose of showing an election was error, where no one testified as to who prepared the papers, nor that they were accurately made and they were only signed by a clerk, and not in such form as to constitute any part of the lawful return of an election.—*Griffith v. State*, 216 S. W. 469.

§305(1) (Tex.Civ.App.) Under *Vernon's Sayles' Ann. Civ. St. 1914*, art. 3065, a decision in an election contest can be reviewed only by appeal, and a writ of error to review the same must be dismissed.—*Frank v. Sufford*, 216 S. W. 283.

## ELECTRICITY.

See Damages, §132.

§16(3) (Mo.) Where a power company negligently permitted a wire to become uninsulated and to come in contact with the branches of a tree or another wire for such length of time as to have enabled it to have discovered the defects in time to have prevented an injury, and the wires fell to the ground and injured one who subsequently came in contact therewith, the power company was liable, even though the wire was not down for more than a moment.—*Meeker v. Union Electric Light & Power Co.*, 216 S. W. 923.

A power company which was notified that its wire was uninsulated and was coming in contact with branches of a tree and failed to remedy the defect within 10 days, was liable for injury to one who came in contact with the wire, the wire having been worn or broken in two by reason of its contact with the branches of the tree.—Id.

§19(2) (Mo.) A petition, stating that defendant electric company had negligently permitted its wires to become uninsulated, and to break in two and to fall to the ground, charges three distinct acts of negligence, but proof of one of

them is sufficient to make out plaintiff's case.—*Meeker v. Union Electric Light & Power Co.*, 216 S. W. 923.

## ELEVATORS.

See Master and Servant, §289, 291.

## EMINENT DOMAIN.

See Constitutional Law, §228, 281; Eminent Domain, §300; Statutes, §75.

## II. COMPENSATION.

### (A) Necessity and Sufficiency in General.

§71 (Tenn.) Acts 1917, c. 74, § 5, and Acts 1919, c. 149, § 9, in view of said section 5 authorizing judgment against county in condemnation suit to appropriate land for highway purposes, make adequate provision for compensation under Const. art. 1, § 21, since *Thomp. Shan. Code*, §§ 681-684, authorize imposition of tax to pay judgment against county, and give owner of the judgment right to compel levy of tax.—*State Highway Department v. Mitchell's Heirs*, 216 S. W. 336.

§75 (Tenn.) Acts 1919, c. 149, § 9, empowering highway commission immediately upon filing of condemnation suit to take possession of the property designated, is not subject to the objection that it is a suspension of general law for the benefit of particular individuals inconsistent with the law of the land, and therefore in violation of Const. art. 11, § 8, art. 1, § 8, and Const. U. S. Amend. 14.—*State Highway Department v. Mitchell's Heirs*, 216 S. W. 336.

Where the general funds of a county of the state are subject to satisfaction of the landowner's claim, the Legislature may with propriety permit entry upon the property designated without prepayment or bond.—Id.

§77 (Tenn.) Acts 1917, c. 74, § 5, authorizing condemnation suits for acquisition of right of way for highways to be prosecuted without cost bond, is not subject to objection that it is a suspension of general law, for the benefit of particular individuals, inconsistent with the law of the land, and therefore in violation of Const. art. 11, § 8, art. 1, § 8, and Const. U. S. Amend. 14.—*State Highway Department v. Mitchell's Heirs*, 216 S. W. 336.

## III. PROCEEDINGS TO TAKE PROPERTY AND ASSESS COMPENSATION.

§167(1) (Tenn.) Since neither Acts 1917, c. 74, § 5, nor Acts 1919, c. 149, § 9, though conferring right of eminent domain, prescribe details of procedure to be followed by counties or highway commission in acquiring property for highway purposes, the acts will be held to have been passed "with reference to the established mode of procedure in such cases existing at the time," and the proper procedure, therefore, is according to *Thomp. Shan. Code*, § 1844 et seq., except as modified by said sections 5 and 9.—*State Highway Department v. Mitchell's Heirs*, 216 S. W. 336.

§224 (Tex.Civ.App.) In proceedings to condemn a 25-foot square plat of ground for steel electric transmission line tower and for easement for wires, that a juror had stated in the presence of other jurors, during the jury deliberations and before verdict, that he had been authorized to offer for similarly situated land \$750 per acre, held not such misconduct that refusal of new trial therefor constituted abuse of discretion under *Vernon's Sayles' Ann. Civ. St. 1914*, art. 2021.—*Dallas Power & Light Co. v. Edwards*, 216 S. W. 910.

In condemnation proceedings, refusal of motion for new trial of condemnor on the ground that a juror concealed upon examination on voir dire his preconceived notions and ideas as to the value of the land sought to be condemned was not an abuse of discretion, where

it appeared merely that such juror knew at the time that he had been authorized by another party to pay \$750 per acre for land similarly situated.—Id.

⚡237(2) (Mo.) Where commissioners, ascertaining damage to property owners in proceedings for establishment opening and widening of street, were appointed and filed their report after charter of city of St. Louis of 1914 took effect, the disapproval of the report by the municipal assembly did not preclude court from confirming report under charter of 1876, art. 6, § 9, requiring court to set aside report if disapproved by municipal assembly, since section 2 of schedule of charter of 1914 requires that "subsequent proceedings" in condemnation proceedings be conducted as nearly as practicable in accordance with the provisions of such charter; the rejection of report upon disapproval of municipal assembly being a "proceeding," and not a substantive right.—City of St. Louis v. Cooper Carriage Woodwork Co., 216 S. W. 944.

⚡237(5) (Mo.) In street opening condemnation proceedings, where evidence showed easement in public over a strip of land not exceeding 30 feet in width, report of commissioners, based on theory that 80 feet was burdened with the easement, was properly set aside.—City of St. Louis v. Cooper Carriage Woodwork Co., 216 S. W. 944.

⚡238(6) (Mo.) In suit to condemn land for establishing, opening, and widening of certain street, where the proceeding was at the instance of the city converted into one for determination of title, it was in the nature of an action at law in which parties were entitled to a jury, and findings of facts by the court, where abundantly supported by substantially competent evidence, were not reviewable on appeal.—City of St. Louis v. Cooper Carriage Woodwork Co., 216 S. W. 944.

⚡246(2) (Mo.) City of St. Louis charter of 1914 does not interfere with the exercise of an absolute discretion by the legislative body of the city to dismiss or abandon a condemnation proceeding at any stage before final judgment if in its power the public interest demands such action.—City of St. Louis v. Cooper Carriage Woodwork Co., 216 S. W. 944.

⚡262(5) (Tex.Civ.App.) Incorrect charges as to the measure of damages, improper testimony, or other irregularities such as an authorized statement of a juror as to value, when it can certainly be said that such matters affect only the amount of the verdict, are not ground for reversal, in the absence of any claim the verdict is excessive.—Dallas Power & Light Co. v. Edwards, 216 S. W. 910.

#### IV. REMEDIES OF OWNERS OF PROPERTY.

⚡298 (Ky.) In an action for damages to plaintiff's property because of construction of embankments interfering with access through certain streets, evidence that defendant had built a new street which afforded plaintiff a better means of travel than she had had prior to the obstruction held admissible on the question of damages.—Husbands v. Paducah & I. R. Co., 216 S. W. 840.

⚡300 (Ky.) In an action for damages for injuries to property because of the construction of an embankment interfering with access to plaintiff's property wherein a view of the premises was taken and a verdict of \$1 was awarded, notwithstanding that there was evidence that plaintiff's property had been injured from 25 to 50 per cent. of its value, and not a single witness testified that the property was not injured, such verdict held flagrantly against the evidence.—Husbands v. Paducah & I. R. Co., 216 S. W. 840.

#### EMPLOYERS' LIABILITY ACTS.

See Master and Servant, ⚡180, 287, 358.

#### ENTIRETY, ESTATE BY.

See Husband and Wife, ⚡14; Wills, ⚡627.

#### EQUAL PROTECTION OF THE LAWS.

See Constitutional Law, ⚡228.

#### EQUITY.

See Appeal and Error, ⚡80, 837, 987, 1009, 1175; Corporations, ⚡252, 617; Costs, ⚡32; Dower, ⚡29; Injunction; Joint Adventures, ⚡5; Mechanics' Liens, ⚡309; Partition; Quietting Title; Reformation of Instruments; Sequestration; Specific Performance; Subrogation; Trusts.

#### I. JURISDICTION, PRINCIPLES, AND MAXIMS.

(A) Nature, Grounds, Subjects, and Extent of Jurisdiction in General.

⚡42(1) (Ark.) In suit in equity, defendant waived the right to ask for a trial at law of the issues raised by failure to request to have cause transferred to law side of court.—Hayes v. Bishop, 216 S. W. 298.

(B) Remedy at Law and Multiplicity of Suits.

⚡44 (Tex.Civ.App.) The exercise by district court of equity jurisdiction to protect the rights of parties in other courts is not an encroachment upon the jurisdiction of the other courts, even when it prevents such courts from proceeding with the trial of cases within their jurisdiction.—Houston Heights Water & Light Ass'n v. Gerlach, 216 S. W. 634.

The exclusive jurisdiction given a justice court in certain classes of cases was not intended to limit or restrict the equity jurisdiction of the district court to give relief against wrong and injustice, when the justice court does not possess adequate power to grant such relief.—Id.

(C) Principles and Maxims of Equity.

⚡56 (Mo.App.) The law looks at substance, and not form.—Emerson-Brantingham Implement Co. v. Rogers, 216 S. W. 994.

⚡60 (Mo.App.) Where one of two innocent parties must suffer because of the fraud of a wrongdoer, the innocent party who has the first lien in point of time will be protected in his right, provided he has done nothing which ought to estop from asserting his right.—Stratton v. Cole, 216 S. W. 976.

#### II. LACHES AND STALE DEMANDS.

⚡72(1) (Mo.App.) To be charged with laches a party must know, or have reason to know, that his delay is likely to cause, or is causing, harm to another.—Burruss v. Richardson, 216 S. W. 800.

⚡72(2) (Mo.App.) Innocent purchaser of note secured by deed of trust who delayed collection beyond due date, interest being paid by maker, was not chargeable with laches because a duplicate note in the hands of a third person, of which he had no knowledge, was thereafter paid by the maker's grantee, who also had no knowledge of the existence of duplicate notes.—Burruss v. Richardson, 216 S. W. 800.

#### III. PARTIES AND PROCESS.

⚡97 (Tex.Civ.App.) Class suits may be maintained in equity; class suits being those in which one or more in a numerous class, having a common interest in the subject-matter, sue in behalf of themselves and all others of the class.—City of Dallas v. Armour & Co., 216 S. W. 222.

Persons named in the record in a class suit are parties; but others of the class, although persons interested, are not parties.—Id.

For cases in Dec.Dig. & Am.Dig. Key-No.Series & Indexes see same topic and KEY-NUMBER

## XI. BILL OF REVIEW.

⚡442 (Ark.) The validity of an execution sale made under an execution issued on maturity of a bond executed after foreclosure sale, as provided in Kirby's Dig. §§ 3260, 3261, was not a proper subject for a bill in review; sale having been made after the final adjudication in the original foreclosure proceedings.—*Sumpter v. Hot Springs Savings, Trust & Guaranty Co.*, 216 S. W. 311.

## ERROR, WRIT OF.

See Appeal and Error.

## ESCAPE.

See Criminal Law, ⚡372.

## ESCHEAT.

See Attorney General, ⚡2.

## ESTATES.

See Descent and Distribution; Dower; Executors and Administrators; Joint Tenancy; Life Estates; Remainders; Tenancy in Common; Trespass to Try Title, ⚡32; Wills.

## ESTOPPEL.

See Appeal and Error, ⚡882, 1170; Boundaries, ⚡37; Brokers, ⚡104; Criminal Law, ⚡1109; Dedication, ⚡39; Equity, ⚡60; Executors and Administrators, ⚡377; Insurance, ⚡247, 724, 755; Mechanics' Liens, ⚡76, 288; Partnership, ⚡37, 213; Railroads, ⚡68, 179.

## II. BY DEED.

(A) Creation and Operation in General.

⚡30 (Ky.) A vendee is not only bound by the recitals of his own deed, but must take notice of the contents of prior deeds therein referred to, a vendee being in such privity with his vendor that recitals in a deed of record, constituting a link in a chain of title that will amount to an estoppel against his vendor, will be available as an estoppel against vendee.—*Virginia Iron, Coal & Coke Co. v. Combs*, 216 S. W. 348.

Where deed by three grantors recited that it was "executed in lieu of a deed made to F. (one of the grantors) on August 16, 1885, and which deed was not properly certified and recorded," and where there was an improperly certified and recorded deed to F. by other two grantors upon the records, dated August 16, 1885, with almost identically the same description, grantee in first-mentioned deed was estopped from denying previous conveyance to F. and was chargeable with notice of F.'s subsequent mineral deed of record to third party.—*Id.*

## III. EQUITABLE ESTOPPEL.

(B) Grounds of Estoppel.

⚡63 (Ky.) In action under Ky. St. § 1786, to require adjoining owner, who has joined his fence to that of plaintiff to effect an inclosure of his land, to contribute to cost of plaintiff's fence or detach his fence therefrom, adjoining owner is estopped from claiming that plaintiff's fence was not a lawful fence under section 1786, so that he was not liable for portion of cost.—*Burchett v. Leslie*, 216 S. W. 850.  
⚡69 (Tex.Civ.App.) Where wife of bankrupt admitted in bankruptcy proceeding under oath that certain land belonged to the estate of her husband, and swore that a deed to her was a mortgage, and not intended as a conveyance of title, and the federal court set aside the deed on said admission, and she accepted a compromise of her claim, and accepted money of the estate on the compromise, and other benefits, she is estopped from thereafter setting up any claim to the land on the ground that trans-

fers made under order of the federal court were void.—*Koger v. Clark*, 216 S. W. 434.

⚡78(2) (Tex.Civ.App.) When a contract is made, and the parties thereto as a basis therefor assume a certain state of facts to be true, they are thereafter estopped from denying the existence of such facts so made the basis of the contract.—*Allen v. Berkmier*, 216 S. W. 647.

⚡92(1) (Ark.) Where, after a surety on the bond of a contractor, who was constructing municipal water and sewer system, had made payment to municipality in compromise of its action for nonfulfillment of the contract, the contractor recovered judgment against the city in the federal court, which judgment was rendered pursuant to a settlement specifically including any claim against the city on account of the surety's payment, *held*, that the contractor, having received benefit of the payment, was estopped from denying the surety's authority to make the same.—*Peay v. Southern Surety Co.*, 216 S. W. 722.

(B) Pleading, Evidence, Trial, and Review.

⚡107 (Mo.App.) The question of estoppel is not in issue unless pleaded.—*Berkshire v. Holcker*, 216 S. W. 556.

⚡110 (Mo.App.) In order for persons claiming under a fraudulent buyer of chattels to urge that the seller had waived his right to complain of the fraud, which consisted of misrepresentation of the buyer's identity, so that no title passed, or that the seller was estopped from complaining of it, they should have pleaded such estoppel, waiver, or ratification.—*Windle v. Citizens Nat. Bank*, 216 S. W. 1023.

## EVIDENCE.

See Courts, ⚡231; Criminal Law, ⚡304-566; Depositions; New Trial, ⚡102; Witnesses.

For evidence as to particular facts or issues or in particular actions or proceedings, see also the various specific topics.

For review of rulings relating to evidence, see Appeal and Error.

Reception at trial, see Criminal Law, ⚡665-673; Trial, ⚡48-105.

## I. JUDICIAL NOTICE.

⚡5(2) (Ark.) It is a matter of common knowledge that levees and drains have passed beyond the experimental stage.—*Wilkinson v. St. Francis County Road Improvement Dist. No. 1*, 216 S. W. 304.

⚡6 (Ky.) It is a matter of common knowledge that December 14th is not necessarily within cropping season.—*Osborn v. Roberts*, 216 S. W. 359.

⚡6 (Tex.Civ.App.) The court must judicially know that in August at 6 o'clock in the evening at Paradise, Tex., the sun cast a shadow on the east side of a train facing north, and on the steps on the east side of a coach.—*Chicago, R. I. & G. Ry. Co. v. Wisdom*, 216 S. W. 241.

⚡10(5) (Ky.) It is a well-known fact that the course of a stream often changes.—*Perkins v. Harmon*, 216 S. W. 90.

⚡20(1) (Ky.) It is a matter of common knowledge that it would be very difficult, if not impossible, for any one to ascend the smooth, sloping sides of the hopper bottom of a grain tank and sweep the same with a rope tied about him, heavy enough to sustain his weight.—*White's Adm'r v. Kentucky Public Elevator Co.*, 216 S. W. 837.

⚡20(2) (Tex.Civ.App.) Relative to duty of carrier to assist female passenger, it is a matter of common knowledge that often women resent the laying of hands on their person under any pretense.—*Chicago, R. I. & G. Ry. Co. v. Wisdom*, 216 S. W. 241.

The court may judicially know that rubber on a car step merely worn smooth will not be-

come "slick" from this cause alone, so as to invite a slipping of the foot.—Id.

⚡25(2) (Ky.) It is a matter of common knowledge that streets in towns with a population of from 200 to 1,000 are often wider than it is necessary for the safe and convenient use of the traveling public, and that the area of these municipalities is much greater than their business necessities require.—City of Lancaster v. Broadus, 216 S. W. 373.

⚡29 (Ark.) The courts will take judicial notice that a bill in question was passed and approved on a certain date.—Booe v. Road Improvement Dist. No. 4, Prairie County, 216 S. W. 500.

⚡43(3) (Mo.App.) That defendant express company, sued for negligent delay, was, like the railroads, under governmental control, is not conclusive proof that defendant, and its predecessor, was made such a governmental agency as to oust the state court of jurisdiction to enter judgment; the court not being required to take judicial notice of the facts in other cases determining the status of the carrier.—Edwards v. American Ry. Express Co., 216 S. W. 781.

⚡46 (Ark.) Proclamation of Governor, calling extraordinary session of General Assembly under Const. art. 6, § 19, when issued becomes a record of which the court may take judicial notice.—Booe v. Road Improvement Dist. No. 4, Prairie County, 216 S. W. 500.

## II. PRESUMPTIONS.

⚡59 (Mo.) In action for death in fire, against owner who had failed to provide required number of fire escapes, defended on ground that deceased did not avail himself of existing facilities of escape, it will be presumed that deceased tried to escape, and that he wanted to live rather than die.—Newell v. Boatmen's Bank, 216 S. W. 918.

⚡77(5) (Mo.) In an action against a railroad company for negligence resulting in the death of its locomotive fireman, the defendant's failure to call as witnesses the engineer and student fireman, who were on the engine at the time of the fatal explosion, is a strong circumstance against the defendant.—McCord v. Schaff, 216 S. W. 320.

⚡82 (Mo.) It must be assumed that the court, trying an action of ejectment and rendering judgment for plaintiff, acted regularly and with full knowledge of the situation in describing the land in the judgment, so that it must be presumed that the sheriff, enforcing the judgment, would know where to find the section, corner, or section line involved; the judgment covering the land described, following the courses and distances wherever the same might fall, such courses and distances being limited to known lines and monuments.—Eversmeyer v. Broyles, 216 S. W. 317.

⚡83(7) (Mo.) It must be assumed that the court, trying an action of ejectment and rendering judgment for plaintiff, acted regularly and with full knowledge of the situation in describing the land in the judgment; so that it must be presumed that the sheriff, enforcing the judgment, would know where to find the section, corner, or section line involved, the judgment covering the land described, following the courses and distances wherever the same might fall, and such courses and distances being limited to known lines and monuments.—Eversmeyer v. Broyles, 216 S. W. 317.

## IV. RELEVANCY, MATERIALITY, AND COMPETENCY IN GENERAL.

### (A) Facts in Issue and Relevant to Issues.

⚡99 (Mo.App.) In an action on a note defended on the ground that it was given by defendant to plaintiff, his granddaughter, to stifle prosecution of defendant, and not for civil damages growing out of defendant's being the father of plaintiff's illegitimate child, as plain-

tiff claims, evidence of transaction between plaintiff and her agents, her father, and the prosecuting attorney, which did not include statements of guilt or innocence nor attempt to evade her agents' acts, but merely showed plaintiff did not want to prosecute, but did want damages, objected to as res inter alios acta, as held admissible.—Hart v. Brown, 216 S. W. 552.

⚡113(11) (Tex.Civ.App.) In an action against a railroad company for damages, the contention that the value of the grass burned should be determined by what rental other persons paid for pasture land is not tenable, since what plaintiff and others paid per acre may or may not have been the value of the land for pasture or other purposes at the time of making the rental contract, and at the time of the fire the value of the grass might have been more or less than the rental price.—Galveston, H. & S. A. Ry. Co. v. Harris, 216 S. W. 430.

### (B) Res Gestæ.

⚡123(11) (Mo.App.) In an action for damages for injuries received by plaintiff when his team was scared by defendant's jitney car, evidence of statements made by the driver after he reached his destination and some time after the accident is inadmissible, the declarations not having been made so near the time of the accident as to be part of the res gestæ.—Fore v. Rodgers, 216 S. W. 566.

### (C) Competency.

⚡148 (Mo.) Where evidence showed that the U. company had a telephone in its office, with a given number, which was published in the telephone book, and that witness picked up the book and called that number, and in response thereto some one answered, "This is the U. Company" the witness could testify as to what was said; such communications being admissible upon the theory that the person who has charge of the telephone is presumably an agent or servant for the purpose of receiving communications.—Meeker v. Union Electric Light & Power Co., 216 S. W. 923.

## V. BEST AND SECONDARY EVIDENCE.

⚡158(19) (Tex.Civ.App.) In a quo warranto proceeding to determine title to the office of county judge, where there was positive proof of the existence of the ballots, it was improper to permit the voters to testify as to how they voted, because such testimony was secondary evidence not admissible without accounting for absence of the best evidence.—Griffith v. State, 216 S. W. 469.

⚡158(27) (Tex.Civ.App.) In an action by members of a truck growers' association for breach of a contract to furnish onion crates, the written, signed, and accepted contract itself was the best evidence as to the number of crates to be delivered and as to the time of delivery.—Mayhew & Isbell Lumber Co. v. Valley Wells Truck Growers' Ass'n, 216 S. W. 225.

⚡178(4) (Tex.Civ.App.) Testimony that witness was present and knew of the transaction by which his father acquired title to land, it being asserted that the deed had been lost since the father's death, cannot be excluded as an effort to prove conveyance of real estate by parol testimony.—Martinez v. Bruni, 213 S. W. 655.

⚡182 (Tex.Civ.App.) In an action of trespass to try title, testimony that the witness saw a deed to his father held sufficient predicate to warrant evidence of contents of the lost deed, particularly as the whole subject was finally submitted to the jury.—Martinez v. Bruni, 216 S. W. 655.

Where sufficient predicate to allow testimony as to existence and loss of deed was laid in absence of jury, the refusal of the court to allow a rebutting witness to testify was not an abuse of discretion, as such witness would again have to be heard by the jury.—Id.

For cases in Dec.Dig. & Am.Dig. Key-No.Series & Indexes see same topic and KEY-NUMBER

—183(15) (Ky.) Defendant claiming under deed last seen in his possession could not prove contents by parol evidence, in absence of showing that it was lost or destroyed, and evidence merely tending to show that deed was outside of state was insufficient to warrant admission of secondary evidence.—*Althoff v. Cull*, 216 S. W. 361.

—183(15) (Tex.Civ.App.) Testimony that one under whom plaintiff claimed executed a deed to defendant's father, that the deed with a box of jewelry was stolen, that the robbers were pursued to the borders of a foreign country, and that nothing was recovered, is a sufficient showing of loss and inability to produce the instrument.—*Martinez v. Bruni*, 216 S. W. 655.

—187 (Tex.Civ.App.) The question whether sufficient predicate for the introduction of testimony to establish the existence and loss of a deed has been established is a question of law addressed to the sound discretion of the court.—*Martinez v. Bruni*, 216 S. W. 655.

## VI. DEMONSTRATIVE EVIDENCE.

—192 (Mo.) In an action by parent for loss of services of a minor child, claimed to have been totally disabled through defendant's negligence, it was within the discretion of the lower court to permit plaintiff to exhibit the body of the injured child to the jury for the purpose of showing his injuries.—*Meeker v. Union Electric Light & Power Co.*, 216 S. W. 933.

## VII. ADMISSIONS.

(A) Nature, Form, and Incidents in General.

—219(1) (Mo.) Where a railroad ran down and mortally injured one on its track, evidence that the railroad's physician attempted to hide from the deceased's relatives the fact of the injury and death, and from the public at large the cause of death, was admissible in evidence in an action for damages, being the nature of an admission by the railroad of a consciousness of being negligent.—*Rice v. Jefferson City Bridge & Transit Co.*, 216 S. W. 746.

## VIII. DECLARATIONS.

(A) Nature, Form, and Incidents in General.

—271(10) (Tex.Civ.App.) Where plaintiff in trespass to try title claimed under a deed with an ambiguous description, testimony that defendant continued to claim the land after the execution of the deed *held* not self-serving, but admissible to show defendant's intention.—*Delta Land & Timber Co. v. Spiller*, 216 S. W. 414.

Where plaintiff in trespass to try title claimed under a deed with an ambiguous description, testimony that defendant subsequent to the conveyance claimed the timber on the land in controversy and sold it to another *held* not inadmissible as self-serving declarations, where a person has parted with title, nor as contradicting the written instrument.—*Id.*

—271(19) (Mo.App.) In an action for compensation for drilling an oil well, letters written by the driller to defendants, setting forth his claims, are self-serving declarations, which should not be admitted in evidence.—*Diets v. Nix*, 216 S. W. 791.

—273(3) (Tex.Civ.App.) In suit upon issue whether deed from defendant and wife to plaintiff was intended as a mortgage or for security, testimony as to declarations of defendant grantor to the effect that he was the owner, made when plaintiff was not present, claimed to be self-serving, was inadmissible.—*Ellis v. Haynes*, 216 S. W. 249.

## IX. HEARSAY.

—317(15) (Mo.App.) In brokers' action for commissions involving question of whether own-

er's sale to third party instead of to procured purchaser, who subsequently bought land from third party, was a blind for fraudulent purpose of depriving brokers of commission, statements of third party were not admissible to show fraud, where neither owner nor his agent was present at time statements were made.—*Lorton v. Trail*, 216 S. W. 54.

## X. DOCUMENTARY EVIDENCE.

(C) Private Writings and Publications.

—354(11) (Tex.Civ.App.) In suit submitted upon sole issue whether deed from defendant and wife to plaintiff was intended as a mortgage or for security, where plaintiff claimed that at time of conveyance he paid to defendant \$500 in cash for the land, the court erred in excluding evidence of the cashier of the bank as to whether plaintiff's account showed a charge of \$500 on said date, though the cashier had not made the entry.—*Ellis v. Haynes*, 216 S. W. 249.

—359(3) (Tex.Civ.App.) In an action for damages for death, photographs of the place of the accident were properly admitted in evidence.—*Southwestern Portland Cement Co. v. Bustillos*, 216 S. W. 268.

(D) Production, Authentication, and Effect.

—370(4) (Tex.Civ.App.) Where, there was no attack on the genuineness of an application for membership in a fraternal insurance society, the application, which was signed by deceased, proves itself.—*Sovereign Camp, Woodmen of the World, v. Wernette*, 216 S. W. 669.

—372(3) (Tex.Civ.App.) In trespass to try title, where defendants claimed under an alleged lost deed, tax receipts issued 30 years before trial by the proper officer, which identified the persons paying the same by name and described the land, *held* properly admitted as against objection that there was no proof of execution or identity.—*Martinez v. Bruni*, 216 S. W. 655.

Receipts showing payments by defendant's ancestor to one under whom plaintiff claimed executed more than 30 years before trial *held* admissible as ancient documents; such receipts having been attached to a deposition taken in another cause wherein they had remained on file for more than 10 years.—*Id.*

—376(9) (Tex.Civ.App.) In suit on an open account for materials and labor, testimony of plaintiff's foreman as to items of the account sued on was admissible, where he testified that, though he had no personal knowledge at the time of suit of the accuracy of the items of the account, nevertheless he would not have O. K.'d time slips from which they were made up unless at the time he had known them to be accurate.—*Mardez Lumber Co. v. Lufkin Foundry & Machine Co.*, 216 S. W. 493.

—377 (Tex.Civ.App.) In suit on an open account for labor and materials, the trial court properly admitted in evidence certain time slips from which the items of the account were made up; plaintiff's foreman having testified that he would not have signed the slips and turned them in at the office unless he had known at the time that such slips, in their charges of hours of labor, were accurate.—*Mardez Lumber Co. v. Lufkin Foundry & Machine Co.*, 216 S. W. 493.

—383(3) (Mo.) Recital in deed made by sheriff on making sale as substitute trustee under deed of trust that he acted at request of the legal holder of the note, while *prima facie* evidence, was not conclusive of that fact, necessary under provision of the deed of trust to transfer the power of sale to him.—*Hurst Automatic Switch & Signal Co. v. Trust Co. of St. Louis*, 216 S. W. 954.

↪383(7) (Mo.) Recitals in a deed relating to past events, such as the source of the grantor's title, are insufficient to establish the truth of the facts recited. (Per Goode and Graves, JJ.)—*Crews v. Lombard*, 216 S. W. 512.

↪383(10) (Tex.Civ.App.) In an action by a passenger for personal injuries from a fall while alighting from a train, testimony of a 17 year old boy, who stood some distance away obliquely, that the rubber on the steps of the coach from which plaintiff was alighting was entirely worn through, held not sufficient to raise a conflict or to warrant the jury in finding that the rubber was worn entirely through, where immediately photographs were taken which showed that, although the rubber was worn, it was not worn through.—*Chicago, R. I. & G. Ry. Co. v. Wisdom*, 216 S. W. 241.

## **XI. PAROL OR EXTRINSIC EVIDENCE AFFECTING WRITINGS.**

(A) Contradicting, Varying, or Adding to Terms of Written Instrument.

↪387(2) (Ark.) In determining the validity of a statute, evidence outside of the record is inadmissible to overcome the presumption of regularity arising from the fact that the enrolled copy has been signed by the Governor and deposited with the Secretary of State.—*Helena Water Co. v. City of Helena*, 216 S. W. 28.

↪419(2) (Ark.) The true consideration of a deed may be shown by parol evidence, even though contradicting the written consideration expressed in the deed, for the purpose of recovering the consideration, but it cannot be shown for the purpose of destroying or invalidating the instrument itself.—*Sutton v. Sutton*, 216 S. W. 1052.

↪420(3) (Tex.Civ.App.) Parol testimony is not admissible to ingraft a condition upon a plain contract.—*Mayhew & Isbell Lumber Co. v. Valley Wells Truck Growers' Ass'n*, 216 S. W. 225.

(C) Separate or Subsequent Oral Agreement.

↪443(1) (Tex.Civ.App.) Where a national bank loaned money to the statutory limit to a company, and that the company might have further funds, agreed with defendants, its vice president and a controlling stockholder of the company, to discount their notes, paying the proceeds to the company, and to apply in extinguishment of the notes deposits subsequently received from the company, the agreement was collateral to the promise in the note sued on, executed pursuant to it, and was not merged in the note, being provable by parol and valid as a defense, whether made orally or in writing.—*Goldstein v. Union Nat. Bank of Dallas*, 216 S. W. 409.

(D) Construction or Application of Language of Written Instrument.

↪448 (Tex.Civ.App.) Where the language of a note is plain, parol evidence is not admissible to change the due date specified therein.—*Gregory v. South Texas Lumber Co.*, 216 S. W. 420.

↪450(7) (Mo.App.) In determining whether it was intention of parties to contract for a railroad "fill" that part or that all dirt placed in fill should be paid for at contract price, contract held not so lacking in definiteness, certainty, or clarity as to permit extrinsic evidence to clarify ambiguity.—*Godfrey v. Martha Inv. Co.*, 216 S. W. 822.

↪460(2) (Tex.Civ.App.) Where plaintiff in trespass to try title to a 100-acre tract of land claimed under a deed granting 87½ acres in a certain survey, "being the remaining part and interest in 400 acres deeded to me," evidence of a prior parol sale of the tract in controversy to a third party after a division of the entire tract into parcels, one containing 87½

acres and another 100 acres, was admissible to identify the land conveyed under plaintiff's deed.—*Delta Land & Timber Co. v. Spiller*, 216 S. W. 414.

Where plaintiff in trespass to try title claimed under a deed with an ambiguous description, testimony that defendant subsequent to the conveyance claimed the timber on the land in controversy and sold it to another held not inadmissible as self-serving declarations, where a person has parted with title, nor as contradicting the written instrument.—Id.

↪460(4) (Ark.) Parol evidence is admissible to apply the description of a lease in order to show that there are lands of the particular description.—*Neal v. Harris*, 216 S. W. 6.

↪460(5) (Tex.Civ.App.) While parol evidence is often admissible to ascertain what lands are embraced in the description of a deed, such evidence cannot make the deed operate upon land not embraced in the descriptive words.—*Bule v. Miller*, 216 S. W. 630.

## **XII. OPINION EVIDENCE.**

(A) Conclusions and Opinions of Witnesses in General.

↪471(24) (Tex.Civ.App.) In live stock shipper's action against railroad to recover charge for extra feed necessitated by delay in transportation, statement by witness that necessity for extra feed was caused by the stock standing in the cars at point of delay held a mere conclusion.—*Kansas City, M. & O. Ry. Co. of Texas v. Chitt*, 216 S. W. 682.

↪471(26) (Tex.Civ.App.) Testimony that a witness knew his father acquired the interest of another in land, that he was present when the purchase was made, and knew of the transaction, cannot be excluded as a conclusion.—*Martinez v. Bruni*, 216 S. W. 655.

↪474(3) (Tex.Civ.App.) Testimony of witnesses, who knew plaintiff and saw him just before and just after his injury, being their personal observations of outward manifestations of condition, open to all who came in contact with him after his injury, held competent, as showing his condition at the time, and not open to objection of being speculative and the opinion of a nonexpert.—*Galveston, H. & S. A. Ry. Co. v. White*, 216 S. W. 265.

↪487 (Mo.App.) In salesman's action for wrongful discharge, to recover commissions he would have earned during term of employment, evidence of salesman's experience held to establish a sufficient foundation for testimony by him as to what his commissions would have been during such period.—*Wamsans v. Blanke-Wenneker Candy Co.*, 216 S. W. 1025.

(B) Subjects of Expert Testimony.

↪514(3) (Tex.Civ.App.) There is no error in allowing witnesses of experience to give their testimony as to the distance in which a locomotive may be stopped.—*El Paso & S. W. Ry. Co. v. Havens*, 216 S. W. 444.

## **XIV. WEIGHT AND SUFFICIENCY.**

↪586(3, 4) (Ky.) Affirmative evidence is entitled to greater consideration than negative, other things being equal.—*Cabble v. Hawkins*, 216 S. W. 345.

↪588 (Ky.) The testimony of witnesses who have been told the kind of testimony they are expected to give is deserving of the severest condemnation, and instead of strengthening, it tends strongly to weaken, the case of the side on whose behalf it is offered.—*Ambrose v. Reece*, 216 S. W. 341.

↪598(1) (Tex.Civ.App.) A verdict for plaintiffs in personal injury case is not contrary to decided preponderance of evidence, because appellees had only two witnesses to accident, one of whom was one of the appellees, while appellant had three disinterested witnesses.—*Zucht v. Brooks*, 216 S. W. 684.

**EXCEPTIONS, BILL OF.**

See Appeal and Error, **511, 518, 544-553, 584, 613, 655**; Criminal Law, **1090, 1091, 1092, 1097, 1106, 1120, 1124, 1144**; Homicide, **327**; Municipal Corporations, **642**.

**EXCHANGE OF PROPERTY.**

See Fraud, **20, 31, 36, 41, 62, 64, 65**.

**EXECUTION.**

See Ejectment, **23**; Equity, **442**; Homestead, **128, 193**; Judgment, **521, 527**; Landlord and Tenant, **252**; Mortgages, **524**; Trespass, **27**.

**VII. SALE.****(B) Proceeds.**

**327 (Mo.App.)** In view of Rev. St. 1909, § 2173, describing the form of execution issued by the court to the sheriff, a surplus fund in the hands of the sheriff after satisfying execution is not in custodia legis, so as to be subject to the court's order to the sheriff to pay it into court, despite interposed claims to the fund and the pendency of an interpleader proceeding elsewhere.—*Wilkinson v. Wilkinson*, 216 S. W. 1015.

The circuit court of St. Louis, which tried a divorce suit, had no jurisdiction over the sheriff of Perry county to make an order on him to pay a surplus fund, arising from sale of defendant husband's land under execution, into the St. Louis court, where there were several claimants to the fund, one of whom was not before the St. Louis court, and an interpleader proceeding instituted by the sheriff was pending in Perry county, wherein the rights of all claimants could be determined.—*Id.*

**VIII. RETURN.**

**344 (Ky.)** In action involving question of whether ownership of property at time of wife's death was in husband or wife, evidence of sheriff's return of "no property found" upon execution against husband shortly before wife's death held of little value upon question of ownership, in absence of proof that husband had denied ownership to sheriff.—*Groves v. Bryant*, 216 S. W. 384.

**XII. WRONGFUL EXECUTION.**

**464 (Tex.Civ.App.)** When real or personal property had been levied on by a writ of execution, to which the claimant or owner is not a party, he may resort to his common-law remedy for the damages inflicted by seizure thereunder.—*Baasham v. Evans*, 216 S. W. 446.

**EXECUTORS AND ADMINISTRATORS.**

See Appeal and Error, **374**; Courts, **39, 472**; Death, **31**; Descent and Distribution; Judgment, **910**; Wills; Witnesses, **130, 159, 164**.

**I. ADMINISTRATION IN GENERAL.**

**7 (Tex.)** Judgment of district court on the minutes on appeal from order of probate court appointing guardian for minor heirs, denying application of applicant to be appointed guardian, but not confirming appointment of appellee, is insufficient to sustain a judgment ordering the estate withdrawn from administration.—*Drew v. Jarvis*, 216 S. W. 618.

That application of guardian of minor heirs for withdrawal of estate from administration did not state that applicant was guardian of estates as well as persons of minors did not deprive county court of jurisdiction to determine whether estate should be withdrawn, and to whom it should be delivered, if withdrawn; applicant having executed bond required by *Vernon's Sayles' Civ. St. 1914, art. 3385*.—*Id.*

**II. APPOINTMENT, QUALIFICATION, AND TENURE.**

**24 (Mo.)** Under Rev. St. 1909, § 302, cl. 4, public administrator had the right to demand and take possession of stock of bank domiciled in Missouri owned by nonresident decedent, though certificates were in possession of executor duly appointed in other state wherein decedent resided and was domiciled and had certificates at time of her death; the situs of the stock being in state in which bank is domiciled.—*Troll v. Third Nat. Bank*, 216 S. W. 922; *Same v. National Bank of Commerce in St. Louis, Id.* 923; *Same v. United Rys. Co. of St. Louis, Id.*

**IV. COLLECTION AND MANAGEMENT OF ESTATE.****(A) In General.**

**85(2) (Mo.App.)** A proceeding under Rev. St. 1909, §§ 70-74, to discover assets of the estate of a deceased person, may be had as well against an administrator as against any other person.—*State ex rel. Lamm v. Lamm*, 216 S. W. 332.

**VI. ALLOWANCE AND PAYMENT OF CLAIMS.****(A) Liabilities of Estate.**

**216(2) (Ark.)** An attorney employed by an administrator of an estate to render services for it has no claim against the estate, though his services may have inured to its benefit, but must look for compensation to the administrator who employed him.—*Gilleylen v. Hallman*, 216 S. W. 15.

**221(4) (Tex.Civ.App.)** Evidence held insufficient to support finding that the estate of decedent was bound by the contract of only one of three executors and trustees, employing plaintiff broker to sell the land on commission.—*Dodge v. Lacey*, 216 S. W. 400.

**221(5) (Ky.)** In suit by a partnership against a decedent's administrator, evidence held to show that decedent furnished money to the firm, to carry on its business, which in repayment turned over to him the gross receipts of the business, actually in much greater amounts than were lent.—*Wilson v. McCullough Bros.*, 216 S. W. 74.

**VII. DISTRIBUTION OF ESTATE.**

**315(6) (Mo.App.)** Where testator gave wife life estate in land, with right to dispose of one-half of proceeds of sale thereof by will, and gave remainder in other half to his sisters, probate court's order of distribution in administration of wife's estate directing distribution of sisters' as well as wife's half of proceeds of sale of the land, was not res judicata as to rights in sisters' share of proceeds; probate court having no jurisdiction to determine such rights.—*McClure v. Baker*, 216 S. W. 1018.

**VIII. SALES AND CONVEYANCES UNDER ORDER OF COURT.****(A) When Authorised.**

**324 (Ark.) Kirby's Dig. § 5073**, requiring action on judgment to be commenced within 10 years after accrual of cause of action, did not bar administrators from having land sold for payment of debts allowed against the estate more than 10 years prior to filing of petition for sale of the land, where administration was still pending and no order for payment of claims had been made under sections 142 to 159.—*Turner's Heirs v. Turner*, 216 S. W. 44.

**329(2) (Ark.)** Under the Constitution, creditors of deceased husband have no right to subject homestead to payment of debts until homestead rights of widow and minor children have ceased.—*Turner's Heirs v. Turner*, 216 S. W. 44.



(B) Application and Order.

§334 (Ark.) Where the only land available for payment of debts was valueless, if sold separate and apart from the homestead and dower tracts, and where the sale of the reversion in the homestead and dower tracts would not have yielded sufficient proceeds to pay the debts, administrators were not barred by laches from having the land sold upon petition filed 3 months after widow's death, though more than 20 years had elapsed since the claims were probated.—Turner's Heirs v. Turner, 216 S. W. 44.

(C) Sale.

§377 (Tex.Civ.App.) Heirs who, being of age, agreed among themselves and with the administrator that, in order to secure a final settlement and distribution of estate, land should be sold to certain of the heirs at specified price, and who participated in the distribution of the proceeds of such sale, are estopped from denying validity of sale, since, having assumed that administrator had the right to make sale, they are estopped from denying existence of such fact.—Allen v. Berk-mier, 216 S. W. 647.

X. ACTIONS.

§435 (Ark.) In view of Const. 1874, art. 7, § 34, giving the probate court exclusive jurisdiction of the estates of decedents, etc., the fact that an administrator is authorized by the probate court to institute suit to recover in the circuit court an amount due the estate does not give the circuit court jurisdiction to distribute or administer the funds adjudged by it to belong to the estate, by declaring a lien thereon in favor of the attorneys employed by the administrator, who have prosecuted the litigation successfully.—Gilleylen v. Hallman, 216 S. W. 15.

Order of the probate court, authorizing an administrator to employ counsel to sue to recover money for the decedent's estate on a fixed or contingent fee, is not tantamount to a distribution in advance by the probate court of funds so recovered, and a separation of the funds from the general assets of the estate, to authorize the circuit court, in which the attorneys employed successfully prosecuted litigation, to enforce a lien in favor of the attorneys on such funds.—Id.

XI. ACCOUNTING AND SETTLEMENT.

(B) Proceedings for Accounting.

§473, 474(2) (Ky.) Rejecting petition to intervene in an action to sell decedent's real estate and settle his estate is error; if its allegations are sufficient to support a constructive trust in petitioner's favor in lands to which deceased held title.—Middleton v. Beasley, 216 S. W. 591.

XIII. LIABILITIES ON ADMINISTRATION BONDS.

§537(8) (Mo.App.) In the absence of an allegation that money paid out was not paid out on items allowed by the probate court in an action against an administratrix and her sureties, it will be presumed on demurrer that the money was lawfully paid out.—State ex rel. Lamm v. Lamm, 216 S. W. 332.

EXEMPTIONS.

See Constitutional Law, §205; Homestead; Municipal Corporations, §967; Taxation, §193, 219, 347.

EXPLOSIVES.

See Landlord and Tenant, §170; Master and Servant, §316; Negligence, §130, 132.

EXPRESS COMPANIES.

See Railroads, §5½.

EXTRADITION.

See Habeas Corpus, §85.

II. INTERSTATE.

§28½ (Mo.App.) One convicted of a crime who has been paroled and violates such parole by escape into another state may be extradited therefrom.—Ex parte Weinhouse, 216 S. W. 548.

§30 (Mo.App.) Where one arrested under extradition proceedings based on a charge of larceny in a foreign state had, under agreement with the prosecuting attorney and the person from whom the property was stolen, made restitution and was released by consent of the probation officer under the laws of the foreign state, accused was not a fugitive from justice.—Ex parte Weinhouse, 216 S. W. 548.

EYES.

See Carriers, §320; Damages, §131.

FACTORS.

See Brokers.

FEDERAL EMPLOYERS' LIABILITY ACT.

See Master and Servant, §180, 287.

FEDERAL OPERATION OF RAILROADS.

See Constitutional Law, §299; Evidence, §43; Railroads, §5½.

FELLOW SERVANTS.

See Master and Servant, §180-201.

FENCES.

See Costs, §32; Criminal Law, §1056; Estoppel, §63.

§19 (Ky.) That during ten-year period, stock succeeded in getting through fence onto premises of adjoining owner on one or two occasions is not indicative of a condition so defective and insecure that fence will not turn stock within Ky. St. § 1780, defining a "lawful fence" as one through which cattle cannot creep.—Burchett v. Leslie, 216 S. W. 850.

§28(1) (Tex.Cr.App.) In prosecution for unlawfully breaking, pulling down, and injuring fence of another without his consent, that fence was in possession of person in whom ownership was alleged under Code Cr. Proc. 1911, art. 457, and that such person did not consent to breaking down of fence, is essential to conviction.—McCullers v. State, 216 S. W. 182.

§28(3) (Tex.Cr.App.) In prosecution for unlawfully breaking, pulling down, and injuring fence of another without his consent, evidence held insufficient to prove possession of fence by person in whom ownership was alleged.—McCullers v. State, 216 S. W. 182.

FICTITIOUS NAMES.

See Chattel Mortgages, §150; Deeds, §31; Mortgages, §43; Sales, §234.

FINANCIAL CONDITION.

See Assault and Battery, §33.

FIRE ESCAPES.

See Health, §32; Landlord and Tenant, §109.

FIRES.

See Negligence, §51.



**FOOD.**

See Pleading, 369; Sales, 255.

25 (Ark.) Where food products are prepared by a manufacturer for sale to retail dealers for consumption by ultimate purchasers, such a purchaser has a right of action against the manufacturer for injury resulting to him from negligence in the preparation of the food.—*Drury v. Armour & Co.*, 216 S. W. 40.

In an action against a packing company for the death of plaintiff's wife through having eaten sausage prepared by the company and sold to plaintiff by an intermediate retail dealer, whether the wife was made sick and killed by the poisonous condition of the sausage, and whether defendant packing company was negligent in preparing the sausage and putting it on the market, *held* for the jury.—*Id.*

**FORCIBLE ENTRY AND DETAINER.**

See Judgment, 747; Justices of the Peace, 174, 208; Landlord and Tenant, 288, 291.

**I. CIVIL LIABILITY.**

24(3) (Mo.App.) In suit for forcible entry and detainer originating before a justice of the peace, complaint *held* sufficient in its description of the land as "nine acres more or less, of growing wheat, located near the center of the northwest quarter (¼) of the northwest quarter (¼), of section twenty (20), township twenty-six (26), range twenty-seven (27)" in a certain township and county.—*Avero v. Wells*, 216 S. W. 802.

**FOREIGN CORPORATIONS.**

See Corporations, 642-661.

**FORFEITURES.**

See Bail, 77; Contracts, 318; Corporations, 83; Homestead, 193; Husband and Wife, 36; Insurance, 368, 724, 755; Mines and Minerals, 77; Vendor and Purchaser, 185.

**FORGERY.**

See Criminal Law, 780.

5 (Tex.Cr.App.) Where defendant, at the request of another, who represented that he could not write, drew a check and signed the name of a third person, and defendant acted innocently and without any intention to defraud, he is not guilty of a forgery.—*Flores v. State*, 216 S. W. 185.

**FORMER JEOPARDY.**

See Criminal Law, 198.

**FRANCHISES.**

See Taxation, 40, 151.

**FRAUD.**

See Appeal and Error, 216; Brokers, 46; Chattel Mortgages, 139; Contracts, 263; Corporations, 80, 265; Deeds, 94, 203, 211; Divorce, 167; Dower, 20; Estoppel, 110; Frauds, Statute of; Fraudulent Conveyances; Husband and Wife, 8, 269; Insurance, 723, 724, 815; Judgment, 443; Mortgages, 209, 369; Pleading, 8, 406; Principal and Agent, 175; Sales, 234, 318; Vendor and Purchaser, 239, 351.

**I. DECEPTION CONSTITUTING FRAUD, AND LIABILITY THEREFOR.**

9 (Mo.App.) If vendor, in selling land, informs purchaser that he is selling land on the

basis of its containing a certain number of acres, though he does not know if there are in fact the specified number of acres in the land, he would not be guilty of misrepresentations entitling purchaser to damages in the event of shortage.—*Messerli v. Bantrup*, 216 S. W. 825.

41(1) (Tex.Civ.App.) Where an agent selling corporate stock made misrepresentations to prospective purchaser as to the returns from the stock, such representations, though partaking of the nature of opinion and of promissory character, are actionable, and hence admissible in an action by purchaser to recover not only payments on the ground that subscription was induced by false representations but also exemplary damages.—*Texas Co-operative Inv. Co. v. Clark*, 216 S. W. 220.

13(2) (Mo.App.) Vendor representing his land to consist of certain number of acres was guilty of misrepresentations if he knew of shortage, though he did not know the precise number of acres of shortage.—*Messerli v. Bantrup*, 216 S. W. 825.

13(3) (Mo.App.) Actual or intentional falsehood need not always be uttered in order to sustain an action for fraud and deceit, since if one asserts a material fact as of his own knowledge, and not as a mere matter of opinion, knowing at the time that he has no such knowledge, and does this for the purpose of inducing another to act, and thereby induces the latter to act upon it to his injury and loss, such assertion is the same as if known to be untrue when made.—*Messerli v. Bantrup*, 216 S. W. 825.

20 (Mo.App.) The mere fact that plaintiff who had been induced to enter into farm exchange contract by misrepresentations as to the number of acres in defendant's land, could have discovered the shortage had he demanded a survey, does not release defendant from liability for such misrepresentation, nor convict plaintiff of negligence, so as to make such negligence, and not the alleged fraud, the cause of plaintiff's loss.—*Messerli v. Bantrup*, 216 S. W. 825.

**II. ACTIONS.****(A) Rights of Action and Defenses.**

31 (Mo.App.) Plaintiff, who had been induced by defendant by fraud and deceit to enter into farm exchange contract, could sue for damages on misrepresentations, and was not required to sue on the deed nor rescind the contract.—*Messerli v. Bantrup*, 216 S. W. 825.

36 (Mo.App.) In action for misrepresentations as to quantity of land inducing plaintiff to enter into farm exchange contract with defendant, a contract subsequently entered into by the parties in settlement of a dispute, having no relation to the quantity of land, *held* no defense.—*Messerli v. Bantrup*, 216 S. W. 825.

**(B) Parties and Pleading.**

41 (Mo.App.) In action to recover damages for fraud and deceit inducing plaintiff to enter into farm exchange contract with defendant, petition *held* to state cause of action.—*Messerli v. Bantrup*, 216 S. W. 825.

**(C) Evidence.**

50 (Mo.) Plaintiff in a suit based on fraud has the burden of making out his case by clear and convincing evidence.—*Jones v. Nichols*, 216 S. W. 962.

While fraud may be inferred from facts and circumstances, it is never to be presumed; and, where a transaction may as well consist with honest and fair dealing as with a fraudulent purpose, it is to be referred to the better motive.—*Id.*

58(1) (Tex.Civ.App.) In counterclaim for damages for breach of warranty and fraudulent representations in a sale of riparian rights, evidence that 95 per cent. of the land sold was submerged and 5 per cent. not submerged did not afford any basis for estimating damages,

as there could be no presumption that the submerged land was worth only 5 per cent. of the purchase price, as a basis for estimating damages.—*Westervelt v. Meuly*, 216 S. W. 680.

(D) Damages.

⚡62 (Mo.App.) In action for misrepresentation as to character and location of farm land, inducing plaintiff to enter into farm exchange contract with defendant, where jury found facts to be as evidence in plaintiff's behalf tended to prove them, verdict for \$1 for plaintiff held grossly inadequate.—*Meily v. Hill*, 216 S. W. 545.

(E) Trial, Judgment, and Review.

⚡64(3) (Mo.App.) In action for misrepresentations as to number of acres in defendant's land inducing plaintiff to enter into farm exchange contract with defendant, question of whether defendant represented land to contain specified number of acres, or told plaintiff that he was uncertain as to the number of acres, and had been told that there was a shortage, but was determined to make transaction on the basis of specified number of acres, held for jury.—*Messerli v. Bantrup*, 216 S. W. 825.

⚡65(3) (Mo.App.) In action for misrepresentations as to quantity of land inducing plaintiff to enter into farm exchange contract with defendant, instruction that intent to deceive will be inferred if defendant made unqualified representations as to quantity of land knowing it to be untrue as misleading in not making it clear that representations, if unqualifiedly made, would have had same legal effect if not known to be true.—*Messerli v. Bantrup*, 216 S. W. 825.

## FRAUDS, STATUTE OF.

See Evidence, ⚡460.

### III. PROMISES TO ANSWER FOR DEBT, DEFAULT OR MISCAR- RIAGE OF ANOTHER.

⚡16 (Ky.) Partner's promise to pay other partner's share, as well as his own, of partnership debts, being a promise to pay debts for which he himself was personally liable, was not within statute of frauds, relating to promises to pay debt or default of another, and was enforceable though not in writing.—*Davis v. Abell*, 216 S. W. 104.

⚡17 (Ky.) Ordinarily, under statute of frauds, one is not bound for the debt or default of another, unless his undertaking is in writing and signed by the person to be charged.—*Davis v. Abell*, 216 S. W. 104.

⚡18(3) (Mo.App.) Statute of frauds (Rev. St. 1909, § 2783), prohibiting actions upon promises to pay the debt of another unless based upon a writing, etc., does not prevent plaintiff payee of a note from suing defendant, who had orally promised the maker of the note to pay it in consideration of certain property being transferred from the maker to defendant.—*Texas County Bank v. Whitman*, 216 S. W. 835.

### V. AGREEMENTS NOT TO BE PER- FORMED WITHIN ONE YEAR OR DURING LIFETIME.

⚡45(1) (Ky.) Under a contract whereby a street railroad agreed to transport coal for a mining company, the freights falling due and being payable between the 10th and 15th of the month succeeding that of haulage, the railroad had no right to demand freights before the 10th of the succeeding month, the contract was merely one from month to month, and was not within the statute of frauds as not to be performed within a year.—*Owensboro City R. Co. v. Owensboro Fuel Co.*, 216 S. W. 72.

### VI. REAL PROPERTY AND ESTATES AND INTERESTS THEREIN.

⚡58(2) (Ark.) Where the lessor of a farm for a year agreed to give the lessee the refusal

of the place for the two following years at the same rental per acre, on exercising his option, the lessee, without any execution of a new lease, became entitled to an extended term of two additional years; no question of the application of the statute of frauds arising.—*Neal v. Harris*, 216 S. W. 6.

⚡63(1) (Mo.) The statute of frauds constitutes no obstacle to the acquisition of title by adverse possession.—*Reader v. Williams*, 216 S. W. 733.

### VIII. REQUISITES AND SUFFICIENCY OF WRITING.

⚡109 (Mo.App.) A memorandum sales agreement, setting out items and prices in usual trade abbreviations and easily understood, held sufficient to meet the requirements of the statute of frauds.—*Colorcraft Co. v. American Packing Co.*, 216 S. W. 831.

### IX. OPERATION AND EFFECT OF STATUTE.

⚡129(8) (Tex.Civ.App.) Where defendants entered into possession under a turpentine lease or contract, and began to cut trees, and part of the rental was paid, defendants cannot defeat an action for recovery of rental thereafter becoming due, on the ground that the contract or lease was void because of ambiguity in the description of the property.—*Spivey v. Hooks*, 216 S. W. 486.

### X. PLEADING, EVIDENCE, TRIAL, AND REVIEW.

⚡158(3) (Ark.) Parol evidence is admissible to apply the description of a lease in order to show that there are lands of the particular description, but is inadmissible to supply or add to the description to make it comply with the statute of frauds.—*Neal v. Harris*, 216 S. W. 6.

## FRAUDULENT CONVEYANCES.

See Husband and Wife, ⚡6, 269.

### I. TRANSFERS AND TRANSACTIONS INVALID.

#### (D) Indebtedness, Insolvency, and Intent of Grantor.

⚡57(5) (Tex.Civ.App.) Where plaintiff, who attacked a conveyance, under Rev. St. 1911, arts. 3966 and 3967, by husband to his wife, as in fraud of creditors, failed to show that the husband was insolvent at the time of the conveyance, there can be no recovery.—*Allen v. Crutcher*, 216 S. W. 236.

#### (J) Knowledge and Intent of Grantee.

⚡168 (Ky.) Where the consideration was a valuable one, the good faith of son in purchasing land in question from his father is not affected by the fact that the value of the land may have been somewhat greater than the amount paid, unless it appears that the son had notice of the fraudulent intent of his father in making the conveyance.—*Caldwell v. Puckett*, 216 S. W. 344.

### II. RIGHTS AND LIABILITIES OF PARTIES AND PURCHASERS.

#### (A) Original Parties.

⚡187 (Ky.) If there is a valuable consideration paid by the grantee and he is without knowledge of the intent of the grantor to defraud his creditors, or in possession of no facts calculated to put him on inquiry, he will not, upon the setting aside of the conveyance, be made to lose the consideration paid by him for the land.—*Caldwell v. Puckett*, 216 S. W. 344.

For cases in Dec.Dig. & Am.Dig. Key-No.Series & Indexes see same topic and KEY-NUMBER

### III. REMEDIES OF CREDITORS AND PURCHASERS.

#### (A) Persons Entitled to Assert Invalidity.

⚡206(1) (Tex.Civ.App.) Where plaintiff, who attacked a conveyance, under Rev. St. 1911, arts. 3966 and 3967, by husband to his wife as in fraud of creditors, failed to show that the demand on which she recovered judgment against the husband two years after the conveyance was in existence at the time of the conveyance, or that the husband was insolvent at the time of the conveyance, there can be no recovery.—*Allen v. Crutcher*, 216 S. W. 236.

⚡208 (Ky.) Conveyances without consideration and to protect the property, made by a judgment debtor to his wife, before creation of debt and rendition of judgment, and, after judgment, by the debtor and his wife to the debtor's brother, who reconveyed to the debtor or as trustee for his daughter, were fraudulent and void, under Ky. St. § 1906, as to the debtor's creditors, past, present, and prospective.—*Ball v. Brown-Ross Shoe Co.*, 216 S. W. 612.

#### (G) Evidence.

⚡278(1) (Ky.) In action under Civ. Code Prac. § 439, to enforce satisfaction of an unpaid judgment, petition attacking conveyance by judgment debtor to his son as fraudulent, and asking that it be set aside on the grounds specified by Ky. St. §§ 1906, 1910, the relationship cast upon the son the burden of showing his ignorance of the fraud shown to have been practiced by his father upon creditors in making the conveyance to the son.—*Caldwell v. Puckett*, 216 S. W. 344.

⚡299(11) (Ky.) Evidence held to show that conveyances from a judgment debtor to his wife prior to the judgment for a recited consideration of \$750, from the judgment debtor and his wife after the judgment to the debtor's brother as trustee, and from the brother back to the judgment debtor as trustee for his daughter, were solely to insure the judgment debtor's enjoyment of the property, whatever the result of his business ventures; the conveyances having been without consideration.—*Ball v. Brown-Ross Shoe Co.*, 216 S. W. 612.

### FUNDAMENTAL ERROR.

See Criminal Law, ⚡1056.

### GAMING.

#### I. GAMBLING CONTRACTS AND TRANSACTIONS.

##### (A) Nature and Validity.

⚡6 (Tex.Civ.App.) Where plaintiff agreed with another to run a horse race, the owner of the fastest horse to get stakes, and if either failed or refused to race, the other to have the stakes, such agreement was illegal under Pen. Code 1911, art. 578, as betting on a horse race, and either party could rescind and recover his money from defendant stakeholder.—*Leber v. Dibrell*, 216 S. W. 477.

##### (B) Rights and Remedies of Parties.

⚡29 (Tex.Civ.App.) Where plaintiff agreed with another to run a horse race, the owner of the fastest horse to get the stakes, and if either failed or refused to race the other to have the stakes, such agreement was illegal under Pen. Code 1911, art. 578, as betting on a horse race, and either party could rescind and recover his money from defendant stakeholder.—*Leber v. Dibrell*, 216 S. W. 477.

### III. ORIGINAL RESPONSIBILITY.

#### (B) Prosecution and Punishment.

⚡90(2) (Mo.) Information, charging that defendant "set up a gambling table or gambling device, commonly called a poker table, adapted, devised, and designed for the purpose of play-

ing a certain game of chance, commonly called poker," etc., was insufficient to charge a crime under Rev. St. 1909, § 4750; it being essential where device is not of the kind named in statutes to describe it, so as to bring it within class of named devices.—*State v. Crayne*, 216 S. W. 47.

### GARBAGE.

See Contracts, ⚡304; Damages, ⚡40, 120.

### GARNISHMENT.

See Appeal and Error, ⚡496.

### VIII. CLAIMS BY THIRD PERSONS.

⚡218 (Ark.) Evidence held to show that assignment of stock to intervener was prior to garnishment of dividends thereon.—*Robbins v. Union Mercantile Trust Co.*, 216 S. W. 689.

### GAS.

See Mines and Minerals, ⚡74, 78.

### GATES.

See Easements, ⚡5, 8, 32.

### GIFTS.

See Adverse Possession, ⚡64, 85, 115; Husband and Wife, ⚡266, 269.

#### I. INTER VIVOS.

⚡1 (Ky.) A "gift inter vivos" is one made by one or more persons to another or other persons without reference to the future and to come into immediate and absolute effect without further act of the parties, delivery being an essential.—*Moore v. Shifflett*, 216 S. W. 614.

⚡18(1) (Ky.) A "gift inter vivos" is one made by one or more persons to another or other persons without reference to the future and to come into immediate and absolute effect without further act of the parties, delivery being an essential.—*Moore v. Shifflett*, 216 S. W. 614.

⚡41 (Ky.) A gift inter vivos cannot be revoked.—*Moore v. Shifflett*, 216 S. W. 614.

⚡49(4) (Ark.) In daughter's action for partition of land left by deceased father, against son who asserted title under a parol gift from father, finding that father had not given the land to son held not against the preponderance of the evidence.—*Koontz v. Smith*, 216 S. W. 1042.

#### II. CAUSA MORTIS.

⚡53 (Ky.) A "gift causa mortis" is a gift of personalty in expectation of death then imminent, and on an essential condition that the property shall belong fully to the donee in case the donor dies as anticipated, leaving the donee surviving him, if the gift is not revoked, but not otherwise.—*Moore v. Shifflett*, 216 S. W. 614.

⚡62(6) (Ky.) Where a wife before her death called in her sister, showed her money in gold and greenbacks, and had her replace it in a dresser drawer from which it had been taken, and gave such sister the key, stating that she wished her nephew to have the money after her death, there was a valid gift causa mortis; the symbolical delivery by means of the key being sufficient.—*Moore v. Shifflett*, 216 S. W. 614.

⚡74 (Ky.) A gift inter vivos cannot be revoked, while a gift causa mortis may be revoked by the donor at any time before his death.—*Moore v. Shifflett*, 216 S. W. 614.

Where a wife before her death called in her sister, showed her money in gold and greenbacks, and had her replace it in a dresser drawer from which it had been taken, and gave such sister the key, stating that she wished her nephew to have the money after her death, there was a valid gift causa mortis, the symbolical delivery by means of the key being sufficient which gift was not revoked by the wife's subse-

quent will to her husband which took effect only at her death.—Id.

## GOOD WILL.

See Partnership, ¶230.

## GOVERNMENT OPERATION OF RAILROADS.

See Constitutional Law, ¶299; Evidence, ¶43; Railroads, ¶5½.

## GOVERNMENT SHIPMENTS.

See Carriers, ¶104; Railroads, ¶5½.

## GOVERNOR.

See Statutes, ¶284.

## GRAND JURY.

See Criminal Law, ¶402, 406; Witnesses, ¶379.

## GUARANTY.

See Principal and Surety, ¶6, 126.

### I. REQUISITES AND VALIDITY.

¶1 (Ark.) An agreement guaranteeing honest and faithful performance of sales contract by buyer was a contract of guaranty.—Shores-Mueller Co. v. Palmer, 216 S. W. 295.

### IV. REMEDIES OF CREDITORS.

¶82(3) (Ark.) An agreement guaranteeing honest and faithful performance of sales contract by buyer was a contract of guaranty, and, where it was attached to, so as to become a part of, the sales contract, the guarantors and buyer could be sued in same action.—Shores-Mueller Co. v. Palmer, 216 S. W. 295.

## GUARDIAN AND WARD.

See Appeal and Error, ¶664, 843; Courts, ¶42, 202; Executors and Administrators, ¶7; Infants, ¶19, 39, 80, 89; Municipal Corporations, ¶980; Process, ¶4.

### II. APPOINTMENT, QUALIFICATION, AND TENURE OF GUARDIAN.

¶8 (Tex.Civ.App.) The county court is a proper tribunal to appoint a guardian for the person of a minor.—Ex parte Grimes, 216 S. W. 251.

¶15 (Tex.Civ.App.) A guardian's bond is to be construed with reference to the law in force when and where it was given, and read in the light of the provisions of the law then in force; the obligation of the sureties being measured and determined by it.—American Indemnity Co. v. Noble, 216 S. W. 441.

Where a guardian for the estate of a minor was appointed in 1901, and qualified by giving bond in double the estimated value of her ward's property, after her removal in 1913 the case was "pending" within Vernon's Sayles' Ann. Civ. St. 1914, art. 4177, providing that in cases pending when the law became effective, and in which the guardian had a satisfactory bond filed equal to twice the amount of all personal property of the ward, and twice the amount of real estate sold, he would not be required to file a new bond, and the guardian succeeding her and coming into possession of the ward's property was required to give bond only identical with that given by the original guardian.—Id.

### III. CUSTODY AND CARE OF WARD'S PERSON AND ESTATE.

¶29 (Tex.Civ.App.) Guardians of minors may be either of the person or of the estate, the guardian of the person being entitled to the charge and control of the ward and the

care of his support and education, in view of Rev. St. 1911, art. 4122.—Ex parte Grimes, 216 S. W. 251.

A statute giving to the legally appointed guardian of a minor control of the person of the ward and the care of his support and education upon such terms and under such restrictions as may be provided by law is constitutional.—Id.

¶69 (Ark.) A guardian's purchase of real estate from his minor ward is valid only in case the guardian has exercised the utmost good faith in the transaction.—Sconyers v. Sconyers, 216 S. W. 1045.

¶70 (Ark.) A ward did not ratify a sale of real estate to his guardian upon demanding payment of a purchase-money note after the guardianship expired where he demanded payment without knowing that he could elect to rescind, and the guardian's influence over the ward still continued.—Sconyers v. Sconyers, 216 S. W. 1045.

### IV. SALES AND CONVEYANCES UNDER ORDER OF COURT.

¶87 (Ky.) In a suit brought under Civ. Code Prac. § 490, subsec. 2, bringing all necessary parties before the court, the fact that no summons was issued upon the pleading of the holder of a mortgage lien constituted no objection to the proceedings or judgment, where the original petition set out the amount of such debt as just and subsisting, and while the case should have been submitted on the whole pleadings, error in submitting it upon the lien claimant's plea was not prejudicial to the interest of an infant distributee.—Baxter Realty Co. v. Martin, 216 S. W. 110.

¶90 (Ky.) That the statutory guardian of an infant filed a pleading for the mortgage holder in a proceeding for sale of indivisible land for payment of the mortgage and distribution, where the infant was a distributee, does not render the judgment therein void as to such infant.—Baxter Realty Co. v. Martin, 216 S. W. 110.

¶105(1) (Ky.) The error of the court in allowing to be paid out of the proceeds of sale, in a suit brought by a statutory guardian for sale of indivisible property, payment of debts and distribution of the estate, certain claims that should not have been paid, did not in any manner affect the validity of the judgment ordering the sale, nor authorize its vacation; such errors being available only on appeal.—Baxter Realty Co. v. Martin, 216 S. W. 110.

¶107 (Ky.) A judgment for sale of indivisible property of an estate in remainder for payment of lien notes and distribution of proceeds, if not void, but merely erroneous, cannot be attacked in a collateral proceeding against the purchaser at such sale or his vendee by a minor distributee, who was represented by guardian in such suit for distribution, and has since become of age.—Baxter Realty Co. v. Martin, 216 S. W. 110.

¶114 (Ky.) Where a judgment directing sale of indivisible land of an estate in possession for payment of a lien and distribution was neither void nor erroneous, an infant distributee, whose share was unlawfully permitted to be withdrawn by her guardian, who squandered it, has a remedy under Civ. Code Prac. § 497, providing, in such a proceeding under section 490, subsec. 2, the infant's share shall not be paid by the purchaser, but shall remain a lien on the land, bearing interest until she comes of age, and her claim may be enforced against the land, where the guardian has not executed the bond required by section 493.—Baxter Realty Co. v. Martin, 216 S. W. 110.

Where an order in a proceeding for sale and distribution of an estate recites that G., as guardian "ad litem," was permitted to withdraw the proceeds, held, that it must be presumed that the words "ad litem" were added by mistake or inadvertence, and that he with-

For cases in Dec.Dig. & Am.Dig. Key-No.Series & Indexes see same topic and KEY-NUMBER

drew the fund as statutory guardian, which he was, where he was not guardian ad litem.—Id.

A purchaser of land in which an infant has an interest must look to the record in which the land is sold, and carefully see that every substantial provision of the Code intended for the infant's protection has been observed, and, failing to do so, no orders or judgments of the court will save the purchaser at the suit of the infant to recover the estate.—Id.

#### V. ACTIONS.

§131 (Ark.) Evidence that land purchased by a guardian from his minor ward was worth at least the purchase price and perhaps more, that the guardian did not disclose that his ward had some money without selling the land, etc., *held* not to show that utmost good faith on the guardian's part which is necessary to sustain a guardian's purchase from his ward.—Sconyers v. Sconyers, 216 S. W. 1045.

There is no presumption of law that the relation of trust and confidence terminates immediately upon the ward becoming of age or the guardianship ceasing.—Id.

#### GUNS.

See Homicide, §3.

#### HABEAS CORPUS.

See Infants, §19.

#### I. NATURE AND GROUNDS OF REMEDY.

§3 (Tex.Civ.App.) Where the county court authorized the probate officer to take charge of a dependent child pending a motion for a new trial, such action, if error, could be corrected only upon motion for new trial or upon appeal, but not by means of writ of habeas corpus.—Ex parte Grimes, 216 S. W. 251.

§4 (Tex.Civ.App.) Where the county court authorized the probate officer to take charge of a dependent child pending a motion for a new trial, such action, if error, could be corrected upon appeal, but not by means of a writ of habeas corpus.—Ex parte Grimes, 216 S. W. 251.

Habeas corpus is not a method of appeal.—Id. §28 (Tex. Cr. App.) Under Vernon's Ann. Code Cr. Proc. 1916, art. 183, where the act penalized for contempt is beyond the jurisdiction of the trial court to punish, the Court of Criminal Appeals will review the case and relieve under a writ of habeas corpus.—Ex parte Kemper, 216 S. W. 172.

§30(1) (Tex.Civ.App.) Habeas corpus is not a method of appeal, and is a collateral attack which cannot be invoked where there have been mere irregularities in proceedings of another court, but only where the judgment of such other court is absolutely void.—Ex parte Grimes, 216 S. W. 251.

#### II. JURISDICTION, PROCEEDINGS, AND RELIEF.

§46 (Tex.Civ.App.) Rev. St. 1895, arts. 3502a, 3502b, conferred upon the county courts the power to determine the custody of children and to exercise the power through a writ of habeas corpus in cases where guardianship was not involved, while Rev. St. 1911, arts. 2184, 2189, and 2190, provide for the appointment of guardians and make custody in such cases only an incident of the guardianship.—Ex parte Grimes, 216 S. W. 251.

§85(1) (Tex.Civ.App.) In habeas corpus proceedings by father to recover possession of his child from its grandparents, evidence tending to show that he had once been found drunk, and that an unknown woman had at one time claimed him as her property, *held* insufficient to establish his unfitness to have his child's custody.—Cardenas v. Barrera, 216 S. W. 474.

In habeas corpus proceedings by father to re-

cover possession of his child from its grandparents, the grandparents have the burden of proving that the father was unfit to have charge of the child, or that its best interests would be subserved by the grandparent's custody.—Id. §85(2) (Mo.App.) While the requisition from the Governor of a foreign state and compliance therewith by the Governor of the state where the prisoner is apprehended is *prima facie* sufficient to justify extradition; it is not conclusive, and on habeas corpus evidence to determine the substantive fact whether accused is a fugitive from justice may be considered.—Ex parte Weinhouse, 216 S. W. 548.

#### HARMLESS ERROR.

See Appeal and Error, §1026-1073; Criminal Law, §1166-1173.

#### HEALTH.

##### I. BOARDS OF HEALTH AND SANITARY OFFICERS.

§3 (Ark.) As Acts 1913, p. 348, creating city boards of health, necessarily constitutes such boards a department of the city government, a city manager appointed under Acts 1917, p. 568, may appoint such board, the provisions of the earlier act, giving the mayor power of appointment, being repealed by that provision of Acts 1917, repealing all inconsistent acts.—McClenendon v. Board of Health of City of Hot Springs, 216 S. W. 289.

##### II. REGULATIONS AND OFFENSES.

§32 (Mo.) Seven-story nonfireproof building, occupied by a club, containing kitchen, dining room, library, banquet and dancing hall, and 85 bedrooms, furnishing sleeping accommodations, above second floor, for 125 persons, *held* a "dormitory," within Rev. St. 1909, § 10668, regulating number of fire escapes on "dormitories" of nonfireproof construction, three or more stories in height.—Newell v. Boatmen's Bank, 216 S. W. 918.

#### HERNIA.

See Insurance, §454.

#### HIGHWAYS.

See Appeal and Error, §1068; Bridges; Constitutional Law, §70, 228, 281; Criminal Law, §800; Drains, §70, 71, 79; Election of Remedies, §3; Eminent Domain, §71, 75, 77, 167; Evidence, §123; Municipal Corporations, §29, 282, 469, 487, 646, 648; Private Roads; Statutes, §75, 170, 283.

##### I. ESTABLISHMENT, ALTERATION, AND DISCONTINUANCE.

(A) Establishment by Prescription, User, or Recognition.

§6(1) (Mo.App.) Under Rev. St. 1909, § 10446, as amended by Laws 1913, p. 658, § 15, and Laws 1917, p. 450, § 13, providing that roads "used as such by the public for ten years continuously, and upon which there shall have been expended public money or labor for such period, shall be deemed legally established roads," road so used for such period and upon which sufficient public money or labor is expended "for such period" to keep it in substantial repair and condition for public use is a legally established road, though public money and labor has not been expended each and every year during such period.—State v. Kitchen, 216 S. W. 981.

(C) Alteration, Vacation, or Abandonment.

§71 (Tenn.) Though Priv. Acts 1917, c. 25, and chapter 131, authorizing Washington coun-

ty to issue bonds to provide a road system, required a particular road to pass a certain place and intersect with another road at about that place, and bonds were voted and the road constructed, *held* that the state highway commission had authority, under Acts 1919, c. 149, § 9, to alter the course of the road at said place by a deviation of about one-third of a mile; deviation being thought necessary to make road conform to federal requirements.—State Highway Department v. Mitchell's Heirs, 216 S. W. 336.

☞79(1) (Mo.App.) In prosecution for obstructing road in violation of Rev. St. 1909, § 10533, that county court had ordered the establishment of new road in close proximity to road defendant had obstructed *held* not sufficient to show that old road had been abandoned at point of obstruction, especially where there was no order therefor, and where public continued to use, and overseers of district continued to work, old road.—State v. Kitchen, 216 S. W. 981.

## II. HIGHWAY DISTRICTS AND OFFICERS.

☞90 (Ark.) Acts 1917, p. 1149, providing for the construction of a highway, *held* repealed by Acts 1919, p. 134, on the same subject, notwithstanding it contains no express provision to that effect.—Faucette v. Patterson, 216 S. W. 300.

☞90 (Ark.) Road Acts 1919, vol. 1, p. 706, creating the Delta road improvement district of Lee county, is not unconstitutional as giving the commissioners power to lay out and establish new public roads and taking away from the county court the exclusive jurisdiction over public roads vested in it by Const. art. 7, § 28.—Bush v. Delta Road Improvement Dist. of Lee County, 216 S. W. 690.

Road Acts 1919, vol. 1, p. 359, § 3, creating road improvement district, provides that, if any part of the proposed road has not been laid out as a public road, it is the duty of the county court to lay out the same in accordance with Acts 1911, p. 364, and such section is merely a method of procedure for the guidance of the county court and is not mandatory so as to deprive the county court of its freedom of judgment in laying out new roads.—Id.

The Legislature has full power to establish local improvement districts and to abolish those already created, and, if it be assumed that a prior district was a valid one, the subsequent creation of a district including the former district impliedly repealed the former statute so far as a construction of the latter road law is concerned.—Id.

Road Acts 1919, vol. 1, p. 706, is not void because not definitely describing the boundaries of the district. The language "and that part of sections 21 and 22 on the left or east bank of the St. Francis river," read in connection with other parts of the description, means the east side of the river; the map showing that a part of each of such sections is on the east side of the river.—Id.

☞90 (Ark.) In Acts 1919, p. 105, creating the Monette Road improvement district, the words "last county assessment," in section 14, limiting the construction cost to 30 per cent. of district realty values as shown by the "last county assessment," mean, not the last assessment preceding the construction of the improvement, but the last assessment preceding the enactment of the statute (the 1918 assessment); the statute contemplating immediate initiation of the improvement.—Watson v. Boydston, 216 S. W. 721.

☞90 (Ark.) Road Laws 1919, vol. 2, p. 1631, creating road district No. 1 of Marion county, is invalid in that it provides for the improvement of all the highways in the district, including streets in three incorporated towns, and thereby attempts to join together as a single improvement projects necessarily sepa-

rate and distinct.—Payne v. Road Imp. Dist. No. 1, of Marion County, 216 S. W. 1047.

A road improvement district created to improve a general highway could properly include portions of the streets of towns which formed a part of the general highway.—Id.

## IV. TAXES, ASSESSMENTS, AND WORK ON HIGHWAYS.

☞135 (Ark.) In making assessment to pay for any proposed road improvement, the question is to what extent the proposed improvement will enhance the value of the property against which the assessment is to be levied, for it is the enhanced value that is taxed.—Wilkinson v. St. Francis County Road Improvement Dist. No. 1, 216 S. W. 304.

☞139 (Ark.) Taxation by special assessment is defensible only on the theory of corresponding special benefits to the property assessed, and the question of benefits to special road district is one of fact, and location and surface conditions of the lands are to be considered in assessing, and Road Acts 1919, vol. 1, p. 706, provides that the commissioners shall assess benefits and damages after due notice, giving owners full opportunity for complaint, when lands are assessed, and an injunction suit brought prior to assessment is premature.—Bush v. Delta Road Improvement Dist. of Lee County, 216 S. W. 690.

☞140 (Ark.) Assessments of lands by a road improvement district on a zone system, \$7 an acre on lands within a mile of the road, \$8 an acre on land within two miles of the road, etc., were not subject to judicial reduction, though as a result of such method of assessment lands worth more than \$100 an acre would pay no more tax than lands worth less than \$5 an acre; the assessments having been made in good faith by a board of competent men named by statute.—Wilkinson v. St. Francis County Road Improvement Dist. No. 1, 216 S. W. 304.

☞142 (Ark.) The judgment of the judges reviewing assessments for a road improvement should not be substituted for that of the assessors who made the assessments, unless the evidence clearly shows that the assessment is erroneous.—Wilkinson v. St. Francis County Road Improvement Dist. No. 1, 216 S. W. 304.

☞148 (Ark.) Taxation by special assessment is defensible only on the theory of corresponding special benefits to the property assessed, and the question of benefits to special road district is one of fact, and location and surface conditions of the lands are to be considered in assessing, and Road Acts 1919, vol. 1, p. 706, provides that the commissioners shall assess benefits and damages after due notice, giving owners full opportunity for complaint when lands are assessed, and an injunction suit brought prior to assessment is premature.—Bush v. Delta Road Improvement Dist. of Lee County, 216 S. W. 690.

## V. REGULATION AND USE FOR TRAVEL.

### (A) Obstructions and Encroachments.

☞164(3) (Tex.Cr.App.) In a prosecution for obstructing a public road, evidence *held* to sustain conviction.—Howard v. State, 216 S. W. 168.

### (B) Use of Highway and Law of the Road.

☞173(2) (Ky.) A motor vehicle is a "dangerous instrumentality," and one in charge should exercise care commensurate with the dangers attending its operation upon a highway to travelers thereon, including reasonable warning of approach; and Ky. St. § 2739, subsec. 15, makes it negligence per se as to a pedestrian injured, where the injury is the proximate result of the driver's failure to signal its approach.—Collett's Guardian v. Standard Oil Co., 216 S. W. 356.

☞184(2) (Ky.) In an action for personal injury received by a boy, colliding with a motor

For cases in Dec. Dig. & Am. Dig. Key-No. Series & Indexes see same topic and KEY-NUMBER

truck upon a public highway, uncontradicted evidence held not to show that the boy was in a place of safety off the highway, so that the defendant, owner of the truck, was under no obligation to signal the truck's approach until the instant of the collision, when the boy came upon the highway and it was too late to avert the accident.—Collett's Guardian v. Standard Oil Co., 216 S. W. 356.

In action for personal injury to minor, from collision with automobile truck on a highway, evidence showing that boy was playing with another, running and looking backward, and failed to see the approach of the truck, when his attention was attracted by an automobile giving warning signal coming from another direction and also by a passing train, held not to show that the boy failed to exercise the degree of care expected of one of his age under similar circumstances.—Id.

§184(3) (Ky.) In an action for injury to a boy pedestrian by collision with an automobile on a highway, whether positive testimony that signals were given outweighs negative testimony that they did not hear the signal of approach was for the jury, so that it was error to direct a verdict for defendant on the ground that there was no testimony tending to prove negligence.—Collett's Guardian v. Standard Oil Co., 216 S. W. 356.

§184(3) (Tex. Civ. App.) In an action for personal injury to one of the plaintiffs resulting from collision upon a bridge on a highway between plaintiffs' surrey and team and defendant's automobile, where defendant had the right to travel on the bridge, which was too narrow for them to pass each other, and it was night, and the dust obscured the view, whether defendant negligently caused the accident was a question for the jury.—Melton v. Manning, 216 S. W. 488.

In view of Vernon's Ann. Pen. Code Supp. 1918, art. 820k, requiring drivers to operate motor vehicles on public highways in a careful manner with due regard to the safety and convenience of others, keeping to the right-hand side whenever practicable, whether plaintiffs suing for personal injuries could have seen defendant's automobile before driving on the bridge, which was too narrow for passing, and used due caution to prevent the collision, was for the jury.—Id.

## HOMESTEAD.

See Executors and Administrators, §329, 334; Judgment, §429; Mortgages, §530; Trial, §350; Vendor and Purchaser, §26, 261, 284.

### I. NATURE, ACQUISITION, AND EXTENT.

#### (E) Liabilities Enforceable Against Homestead.

§108 (Tex. Civ. App.) Where mortgagors designated a homestead on a portion of the mortgaged premises, their homestead right became perfect, except as to the mortgage, and on foreclosure they are entitled to have the land outside the homestead first sold.—Chandler v. Young, 216 S. W. 484.

### II. TRANSFER OR INCUMBRANCE.

§128 (Ark.) A homestead claimant may sell the homestead free from any judgment rendered against him, or execution issued thereon, except for claims which may be enforced against a homestead, under Const. art. 9, § 3, and Kirby's Dig. § 3898.—Dean v. Cole, 216 S. W. 308.

§129(2) (Tex. Civ. App.) While trust deed and vendor's lien note arising out of a simulated sale of a homestead are void as against one having actual or constructive notice as far as wife is concerned, the husband should not be freed of liability as against purchaser of the note with constructive notice only.—Brooker v. Wright, 216 S. W. 196.

## III. RIGHTS OF SURVIVING HUSBAND, WIFE, CHILDREN, OR HEIRS.

§143 (Ky.) The only right of possession given the widow prior to the assignment of homestead or dower is that conferred by Ky. St. § 2138, declaring that she shall hold the mansion house, etc., until dower is assigned and her possession is that of a tenant at will of the heirs.—Consolidation Coal Co. v. Grayson, 216 S. W. 848.

§146 (Ky.) Where a widow, in the absence of a previous assignment to her of dower or homestead, executes a lease on an entire tract and all of the land of which her husband was owner at the time of his death, such lease embraces no more than her dower interest.—Consolidation Coal Co. v. Grayson, 216 S. W. 848.

### IV. ABANDONMENT, WAIVER, OR FORFEITURE.

§162(1) (Ark.) In order to constitute abandonment of a homestead, the homestead claimant must remove therefrom with an intention not to return.—Dean v. Cole, 216 S. W. 308.

### V. PROTECTION AND ENFORCEMENT OF RIGHTS.

§193 (Ark.) The failure by a homestead claimant to claim the exemption before sale of the land on execution, or to file a description or schedule of it in the recorder's or clerk's office, does not work a forfeiture of the homestead right, which, under Kirby's Dig. § 3902, may be asserted when suit is brought for possession of the lands constituting the homestead.—Dean v. Cole, 216 S. W. 308.

## HOMICIDE.

See Bail, §48, 77; Conspiracy, §27, 47; Criminal Law, §338, 369, 371, 388, 896, 407, 413, 419, 420, 424, 556, 596, 597, 736, 763, 764, 772, 778, 811, 822, 857, 867, 938, 1088, 1092, 1115, 1170; Indictment and Information, §191; Witnesses, §370.

### I. THE HOMICIDE.

§3 (Tex. Cr. App.) A shotgun at such long range as to make it apparent that death or serious bodily injury could not result from its use would not be legally a deadly weapon.—Medford v. State, 216 S. W. 175.

### II. MURDER.

§13 (Ark.) Where accused shoots at one man and kills another, malice will be implied as to the latter.—Brooks v. State, 216 S. W. 705.

§17 (Ark.) At common law, if a person shot at another with malice and by accident or mistake killed a third person, the offense was "murder."—Brooks v. State, 216 S. W. 705.

Under the statute, a person will be held guilty of murder or manslaughter according to the circumstances of the killing, where in an attempt to kill one person he kills a third person by mistake, although there is no intent or design to kill such third person.—Id.

Where accused shoots at one man and kills another, a felonious intent is transferred.—Id.

§23(1) (Ark.) The leading characteristic of murder in the second degree is the presence of malice distinguishing it from manslaughter and the absence of premeditation or deliberation.—Brooks v. State, 216 S. W. 705.

### III. MANSLAUGHTER.

§60 (Ark.) Under the statute, a person will be held guilty of murder or manslaughter according to the circumstances of the killing, where in an attempt to kill one person he kills a third person by mistake, although there is no intent or design to kill such third person.—Brooks v. State, 216 S. W. 705.



## V. EXCUSABLE OR JUSTIFIABLE HOMICIDE.

§109 (Tex.Cr.App.) Whether or not the persons involved in an affray had previously conspired to kill the other person fought with, the mere fact that they may have conspired to kill him if they were attacked on their part by him when acting inoffensively did not debar them from the right of self-defense.—King v. State, 216 S. W. 1091.

§112(2) (Ky.) A person instigating a quarrel by his own wrongful act forfeits his right to plead self-defense, and a challenge, assault, or insult reasonably calculated to provoke an assault is usually regarded as sufficient provocation.—Jones v. Com., 216 S. W. 607.

An instruction depriving accused of his right of self-defense if he instigated dispute with deceased regarding the boundary line between their farms and thus brought on the quarrel, etc., held erroneous, since accused had a right to discuss the proper location of the boundary line with deceased.—Id.

§112(2) (Tex.Cr.App.) Defendant did not forfeit his right of self-defense by the mere act of arming himself and seeking an interview with deceased to bring about a peaceful adjustment of their difficulties.—Richards v. State, 216 S. W. 888.

§112(4) (Tex.Cr.App.) Where one procured a gun to protect himself or himself and his son from unlawful violence, and such preparatory act caused an unlawful attack upon him, and in his own necessary self-defense he shot and killed the assaulting party, he was not guilty of any offense.—Medford v. State, 216 S. W. 175.

§112(5) (Tex.Cr.App.) An intent to provoke deceased to attack accused in order to produce occasion to kill deceased is an essential element in the law of provoking the difficulty, but the mere existence of such intent, in the absence of some word or action reasonably calculated to effect the end intended, is insufficient.—Richards v. State, 216 S. W. 888.

§116(2) (Tex.Cr.App.) In measuring culpability of accused, who is relying on self-defense, incidents at time of homicide are to be viewed from accused's standpoint at the time.—Dugan v. State, 216 S. W. 161.

§116(2) (Tex.Cr.App.) Where a plea of self-defense is interposed in a prosecution for homicide, it is fundamental that the killing must be viewed from the standpoint of defendant, as understood by him at the time he acted.—Singleton v. State, 216 S. W. 1094.

§119 (Tex.Cr.App.) Under Pen. Code 1911, art. 1105, homicide is permissible in repelling an assault where death or serious bodily injury is to be apprehended, but where an assault is of such character that no serious injury is to be apprehended, one assaulted must, under article 1107, resort to other reasonable means at hand of preventing injury before he can be justified in taking the life of his antagonist.—Petty v. State, 216 S. W. 867.

## VI. INDICTMENT AND INFORMATION.

§138 (Ark.) Where accused shoots at one man and kills another, malice will be implied as to the latter, and a felonious intent is transferred, and in such case the indictment must allege that the assault was made on the party murdered, etc., in all respects just as if the party killed had been the party shot at.—Brooks v. State, 216 S. W. 706.

§142(1) (Tex.Cr.App.) In a prosecution for murder, contentions of the state and defendant held to present the issues of murder, manslaughter, and self-defense.—Johnson v. State, 216 S. W. 192.

## VII. EVIDENCE.

### (A) Presumptions and Burden of Proof.

§144 (Tex.Cr.App.) In murder prosecution, where defendant admitted killing deceased, but

claimed to have done so in self-defense, burden was on state to prove an unlawful homicide, to overcome presumption of innocence.—Dugan v. State, 216 S. W. 161.

§145 (Tex.Cr.App.) In murder prosecution, involving self-defense issue, presumption of intent from character of weapon used, under Pen. Code 1911, art. 1147, was inapplicable, since, the killing by defendant being admitted, defendant's intent was not in issue; the only question being whether homicide was lawful or unlawful.—Dugan v. State, 216 S. W. 161.

§145 (Tex.Cr.App.) The use of a weapon calculated to produce death does not always carry with it the presumption of an intent to kill or inflict serious bodily injury, as the manner of use of the weapon must always be taken into consideration.—Medford v. State, 216 S. W. 175.

### (B) Admissibility in General.

§169(1) (Tex.Cr.App.) Evidence showing that defendant prosecuted for homicide was out with a woman on the Sunday night preceding the killing and their conduct with each other was admissible as shedding light on the frame of mind of defendant at the time of the homicide, which came after a quarrel in which deceased stated he had been told that defendant was out with the woman.—Parker v. State, 216 S. W. 178.

§169(2) (Tex.Cr.App.) In a prosecution for murder, where deceased was killed by defendant after quarrel over a statement that defendant was out in a pasture at a certain time with a certain woman, evidence was properly admitted showing that witness saw tracks of men and women, cigar stubs, etc., in the pasture in question, which corroborated the state's claim that defendant was at such place at such time.—Parker v. State, 216 S. W. 178.

§189 (Ky.) In murder prosecution, where evidence for the commonwealth tended to show defendant was the aggressor, while evidence for defendant showed deceased brought on the difficulty by his acts and declarations, the state of feeling existing between defendant and deceased, as evidenced by their declarations and conduct previous to killing, was admissible for purpose of showing who commenced the difficulty.—Lay v. Commonwealth, 216 S. W. 123.

§190(6) (Tex.Cr.App.) In a prosecution for murder, evidence of a witness that shortly before the homicide he saw and heard deceased point through the door and say, "There goes a man I am going to shoot a hole through, I will put his lights out," was admissible, and the fact that no name was used by deceased could only affect the weight of the testimony, where the witness said that when the statement was made he looked through the door and saw no one except defendant.—Parker v. State, 216 S. W. 178.

### (C) Dying Declarations.

§207 (Ky.) In a homicide case, dying declarations made by replying to questions by nodding the head are admissible, although deceased previously and subsequently verbally answered other questions.—Jones v. Com., 216 S. W. 607.

### (E) Weight and Sufficiency.

§244(1) (Ky.) In prosecution for murder of policeman, where defendant claimed self-defense, evidence held to show that defendant killed policeman to prevent arrest, knowing at the time of the killing that deceased was a policeman and intending to arrest him.—Music v. Commonwealth, 216 S. W. 116.

§244(1) (Tex.Cr.App.) In a prosecution for murder, evidence of a witness that shortly before the homicide he saw and heard deceased point through the door and say, "There goes a man I am going to shoot a hole through, I will put his lights out," was admissible, and the fact that no name was used by deceased could only affect the weight of the testimony, where the



For cases in Dec.Dig. & Am.Dig. Key-No.Series & Indexes see same topic and KEY-NUMBER

witness said that when the statement was made he looked through the door and saw no one except defendant.—Parker v. State, 216 S. W. 178.

↪244(3) (Tex.Cr.App.) A request to instruct that, if jury have a reasonable doubt as to whether the defendant killed the deceased in self-defense, they should find him not guilty, was properly refused.—Medford v. State, 216 S. W. 175.

↪254 (Ark.) In homicide case, evidence held sufficient to sustain a conviction of murder in the second degree.—Brooks v. State, 216 S. W. 705.

### VIII. TRIAL.

#### (B) Questions for Jury.

↪276 (Tex.Cr.App.) In a prosecution for murder, question as to whether defendant's acts and statements were for purpose of provoking attack was for the jury.—Parker v. State, 216 S. W. 178.

↪282 (Ky.) Where there is any evidence that accused is guilty of manslaughter, such question is always for the jury.—Jones v. Com., 216 S. W. 607.

#### (C) Instructions.

↪286(1) (Tex.Cr.App.) Pen. Code 1911, art. 1147, relating to presumption of intent from character of instrument used in committing a homicide, is not to be made the basis of a charge against accused in any case of homicide, since it conflicts with charge on presumption of innocence, necessary in every case.—Dugan v. State, 216 S. W. 161.

↪300(3) (Tex.Cr.App.) Where evidence in murder case shows that language of deceased at time of killing may have given color to his acts, charge on self-defense should be so framed as to give accused benefit of language, as well as acts of deceased, under Pen. Code 1911, art. 1105.—Dugan v. State, 216 S. W. 161.

↪300(3) (Tex.Cr.App.) In a homicide case, court properly refused to instruct that, if one has made threats and at the time of the homicide did something showing the intention of executing such threats, his slayer should be held not guilty; such an instruction not being full and correct statement of the law.—Medford v. State, 216 S. W. 175.

↪300(7) (Tex.Cr.App.) Charge on provoking the difficulty is proper, where first attack was made by deceased, but was induced by words and conduct of accused reasonably calculated and intended to provoke an attack, to be used by accused as an occasion for harm to deceased.—Dugan v. State, 216 S. W. 161.

Issue of provoking the difficulty, justifying instruction thereon, does not arise from evidence which is merely conflicting as to who made the first attack.—Id.

Charge on provoking the difficulty held improper under the evidence, which was insufficient to raise the issue.—Id.

↪300(7) (Tex.Cr.App.) A charge that homicide is justifiable in protection of the person against any unlawful and violent attack, but in such case all other means must be resorted to for the prevention of the injury, held erroneous; the evidence showing that from defendant's standpoint the attack upon him was one calculated to kill or seriously injure him, in which case defendant was not required to resort to any other means than force.—Petty v. State, 216 S. W. 867.

The act of defendant, who with others was working on a public road, in lying down on a pallet which deceased claimed as his bed and refusing upon request to surrender it, was not unlawful, and where it did not appear to have been intended or reasonably calculated to provoke assault by deceased, an instruction on provoking the difficulty was not appropriate.—Id.

↪300(7) (Tex.Cr.App.) In a prosecution resulting in conviction of manslaughter, instruction qualifying defendant's right of self-defense

by a charge on provoking the difficulty held not justified by evidence.—Richards v. State, 216 S. W. 888.

↪300(8) (Tex.Cr.App.) In a prosecution for murder, evidence held sufficient to warrant an instruction given on the matter of accused's provoking the difficulty leading to the killing, and question as to whether defendant's acts and statements were for purpose of provoking attack was for the jury.—Parker v. State, 216 S. W. 178.

↪300(12) (Ky.) In a prosecution for murder of policeman while attempting to arrest defendant, instructions held not to deprive defendant of the right to the exercise of self-defense if he had not known deceased was an officer and was attempting to arrest him.—Music v. Commonwealth, 216 S. W. 116.

↪300(14) (Tex.Cr.App.) In a prosecution for manslaughter, an instruction as to self-defense held erroneous as not clearly stating that the act of defendant, alleged to have been in self-defense, must be viewed from defendant's standpoint at the time.—Singleton v. State, 216 S. W. 1094.

↪301 (Tex.Cr.App.) In a homicide case, held error, in view of the evidence, to refuse to instruct as to the right of accused to arm himself and interpose in a difficulty to protect his son from unlawful violence.—Medford v. State, 216 S. W. 175.

↪309(1) (Tex.Cr.App.) In prosecution for murder, wherein defendant's testimony presented the issues of manslaughter and self-defense, in that the person he killed and another, acting together, attacked him, excerpt from a charge on manslaughter that the offense was of such grade if defendant killed when assaulted, believing that both decedent and the other attacking person were acting together, etc., held proper.—Johnson v. State, 216 S. W. 192.

In a prosecution for murder, wherein defendant testified that the killing was either manslaughter or in self-defense because he was attacked both by the person killed and another, an excerpt from a charge on manslaughter, that the killing was of such grade, if decedent and the other had combined, and the defendant believed they had, to do defendant some injury, and the conspirator with decedent had given the latter a knife to use against defendant, held not erroneous, as unduly limiting reduction of the offense to manslaughter only by an attack on defendant from both decedent and the other.—Id.

↪309(4) (Ky.) Evidence tending to show that accused and deceased were on friendly terms until they reached a disputed boundary line between their farms, when the difficulty suddenly arose, held to require instruction as to manslaughter; such issue always being for the jury where there is any evidence that accused was guilty of manslaughter.—Jones v. Com., 216 S. W. 607.

↪309(4) (Tex.Cr.App.) In a prosecution for murder, it was error to refuse an instruction with reference to the law of manslaughter, where it appeared that decedent was defendant's landlord and that the killing occurred after decedent had attempted to collect rent from defendant for a parcel of ground which he was entitled to hold rent free.—Jones v. State, 216 S. W. 884.

### X. APPEAL AND ERROR.

↪325 (Tex.Cr.App.) Where there was no exception to the court's charge, a claim of failure to submit the proposition in a homicide case, in reference to self-defense, that the occurrence must be viewed from defendants' standpoint, cannot be considered on appeal.—Medford v. State, 216 S. W. 175.

↪327 (Tex.Cr.App.) In a prosecution for murder, bills of exceptions to testimony that witness smelled whisky on appellant's breath on the day of the homicide, objected to as imma-

terial, irrelevant, and highly inflammatory, *held* to present nothing showing injury; since the bill not only stated the ground of objection, but made apparent the injury claimed.—*Parker v. State*, 216 S. W. 178.

⚡340(1) (Ark.) Where accused was convicted of murder in the second degree, an instruction, allowing the jury to find him guilty of such offense without requiring a finding of malice, was necessarily prejudicial, because jury might have found him guilty of manslaughter.—*Brooks v. State*, 216 S. W. 705.

⚡341 (Tex.Cr.App.) In homicide prosecution, wherein accused relied on self-defense, court's refusal to instruct jury to consider language as well as acts of deceased, in determining question of whether accused was justified in shooting deceased, *held* prejudicial error, under Pen. Code 1911, art. 1105, where there was a conflict in evidence as to conduct of the parties immediately preceding homicide, and there was evidence that deceased, immediately before slashing accused with a knife said "D—n you, I will kill you."—*Dugan v. State*, 216 S. W. 161.

⚡347 (Ark.) In homicide case, where accused was convicted of murder in the second degree, an erroneous instruction, permitting jury to find him guilty of such offense without requiring a finding of malice, can be cured on appeal by reducing the judgment so as to sentence the defendant for manslaughter for the minimum term, the Attorney General consenting.—*Brooks v. State*, 216 S. W. 705.

## HORSE RACING.

See Gaming, ⚡6.

## HOSPITALS.

See Master and Servant, ⚡77.

## HUSBAND AND WIFE.

See Assault and Battery, ⚡33; Deeds, ⚡203, 211; Divorce; Dower; Execution, ⚡344; Fraudulent Conveyances, ⚡57, 206; Marriage; Mechanics' Liens, ⚡71, 76, 288; Telegraphs and Telephones, ⚡73; Trusts, ⚡103; Wills, ⚡627.

### I. MUTUAL RIGHTS, DUTIES, AND LIABILITIES.

⚡6(4) (Mo.) Where a man who had property worth over \$75,000, after engaging to marry plaintiff and before the marriage, executed two trust deeds and two notes secured thereby to a daughter by a former marriage, one securing \$30,000 and the other \$45,000, such transaction constituted a fraud on the grantor's prospective wife.—*Vordick v. Kirsch*, 216 S. W. 519.

Where a husband, in contemplation of marriage, has executed trust deeds to a daughter by a former marriage in fraud of his prospective wife, that he has promised his first wife to care for this daughter out of the property which was the result of their joint efforts does not affect the wife's right to have the conveyance set aside.—*Id.*

⚡14(2) (Mo.App.) When a husband and wife take an estate by the entirety they hold, not as separate individuals and by moieties, but as one person, each holding the whole of it, and on the death of either the entire estate belongs to the survivor.—*Lomax v. Cramer*, 216 S. W. 575.

There can be an estate by the entirety in personal property as well as in real property.—*Id.*

⚡14(2) (Mo.App.) Both at common law and under statute, a deed to husband and wife creates an estate in entirety in them, and the interest of neither is liable for debts of the other.—*Traw v. Heydt*, 216 S. W. 1006.

### II. MARRIAGE SETTLEMENTS.

⚡29(7) (Tex.Civ.App.) Rev. St. 1911, art. 4618, providing that every "matrimonial agreement" must be acknowledged before some officer and attested by at least two witnesses, *held* not to govern deeds executed before marriage by a husband to his future wife to settle on her a portion of the property of which he was absolutely possessed, in consideration of her marrying, the property to be her separate estate for life, to revert to him if she died without issue, but if she had issue to go to her heirs.—*Runge v. Freshman*, 216 S. W. 254.

⚡29(9) (Tex.Civ.App.) Deeds executed before marriage by a husband to his future wife, granting her the property for life, to revert to him if she died without issue, but if she had issue to go to her heirs, *held* not prohibited by Rev. St. 1911, art. 4617, as a stipulation between parties about to marry, altering the legal order of descent and distribution as contemplated by the Legislature.—*Runge v. Freshman*, 216 S. W. 254.

### IV. DISABILITIES AND PRIVILEGES OF COVERTURE.

#### (B) Property and Conveyances.

⚡89½ (Mo.) A widow to whom dower had never been assigned, by possession for 10 years, after death of her husband, of his homestead, did not acquire title by adverse possession, she having daughters by him, who when he died, and for at least part of the 10 years, had husbands.—*Jones v. Nichols*, 216 S. W. 962.

#### (C) Contracts.

⚡86 (Tex.Civ.App.) A married woman cannot be bound by provisions in a contract for the subscription to corporate stock which would warrant forfeiture of payments for nonpayment of subsequent installments.—*Texas Co-operative Inv. Co. v. Clark*, 216 S. W. 220.

⚡102 (Ark.) The common-law rule that the husband is liable for torts of his wife committed in his absence has been abrogated by the Married Woman's Act.—*Bourland v. Baker*, 216 S. W. 707.

### V. WIFE'S SEPARATE ESTATE.

#### (A) What Constitutes.

⚡119(3) (Tex.Civ.App.) Where deed of husband to wife upon its face discloses that the property is conveyed to her as her separate estate, this makes the property her separate estate.—*Armstrong v. Turbeville*, 216 S. W. 1101.

⚡129(6) (Ky.) In suit against husband and wife for specific performance of their contract to convey land, claimed by the wife to have been purchased by her for her separate estate with money given her by her father, and to have been deeded to her husband by mistake, *held*, that defendant wife, though insisting she never authorized or consented to the sale, was not entitled to relief; she having received the consideration and moved off the property.—*Ambrose v. Reece*, 216 S. W. 341.

⚡133(1) (Ky.) In action involving question of whether ownership of land at time of wife's death was in husband or in wife, where deed and record thereof had been destroyed by fire, circumstantial evidence *held* to give at least colorable support to finding of ownership in husband.—*Groves v. Bryant*, 216 S. W. 864.

### VII. COMMUNITY PROPERTY.

⚡249 (Tex.Civ.App.) If the wife borrow money for the benefit of her separate property, intending to repay it out of her separate estate, and both she and her husband intend that the borrowed fund shall not be community property, but shall belong separately to the wife, such will be its status, though the husband has signed the note and pledged his

separate property to secure the loan.—*Armstrong v. Turbeville*, 216 S. W. 1101.

That there was an agreement between husband and wife that money borrowed on notes signed by them should be used in making improvements on her separate estate, and that the loan should be paid out of her separate estate, is sufficient to show an agreement that such money was to belong separately to the wife, and was not to be community property.—*Id.*

Agreement between husband and wife that money borrowed on notes signed by them both should be repaid out of rents of her separate property had the same legal effect in making the borrowed money the wife's separate property as if it had been intended that repayment was to be made out of her separate property.—*Id.*

§256 (Tex.Civ.App.) The status as wife's separate property of property conveyed to wife is not affected by the fact that the deed does not on its face disclose that the property was conveyed to her as her separate property, where it appears that both husband and wife directed that the deed be made to her for the purpose and with the intent to make the conveyed property her separate property, and that at the time of the delivery of the deed it was their mutual intention that it should be her separate and not community property, and was to be taken in her name to effect that purpose.—*Armstrong v. Turbeville*, 216 S. W. 1101.

Where property was acquired after marriage, and deeded by the vendor to his wife, in consideration of separate property of the wife traded for it, the husband and wife also giving their note for a certain sum, and it was the mutual intention of husband and wife that the acquired property should be her separate property, and the title was taken in her name for that purpose, and they also intended that the note should be paid out of the wife's separate funds, and such payments thereon were made from rents accruing from the property subsequent to the taking effect of Act April 4, 1917 (Acts 1917, c. 194 [Vernon's Ann. Civ. St. Supp. 1918, art. 4621]), making rents derived from wife's separate realty her separate property, the acquired property became her separate property, and not community property, notwithstanding the fact that the husband joined in the note, and that the deed, though made to the wife, did not disclose that the property was conveyed to her as her separate property.—*Id.*

§257 (Tex.Civ.App.) Although the rule that rents arising from wife's separate realty becomes community property was not changed so as to make such rents the wife's separate property, by Act March 21, 1913 (Acts 1913, c. 32 [Vernon's Sayles' Ann. Civ. St. 1914, arts. 4621, 4622, 4624]), this statute made a great change in the law respecting such rents, in that the control, management, and disposition were vested in the wife alone, and were no longer subject to the payment of debts contracted by the husband, and so far as the husband's creditors are concerned they occupy the same status as property which is strictly the wife's separate property.—*Armstrong v. Turbeville*, 216 S. W. 1101.

§262(1) (Tex.Civ.App.) Money borrowed by the husband or the wife, in the absence of agreement to the contrary, is presumed to be community property, even though the separate property of one of the spouses is mortgaged to secure the loan.—*Armstrong v. Turbeville*, 216 S. W. 1101.

§266 (Tex.Civ.App.) Husband and wife cannot, by mere postnuptial agreement between themselves, change the character of their property to be thereafter acquired so as to convert community into separate property.—*Armstrong v. Turbeville*, 216 S. W. 1101.

A husband may make to his wife a gift of his interest in the community property then

in esse, when it can be done without injury to the rights of others.—*Id.*

While the community status of rents collected from wife's separate property could not be affected by the mere agreement between the husband and wife, made when he conveyed the property to her, that the rents that should thereafter accrue from the premises should be her separate property, yet if such agreement was thereafter observed and actually carried out by delivering the rents into her possession, such collected rents became her separate property, unless the gift was in fraud of creditors' rights.—*Id.*

§269 (Tex.Civ.App.) Since, under the act of March 21, 1913 (Acts 1913, c. 32 [Vernon's Sayles' Ann. Civ. St. 1914, arts. 4621, 4622, 4624]), rents from wife's separate property were not subject to the payment of debts contracted by the husband, the donation by a husband to his wife of his community interest in such rents was not in fraud of any rights of creditors, as they had no interest in such rents.—*Armstrong v. Turbeville*, 216 S. W. 1101.

§270(5) (Tex.Civ.App.) A wife is not a necessary party to suit upon a note given for a community debt and to foreclose a mortgage on community property.—*Chandler v. Young*, 216 S. W. 484.

§270(7) (Tex.Civ.App.) In an action on a note given for a community debt and to foreclose a mortgage on community property, a husband has the right to answer for his wife, though she has not been cited.—*Chandler v. Young*, 216 S. W. 484.

§270(10) (Tex.Civ.App.) A husband has no right to appear for his wife in an action on a note given for a community debt and to foreclose a mortgage on community property, so as to give the court jurisdiction to render personal judgment against the wife.—*Chandler v. Young*, 216 S. W. 484.

§273(4) (Tex.Civ.App.) It is not true that any creditor having a claim against a community estate is entitled to recover his debt from the survivor, if it does not exceed the amount of her bond, regardless of whether there has been a devastavit.—*Hurst v. Crawford*, 216 S. W. 284.

§273(8) (Tex.Civ.App.) A deed by which a surviving husband quitclaimed "all my right, title and interest" in certain community real estate, conveyed the entire interest that the husband and his deceased wife had in the land, and not merely that of the surviving husband.—*Iiams v. Mager*, 216 S. W. 422.

§273(9) (Tex.Civ.App.) A surviving husband may sell community property for the purpose of paying community debts, provided the power is exercised in good faith.—*Iiams v. Mager*, 216 S. W. 422.

§273(10) (Tex.Civ.App.) In an action by deceased wife's heirs against persons purchasing community property from the surviving husband, the purchaser, in order to defend his title, need ordinarily show only the existence of community debts at the time of his purchase.—*Iiams v. Mager*, 216 S. W. 422.

In action by persons claiming under a deceased wife against purchasers of community property from the surviving husband, evidence that part of the purchase price of such community real estate was still due the state, and that it was incumbered by a judgment lien at the time it was sold, held to sustain a finding that defendants had discharged burden of showing existence of community debts at time of sale.—*Id.*

§276(6) (Tex.Civ.App.) It is not true that any creditor having a claim against a community estate is entitled to recover his debt from the survivor and her bondsmen, if it does not exceed the amount of the bond, regardless of whether there has been a devastavit.—*Hurst v. Crawford*, 216 S. W. 284.

§276(9) (Tex.Civ.App.) A survivor in community is not included within the provision of Rev. St. 1911, art. 1830, subd. 6, providing that suits against executors, etc., be brought in the county where the estate is being administered.—Hurst v. Crawford, 216 S. W. 284.

### IMMUNITY.

See Constitutional Law, §205.

### IMPROVEMENTS.

See Drains, §35; Highways, §90, 135, 140; Municipal Corporations, §282-487; Statutes, §283.

### INCEST.

See Criminal Law, §784, 785, 814, 822, 1172; Witnesses, §395.

### INCONTESTABLE CLAUSE.

See Insurance, §719, 723, 745.

### INDECENT PROPOSALS.

See Breach of the Peace, §1.

### INDEMNITY.

See Guaranty.

### INDEX.

See Chattel Mortgages, §90.

### INDICTMENT AND INFORMATION.

See Animals, §57; Burglary, §22, 28, 28; Criminal Law, §565, 878, 915, 1032, 1088, 1090, 1134, 1144; Gaming, §90; Homicide, §138-142; Infants, §16; Libel and Slander, §152; Municipal Corporations, §642.

### IV. FILING AND FORMAL REQUISITES OF INFORMATION OR COMPLAINT.

§41(2) (Tex.Cr.App.) A misdemeanor cannot be prosecuted in the county court without a complaint as a predicate for the information.—McDonald v. State, 216 S. W. 166.

### V. REQUISITES AND SUFFICIENCY OF ACCUSATION.

§59 (Mo.App.) The same strictness of pleadings is not required in misdemeanors as in felonies. (Per Farrington, J.)—State v. Ladd, 216 S. W. 1004.

§87(3) (Tex.Cr.App.) Indictment charging burglary held sufficient without specific allegation that offense was committed anterior to presentation of indictment, where it appeared from recitals in the indictment that the date of the offense alleged was before indictment was filed.—Dixon v. State, 216 S. W. 1007.

The date on which the offense is alleged to have taken place must be a date anterior to the filing of the indictment.—Id.

§110(3) (Mo.App.) Where the statute describes and defines the offense, an indictment charging the offense in the language of the statute is sufficient. (Per Sturgis, P. J.)—State v. Ladd, 216 S. W. 1004.

§110(3) (Tex.Cr.App.) The rule that it is sufficient if the indictment follows the language of the statute applies only where the indictment is framed under a statute which defines the acts constituting the offense in a manner that will inform accused of the nature of the charge, the test being, not that the indictment follows the statute, but that it is a compliance with the law prescribing the requisites of an indictment, an "indictment" being a written statement of the grand jury accusing person therein named of some act or omission which by law is declared to be an offense, such offense to be set forth in plain

and intelligible words, in view of Code Cr. Proc. 1911, §§ 450, 451, and Const. art. 1, § 10.—Kennedy v. State, 216 S. W. 1086.

§110(4) (Mo.App.) Generally speaking, an indictment and information charging the commission of an offense that is crime by statute is good, if it follows the language of the statute; but this is not true if the statute creating the offense uses generic terms in defining the offense, and does not individuate the offense with such particularity as to notify the defendant of what he or she is to defend against.—State v. Asher, 216 S. W. 1013.

§110(51) (Tex.Cr.App.) An indictment charging that defendant "did then and there unlawfully and willfully attempt to procure, and did procure, and was concerned in procuring," a female named as an inmate of a house of prostitution, although following the words of the statute, held insufficient as not disclosing the acts or omissions of accused by which he was charged to have procured the female inmate in view of Code Cr. Proc. 1911, arts. 450 and 451, and Const. art. 1, § 10.—Kennedy v. State, 216 S. W. 1086.

### VI. JOINDER OF PARTIES, OFFENSES, AND COUNTS, DUPLICITY, AND ELECTION.

§125(20) (Tex.Cr.App.) Where there are various ways set forth in a statute by which an offense may be committed, an indictment may charge the various methods conjunctively.—Black v. State, 216 S. W. 181.

### VII. MOTION TO QUASH OR DISMISS, AND DEMURRER.

§140(2) (Tex.Cr.App.) That prosecuting witness testified after start of trial that he would not have sworn to complaint charging accused with "habitual" carnal intercourse, if he had known that complaint so charged, is not sufficient to quash complaint, where prosecuting attorney stated that he read over the entire complaint to prosecuting witness before he signed.—Webb v. State, 216 S. W. 865.

Where a complaint was read over to prosecuting witness before he swore to it, the burden of proof is on accused, on motion to quash because prosecuting witness would not have signed complaint had he known what it contained, to show fraud.—Id.

### X. CONVICTION OF OFFENSE INCLUDED IN CHARGE.

§191(1) (Tex.Cr.App.) In view of Pen. Code, arts. 1433, 1434, 1435, and 1439, if a conspiracy was to kill another, it was included within conspiracy to commit murder.—King v. State, 216 S. W. 1091.

§191(4) (Mo.App.) A conviction of common assault, as defined in Rev. St. 1909, § 4484, will be sustained under an information charging assault with intent to kill.—State v. Miller, 216 S. W. 571.

### XI. WAIVER OF DEFECTS AND OBJECTIONS, AND AID BY VERDICT.

§202(5) (Mo.App.) Information charging unlawful disturbance of religious congregation, in words of Rev. St. 1909, § 4713, defining such crime, was sufficient to sustain conviction, where no objection to sufficiency was made until after verdict, though it did not charge that the disturbance occurred at place set apart for religious purpose or in church or building used for such purpose.—State v. Ladd, 216 S. W. 1004.

### INFANTS.

See Courts, §42; Damages, §133, 186, 210; Death, §95, 104; Guardian and Ward; Habeas Corpus, §85; Judgment, §497; Jury, §29; Master and Servant, §91; Municipal Corporations, §980; Negligence,

For cases in Dec. Dig. & Am. Dig. Key-No. Series & Indexes see same topic and KEY-NUMBER

⚡33, 85; Parent and Child; Process, ⚡4; Street Railroads, ⚡95, 117; Taxation, ⚡668.

## II. CUSTODY AND PROTECTION.

⚡16 (Mo.App.) An information, under Sess. Acts 1911, p. 177, charging defendant to be a delinquent child, in that she knowingly associated with vicious and immoral persons, was insufficient to sustain a conviction, where it did not name the persons with whom she was accused of associating, in view of Const. art. 2, § 22.—State v. Asher, 216 S. W. 1013.

⚡19 (Tex.Civ.App.) Where the county court sitting as a juvenile court, tried a complaint that a certain person was a dependent child before a jury, and adjudged such person to be a dependent child and the ward of the court subject to its orders until finally discharged or until attaining the age of 21 years, the proceeding was one to appoint a guardian for the dependent child.—Ex parte Grimes, 216 S. W. 251.

Where the county court, sitting as a juvenile court, acting upon a petition charging a certain person with being a dependent child, decreed the child to be dependent and issued an order of commitment to the probate officer of the county until further order of the court, the effect of the order was to make such probate officer the guardian of the dependent, in view of Rev. St. 1911, art. 2184, 2189, and 2190.—Id.

Rev. St. 1895, art. 3502a, 3502b, conferred upon the county courts the power to determine the custody of children and to exercise the power through a writ of habeas corpus in cases where guardianship was not involved, while Rev. St. 1911, arts. 2184, 2189, and 2190, provide for the appointment of guardians and make custody in such cases only an incident of the guardianship.—Id.

## III. PROPERTY AND CONVEYANCES.

⚡39 (Ky.) The power of equity courts to sell infant's real estate is purely statutory, and all substantial provisions of the Code relating thereto, must be strictly complied with, or otherwise they will not be divested of title, an infant may bring such a suit as plaintiff, through a statutory guardian, in which case Civ. Code Prac. § 36, subsec. 3, providing against rendering judgments against infants, summoned, before the regular guardian or committee shall have made a defense, etc., is without application to a set-off by a lien claimant.—Baxter Realty Co. v. Martin, 216 S. W. 110.

## VII. ACTIONS.

⚡80(1) (Ky.) Issuance of summons by the clerk of court against a stranger to the record as guardian ad litem after affidavit had been filed making it his duty to make the appointment as guardian under Civ. Code Prac. § 52, attested the clerk's appointment of such stranger as guardian ad litem sufficiently at least to render it impossible to assert that the record affirmatively showed that no such appointment was made by him.—Luck v. Schabell, 216 S. W. 1068.

⚡89 (Ky.) Where an infant, pursuant to Civ. Code Prac. § 52, was brought before the court trying suit to partition his lands when he was under 14 years of age, having been sued by guardian ad litem, he was in court, and the authority of his guardian to defend continued until termination of the cause, unless he was removed by the court or his authority terminated by the infant's arrival at majority, and orders of sale and confirmation made after the infant reached 14 were not void, though process required when infant is 14 years old was not served.—Luck v. Schabell, 216 S. W. 1066.

216 S.W.—75

## INJUNCTION.

See Highways, ⚡139, 148; Judges, ⚡44; Judgment, ⚡429, 437, 461, 527; Mandamus, ⚡37; Municipal Corporations, ⚡697; Quieting Title, ⚡44; Venue, ⚡5; Waters and Water Courses, ⚡179.

## I. NATURE AND GROUNDS IN GENERAL.

### (B) Grounds of Relief.

⚡19 (Tex.Civ.App.) Equity will grant an injunction to prevent a multiplicity of suits; the question of whether, in a particular case, equity will assume jurisdiction, depending, if case is not covered by a controlling precedent, upon the merits of the particular case, the real and substantial convenience of all parties, the adequacy of the legal remedy, the situations of the parties, the points to be contested, and the result to follow as to whether the interests of any of the parties will be unreasonably overlooked or obstructed.—Houston Heights Water & Light Ass'n v. Gerlach, 216 S. W. 634.

## II. SUBJECTS OF PROTECTION AND RELIEF.

### (A) Actions and Other Legal Proceedings.

⚡26(4) (Tex.Civ.App.) Where seven members of the same household, at the instigation of one of them, brought separate damage suits against defendants for same alleged wrongful act, and where the suits were wholly without merit and for the purpose of harassing and annoying defendants and causing them to expend attorney's fees and costs and were brought in justice court, where they could not be consolidated, and for an amount just below amount which would have entitled defendants to an appeal, for purpose of preventing such appeal, equity will enjoin further prosecution of suits in justice court and require them to be tried in one proceeding in district court, since such proceeding will be a relief to defendants and will work no hardships to the plaintiffs.—Houston Heights Water & Light Ass'n v. Gerlach, 216 S. W. 634.

### (B) Property, Conveyances, and Incumbrances.

⚡46 (Ark.) Trespass and threats of ouster, not of a continuous or irreparable nature, will not be enjoined; defendants not being insolvent.—Sumpter v. Hot Springs Savings, Trust & Guaranty Co., 216 S. W. 311.

## III. ACTIONS FOR INJUNCTIONS.

⚡110 (Tex.Civ.App.) In view of Vernon's Sayles' Ann. Civ. St. 1914, art. 4643, an injunction issued by a nonresident district judge was void, where it was erroneously thought that the resident judges were disqualified by interest.—City of Dallas v. Armour & Co., 216 S. W. 222.

⚡111 (Tex.Civ.App.) The venue of a suit which was primarily to recover possession of land, though injunction is asked as relief ancillary to the main suit, is governed by Vernon's Sayles' Ann. Civ. St. 1914, art. 1830, subd. 14, permitting suit for the recovery of land to be brought in the county where land is situated, not by article 4653, requiring suits for injunction to be brought in the county of defendant's residence.—Evans v. Hudson, 216 S. W. 491.

## INNKEEPERS.

See Contracts, ⚡10, 304; Damages, ⚡40, 120.

## INSANE PERSONS.

See Criminal Law, ⚡938, 958, 981; Deeds, ⚡61, 210, 211; Judgment, ⚡497, 707, 718.

## II. INQUISITIONS.

§26 (Ark.) That a person is at one time adjudicated to be insane does not establish insanity at a prior time.—*Shores-Mueller Co. v. Palmer*, 216 S. W. 295.

## V. PROPERTY AND CONVEYANCES.

§61 (Mo.) A deed is not void merely because grantor was an insane person not under legal guardianship, but is only voidable, and can only be set aside in equity.—*Wigginton v. Burns*, 216 S. W. 756.

## INSOLVENCY.

See Bankruptcy; Carriers, §194; Fraudulent Conveyances, §57.

## INSPECTION.

See Sales, §52, 168, 176, 304.

§4 (Ky.) In view of Ky. St. § 2204, the term of oil inspector is four years, and when a vacancy occurs in such office it may be filled by the county judge for the remainder of the term, even though the term of office of the county judge expires thereafter during the term of the office of inspector, but such appointment can only be for the unexpired part of the term, and not for the full four years.—*Cliff v. Rice*, 216 S. W. 101.

In determining when the term of an oil inspector, appointed under Ky. St. § 2204, will expire, the date of the appointment of the first inspector in the county under such act (passed in 1886 [Laws 1885-1886, c. 1150]) must be ascertained, and four-year periods be counted from that time.—Id.

Where one appointed oil inspector under Ky. St. § 2204, filed his bond with the clerk of the county court, but no order was made by the county court appointing him or accepting his bond, the court thereafter could enter, nunc pro tunc, an order appointing him and accepting his bond as of the date he was originally appointed; bond rendering it unnecessary for the court to depend upon the memory or recollection of any person.—Id.

## INSTALLATION.

See Electricity, §16; Sales, §85, 90.

## INSTALLMENTS.

See Drains, §79.

## INSTRUCTIONS.

See Criminal Law, §759-829; Trial, §186-285.

## INSURANCE.

See Appeal and Error, §1050; Constitutional Law, §70; Evidence, §370; Mandamus, §10; Master and Servant, §382, 411; Pleading, §245; Taxation, §113; Tender, §14; Trial, §68, 105.

## III. INSURANCE AGENTS AND BROKERS.

### (A) Agency for Insurer.

§90 (Tex.Civ.App.) Where express limitation on agents' authority that no statements or promises by them, unless written on the application, shall bind the company, was contained in an endowment policy itself and the application therefor, assignee of the policy was bound thereby, and could not claim to have relied upon any apparent authority in agents to commit the insurer by their individual statements as to the amount of dividends there would be on the policy at its maturity, where no such statements appeared in application or policy.—*Manhattan Life Ins. Co. v. Stubbs*, 216 S. W. 896.

## V. THE CONTRACT IN GENERAL.

### (A) Nature, Requisites, and Validity.

§125(1) (Mo.) A life insurance policy is governed by the laws in force when issued.—*Alford v. New York Life Ins. Co.*, 216 S. W. 754.

§144(1) (Tex.Civ.App.) Where insurer under a health policy waived its legal right to cancel the policy, upon the execution by insured of a release covering disability caused by hernia, which release became a part of the insurance contract, such waiver constituted a sufficient consideration for the release.—*Massachusetts Bonding & Ins. Co. v. Florence*, 216 S. W. 471.

§145(1) (Mo.) Petition in action on parol contract renewing insurance on certain property against fire is fatally defective without an allegation as to a consideration.—*Swift v. Central Union Fire Ins. Co.*, 216 S. W. 935.

### (B) Construction and Operation.

§146(1) (Tex.Civ.App.) That a policy is a poor one for the insured cannot alter or affect its provisions.—*Hartwig v. Southern Surety Co.*, 216 S. W. 455.

## VII. ASSIGNMENT OR OTHER TRANSFER OF POLICY.

§205 (Mo.App.) A life policy may be assigned or pledged by concurrent act of the insured and beneficiary as security for debt.—*Missouri State Life Ins. Co. v. California State Bank*, 216 S. W. 785.

The insured, without the beneficiary joining him, can assign or pledge the interest he has in life policy.—Id.

§222 (Mo.App.) Where life policy gave insured the right to change beneficiary and assign policy, insured had the right to transfer all beneficial rights and interest of whatever character in policy to secure his debt, subject to the full rights of the beneficiary being restored upon fulfillment of the conditions of the pledge.—*Missouri State Life Ins. Co. v. California State Bank*, 216 S. W. 785.

## VIII. CANCELLATION, SURRENDER, ABANDONMENT, OR RESCISSION OF POLICY.

§247 (Tex.Civ.App.) Where insured accepted a health policy, reserving to insurer the right to cancel the policy at any time on notice and return of unearned premiums, that insurer had knowledge that insured was ruptured prior to the execution of the policy did not constitute an estoppel on insurer to cancel the policy on that ground.—*Massachusetts Bonding & Ins. Co. v. Florence*, 216 S. W. 471.

## X. FORFEITURE OF POLICY FOR BREACH OF PROMISSORY WARRANTY, COVENANT, OR CONDITION SUBSEQUENT.

### (B) Matters Relating to Property or Interest Insured.

§335(2) (Tex.Civ.App.) That insured in preparing an inventory of stock omitted old, unsalable stock held not to avoid the fire policy, which required the taking of an inventory.—*Westchester Fire Ins. Co. v. Biggs*, 216 S. W. 274.

§335(4) (Tex.Civ.App.) Where insured produced a memorandum of an inventory taken in July before the policies were issued, and a complete inventory taken in the following January, together with record of transactions occurring thereafter, held that the fact that the earlier inventory was burned, and so was not produced, would not defeat recovery, despite the requirements of the policy as to taking an inventory and keeping it in an iron safe.—*Westchester Fire Ins. Co. v. Biggs*, 216 S. W. 274.

Where insured duly prepared an inventory

For cases in Dec.Dig. & Am.Dig. Key-No.Series & Indexes see same topic and KEY-NUMBER

and kept it in an iron safe, the fact that the inventory was removed from the safe shortly before the fire without the insured's knowledge, by one of those from whom he acquired the business, and, having been left in a desk, was destroyed, *held* not to avoid the policy.—Id.

**(E) Nonpayment of Premiums or Assessments.**

§368(1) (Mo.) Prior to the amendment in 1895 of Rev. St. 1889, § 5859, a life insurance company and an insured could not avoid the effect of sections 5856-5858, relating to nonforfeiture of policies on failure to pay premiums, by agreeing to substitute the reserve values fixed by the laws of the state of the insurer's origin.—*Alford v. New York Life Ins. Co.*, 216 S. W. 754.

The proviso in the amendment of 1895 to Rev. St. 1889, § 5859, did not automatically transform a foreign life policy which did not provide for temporary or paid-up insurance of a value equal to that under the law, though the law of the insurer's state authorized such value in case of a default in payment of the fourth annual premium, into a paid-up insurance of the net value prescribed in section 5856; the word "entitle," as used in such proviso, meaning only that insured is "furnished, with grounds" for having the policy transformed into paid-up insurance.—Id.

**XI. ESTOPPEL, WAIVER, OR AGREEMENTS AFFECTING RIGHT TO AVOID OR FORFEIT POLICY.**

§389(7) (Tex.Civ.App.) Where applicant for a life insurance policy makes no statement as to age, or imperfectly and incompletely states it, insurer, by issuing a policy, waives the information and is bound, notwithstanding that the age, if given, would have caused a refusal of insurance.—*Royal Neighbors of America v. Sims*, 216 S. W. 240.

**XII. RISKS AND CAUSES OF LOSS.**

**(E) Accident and Health Insurance.**

§452 (Tex.Civ.App.) Where accident policy provided for specific indemnity for loss of life "only when \* \* \* sustained in the manner specified in section D, clause 1," which specified accidents while insured was traveling as a passenger, beneficiary could not recover thereon for death of insured, which occurred in a manner not specified in such clause, but in a manner specified in another clause of section D, even though there was no provision in policy for indemnity for death resulting from accidents sustained in manner specified in such other clause, where there was another section in policy referring to all clauses of section D.—*Hartwig v. Southern Surety Co.*, 216 S. W. 455.

§454 (Tex.Civ.App.) A health insurance policy, covering disability resulting from illness, embraces disability of an insured who, while suffering from a hernia, accidentally stepped into a hole in the street, displacing the truss, and causing the hernia to come down, whereby he was incapacitated for two months.—*Massachusetts Bonding & Ins. Co. v. Florence*, 216 S. W. 471.

**XIII. EXTENT OF LOSS AND LIABILITY OF INSURER.**

**(D) Life Insurance.**

§517 (Ky.) Where a 19-payment life policy provided various options which might be exercised by the insured at the expiration of the premium period, and the last option provided that the insured might continue it as a paid-up life contract without payment of further premiums, and insured did not take any steps to obtain the surrender value of the policy, etc., it will be presumed that he continued it as a paid-up policy.—*Choate v. Provident Savings Life Assur. Soc.*, 216 S. W. 1073.

Where a 19-payment policy provided that in event of the death of the insured during the premium period the beneficiary should be entitled to the face value of the policy, plus an amount equal to its loan value, and further provided that, after payment of the last premium the policy should become paid up for life for its full face value, *held* that, where the insured did not exercise options to obtain the cash surrender of the policy on payment of the last premium, his beneficiaries were not, upon his death after expiration of the premium period, entitled, in addition to the face of the policy, to an amount equal to its loan value.—Id.

**XVI. RIGHT TO PROCEEDS.**

§586 (Mo.App.) Where there is no provision in the policy that insured may change his beneficiary, the issue of the policy confers immediately a vested right upon and raises an irrevocable trust in favor of the party named as beneficiary, a right which no act of insured can impair without beneficiary's consent.—*Missouri State Life Ins. Co. v. California State Bank*, 216 S. W. 785.

§587 (Mo.App.) If the right to change the beneficiary is reserved in the policy, the insured may change beneficiary without the consent of the named beneficiary; the named beneficiary in such case having no vested right in the policy.—*Missouri State Life Ins. Co. v. California State Bank*, 216 S. W. 785.

Insured, after having assigned all beneficial rights in life policy, could not designate a new beneficiary.—Id.

§593(2) (Mo.App.) Facts *held* to show that life policy was pledged to bank as collateral by insured to be held by bank as collateral for insured's loans.—*Missouri State Life Ins. Co. v. California State Bank*, 216 S. W. 785.

**XVII. PAYMENT OR DISCHARGE, CONTRIBUTION, AND SUBROGATION.**

§602 (Tex.Civ.App.) Where on the maturity of a 15-year endowment policy, the amount due thereon was in dispute, company's act in sending to assignee of policy draft for its admitted liability thereon, payable, however, to both original insured and assignee, with payment further conditioned upon the execution by them both of a full release of any further claims or demands on account of the policy, was not such an unconditional tender of its admitted debts as assignee was entitled to, and the company was thus left liable for delay under Rev. St. 1911, art. 4746.—*Manhattan Life Ins. Co. v. Stubbs*, 216 S. W. 896.

Where, on maturity of \$5,000 endowment policy, assignee of the policy claimed about \$1,200 extra dividends, while insurer admitted, in addition to the \$5,000 face of policy, dividends due to extent only of \$90, assignee was entitled to have penalty and attorney's fee for delay in payment predicated upon the \$5,090, which was adopted by the court, rather than upon the \$1,200 involved in dispute between the parties, where no unconditional tender was ever made of the \$5,090, since, by reason of lack of unconditional tender of what was admittedly due, the assignee was forced into the courts in order to get, not only the disputed, but also the undisputed, portion of his claim.—Id.

The survival of insured for the time limited in an endowment policy is a contingency involving a loss to the insurer, within Rev. St. 1911, art. 4746, imposing attorney's fees and penalties against the insurer for delaying payment after "loss," in case of life insurance, as well as other named kinds of insurance; endowment insurance being life insurance, since the amount of loss depends on the duration of life, and the word "loss" being used in the statute as a synonym of liability.—Id.



### XVIII. ACTIONS ON POLICIES.

☞660 (Tex.Civ.App.) In an action on a fire policy where it appeared that the inventory taken before the policy was written was destroyed through no fault of insured, *held* that the submission of books and other data produced by the insured was proper.—Westchester Fire Ins. Co. v. Biggs, 216 S. W. 274.

☞665(2) (Mo.) In action on parol contract insuring property against loss by fire, testimony *held* to show a contract in present and not a mere agreement to enter into a contract.—Swift v. Central Union Fire Ins. Co., 216 S. W. 935.

☞665(3) (Tex.Civ.App.) In an action on an insurance policy, wherein insurer pleaded that insured had misrepresented the date of her birth, evidence *held* to support a finding that the year of birth on the application had been left blank by insured, and subsequently erroneously filled in by some one else.—Royal Neighbors of America v. Sims, 216 S. W. 240.

☞668(4) (Tex.Civ.App.) In an action on a fire policy covering fixtures as well as a stock of goods, defendant's motion for direction of verdict, on the ground that plaintiff failed to make proof of any loss on fixtures which would preclude him from recovery, since the evidence showed he breached the record warranty clause, *held* properly denied.—Westchester Fire Ins. Co. v. Biggs, 216 S. W. 274.

### XX. MUTUAL BENEFIT INSURANCE.

#### (A) Corporations and Associations.

☞695 (Mo.App.) Where fraternal benefit association by-laws required member changing to hazardous occupation to "notify the clerk of the camp," notice of change of occupation to such clerk was notice to the association itself.—Jegglin v. Sovereign Camp, Woodmen of the World, 216 S. W. 815.

#### (B) The Contract in General.

☞719(1) (Tex.Civ.App.) An incontestable clause added by the by-laws to a fraternal insurance certificate does not have a retroactive effect so as to make incontestable a certificate which had already been issued for a period of five years, after expiration of which time it was provided there should be no contest; hence, where the incontestable clause was, in less than the five years fixed, changed so as to allow contests when insured shall die while engaged in prohibited occupations, a certificate issued on deceased's false representation that he was not engaged in prohibited occupation may be contested, though it had been issued more than five years.—Sovereign Camp, Woodmen of the World, v. Wernette, 216 S. W. 669.

☞723(2) (Tex.Civ.App.) Where a fraternal insurance certificate was void because of false representations made by the applicant in his application, it was never in force, and could not be validated by an incontestable clause.—Sovereign Camp, Woodmen of the World, v. Wernette, 216 S. W. 669.

☞723(8) (Tex.Civ.App.) Where an applicant for membership in a fraternal insurer which classed saloon keeping as a prohibited occupation falsely represented that he was not engaged in the saloon business, and thus procured a certificate, such certificate is null and void because of the misrepresentation, and recovery cannot be allowed, though the member paid assessments for long period.—Sovereign Camp, Woodmen of the World, v. Wernette, 216 S. W. 669.

Where deceased at the time of his application for membership in a fraternal insurer falsely represented that he was not engaged in the saloon business, whereupon he was admitted to membership and paid assessments until death, no recovery can be allowed on the certificate because of those provisions of by-laws of the insurer which, after forbidding the insuring of persons engaged in the saloon business, allowed members who thereafter entered such

prohibited occupation to continue their insurance upon payment of an additional assessment.—*Id.*

Where deceased from time of his application for membership until death was a member of a partnership engaged in the hotel and saloon business, deceased managing the hotel, and his partner the saloon, he was engaged in the saloon business within the by-laws of a fraternal insurer prohibiting the insuring of persons in such business, notwithstanding the clerk of the insurer construed the prohibition to extend only to those actively selling intoxicants, etc.—*Id.*

☞724(1) (Tex.Civ.App.) Since Acts 33d Leg. c. 113, § 20 (Vernon's Sayles' Ann. Civ. St. 1914, art. 4847), provides, that a fraternal insurer may provide by its constitution and by-laws that no subordinate body of subordinate officers shall have power to waive any of its provisions, no estoppel can arise against a fraternal insurer because of the acts or knowledge of a subordinate officer, where the by-laws contain such prohibition against waiver, etc.—Sovereign Camp, Woodmen of the World, v. Wernette, 216 S. W. 669.

☞724(2) (Tex.Civ.App.) Where the applicant for membership in a fraternal insurer falsely stated that he was not engaged in the saloon business, and the clerk issuing the certificate testified he did not know that the applicant was so engaged, the insurer cannot be estopped to rely on the false statement in the application because it was well known in the community that the applicant was engaged in the saloon business, which was one of the occupations prohibited by the by-laws of insurer, etc.—Sovereign Camp, Woodmen of the World, v. Wernette, 216 S. W. 669.

Where, at the time deceased became a member of a fraternal insurance society which included saloon keeping within the prohibited occupations, the clerk of the fraternal insurer knew that deceased was engaged in the business of a saloon keeper, the insurer, having accepted premiums paid, is estopped from asserting the invalidity of the certificate, although it was provided in the policy that an agent might not waive its conditions.—*Id.*

To estop a fraternal insurer to claim a forfeiture of the certificate because of the member's false statements that he was not engaged in a prohibited occupation, it must appear that the clerk had actual knowledge that deceased was engaged in the prohibited occupation, and such knowledge cannot be presumed.—*Id.*

#### (D) Forfeiture or Suspension.

☞745 (Tex.Civ.App.) There is no law requiring fraternal benefit insurance societies to put incontestable clauses in their certificates, as is demanded by Rev. St. 1911, § 4741, of health, life, and accident companies, and consequently clauses of that kind in certificates of fraternal insurers derive their authority, not from statute, but from contract.—Sovereign Camp, Woodmen of the World, v. Wernette, 216 S. W. 669.

☞755(1) (Mo.App.) Fraternal benefit association may itself with notice or knowledge of facts waive compliance with by-law requirements, notwithstanding Laws 1911, p. 292, § 22, and by-law provisions of association taking from subordinate organizations and officers thereof the power to create waiver.—Jegglin v. Sovereign Camp, Woodmen of the World, 216 S. W. 815.

☞755(3) (Mo.App.) Where fraternal benefit association by-laws required member changing to hazardous occupation to "notify the clerk of the camp," notice of change of occupation to such clerk was notice to the association itself, and, where association with such notice failed to increase amount of dues and accepted payment of dues at old rate down to date of insured's death, it waived compliance with by-laws requiring payment of high-



er rate for the hazardous occupation and suspending member upon failure to so do.—*Jegglin v. Sovereign Camp Woodmen of the World*, 216 S. W. 815.

Where fraternal benefit association, with full knowledge that insured had changed occupation requiring payment of increased dues at an increased rate, kept and retained premiums paid, for two years after change of occupation, at the old rate, without offering to return such premiums or depositing them in court, it will be estopped to deny that policy is valid, or to say that a forfeiture has not been waived.—*Id.*

#### (E) Beneficiaries and Benefits.

—787 (Mo.App.) In order to relieve a fraternal insurer under a provision that the certificate should be void if the member should meet his death as a direct result of drinking intoxicants or in consequence of a violation or attempted violation of the law, it must appear that the intoxication or law violation was the direct and proximate cause of the death; hence, where a member had ceased to exhibit a gun in an unlawful and angry threatening manner, the fact that he was killed by accidental discharge of the gun will not bar recovery.—*Ingle v. Sovereign Camp, Woodmen of the World*, 216 S. W. 787.

That a member of a fraternal insurer was grossly negligent in using shotgun, and as a result it was discharged and killed him, will not preclude recovery under provision of the certificate declaring it should be void if the member should meet his death as the direct result of intoxication, even though the member's negligence might have been largely the result of drinking intoxicants.—*Id.*

#### (F) Actions for Benefits.

—815(2) (Tex.Civ.App.) In the absence of exceptions, the allegations of an answer of a fraternal insurer held sufficient to raise the issue that the applicant was guilty of fraud in falsely representing that he was not engaged in the saloon business when in fact, he was engaged in such business, which occupation was prohibited by the insurer, etc.—*Sovereign Camp, Woodmen of the World, v. Wernette*, 216 S. W. 669.

—819(4) (Mo.App.) In an action on a certificate issued by a fraternal insurer, evidence held to warrant finding that the member who was killed by the discharge of a shotgun, the barrel of which he was using to open a gate after he had broken off the stock in attempting to enter a neighbor's house in search of his wife, who had left him when he began to abuse her, did not meet his death as a result of his previous unlawful acts, but that the accident occurred after he had calmed down and was no longer committing any unlawful act.—*Ingle v. Sovereign Camp, Woodmen of the World*, 216 S. W. 787.

### INSURANCE COMMISSIONER.

See Mandamus, —10.

### INTENT.

See Sales, —199.

### INTEREST.

See Drains, —90; Judgment, —256; Justices of the Peace, —44; Mortgages, —24; Principal and Agent, —106; Usury.

### I. RIGHTS AND LIABILITIES IN GENERAL.

—3 (Tex.Cr.App.) The right to lend money at interest is a creature of statute, and not an inherent right.—*Juhan v. State*, 216 S. W. 873.

### II. RATE.

—27 (Tex.Cr.App.) The taking of interest, or as it was then called usury, was looked upon in early times with great disfavor, and actually prohibited, not only by the old English law, but by the Mosaic law of the Jews, and to this day the calling of lending money at interest is subject to regulation.—*Juhan v. State*, 216 S. W. 873.

### III. TIME AND COMPUTATION.

—60 (Mo.) The right to compound interest is a creature of the statute.—*Whitworth v. Davey*, 216 S. W. 736.

### IV. RECOVERY.

—66 (Tex.Civ.App.) Where interest is not claimed by the pleadings, none can be recovered.—*City of San Antonio v. Pfeiffer*, 216 S. W. 207.

In suit against city on two causes of action, overflow of sewer, damaging plaintiff's goods, and injury to his automobile by street sprinkler, where damages from the first cause were alleged to be \$2,000, and by an exhibit attached it was shown that the total damage was \$2,019, and, as to the second claim, his general averment of \$1,000 damages was explained by subsequent allegation that the automobile was worth at least \$1,000 less after the damage than it was before, the petition affirmatively disclosed that interest was not included in the amounts sued for, so that interest could not be deemed to be included in the prayer for general relief; and there being no specific prayer for interest, the petition could not be deemed to claim interest.—*Id.*

### INTERPLEADER.

See Appeal and Error, —877.

### II. PROCEEDINGS AND RELIEF.

—23 (Mo.) A petition in the nature of a bill of interpleader should fairly and fully define the nature and interests of defendants, of which plaintiff had full knowledge; such being material allegations.—*Matlack v. Kline*, 216 S. W. 323.

—26 (Mo.) Where a petition in the nature of an interpleader shows plaintiff a mere stakeholder, with no interest in the subject-matter, a reply which assumes an offensively hostile attitude toward one of the interpleaded defendants, alleging that the latter is estopped from claim to any right to the stake, is improper.—*Matlack v. Kline*, 216 S. W. 323.

### INTERURBAN RAILROADS.

See Railroads, —386, 390, 400.

### INTOXICATING LIQUORS.

See Ball, —58; Criminal Law, —198, 205, 304, 374, 507, 656, 780, 921, 928, 1137, 1168, 1172; Insurance, —787; Jury, —72; Witnesses, —248, 268, 357, 370.

### III. LOCAL OPTION.

—39 (Mo.App.) Proof of the adoption of the local option law by the county or city within which the alleged violation thereof was committed is essential to a conviction, and the burden is on the state to plead and prove such fact.—*State v. Wright*, 216 S. W. 545.

The minimum amount of proof necessary to show the adoption of the local option law in the county of its alleged violation is the order of the county court, declaring the result of such election and ordering notice of such result to be duly published.—*Id.*

### VI. OFFENSES.

—137 (Ark.) In a prosecution for unlawfully manufacturing intoxicating liquors, it is unne-

essary to establish that the liquor was manufactured for use as a beverage.—*Shuffield v. State*, 216 S. W. 695.

⇒146(1) (Ark.) Where prosecuting witness laid money upon drug store counter, followed defendant into back room, took liquor out of barrel or box upon defendant's lifting lid thereof, left store taking with him liquor and change which he found on counter, there was a "sale" of the liquor.—*Beck v. State*, 216 S. W. 497.

⇒146(3) (Ark.) Where one party gave another money wherewith to buy intoxicating liquor, and the latter took money and procured liquor and returned it to former, the latter was himself guilty of the sale, unless he acted only as former's agent.—*Beck v. State*, 216 S. W. 497.

### VIII. CRIMINAL PROSECUTIONS.

⇒236(5) (Ark.) Evidence that a still, mash, etc., was found near accused's residence, that whisky was found in his house, that accused and some of his family were arrested at the still, etc., held to sustain a conviction for manufacturing intoxicating liquors as against the defense that the still belonged to another party who had given accused the whisky.—*Shuffield v. State*, 216 S. W. 695.

⇒236(13) (Tex.Cr.App.) In a prosecution for violating Local Option law, a witness' testimony that he bought what he believed to be a bottle of whisky of one accused, and facts and circumstances showing that it was whisky and that witness became intoxicated from the use of the contents of the bottle, held sufficient.—*Jones v. State*, 216 S. W. 183.

⇒236(19) (Ark.) In prosecution for manufacturing spirituous liquor, contrary to Acts 1915, p. 98, evidence held to sustain verdict of guilty.—*Pinkerton v. State*, 216 S. W. 716.

⇒238(1) (Mo.App.) Evidence that defendant, on his return from a trip by train, brought intoxicating liquors in a suit case and requested a neighbor boy, who met him at the station, to "pack my grip for me," held insufficient to warrant submission to jury of defendant's guilt of delivering intoxicating liquors in local option territory.—*State v. Osborne*, 216 S. W. 970.

⇒239(1) (Ark.) An instruction that accused must be acquitted unless the evidence showed beyond a reasonable doubt that he had manufactured intoxicating liquors sufficiently advised jury that mere preparation for manufacture would not justify conviction.—*Shuffield v. State*, 216 S. W. 695.

### INTOXICATION.

See Insurance, ⇒787.

### INVENTORY.

See Insurance, ⇒335.

### JEOPARDY.

See Criminal Law, ⇒198.

### JEWS.

See Jury, ⇒126.

### JITNEYS.

See Appeal and Error, ⇒1050; Evidence, ⇒123; Municipal Corporations, ⇒703, 708; Negligence, ⇒92; Trial, ⇒351.

### JOINT ADVENTURES.

⇒5(2) (Mo.) Petition alleging that plaintiff and defendant engaged in a joint venture to purchase land, that defendant misrepresented cost of land so as to acquire half interest for less than he should have contributed, that defendant sold a portion of the land representing price, to be less than he actually received, that plaintiff purchased defendant's interest in

portion of land, and sold his (plaintiff's) interest in remaining portion to defendant, thinking defendant had paid his half of the joint purchase price, and that defendant is indebted to plaintiff for various sums, held an action in equity for an accounting and not an action to declare and decree a constructive trust.—*State ex rel. Brinkman v. McElhinney*, 216 S. W. 521.

### JOINT TENANCY.

See Tenancy in Common; Wills, ⇒777.

⇒9 (Ky.) Where a wife and one of her sisters who had lived on certain land before their marriage discharged a purchase-money lien against it with the understanding with other joint owners, their brothers and sisters, that they should have the whole land, and subsequently the sister conveyed an undivided half interest to the wife, which deed was recorded, other brothers and sisters not claiming any interest, and the wife asserting title to the whole, the wife's claim ripened into title by adverse possession.—*Moore v. Shifflett*, 216 S. W. 614.

⇒12 (Ky.) The lease of joint property by one or more of the joint owners is not binding upon the other joint owner or owners, who do not join in the lease or consent to its execution.—*Lawrence v. Fielder*, 216 S. W. 1068.

### JUDGES.

See Injunction, ⇒110; Justices of the Peace; Quo Warranto, ⇒29.

### I. APPOINTMENT, QUALIFICATION, AND TENURE.

⇒7 (Ky.) Under Const. §§ 160, 167, as to length of terms of police judges and when they shall be elected, the term of office is four years.—*Pinkston v. Watkins*, 216 S. W. 832.

The term of office of four years prescribed for police judges by Const. § 160, may not be shortened by the Legislature, as attempted in a particular instance by Ky. St. § 3480b, subsec. 5, part of the 1914 amendment of charters of cities of the third class.—Id.

### IV. DISQUALIFICATION TO ACT.

⇒44 (Tex.Civ.App.) A judge, who is a resident of a city and a taxpayer, although interested in a suit brought by certain persons in behalf of the taxpayers of the city as a class, is not a "party" to the suit, so as to be disqualified to hear it.—*City of Dallas v. Armour & Co.*, 216 S. W. 222.

Judges, who are taxpayers of a city, although interested in a suit brought in behalf of the taxpayers of such city as a class to enjoin a purposed expenditure of the public funds and donation of land, they are not so immediately and directly "interested" as to be disqualified to try and hear the suit, under Const. art. 5, § 11, and Vernon's Sayles' Ann. Civ. St. 1914, art. 1584.—Id.

### JUDGMENT.

See Constitutional Law, ⇒107; Execution; Mandamus, ⇒14, 53.

For judgments in particular actions or proceedings, see also the various specific topics.

For review of judgments, see Appeal and Error.

### I. NATURE AND ESSENTIALS IN GENERAL.

⇒17(1) (Tex.Cr.App.) Where there are more parties than one on a bail bond and sureties have not all been served, a judgment cannot be rendered against them even by default, unless judgment dismisses as to parties not served, and renders judgment against those served.—*Saunders v. State*, 216 S. W. 870.

⇒18(2) (Tex.Civ.App.) A judgment cannot be based on a pleaded conclusion of law not

For cases in Dec. Dig. & Am. Dig. Key-No. Series & Indexes see same topic and KEY-NUMBER

warranted by the facts pleaded.—Hurst v. Crawford, 216 S. W. 284.

#### IV. BY DEFAULT.

##### (A) Requisites and Validity.

§117 (Ark.) In action to foreclose vendor's lien, complaint, in which the only reference to certain defendant was allegation "that plaintiff understands that defendant E. is claiming some interest or claim on said lot," held insufficient to warrant default decree against such defendant personally for recovery of amount of purchase-money notes.—Reed v. First Nat. Bank of Corning, 216 S. W. 306.

##### (B) Opening or Setting Aside Default.

§145(4) (Tex. Civ. App.) Where judgment was entered against a defendant failing to appear at trial, his motion for new trial will be denied, where the meritorious defense urged would require the use of incompetent parol evidence.—Gregory v. South Texas Lumber Co., 216 S. W. 420.

#### VI. ON TRIAL OF ISSUES.

##### (A) Rendition, Form, and Requisites in General.

§212 (Tex. Civ. App.) If, after hearing and decision by the county court of a cause in vacation, nothing had been done relative to the judgment at the succeeding regular term of the court but to have the clerk enter it upon the minutes of the court, it would have been a nullity.—Kerr v. Hume, 216 S. W. 908.

A judgment of the county court did not appear void on its face as having been rendered and the cause heard in vacation, where, although it recited a hearing had in vacation, and that pursuant to said hearing the court "concluded" the plaintiff should recover, and further concluded that such judgment should be entered at the succeeding regular term, it further recited that at the succeeding regular term the court, "upon consideration of the pleadings \* \* \* and the evidence heard on" the prior date during vacation, "concluded" plaintiff was entitled to recover.—Id.

##### (B) Parties.

§237(1) (Tex. Civ. App.) Where plaintiff abandoned his cause of action as against a defendant, there was no merit in an objection to judgment in plaintiff's favor that it was not a final judgment, because not in terms making any disposition of the case as to such defendant.—Buchanan v. Gribble, 216 S. W. 899.

§240 (Tex. Civ. App.) Where members of a truck growers' association brought action joining the association for defendant's breach of contract to furnish onion crates, each member having a separate cause of action, a joint judgment was improper; since each member separately should have been awarded such damages as he proved.—Mayhew & Isbell Lumber Co. v. Valley Wells Truck Growers' Ass'n, 216 S. W. 225.

##### (C) Conformity to Process, Pleadings, Proofs, and Verdict or Findings.

§250 (Mo. App.) Where a petition seeking to replevin a heating furnace alleged a mere bailment, judgment for plaintiff cannot be supported, where the proof showed that the furnace was sold to defendant's vendor, under a conditional sale arrangement that if it should prove unsatisfactory plaintiff would remove it from the building, and that before removal the building was sold to defendant, who knew of plaintiff's rights.—Shellenberger v. Hill, 216 S. W. 542.

§250 (Mo. App.) A petitioner must recover on the cause of action pleaded.—Wamsganz v. Blanke-Wenneker Candy Co., 216 S. W. 1025.

§251(1) (Mo.) A judgment reforming a deed held based on a finding of mutual mistake, as alleged, and not on a finding of fraud, a mat-

ter not pleaded.—Bramhall v. Bramhall, 216 S. W. 766.

§256(2) (Tex. Civ. App.) In suit by husband and children for title and possession of land, where jury found in response to special issue that deed executed by plaintiff husband and his wife to defendant's grantor to correct mistake was intended to operate as a deed, the court could not enter judgment for plaintiffs, who neither objected to the submission of the issue nor filed motion to set aside answer of jury to the issue.—Galloway v. Hodnett, 216 S. W. 239.

§256(6) (Tex. Civ. App.) Notwithstanding defendant expressly admitted he owed plaintiff a certain sum, so that the court did not submit that issue in his general charge, it was error to enter judgment for such sum, since the judgment must follow and conform to the verdict, and cannot exceed it, in view of our statutes.—Shotwell v. Crier, 216 S. W. 262.

§256(7) (Tex. Civ. App.) Where the question of the amount of damage suffered by plaintiff when the basement of his store was flooded, due to the obstruction of a sewer, was submitted to the jury, and a verdict was returned thereon fixing the damage, the court cannot add to the assessment an allowance of interest.—City of San Antonio v. Pfeiffer, 216 S. W. 207.

In an action for injuries to an automobile, where the jury was only required to find facts from which the court could ascertain the damage, interest may be awarded by the court, provided it is sued for.—Id.

#### X. EQUITABLE RELIEF.

##### (A) Nature of Remedy and Grounds.

§418 (Ky.) Where absence of jurisdictional fact rendering judgment void does not appear in the record of the suit in which it was rendered, proper remedy is suit to set aside the judgment, or resort to other form of direct attack; it being enough to allege and show such absence.—Crider v. Sutherland, 216 S. W. 57.

§429 (Tex. Civ. App.) Usury being a defense which is required to be specifically pleaded, such issue cannot be raised for the first time in a suit to set aside the judgment on a note asserted to be usurious.—Chandler v. Young, 216 S. W. 484.

§429 (Tex. Civ. App.) Where petition, in suit to foreclose improvement certificate, did not allege that the property upon which the lien was claimed was the homestead of the owner at any time, but simply that plaintiff had been so informed by the owner, and alleged, in the alternative, that if the property had ever constituted a homestead it was nevertheless subject to the claimed lien because far exceeding in value the constitutional exemption for homestead purposes, and the amount in controversy was within the court's jurisdiction, and defendant owner, being cited, failed to set up her claim of homestead exemption, judgment of foreclosure in such suit was res judicata of the claim of homestead exemption under Const. art. 16, §§ 50, 51, attempted to be set up in a later suit by the owner to enjoin enforcement of the foreclosure judgment by sale.—Eureka Paving Co. v. Barnett, 216 S. W. 903.

§429 (Tex. Civ. App.) In suit to enjoin enforcement of judgment, that moneys sued for and for which judgment was rendered were in the custody of another court was a matter of defense, which should have been pleaded and urged in the suit, and could not render the judgment in the suit void.—Kerr v. Hume, 216 S. W. 908.

§437 (Tex. Civ. App.) In suit to enjoin enforcement of default judgment foreclosing improvement certificate against plaintiff's property, the petition, alleging that she employed a named attorney to file an answer and take such steps as were necessary to her proper defense, and that she assumed he had answered, and that she was not apprised of the rendition of judgment against her until about 30 days before

the instant suit was filed, was insufficient as a legal reason or excuse for failing to appear or answer.—*Eureka Paving Co. v. Barnett*, 216 S. W. 903.

§443(1) (Ark.) In a suit to set aside a decree in a specific performance action at a previous term, allegations that the decree was rendered in plaintiff's absence, sustaining a demurrer which had been filed two weeks before the term and after a withdrawal of the answer without plaintiff's knowledge, plaintiff having been led to expect a trial on the merits, held not to show fraud practiced upon the court in the procurement of the decree under Kirby's Dig. § 4431, subd. 4.—*Barber v. Sager*, 216 S. W. 36.

#### (B) Jurisdiction and Proceedings.

§461(1) (Tex.Civ.App.) In suit to enjoin enforcement of judgment, recitals that the court, at a regular term, considered the evidence, heard in vacation, do not preclude the presumption that sufficient other facts were proved to sustain the judgment, against objection that cause was heard in vacation.—*Kerr v. Hume*, 216 S. W. 908.

In suit to enjoin enforcement of judgment, although record does not show affirmatively jurisdiction of defendant's person by service or answer, the judgment is not void for that reason, as, where the record is silent on the point, it will be presumed they had notice or were present at the trial.—Id.

### XI. COLLATERAL ATTACK.

#### (A) Judgments Impeachable Collaterally.

§470 (Ky.) On a collateral attack upon a judgment and proceedings pursuant thereto, every presumption must be indulged, not only in favor of validity and binding force of the judgment, but also that the customary and necessary proceedings in pursuance thereof were regularly taken to make judgment effective and accomplish the purposes of the action, even though not apparent from the record, unless the contrary affirmatively appears.—*Potter v. Webb*, 216 S. W. 66.

§475 (Mo.App.) Judgments of probate courts are as binding and impervious to collateral attack as those of any other court of record; but, in order for such a judgment to be res judicata, the point decided in the action in which it is rendered must be in substance and effect within the issue.—*McClure v. Baker*, 216 S. W. 1018.

#### (B) Grounds.

§486(1) (Ky.) Only a void judgment can be collaterally attacked in a subsequent suit.—*Luck v. Schabell*, 216 S. W. 1066.

§497(1) (Ky.) To warrant collateral attack on judgment of a court of general jurisdiction, want of jurisdiction must appear on the record; and this in case of judgments against infants or lunatics, as well as those against adults of sound mind.—*Crider v. Sutherland*, 216 S. W. 57.

#### (C) Proceedings.

§518 (Ky.) Attack on judgment is collateral where plaintiff in ejectment replies that judgment relied on by defendants as link in title was void for want of jurisdiction.—*Crider v. Sutherland*, 216 S. W. 57.

§518 (Ky.) Suit to quiet title and for partition, involving question of whether a sale, which would have divested plaintiffs of their title, was made and confirmed pursuant to a recorded judgment of sale, was a collateral, and not a direct, attack upon the judgment and record in former case.—*Potter v. Webb*, 216 S. W. 66.

§521 (Mo.) In his suit to enjoin execution on an ejectment judgment, defendant in the ejectment suit cannot be heard to dispute a fact found by the trial court.—*Eversmeyer v. Broyles*, 216 S. W. 317.

Defendant in ejectment should have set up the defense that he was the owner of an undivided third part of the land, and it can avail him nothing in his suit to enjoin levy of execution and for annulment of the ejectment judgment; he cannot be heard to object to the regularity of the ejectment proceeding, or urge any claim which he might have presented then in defense.—Id.

### XII. CONSTRUCTION AND OPERATION IN GENERAL.

§527 (Mo.) In suit to enjoin levy of an execution and for annulment of the judgment in ejectment on which it was issued, on the ground that the description of the land was defective, findings of the trial court for the judgment defendant held conclusive, in view of the state of the record, not showing that the judgment, in view of its description, actually was for the recovery of land not described in the petition.—*Eversmeyer v. Broyles*, 216 S. W. 317.

### XIII. MERGER AND BAR OF CAUSES OF ACTION AND DEFENSES.

#### (A) Judgments Operative as Bar.

§564(1) (Ark.) Decree in action for partition and division of estate, which instead of finally settling the respective rights of the litigants merely furnished the basis for such settlement, did not bar a subsequent action to recover payments made in excess of those required under the decree by reason of accident, oversight, or mistake.—*Hayes v. Bishop*, 216 S. W. 298.

### XIV. CONCLUSIVENESS OF ADJUDICATION.

#### (A) Judgments Conclusive in General.

§656 (Ark.) A decree, sustaining a demurrer in a suit for specific performance, after the time for correction of mistake under Kirby's Dig. § 4432, has expired, is, in a subsequent suit to set it aside, final and conclusive as to all the allegations in the complaint, but is not conclusive of other matters.—*Barber v. Sager*, 216 S. W. 36.

#### (B) Persons Concluded.

§702 (Tex.Civ.App.) Where an action is brought by a particular class of persons, as citizens and taxpayers, all members of such class are bound by the judgment rendered, although not named in the record as parties.—*City of Dallas v. Armour & Co.*, 216 S. W. 222.

§707 (Ark.) The buyer of a mare involved in litigation between the sellers and a third person not being a party to such litigation, his rights were not affected by it.—*E. O. Barnett Bros. v. Brown*, 216 S. W. 1038.

§707 (Mo.) In a suit to set aside a deed for vendor's mental incapacity, the decision of the court need not be controlled by a former decision of the court in a law case as to vendor's mental incapacity to make a will, where defendant was not a party and could not appear, particularly since the jury's verdict in a law case would not require reversal because it was against the weight of the evidence.—*Wigginton v. Burns*, 216 S. W. 756.

#### (C) Matters Concluded.

§713(1) (Mo.) In a suit by vendor's heirs to set aside a warranty deed on the ground that vendor was mentally incompetent, a decision in another action in the same court that such vendor was not mentally competent to make a will does not settle the matter of mental capacity to convey.—*Wigginton v. Burns*, 216 S. W. 756.

§735 (Mo.App.) Judgments of probate courts are as binding and impervious to collateral attack as those of any other court of record; but in order for such a judgment to be res judicata, the point decided in the action in which it is

rendered must be in substance and effect with-  
in the issue.—*McClure v. Baker*, 216 S. W.  
1018.

⚡744 (Tex.Civ.App.) A judgment in an ac-  
tion on a note and to foreclose a mortgage  
held conclusive as to the amount due on the  
note and the right to foreclose the lien.—*Chan-  
dler v. Young*, 216 S. W. 484.

**(D) Judgments in Particular Classes of  
Actions and Proceedings.**

⚡747(6) (Tex.Civ.App.) In a suit by a land-  
lord for damages for breach of a rental con-  
tract, plaintiff was entitled to recover attor-  
ney's fees and other expenses in a forcible de-  
tainer suit against the tenant appealed from  
justice to county court so as to avoid multi-  
plicity of suits; recovery for such items not  
being prohibited by *Vernon's Sayles' Ann. Civ.  
St. 1914*, art. 3960, relating to trial of such  
suits on appeal to the county court.—*Shotwell  
v. Crier*, 216 S. W. 262.

**XXI. ACTIONS ON JUDGMENTS.**

**(A) Domestic Judgments.**

⚡910(1) (Mo.App.) Judgment debtor whose  
judgment was rendered prior to enactment of  
Laws 1895, p. 221, changing period within  
which action on judgment is required to be  
brought from 20 to 10 years, had no vested  
right in the 20-year statute of limitations un-  
der *Rev. St. 1889*, § 6796; his only vested  
right being not to have his cause of action cut  
off until a reasonable time should expire after  
enactment of former statute.—*Chenault v.  
Yates*, 216 S. W. 817.

⚡910(3) (Mo.App.) Where judgment was  
rendered before enactment of Laws 1895, p.  
221 (*Rev. St. 1909*, § 1912), changing period of  
limitations for actions on judgment from 20 to  
10 years, and where, in action on such judg-  
ment, another judgment was rendered subse-  
quent to enactment of such statute, an action  
on subsequent judgment was barred by failure  
to bring action within 10 years after rendi-  
tion, notwithstanding *Rev. St. 1909*, § 1913,  
making such statute inapplicable to actions  
which had commenced and to cases where the  
right of action or of entry had accrued be-  
fore the time statute took effect.—*Chenault v.  
Yates*, 216 S. W. 817.

⚡910(4) (Ark.) While a pro rata allowance  
of creditors' claims against the estate of a de-  
cedent is a "judgment," within *Kirby's Dig.* §  
5073, requiring an action on "judgment" to be  
commenced within 10 years after accrual of  
cause of action, the statute does not operate to  
bar such a judgment while the estate is in the  
course of administration and before an order  
of payment is made.—*Turner's Heirs v. Turner*,  
216 S. W. 44.

**XXII. PLEADING AND EVIDENCE OF  
JUDGMENT AS ESTOPPEL OR  
DEFENSE.**

⚡949(2) (Ky.) A pleading collaterally at-  
tacking a judgment of a court of general ju-  
risdiction is insufficient if merely alleging ab-  
sence of a jurisdictional fact; it must allege  
that the record affirmatively shows such ab-  
sence.—*Crider v. Sutherland*, 216 S. W. 57.

**JUDICIAL POWER.**

See Constitutional Law, ⚡70.

**JUDICIAL SALES.**

See Appeal and Error, ⚡843, 1175; *Guardian  
and Ward*, ⚡87, 90, 107, 114; *Homestead*,  
⚡193; *Mortgages*, ⚡524; *Municipal Cor-  
porations*, ⚡980; *Taxation*, ⚡668, 692,  
814; *Trespass*, ⚡27.

⚡47 (Ky.) Where, in suit to settle estate,  
it was adjudged that certain land be sold to sat-  
isfy creditors, the presumption that master did  
his duty and carried out judgment by selling

the land and paying proceeds to creditors held  
warranted on collateral attack.—*Potter v.  
Webb*, 216 S. W. 66.

⚡51 (Ark.) Since the purchaser at judicial  
sale has a clear right to possession as against  
all parties to the proceedings, which right the  
court will summarily enforce by writ of as-  
sistance, the only exigencies which will war-  
rant a denial of the writ are where the par-  
ties in possession are not parties to the suit  
and claim by legal right, or are entitled to  
hold on account of equities paramount to the  
rights of the purchaser, but tenants of the  
receiver are not so situated.—*Smith v. Murphy*,  
216 S. W. 719.

**JURY.**

See Contempt, ⚡14; Criminal Law, ⚡295,  
598, 857-867, 1092, 1115; Eminent Domain,  
⚡224; New Trial, ⚡143; Trial, ⚡309.

**II. RIGHT TO TRIAL BY JURY.**

⚡29(3) (Tex.Cr.App.) A charge against one  
of being a delinquent child is not a felony, and  
jury can be waived.—*Mince v. State*, 216 S.  
W. 884.

**IV. SUMMONING, ATTENDANCE, DIS-  
CHARGE, AND COMPEN-  
SATION.**

⚡72(6) (Ark.) *Kirby's Dig.* § 793, amended  
by Acts 1917, p. 1121, providing for the dis-  
qualification of sheriffs upon accused filing an  
affidavit of prejudice, etc., under which de-  
fendant sought to disqualify sheriff from se-  
lecting talesmen, refers only to the sheriff's  
power to issue process in vacation, and does  
not affect his actions during the actual trial.—  
*Shuffield v. State*, 216 S. W. 695.

After the beginning of a criminal trial, the  
disqualification of the sheriff is a matter ad-  
dressed to the discretion of the court.—*Id.*

Where accused's affidavit charged a sheriff  
with prejudice and bias, but no proof was of-  
fered to support the charge, the court did not  
abuse its discretion in refusing to disqualify  
the sheriff from selecting talesmen, although  
the sheriff was a witness at the trial and tes-  
tified that he had watched accused's premises  
and arrested him for making intoxicating liq-  
uors.—*Id.*

**V. COMPETENCY OF JURORS, CHAL-  
LENGES, AND OBJECTIONS.**

⚡126 (Tex.Cr.App.) Where an alleged crim-  
inal libel contained a diatribe against Jews and  
it appeared that four or five members of the  
jury panel were of the Jewish race or con-  
nected with them and would have admitted that  
they would be prejudiced against one criticizing  
the Jews as a race, defendant was entitled to  
bring out such matter on voir dire examina-  
tion, and his challenge against such persons for  
cause should be sustained.—*Potter v. State*, 216  
S. W. 886.

**JUSTICES OF THE PEACE.**

See Equity, ⚡44.

**III. CIVIL JURISDICTION AND AU-  
THORITY.**

⚡44(8) (Tex.Civ.App.) In an action for val-  
ue of steers killed by defendant's trains, in the  
amount of \$195, brought in justice court, in-  
terest thereon is not recoverable eo nomine,  
but only as an item of damages, and must be  
pleaded, or otherwise it is not a matter in con-  
troversy, to be added to the amount sued on  
in determining jurisdiction.—*Hufstutler v. Gulf,  
C. & S. F. Ry. Co.*, 216 S. W. 495.

**IV. PROCEDURE IN CIVIL CASES.**

⚡90 (Mo.App.) In a proceeding in justice  
court, strictness and accuracy in pleading are  
not required.—*Avero v. Wells*, 216 S. W. 802.

## V. REVIEW OF PROCEEDINGS.

### (A) Appeal and Error.

⚡164(3) (Tex.Civ.App.) Where justice of the peace did not comply with Rev. St. 1911, arts. 2396, 2397, requiring in case of appeal to county court, transmission of transcript on or before the first day of the next term, or on or before the first day of the second term of the county court, and defendant appellant did not cause transcript to be filed until the last day of the third term, *held*, county court did not abuse its discretion in dismissing appeal for want of prosecution.—Clark v. Maund, 216 S. W. 257.

While it was the duty of the justice of the peace under Rev. St. 1911, arts. 2396, 2397, to transmit transcript to county court on appeal, it was also the duty of appellant to prosecute his appeal with reasonable diligence, and, if necessary to that end, resort to proper means to compel the justice to make up and transmit transcript to county court.—Id.

⚡164(4) (Tex.Civ.App.) While it would be a better practice to correct a transcript before the parties proceed to trial in county court on an appeal from justice court, such correction at such time is not imperative, and certainly not where the alleged jurisdictional defect is not pointed out specifically until the motion for a new trial is filed.—Hufstutler v. Gulf, C. & S. F. Ry. Co., 216 S. W. 495.

⚡173(3) (Tex.Civ.App.) On appeal from justice court to county court, if the transcript did not conclusively show that the case was within the jurisdiction of the justice court as originally filed, it was error for the trial court to refuse to hear oral testimony as to what the oral pleadings were below.—Hufstutler v. Gulf, C. & S. F. Ry. Co., 216 S. W. 495.

⚡174(17) (Mo.App.) On certiorari or appeal to circuit court from the justice court in unlawful detainer action under Rev. St. 1909, § 7726, the complaint may be amended so as to obviate the defects of uncertainty and indefiniteness in the description of the land, or in any other respect not involving a change in the cause of action originally stated.—Allen v. Jackson, 216 S. W. 539.

In unlawful detainer action, plaintiff, on appeal from justice court under Rev. St. 1909, § 7726, properly amended complaint so as to more definitely and specifically describe the land under section 7660, such amended complaint not stating new cause of action, though specifically mentioning ten-acre tract not referred to in original complaint, where such tract was a part of land described in original complaint.—Id.

⚡174(18) (Tex.Civ.App.) The right conferred by statute and rules on either party to amend pleadings extends to jurisdictional matters, so that, on appeal from justice court to county court, plaintiff had a right to amend his petition by reducing the amount of his damages, so as to cure the defect as to jurisdiction.—Hufstutler v. Gulf, C. & S. F. Ry. Co., 216 S. W. 495.

⚡180 (Mo.App.) Rev. St. 1909, § 1972, requiring the court to state in writing the conclusions of fact found separately from the conclusions of law, where requested by a party, is mandatory in actions at law, and applies to an appeal from the justice of the peace, since section 7588 provides that trials upon such appeals shall be governed by the practice in the appellate court.—Colorcraft Co. v. American Packing Co., 216 S. W. 831.

### (B) Certiorari.

⚡208(2) (Mo.App.) On certiorari to circuit court from the justice court in unlawful detainer action under Rev. St. 1909, § 7726, the complaint may be amended so as to obviate the defects of uncertainty and indefiniteness in the description of the land, or in any other respect not involving a change in the cause of

action originally stated.—Allen v. Jackson, 216 S. W. 539.

## JUVENILE COURTS.

See Courts, ⚡42; Infants, ⚡19.

## KITCHEN.

See Burglary, ⚡4.

## LABOR.

See Master and Servant, ⚡841.

## LABOR UNIONS.

See Trade Unions.

## LACHES.

See Corporations, ⚡108.

## LANDLORD AND TENANT.

See Appeal and Error, ⚡1053; Damages, ⚡62; Disorderly House, ⚡20; Dower, ⚡55, 56; Evidence, ⚡460; Frauds, Statute of, ⚡58, 129, 158; Homestead, ⚡143, 146; Joint Tenancy, ⚡12; Judgment, ⚡747; Justices of the Peace, ⚡174; Life Estates, ⚡12; Master and Servant, ⚡318; Mines and Minerals, ⚡74, 77, 78; Municipal Corporations, ⚡967; Principal and Agent, ⚡123; Receivers, ⚡142; Taxation, ⚡219, 338; Trial, ⚡194; Vendor and Purchaser, ⚡232.

### I. CREATION AND EXISTENCE OF THE RELATION.

⚡5(1) (Mo.) An instrument granting to one an estate for years in premises, and entitling him to possession as against the owner during the term, the owner having no right to enter except to inspect work to be done on the land, consisting in removing stone and lowering the surface of the land, was a lease, and the relation established was that of lessor and lessee.—Baker v. Gates, 216 S. W. 775.

### II. LEASES AND AGREEMENTS IN GENERAL.

#### (A) Requisites and Validity.

⚡24(3) (Ark.) Lease of a "place about ten miles west of M. for the year 1918, and situated in sections 4 and 9, township 2 north, range 2 east, containing about 275 acres in cultivation," aided by parol evidence, *held* not unenforceable as describing the land with insufficient certainty.—Neal v. Harris, 216 S. W. 6.

### III. LANDLORD'S TITLE AND REVERSION.

#### (A) Rights and Powers of Landlord.

⚡53(2) (Ark.) Where landlord's title has passed to another by process of law, the tenant's responsibility is then to the true owner.—Sumpter v. Hot Springs Savings, Trust & Guaranty Co., 216 S. W. 311.

### IV. TERMS FOR YEARS.

#### (A) Nature and Extent.

⚡72 (Tex.Civ.App.) Lease of storehouse at gross rental of \$12,900, payable in monthly payments for five years from April 1st, providing that if building was then incomplete the lessee would accept it when completed, but the lessor would refund such rent as might become due to such time as premises should be ready for occupancy, modified by letter to lessee that lease should stand canceled unless building was ready June 1st and, in lieu of refund, lessor should not begin payment of rent until building was ready, construed, and *held*, that lease commenced on April 1st and terminated March 31st, five years later, although building was not

ready nor occupied until July 15th.—Camp v. U. S. Tire Co., 216 S. W. 1115.

**(C) Extensions, Renewals, and Options to Purchase or Sell.**

⌚86(1) (Ark.) Where, instead of a covenant in a lease for renewal, there is provision for extension of the term at the lessee's option, on exercise of the option by the lessee, there is granted a present lease for the full term to which it may be extended, and not a lease for the lesser period, with a privilege of new lease for the extended term.—Neal v. Harris, 216 S. W. 6.

Where the lessor of a farm for a year agreed to give the lessee the refusal of the place for the two following years at the same rental per acre, on exercising his option, the lessee, without any execution of a new lease, became entitled to an extended term of two additional years; no question of the application of the statute of frauds arising.—Id.

⌚86(2) (Ark.) Where lease of a farm for a year gave the lessee option to extend the term for the two following years, not specifying whether the option should be exercised orally or by writing, it could be shown either way, like any other fact not required to be in writing, and the lessee's oral notice was sufficient.—Neal v. Harris, 216 S. W. 6.

**VII. PREMISES AND ENJOYMENT AND USE THEREOF.**

**(B) Possession, Enjoyment, and Use.**

⌚129(1) (Ky.) In action for failure to give plaintiff possession of premises leased by him from March 1, 1917, to March 1, 1918, instruction to find for plaintiff the difference between agreed rental price for the year 1917 of the farm described and its fair and reasonable rental value for uses and purposes stated in the contract in the year 1917, etc., held a correct statement of law, and not to have misled jury into fixing rental value of the premises as of any other date than when possession was due.—Lawrence v. Fielder, 216 S. W. 1068.

⌚129(3) (Ky.) In action for damages for refusal to give plaintiff lessee possession, testimony, showing the productiveness of the leased premises and the adaptability of certain portions to particular crops agreed to be planted, as well as the value of the remaining land for pasturage, was admissible.—Lawrence v. Fielder, 216 S. W. 1068.

⌚129(4) (Ky.) Expenses incurred by plaintiff lessee in relieving himself of contract subletting a part of the premises, in obtaining a residence for himself and family, and in an effort to induce defendants to carry out their contract, were legitimate items of damage for failure to deliver possession of leased premises.—Lawrence v. Fielder, 216 S. W. 1068.

The measure of damages for refusal of a lessor to deliver possession of the leased premises to the lessee is the difference between the consideration agreed to be paid and the actual value of the lease at the time possession is to be given.—Id.

For refusal to deliver possession of a 320-acre farm leased for one year by plaintiff, held a verdict of \$1,200 for general and special damages was not excessive.—Id.

⌚138 (Ky.) As between landlord and tenant, manure produced upon the premises is the property of the landlord, in which the tenant has no interest, and for removal or sale of which, without the lessor's consent, the tenant is liable, unless custom or usage of the neighborhood, known to the parties previous to the agreement, renders the contract otherwise.—Stuart v. Clements, 216 S. W. 186.

**(E) Injuries from Dangerous or Defective Condition.**

⌚169(11) (Mo.) In action for death in fire, against owner of building who had failed to

provide the required number of fire escapes, where defense was that lack of fire escapes was not proximate cause, and where there was no evidence as to whether deceased made any effort to avail himself of existing means of escape, question of proximate cause held for jury, under *res ipsa loquitur* doctrine.—Newell v. Boatmen's Bank, 216 S. W. 918.

⌚169(11) (Mo.App.) In an action by tenant of an apartment who stepped in a hole in the yard while she was hanging out her washing, question whether the tenant was guilty of contributory negligence held, under the evidence, for the jury.—Milton v. Holtzman, 216 S. W. 828.

⌚170(1) (Mo.) If the intended use of premises by lessee would of necessity create a nuisance, the owner must be held to have authorized the nuisance, and to be answerable for consequent damages; for no one may either use, or agree that some one else may use, his property so as to harm others.—Baker v. Gates, 216 S. W. 775.

Where landlord leased premises to be worked as a stone quarry, a matter necessarily a nuisance by reason of surrounding houses and streets, lessee having the right to permit third persons to quarry the stone, the landlord was not liable for injuries caused by reason of blasting stone by the receiver of one who had entered into a contract with the lessee to remove stone, the receiver not operating the quarry with the consent of the owner or the lessee, but under order of court.—Id.

Where landlord leased premises to be used as a stone quarry, necessarily constituting a nuisance by reason of surrounding houses and streets, the lessee having the right to contract with third persons for the removal of the stone, the landlord was not liable for injuries caused a traveler on the street by blasting done by a receiver of one who had contracted with the lessee, who was operating the quarry without the consent of the owner or the lessee, but under order of court, although the lessee was employed by the receiver.—Id.

⌚170(4) (Mo.) In an action against a landlord for personal injuries to one struck by a rock thrown by a blast through the air into a boulevard from a quarry, operated by a lessee, whether the nuisance necessarily arose from the work so as to render the landlord liable held for the jury.—Baker v. Gates, 216 S. W. 775.

**VIII. RENT AND ADVANCES.**

**(C) Lien.**

⌚249(1) (Tex.Civ.App.) Judgment creditor of tenant who levied upon the crops when the tenant was indebted to his landlord for rent, supplies, or advancements held liable to the landlord for conversion to the extent of so much of the converted crops as might be necessary to satisfy the landlord's claim, liability not being limited to the pro rata part of the tenant's debt to the landlord which the part of the crop levied on bore to the whole of the crop raised by the tenant; the principle of marshaling of securities not being involved.—Fields v. Fields, 216 S. W. 195.

**IX. RE-ENTRY AND RECOVERY OF POSSESSION BY LANDLORD.**

⌚288 (Mo.App.) The gist of unlawful detainer action is the unlawful detainer; the damages and rents being merely incidental, and not unalterably fixed, as in an express contract.—Allen v. Jackson, 216 S. W. 539.

⌚291(8) (Mo.App.) Great strictness and accuracy of description is not essential in unlawful detainer complaints against a tenant.—Allen v. Jackson, 216 S. W. 539.

⌚291(16) (Mo.App.) In unlawful detainer action against tenant, verdict finding defendant guilty in manner and form as charged, finding the damages sustained to be no dollars and the



value of the monthly rents and profits to be no dollars, is not illogical, arbitrary, or unjust, since the gist of such action is the unlawful detainer.—*Allen v. Jackson*, 216 S. W. 539.

#### X. RENTING ON SHARES.

§331(2) (Tex.Civ.App.) Damages claimed by landlord for tenant's breach of contract to cultivate land in a good workmanlike manner held not too remote, speculative, and uncertain to sustain an action therefor.—*Shotwell v. Crier*, 216 S. W. 262.

The measure of damages for the destruction of the landlord's share of a wheat crop by the tenant's pasturing stock thereon is the market value of plaintiff's share of such crops as would probably have been raised if defendant had complied with his contract and not destroyed the crop.—*Id.*

While, as a general rule, in actions in trespass to try title and in forcible entry and detainer, the measure of damages is the rental value of the property while wrongfully withheld, a landlord may sue a tenant on shares holding over only for use of pasture land withheld after expiration of lease or the value of the grass converted, measuring its value by the number of cattle pastured at a fixed price per head.—*Id.*

Where plaintiff landlord was entitled to one-third of a crop free from all expenses of cultivating and harvesting it, his damages cannot be limited to the value of the crop at the time defendant tenant destroyed it, since that would deprive him of the benefit of his contract with defendant to cultivate the land properly.—*Id.*

#### LARCENY.

See Animals, §23; Criminal Law, §372, 759, 780, 792, 878, 982, 1032, 1120, 1170; Extradition, §30.

#### I. OFFENSES AND RESPONSIBILITY THEREFOR.

§27 (Tex.Cr.App.) To convict defendant as an accomplice to theft of automobile charged to have been stolen by P., it is necessary to prove that P. was a principal, and that defendant advised and encouraged him to commit the theft, and that defendant was to receive the stolen automobile and pay therefor.—*Cone v. State*, 216 S. W. 190.

#### II. PROSECUTION AND PUNISHMENT.

##### (B) Evidence.

§55 (Ark.) In a prosecution for larceny, evidence held sufficient to connect defendant with the crime.—*Long v. State*, 216 S. W. 306.

§55 (Tex.Cr.App.) In prosecution for theft of a hog, evidence held sufficient to sustain conviction.—*Jackson v. State*, 216 S. W. 866.

§64(1) (Ark.) The unexplained possession of recently stolen property is a fact from which an inference of guilt may be drawn.—*Long v. State*, 216 S. W. 306.

#### LEASE.

See Landlord and Tenant; Mines and Minerals, §77, 78; Municipal Corporations, §967.

#### LEASEHOLDS.

See Taxation, §219, 338.

#### LEVEES.

See Evidence, §5.

§5 (Ark.) Acts 1913, p. 745, § 5, amending Acts 1909, p. 852, § 32, expressly confers authority for the organization of drainage districts, the main object of which is the construction of levees.—*White River Lumber Co. v. White River Drainage Dist. of Phillips and Desha Counties*, 216 S. W. 1043.

#### LEWDNESS.

§10 (Tex.Cr.App.) In a prosecution of a married man for habitual carnal intercourse with a female not his wife, evidence held to sustain a conviction.—*Webb v. State*, 216 S. W. 865.

#### LIBEL AND SLANDER.

See Jury, §126.

#### I. WORDS AND ACTS ACTIONABLE, AND LIABILITY THEREFOR.

§9(1) (Ky.) Any words, whether oral or written, which prejudice one in his profession or trade, are actionable per se.—*Vanover v. W. M. Ritter Lumber Co.*, 216 S. W. 366.

§9(3) (Ky.) Words which impute to an attorney the want of the requisite qualifications to practice law, or with having been guilty of dishonest or improper practices in the performance of his duties as an attorney, are actionable per se.—*Vanover v. W. M. Ritter Lumber Co.*, 216 S. W. 366.

Defendant's statement to the father of his injured employé, that, if he did not compromise the case for \$400, defendant would go over and buy out the injured employé's attorney for a \$100 or \$200, held not actionable by plaintiff attorney, as meaning nothing more than that defendant would make an effort to buy him out.—*Id.*

#### VI. CRIMINAL RESPONSIBILITY.

##### (A) Offenses.

§141 (Tex.Cr.App.) A corporation as such cannot be criminally libeled.—*Potter v. State*, 216 S. W. 886.

##### (B) Prosecution and Punishment.

§152(2) (Tex.Cr.App.) An indictment, which set out a newspaper article that charged fire was of an incendiary origin, held insufficient to charge offense of criminally libeling the person named in the indictment as the one against whom it was directed, notwithstanding Vernon's Ann. Code Cr. Proc. 1916, art. 472; there being no innuendo showing the applicability of the article to the one claimed to be libeled or that the diatribe in the article against Jews was directed against him.—*Potter v. State*, 216 S. W. 886.

#### LICENSES.

#### I. FOR OCCUPATIONS AND PRIVILEGES.

§11(1) (Tex.Cr.App.) Callings that cannot be regulated except by license tax are those which cannot in their operation be dangerous to the public, but all others may be restricted.—*Juhan v. State*, 216 S. W. 873.

§42(2) (Tex.Cr.App.) In a prosecution under Acts 35th Leg. c. 207, as amended, against the president and general manager of a corporation, based on the operation by the corporation of a motor car on which the seal assigned by the highway department was not displayed, it is a defense that defendant procured a seal for such car, as he did for all the others, and gave orders for its attachment, which orders were not carried out through a change in the personnel of the corporation's servants, and that defendant was ignorant that the car was operated without a seal.—*Axtell v. State*, 216 S. W. 394.

#### LIENS.

See Appeal and Error, §38; Chattel Mortgages, §43; Executors and Administrators, §435; Guardian and Ward, §114; Mechanics' Liens; Municipal Corporations, §975; Taxation, §510, 642, 810, 814; Vendor and Purchaser, §95, 261-284; Venue, §5.



## LIFE ESTATES.

See Limitation of Actions, ¶60; Reformation of Instruments, ¶32; Wills, ¶617, 692, 693.

¶8 (Ky.) Possession of one claiming under deed from life tenant does not become adverse as to remaindermen until death of life tenant.—*Althoff v. Cull*, 216 S. W. 361.

¶8 (Mo.) Possession by life tenant is not adverse to remaindermen.—*Bramhall v. Bramhall*, 216 S. W. 768.

¶12 (Mo.) A life tenant as grantor of a mining lease could not burden the remainder with a lease without ratification by the remaindermen, although tenant could make a lease for any number of years, which would be valid during his life and would not affect the estate in remainder.—*Matlack v. Kline*, 216 S. W. 323.

Neither the joinder of life tenant's wife as a party to a mining lease nor his attempted bequest to her of the monthly rent could add anything to her claim to the rent after the life tenant's death, since she had no interest which she could convey.—*Id.*

Where a life tenant granted a mining lease to plaintiff, on being invested with the fee the remainderman became entitled to the rent or royalty, which followed the ownership of the land, and not the life tenant's widow, where the remainderman had not assented to any other provision.—*Id.*

If a lease by a life tenant terminated upon lessor's death, and the remainderman acquiesced in the tenant's holding, there is no rule of law which would preclude its continuance, and it may, without affecting its validity, be regarded as a new contract between the remainderman and the tenant, and the reasonable rental value may be estimated at a fixed amount of royalty under the original lease.—*Id.*

On the death of a life tenant, lessor under a mining lease, continued with the acquiescence of remainderman, accumulated chats and tailings may be classified as part of the ore taken and the proceeds from sale of those accumulated prior to the life tenant's death belong to lessee as per agreement with the life tenant, while 10 per cent. of the amount realized from sale of those subsequently accumulated belongs to the remainderman in accordance with the original lease.—*Id.*

¶21 (Ky.) Under a will giving testator's widow the "use and benefit" of his property during her life, the widow as life tenant is only entitled to income from cattle and not to the increase in value which is a part of the corpus of the estate of the remaindermen.—*Hornsby v. Hornsby*, 216 S. W. 88.

## LIGHTS.

See Master and Servant, ¶107, 270; Municipal Corporations, ¶706.

## LIMITATION OF ACTIONS.

See Adverse Possession; Constitutional Law, ¶107; Criminal Law, ¶1120; Executors and Administrators, ¶324; Judgment, ¶910.

## I. STATUTES OF LIMITATION.

(B) Limitations Applicable to Particular Actions.

¶24(2) (Tex.Civ.App.) A bill of lading executed by a carrier is a contract in writing to which the four-year statute of limitation applies.—*Missouri, K. & T. Ry. Co. v. Hunter*, 216 S. W. 1107.

¶34(7) (Mo.) An installment of an apportionment on account of public roads against a county for a drainage project is barred by a 5 years' delay in enforcing collection of the same.—*Drainage Dist. No. 1 of Bates County v. Bates County*, 216 S. W. 949.

¶41 (Ark.) Although counterclaim, by way of cross-bill, for breach of guaranty of invoice value of stock of partnership goods, in so far as it sought a judgment over against the plaintiff suing for the balance due on the purchase of his partnership interest, must as respects the statute of limitations, be treated as an independent suit, yet it was good for defensive purposes even if the statutory bar had attached when the cross-bill was filed, being good for recoupment only as long as plaintiff's cause of action existed.—*Huggins v. Smith*, 216 S. W. 1.

## II. COMPUTATION OF PERIOD OF LIMITATION.

(A) Accrual of Right of Action or Defense.

¶60(6) (Mo.) The statute of limitations is no defense to an action brought by one in possession of land under a deed giving him a life estate against persons which the deed made remaindermen; plaintiff being ignorant of the effect of the deed until shortly before he sued, and the interest of the defendants in the land being acquired through mistake of the scrivener, who drew up the deed, in view of Rev. St. 1909, § 2535.—*Bramhall v. Bramhall*, 216 S. W. 768.

(F) Ignorance, Mistake, Trust, Fraud, and Concealment of Cause of Action.

¶100(6) (Ark.) In action on note given for partner's interest in drug store business damages counterclaimed from seller's guaranty that stock and fixtures would invoice at certain figure accrued upon discovery of shortage in invoice value.—*Huggins v. Smith*, 216 S. W. 1.

(H) Commencement of Action or Other Proceeding.

¶121(2) (Tex.Civ.App.) Where a lessee of a horse sued for injuries to the horse, and, without his consent, made the lessor a joint plaintiff, but on the owner's protest filed another petition and sued in his own name, the amended petition did not set up a new cause of action to which limitations would apply.—*Missouri, K. & T. Ry. Co. v. Hunter*, 216 S. W. 1107.

¶127(4) (Tex.Civ.App.) In an action on a contract, an amendment by plaintiff to the pleadings, setting up a mistake in the contract and asking that the same be corrected, was not a new cause of action as respects the statute of limitations.—*Benson v. Ashford*, 216 S. W. 283.

¶127(12) (Tex.Civ.App.) While pleadings in justice court may be informal, and great liberality is indulged both in substance and form, held that, where plaintiff's claim, filed in justice court, based on the refusal of a conductor of a train to stop at the station at which he desired to alight, was founded on an action ex contractu, an amendment, claiming damages for the conductor's insulting words and conduct, which sounded in tort, introduced a new cause of action, and was barred, where the amendment was not filed until more than five years after the cause of action accrued.—*Gulf, C. & S. F. Ry. Co. v. Sander-son*, 216 S. W. 286.

## LIQUOR SELLING.

See Intoxicating Liquors.

## LIS PENDENS.

See Venue, ¶21.

¶5 (Tenn.) An adverse claimant to a right in land is not affected by the pendency of a suit about the land unless he is a party thereto.—*Southern Ry. Co. v. Vann*, 216 S. W. 727.

## LIVERY STABLE AND GARAGE KEEPERS.

See Partnership, ¶230.

## LOCOMOTIVES.

See Evidence, ¶514.

## LOGS AND LOGGING.

See Frauds, Statute of, ¶129.

## LOST INSTRUMENTS.

See Criminal Law, ¶1088; Evidence, ¶182, 183, 187; Trial, ¶249, 352.

## LUNATICS.

See Insane Persons.

## LUNCH.

See Negligence, ¶33.

## MALICE.

See Trade Unions, ¶5.

## MALICIOUS PROSECUTION.

See Witnesses, ¶248.

### I. NATURE AND COMMENCEMENT OF PROSECUTION.

¶3 (Mo.) Liability of defendant, who had plaintiff arrested for tearing down a fence, cannot be predicated on the action of the police in prosecuting plaintiff on the technical charge of trespassing, a matter of which defendant was ignorant and which was not attributable to any fault of his.—*Boyers v. Lindhorst*, 216 S. W. 536.

### V. ACTIONS.

¶59(4) (Mo.) In an action for malicious prosecution, proof of the general bad character of plaintiff, if known to defendant at the time of the prosecution, is admissible in evidence on the issues of malice and want of probable cause; but the reputation of plaintiff sought to be shown must be bad in respect to such matters as naturally would be calculated to affect the probability of the plaintiffs' having committed the crime with which he was charged.—*Boyers v. Lindhorst*, 216 S. W. 536.

In an action for malicious prosecution, plaintiff having been arrested for tearing down a fence belonging to defendant, proof that plaintiff had a general reputation, known to defendant at the time of the arrest, of being a disturber of the peace, quarrelsome, turbulent, and violent in his behavior, was admissible on the questions of malice and probable cause.—*Id.*

¶63 (Mo.) In an action for malicious prosecution, proof of the general bad character of the plaintiff is admissible on the measure of damages, where damages for mortification and disgrace are sought; but the reputation sought to be shown must be bad in the same respect in which his reputation was, or otherwise would have been injured by the malicious prosecution.—*Boyers v. Lindhorst*, 216 S. W. 536.

## MANAGER.

See Municipal Corporations, ¶123, 124.

## MANDAMUS.

### I. NATURE AND GROUNDS IN GENERAL.

¶4(1) (Tex.) Mandamus from Supreme Court to trial court cannot be used as substitute for appeal provided by law, by relator aggrieved

by judgment or order.—*Matthaei v. Clark*, 216 S. W. 856.

¶4(2) (Tex.) Remedy of interveners being by appeal to Court of Civil Appeals from order dismissing intervention and refusing leave to amend, such order or judgment will not be reviewed by Supreme Court in original application for mandamus to control district court.—*Matthaei v. Clark*, 216 S. W. 856.

¶10 (Tex.) Under Const. art. 5, § 3, and Rev. St. arts. 1526, 1528, authorizing issue of mandamus, Supreme Court in original mandamus is without power to direct commissioner of insurance and banking to act in disregard of final judgment of district court having jurisdiction of subject-matter and of bonding company, especially where the acts of the commissioner in relation to bonding company would involve exercise of discretion.—*Matthaei v. Clark*, 216 S. W. 856.

¶14(1) (Tex.) Relators who sought no relief in trial court are not entitled to mandamus in Supreme Court to compel trial court to vacate its judgment, permit them to intervene, and grant certain other relief.—*Matthaei v. Clark*, 216 S. W. 856.

### II. SUBJECTS AND PURPOSES OF RELIEF.

#### (A) Acts and Proceedings of Courts, Judges, and Judicial Officers.

¶26 (Tex.) It is not the function of mandamus from Supreme Court to control, in a purely anticipatory sense, the action of a district court or judge thereof in a matter within the jurisdiction of such court or judge.—*Matthaei v. Clark*, 216 S. W. 856.

Supreme Court will not by mandamus direct district court to render a certain judgment, as to do so would be invasion of powers of district court and control of its discretion.—*Id.*

¶37 (Tex.) Under Const. art. 5, § 3, and Rev. St. arts. 1526, 1528, authorizing issue of mandamus, Supreme Court in original mandamus will not direct trial court to issue injunction.—*Matthaei v. Clark*, 216 S. W. 856.

¶38 (Tex.) Under Const. art. 5, § 3, and Rev. St. arts. 1526, 1528, authorizing issue of mandamus, Supreme Court in original mandamus will not direct appointment of receiver by trial court.—*Matthaei v. Clark*, 216 S. W. 856.

¶53 (Tex.) Supreme Court will not by mandamus direct district court to vacate or set aside judgment, though on proper showing it might require such court to file, hear, and determine petition for such relief.—*Matthaei v. Clark*, 216 S. W. 856.

#### (B) Acts and Proceedings of Public Officers and Boards and Municipalities.

¶72 (Tex.) Supreme Court will not issue mandamus against any public officer except to enforce performance of a clear, legal duty not involving exercise of discretion conferred upon him by law.—*Matthaei v. Clark*, 216 S. W. 856.

## MANSLAUGHTER.

See Homicide.

## MANUFACTURES.

See Army and Navy, ¶34; Intoxicating Liquors, ¶137, 239.

## MANURE.

See Landlord and Tenant, ¶138.

## MARRIAGE.

See Deeds, ¶17; Divorce; Husband and Wife; Slaves, ¶25.

¶16 (Ky.) A customary marriage among slaves was recognized by both white and black.—*Cable v. Hawkins*, 216 S. W. 345.

For cases in Dec.Dig. & Am.Dig. Key-No.Series & Indexes see same topic and KEY-NUMBER

§50(3) (Ky.) A customary marriage among slaves was recognized by both white and black, so that where a man and a woman lived together as husband and wife and recognized each other as such, and were so recognized and acknowledged by people living in the same neighborhood, even though the rites of matrimony had not been publicly celebrated, evidence of a marriage certificate was not necessary to establish the validity of a marriage.—*Cable v. Hawkins*, 216 S. W. 345.

## MARSHALING ASSETS AND SECURITIES.

See Landlord and Tenant, §249, 252.

## MASTER AND SERVANT.

See Appeal and Error, §1033; Carriers, §283, 347; Criminal Law, §58; Evidence, §77, 148, 487; Railroads, §5½; Statutes, §226; Trade Unions; Trial, §191, 203, 240, 251, 295.

### I. THE RELATION.

#### (B) Statutory Regulation.

§16½. Owing to the great increase of matter heretofore classified to this section, we have made a new subdivision, consisting of § number sections 346-420, at the end of this topic, where the matter in this and future index digests will be found.

#### (C) Termination and Discharge.

§31 (Mo.App.) In action by a discharged servant for assault, it is error to charge that defendant had right to discharge plaintiff "without cause and paying plaintiff her wages," and to refuse an instruction that defendant had right to discharge servant "without cause and without payment of wages."—*Traw v. Heydt*, 216 S. W. 1009.

§40(1) (Mo.App.) In a salesman's action for loss of commissions by wrongful discharge before termination of the term for which he had been hired, testimony by a witness for defendant as to a conversation with salesman regarding an article he had been selling was properly excluded, where the testimony was not confined to the period covered by the contract.—*Wamsanz v. Blanke-Wenneker Candy Co.*, 216 S. W. 1025.

§40(2) (Mo.App.) In a salesman's action for loss of commissions by wrongful discharge, the exclusion of testimony of a witness for defendant as to salesman's statements regarding profits from a side line was not reversible error.—*Wamsanz v. Blanke-Wenneker Candy Co.*, 216 S. W. 1025.

§41(6) (Mo.App.) In an action by one employed to sell goods on commission to recover damages on account of lost earnings from the date of his discharge to the end of the term of employment, and a sum alleged to be due as commission, plaintiff's testimony as to his earnings while employed by another company in the same business as defendant was inadmissible, in the absence of showing that the terms of employment were identical.—*King v. Oklahoma Gypsum Co.*, 216 S. W. 992.

## II. SERVICES AND COMPENSATION.

#### (B) Wages and Other Remuneration.

§77 (Tex.Civ.App.) In an employee's action for hospital expenses, question of whether employer's purpose in making monthly deductions from employees' pay, called "hospital fees," was to establish a hospital, or hospital plan, or to apply fees any time thereafter to the payment of hospital expenses at a hospital in case of sickness, held for jury.—*Courchesne v. Brown*, 216 S. W. 674.

Employer, who monthly deducts a portion of employee's wages for purposes of accumulating a fund with which to care for employees who

become sick, holds the fund in trust for the contributing employees, and assumes no personal responsibility to employee who becomes sick, other than a proper and faithful administration of the trust fund, requiring him, in absence of his own hospital or a custom of furnishing hospital service, to furnish such services only if there is an unexpended portion of the trust fund.—*Id.*

Employee suing to recover hospital expenses from employer who had deducted "hospital fee" from monthly wages of employees had burden of alleging and proving that fees were collected as a present hospital fund, to be used in case of sickness, and that employer had on hand a sufficient amount of the funds to pay the expenses.—*Id.*

§83 (Ark.) In an action against a railroad for wages and for penalty for nonpayment thereof under Kirby's Dig. § 6649, as amended by Laws 1905, p. 537, where defendant claimed a breach of contract by refusal to work on Sunday, the question whether an agreement had been made, whereby employee might substitute at his own expense some one else to work on Sunday, held for the jury.—*Missouri Pac. R. Co. v. Ault*, 216 S. W. 3.

A railroad's refusal to permit a freight trucker to continue to work in such capacity and an offer to retain him as porter at a reduced wage was tantamount to a discharge within Kirby's Dig. § 6649, as amended by Laws 1905, p. 537, § 1, giving a penalty for nonpayment of wages.—*Id.*

Where a discharged railroad employee, who demanded wages from his immediate employer and timekeeper, was told that money would be at the station in seven days, this was equivalent to a request by the employee to send the money to the station so as to entitle him, where money was not so sent, to the penalty imposed by Kirby's Dig. § 6649, as amended by Acts 1905, p. 537, § 1, for nonpayment of wages.—*Id.*

## III. MASTER'S LIABILITY FOR INJURIES TO SERVANT.

#### (A) Nature and Extent in General.

§87½. Owing to the great increase of matter heretofore classified to this section, we have made a new subdivision, consisting of § number sections 346-420, at the end of this topic, where the matter in this and future index digests will be found.

§91 (Tex.Civ.App.) Employer was not negligent in permitting boy almost 16 years of age, who had never before worked about machinery, to work as off-bearer at sander machine with duty of taking boards out of machine after they had passed between unguarded rollers, where he was not required to put his hand closer than 12 inches to rollers and where he realized the danger of getting hand between rollers.—*Bering Mfg. Co. v. Sedita*, 216 S. W. 639.

#### (B) Tools, Machinery, Appliances, and Places for Work.

§107(6) (Mo.App.) Where artificial light is necessary to render safe the place where servant is required to work, the failure of the master to exercise ordinary care to provide such light renders him liable for consequent injuries.—*Baldwin v. Hanley & Kinsella Coffee Co.*, 216 S. W. 998.

#### (E) Fellow Servants.

§180(5) (Mo.) A locomotive engineer is the railroad's vice principal, and, where his negligence in not having sufficient water in the boiler results in an explosion causing the fireman's death, the railroad is liable for damages under the federal Employers' Liability Act (U. S. Comp. St. §§ 8657-8665).—*McCord v. Schaff*, 216 S. W. 320.

§201(2) (Ky.) The negligent act of a fellow servant becomes the negligence of the master,

where the servant is doing an act with the knowledge of the master's foreman and practically under his supervision.—*Flummer's Adm'r v. Tri-State Telephone Co.*, 216 S. W. 133.

(F) Risks Assumed by Servant.

☞205(5) (Ky.) A grain tank sweeper ordered to clean a tank with the assurance of his superintendent that it was so nearly empty as to be safe had the right to assume that the superintendent had inspected it and that it was reasonably safe.—*White's Adm'r v. Kentucky Public Elevator Co.*, 216 S. W. 837.

☞222(2) (Mo.App.) If the danger of carrying a tie to top of a steep and slippery embankment with insufficient help was not such as to threaten immediate injury, and the servant by reason of his foreman's order was led to believe that he could carry his part by the use of care, and he proceeded to do the work with the exercise of care, he is not barred from recovering.—*Tull v. Kansas City Southern Ry. Co.*, 216 S. W. 572.

☞226(1) (Mo.) Assumption of risk is not a proper plea to an action founded on the negligence of a master.—*Doody v. California Woolen Mills Co.*, 216 S. W. 531.

☞226(1) (Mo.App.) A servant does not assume the risk of the master's negligence.—*Tull v. Kansas City Southern Ry. Co.*, 216 S. W. 572.

(G) Contributory Negligence of Servant.

☞246(3) (Mo.) Where a servant was in imminent danger, his conduct in trying to save a fellow workman will not be attributed to him as culpable, or render him guilty of contributory negligence.—*Doody v. California Woolen Mills Co.*, 216 S. W. 531.

(H) Actions.

☞250¾. Owing to the great increase of matter heretofore classified to this section, we have made a new subdivision, consisting of ☞ number sections 346-420, at the end of this topic, where the matter in this and future index digests will be found.

☞262(4) (Mo.) In order that contributory negligence may be of any avail as a defense to an action by a servant for personal injuries, it must be properly pleaded in the answer, unless it appears from the plaintiff's own evidence as a matter of law.—*Doody v. California Woolen Mills Co.*, 216 S. W. 531.

A master's plea that servant's injuries "were caused solely by and are due directly to his own carelessness in moving and handling the carboy mentioned in plaintiff's petition, and all of which conduct of plaintiff contributed directly to his injury, if any," was only a plea of contributory negligence to the manner in which plaintiff handled the carboy, and was not a plea that plaintiff was guilty of contributory negligence in stepping into a hole in the floor.—*Id.*

☞264(12) (Mo.App.) Where the petition in an action for the death of a fireman, scalded by steam, alleged that the steam line from the boiler to the engine was defective, and so loosely connected as to come loose, proof that a pipe underneath the boiler leading to the pump and mud pipe became disconnected, and allowed the escape of steam, will not support recovery.—*McCullough v. W. H. Powell Lumber Co.*, 216 S. W. 803.

☞270(10) (Mo.App.) In servant's action for injuries caused by walking into elevator shaft, evidence as to light in basement usually burning and not being lighted at time of injury was admissible to show lack of master's care to safely light place of work and to rebut charge of contributory negligence of servant.—*Baldwin v. Hanley & Kinsella Coffee Co.*, 216 S. W. 998.

☞274(4) (Mo.App.) In servant's action for injuries caused by walking into elevator shaft evidence, as to light in basement usually burning and not being lighted at time of injury,

was admissible to show lack of master's care to safely light place of work and to rebut charge of contributory negligence of servant.—*Baldwin v. Hanley & Kinsella Coffee Co.*, 216 S. W. 998.

☞274(9) (Ky.) Evidence that it was a custom of defendant's grain tank sweepers to take off the rope used for the purpose of getting up and down was competent for the purpose of showing whether deceased, engulfed by grain, was negligent in removing the rope from his body after reaching the bottom of the tank.—*White's Adm'r v. Kentucky Public Elevator Co.*, 216 S. W. 837.

☞285(12) (Ky.) Whether negligence in cutting tree, which fell on telephone wires and caused a rotten telephone pole to fall on and kill a workman not warned of the danger was the proximate cause of death, and the result one which should have been foreseen, held for the jury.—*Flummer's Adm'r v. Tri-State Telephone Co.*, 216 S. W. 133.

☞286(8) (Tex.Civ.App.) Where the proof showed that a sander machine without cover, over the rollers in which employe's hand was caught, was the only character of sander machine then built, that a similar machine was used by others in the same business, and that no machine was protected by a screen over the rollers, there was no inference of negligence in failure to have screen, and submission of question of such negligence to jury was error.—*Bering Mfg. Co. v. Sedita*, 216 S. W. 639.

☞286(32) (Tex.Civ.App.) In an action for injuries to a car inspector struck by a locomotive while he was looking under a car, evidence held to warrant the submission of the issue as to whether the locomotive was operated without proper lookouts.—*El Paso & S. W. Ry. Co. v. Havens*, 216 S. W. 444.

☞286(39) (Ky.) In an action against an elevator company for the death of a grain tank sweeper, whether defendant's superintendent was negligent in ordering deceased to clean the tank with the assurance that it was nearly empty held, under the evidence, for the jury.—*White's Adm'r v. Kentucky Public Elevator Co.*, 216 S. W. 837.

☞286(40) (Ky.) In action for death of a servant caused by the cutting of a tree, which fell upon telephone wires, causing a telephone pole to fall upon the deceased, whether defendant was negligent in allowing the tree to be cut without warning held for the jury.—*Flummer's Adm'r v. Tri-State Telephone Co.*, 216 S. W. 133.

☞287(4) (Mo.) In an action under the federal Employers' Liability Act (U. S. Comp. St. §§ 8657-8665) for the death of a locomotive fireman in an explosion, evidence held sufficient to go to the jury on the question as to the engineer's negligence in not having sufficient water in the boiler.—*McCord v. Schaff*, 216 S. W. 320.

☞288(12) (Ky.) Whether the danger from going into a dimly lighted and dusty grain tank with the assurance that it was nearly empty was apparent to an employe directed to clean it held a jury question.—*White's Adm'r v. Kentucky Public Elevator Co.*, 216 S. W. 837.

☞288(16) (Mo.App.) Where from the evidence jury could say that plaintiff fell by reason of not having sufficient help to carry a tie up a steep and slippery embankment in obedience to his foreman's order, he did not assume the risk as a matter of law.—*Tull v. Kansas City Southern Ry. Co.*, 216 S. W. 572.

☞289(19) (Mo.App.) Evidence held to present jury question of servant's contributory negligence in walking into unlighted elevator shaft, the freight elevator having been removed from position in which plaintiff had left it shortly before.—*Baldwin v. Hanley & Kinsella Coffee Co.*, 216 S. W. 998.

☞289(28) (Ky.) Whether deceased was guilty of contributory negligence in releasing rope around his body after reaching the bottom of

For cases in Dec.Dig. & Am.Dig. Key-No.Series & Indexes see same topic and KEY-NUMBER.

deep grain tank which he had been directed to clean *held* a question for the jury.—*White's Adm'r v. Kentucky Public Elevator Co.*, 216 S. W. 837.

⚡291(1) (Mo.App.) Instruction on master's liability for negligence resulting in servant's injuries *held* not so lengthy and awkward as a whole as to be fatally confusing.—*Baldwin v. Hanley & Kinsella Coffee Co.*, 216 S. W. 998.

⚡291(13) (Mo.App.) In action by servant for injuries caused by walking into elevator shaft, evidence of promiscuous operation of elevator by defendant's employes notwithstanding section 2097, c. 28, Rev. Code of St. Louis, Ordinance No. 28653, requiring employment of elevator operators with certain qualification, *held* to warrant instruction submitting violation of ordinance as proximate cause of injury.—*Baldwin v. Hanley & Kinsella Coffee Co.*, 216 S. W. 998.

⚡291(14) (Mo.) In action by a servant for injuries caused by acid splashing from a carboy when a fellow servant helping plaintiff carry the carboy slipped or stepped into a hole in the floor, where there was evidence that the injury was accidental, it was error to refuse defendant's instruction submitting whether or not the injury was due to a pure accident.—*Doody v. California Woolen Mills Co.*, 216 S. W. 531.

#### IV. LIABILITIES FOR INJURIES TO THIRD PERSONS.

##### (B) Work of Independent Contractor.

⚡316(1) (Ark.) A lease of a cotton gin, requiring lessee to pay rent and keep the gin running, and to be responsible for damages, and requiring the owner to "furnish all repairs necessary for the successful operation of the plant," binds the owner to make all repairs, so that he cannot escape liability for injury to third persons resulting from a boiler explosion, on the ground that lessee was an independent contractor.—*Collison v. Curtner*, 216 S. W. 1059.

#### V. INTERFERENCE WITH THE RELATION BY THIRD PERSONS.

##### (A) Civil Liability.

⚡341 (Mo.App.) Where officers of labor union through business agent resorted to threats of strikes, etc., which deprived a company of its free will in the matter of carrying out its contract with a former member of the union who had gone into business for himself and then sold out to the company on condition that it should employ him, the acts of the officers of the union were the proximate cause of damage to the former member thus deprived of employment, and gave him a cause of action against them.—*Clarkson v. Laiblan*, 216 S. W. 1000.

In an action by a former member of a labor union against its officers for damages through having procured the member's employing company to discharge him under threats of strikes, etc., evidence as to the rules, customs, and usages of the union, and as to the authority of its business agent, *held* sufficient to sustain the allegations of the petition.—*Id.*

Verdict for \$1,200 punitive and \$55 compensatory damages rendered against officers and members of a labor union in favor of a former member on account of the union's wrongful acts in inducing his employing company to discharge him and breach its contracts with him *held* not excessive.—*Id.*

#### VI. WORKMEN'S COMPENSATION ACTS.

##### (A) Nature and Grounds of Master's Liability.

⚡356 (Tex.Civ.App.) Defense of assumed risk is not available to employer who was not a subscriber under the Employers' Liability 216 S.W.—76

Act (Acts 1913, c. 179; Vernon's Sayles' Ann. Civ. St. 1914, §§ 5246h-5246zzzz).—*Bering Mfg. Co. v. Sedita*, 216 S. W. 639.

⚡361 (Tex.Civ.App.) Under Workmen's Compensation Act (Vernon's Ann. Code Cr. Proc. Supp. 1918, arts. 5246-2, 5246-82), naming employes entitled to its benefits and excluding officers and directors of corporations, one under contract of hire, who is injured in the performance of his duties as superintendent and head miller, is not excluded from the benefits of the act, though he is also a director of the corporation employing him.—*Millers' Mut. Casualty Co. v. Hoover*, 216 S. W. 475.

⚡382 (Tex.Civ.App.) The fact that an injured employe may have obtained compensation for total incapacity from another master for a subsequent injury to which he was not entitled cannot defeat his right to recover compensation for total disability in an action against the insurer of the first master, the fraud, if any, being on the second, and not the first master.—*Home Life & Accident Co. v. Corsey*, 216 S. W. 464.

##### (B) Compensation.

⚡385(5) (Tex.Civ.App.) The phrase "total incapacity for work," in the Workmen's Compensation Act (Vernon's Sayles' Ann. Civ. St. 1914, arts. 5246h-5246zzzz), does not imply an absolute disability to perform any kind of labor, and a person disqualified from performing the usual tasks of a workman in such a way as to render him unable to procure and retain employment is ordinarily regarded as being totally incapacitated.—*Home Life & Accident Co. v. Corsey*, 216 S. W. 464.

⚡389 (Tex.Civ.App.) Under Workmen's Compensation Act, § 6a, authorizing an injured employe to either sue a third party injuring him or seek compensation, but not to do both, and providing that insurer paying compensation should be subrogated to the employe's rights and should pay any sum recovered in excess of the compensation to the injured employe, an employe after receiving compensation may sue a third party upon the insurer's failure or refusal to sue, and recover full damages minus the compensation previously received.—*Wm. Cameron & Co. v. Gamble*, 216 S. W. 459.

##### (C) Proceedings.

⚡405(6) (Tex.Civ.App.) Evidence *held* sufficient to support a finding that injured servant, claiming compensation under Workmen's Compensation Act (Vernon's Sayles' Ann. Civ. St. 1914, arts. 5246h-5246zzzz), suffered total incapacity for the period stated in the finding.—*Home Life & Accident Co. v. Corsey*, 216 S. W. 464.

⚡410 (Tex.Civ.App.) In an employe's action against a third party instituted after the employe had received workmen's compensation, an instruction that the jury should deduct the compensation paid for whatever damages they may have found is proper, since a failure to make this deduction would result in double damages.—*Wm. Cameron & Co. v. Gamble*, 216 S. W. 459.

⚡411 (Tex.Civ.App.) In an action by an injured servant against the insurer of his master, the servant is not entitled to recover compensation at a greater rate per week than that prayed for in the petition.—*Home Life & Accident Co. v. Corsey*, 216 S. W. 464.

#### MAXIMUM QUANTITY.

See Sales, ⚡1.

#### MECHANICS' LIENS.

See Trial, ⚡149.

#### II. RIGHT TO LIEN.

##### (C) Agreement or Consent of Owner.

⚡71 (Mo.App.) Where contract for improvements was made with husband of owner, it was

necessary for mechanic's lien claimants, under Laws 1911, p. 314, §§ 8235a-8235g, to show some agency connection in the nature of a moving cause reaching from the improvements back to the owner of the land.—*Berkshire v. Holcker*, 216 S. W. 556.

Mere passive permission and consent of wife where husband contracts for a building upon her land does not render the husband an agent for the wife within the meaning of the lien statute (Laws 1911, p. 314, §§ 8235a-8235g), as there must be an active and moving cause on the part of the owner to procure the erection of improvements in order to subject the land to a lien.—*Id.*

§76 (Mo.App.) In an action under Laws 1911, p. 314, §§ 8235a-8235g, to establish a materialman's lien, the owner of the land in question was not estopped to deny that she knowingly executed a trust deed on the land in question; such document being introduced in evidence as tending to show that her husband, who contracted for the construction of the building in his own name, was acting as her agent.—*Berkshire v. Holcker*, 216 S. W. 556.

(E) **Subcontractors, and Contractors' Workmen and Materialmen.**

§114(2) (Tex.Civ.App.) Where no installment of the price of the work was due the contractor for work done when a materialman or a mechanic gave notice to the owner's agents for the purpose of receiving such notice, the materialman or mechanic secured no right against the owner or the property, through the giving of such notice, accompanied by presentation of an order for payment from the contractor, claimed to operate as an assignment.—*Leeper-Curd Lumber Co. v. Barbuzza*, 216 S. W. 216.

**VII. ENFORCEMENT.**

§279 (Tex.Civ.App.) The burden was on claimants of liens as a materialman and as a mechanic to establish, not only the verity of their claims, but the existence of their liens under the contractor's order on funds in the hands of the owner or his agent.—*Leeper-Curd Lumber Co. v. Barbuzza*, 216 S. W. 216.

§288(2) (Mo.App.) In an action under Laws 1911, p. 314, §§ 8235a-8235g, to establish a materialman's lien, whether husband in contracting for the erection of a building on wife's land was acting as her agent *held* for the jury, although she knew that he was building the house on her land and at his request looked over the plans and made suggestions, and unknowingly signed a deed of trust to raise money to defray the expense of construction.—*Berkshire v. Holcker*, 216 S. W. 556.

Facts shown that a wife passively consented to the construction of a building by the husband in his own name on her land *held* not sufficient, as a matter of law, to create an estoppel to deny that he was acting as her agent in an action under Laws 1911, p. 314, §§ 8235a-8235g, to establish a materialman's lien.—*Id.*

§289 (Mo.App.) In an action under Laws 1911, p. 314, §§ 8235a-8235g, to establish materialman's lien, on question whether husband entering into a contract in his own name for the construction of a house on wife's land was her agent, an instruction that the sole issue was whether the contract was entered into by the husband for and on behalf of himself or on behalf of his wife, and, if the contract was on behalf of himself and as his own individual contract, then verdict should be that the husband was not the agent of the wife, was not improper as narrowing the issue or as withdrawing from consideration of the jury evidence covering the general aspects of the question.—*Berkshire v. Holcker*, 216 S. W. 556.

In an action to establish a materialman's lien, question being whether husband in erecting a house was acting as agent for his wife, an instruction that jury should find that the husband was agent for the wife if he "was au-

thorized by his wife to erect or cause to be erected the building," etc., was properly refused as misleading, where there was no question that the wife knew that the husband was building the house and was passively willing to allow him to do so.—*Id.*

§309 (Mo.App.) Although the lien act of 1911 denominates a suit to establish a mechanic's lien "an equitable action," findings of fact of the jury on conflicting evidence cannot be disturbed by the court, in view of Laws 1911, p. 316, § 8235f.—*Berkshire v. Holcker*, 216 S. W. 556.

**MEMORANDA.**

See Appeal and Error, §527.

**MILITARY LAW.**

See Army and Navy.

**MINES AND MINERALS.**

See Appeal and Error, §43; Champerty and Maintenance, §7; Customs and Usages, §18; Evidence, §271; Life Estates, §12.

**II. TITLE, CONVEYANCES, AND CONTRACTS.**

(B) **Conveyances in General.**

§55(1) (Ky.) Mineral deed, describing land as grantor's land in specified county, on the waters of specified creek and fork, adjoining lands of named persons, and as being the 300 acres bought from named person, *held* to contain sufficient description, it being sufficient for identification of land.—*Virginia Iron, Coal & Coke Co. v. Combs*, 216 S. W. 846.

(C) **Leases, Licenses, and Contracts.**

§74 (Tex.Civ.App.) In purchasing the surface rights of land from lessors of the oil and gas rights to a company and its trustees, plaintiff must be presumed to have known that the trustee lessees had the right to sink a well on his lot, and that thereby he and his family, if in occupancy, would be inconvenienced and perhaps endangered during drilling.—*Grimes v. Goodman Drilling Co.*, 216 S. W. 202.

Where plaintiff purchased the surface rights of a lot burdened with the terms of an oil and gas lease, he cannot complain of conditions produced by the trustee lessees and others such as are usual and customary during the drilling of an oil well.—*Id.*

§77 (Tex.) An oil lease, providing that if oil is found in paying quantities in the first well the lessee will in 30 days begin boring a second well on some other acre of the tract and continue to bore as developments may justify, until at least five or six wells have been completed, or the acre on which lessee has failed to drill a well reverts to lessor, is ambiguous, and will not sustain a forfeiture because of failure to bore all of five wells upon different acres.—*Decker v. Kirlicks*, 216 S. W. 385.

§78(1) (Tex.Civ.App.) Under written oil and gas lease between lot owners and trustees of oil company, trustee lessees *held* not precluded from drilling more than one well on the lots, or from drilling as many wells as appeared reasonably necessary to develop the land for oil and gas, provided the drilling of any subsequent wells would not necessitate the removal of any of the houses on the land when the lease contract was made.—*Grimes v. Goodman Drilling Co.*, 216 S. W. 202.

**MINORS.**

See Infants.

**MISDEMEANOR.**

See Indictment and Information, §41, 59.

For cases in Dec.Dig. & Am.Dig. Key-No.Series & Indexes see same topic and KEY-NUMBER

## MONOPOLIES.

See Contracts, ¶140.

## II. TRUSTS AND OTHER COMBINATIONS IN RESTRAINT OF TRADE.

¶23 (Ky.) Contract, whereby plaintiff agreed to sell seed to defendant, *held* independent of agreement between defendant and others to suppress and restrain competition in trade of buying and selling seed, so that, where plaintiff before date fixed for performance confessed breach and agreed on the amount of damages and paid the same, he cannot recover payments made; the contract of sale not being in restraint of trade under Ky. St. § 8918.—Scobee v. Brent, 216 S. W. 76.

## MORTGAGES.

See Appeal and Error, ¶9, 79, 80, 586; Army and Navy, ¶84; Brokers, ¶61; Chattel Mortgages; Equity, ¶442; Evidence, ¶273, 354, 383; Guardian and Ward, ¶87, 90; Homestead, ¶108; Husband and Wife, ¶6, 270; Judgment, ¶744; Pleading, ¶406; Principal and Agent, ¶111; Trial, ¶232; Usury, ¶55; Vendor and Purchaser, ¶239; Venue, ¶5.

### I. REQUISITES AND VALIDITY.

#### (A) Nature and Essentials of Conveyances as Security.

¶6 (Ky.) Where there is a doubt whether a writing is a mortgage or a conditional sale, that construction will be adopted which is most favorable to the debtor, and the instrument held to be a mortgage.—Sutton v. Hardison, 216 S. W. 609.

Where a mortgagor conveyed to the mortgagee by deed absolute upon its face for a reasonably adequate consideration, and the mortgagee later upon the same day signed a contract by which he agreed to convey the land to the mortgagor upon his making certain installment payments, but providing that, if he failed to do so he should be deemed a renter, etc., the supplemental instrument was merely a conditional sale contract, and the transaction did not constitute a mortgage.—Id.

¶8 (Tex.Com.App.) A deed in trust to secure a debt is in legal effect a mere mortgage with power of sale.—Thornton v. Goodman, 216 S. W. 147.

¶24 (Tex.Com.App.) Interest in the debt secured does not disqualify one from acting as trustee in a trust deed.—Thornton v. Goodman, 216 S. W. 147.

A mortgagee may himself act as trustee in a trust deed.—Id.

¶37(2) (Ky.) A deed absolute upon its face may be shown by parol evidence to have been intended as a mortgage, without alleging fraud, accident, or mistake.—Sutton v. Hardison, 216 S. W. 609.

#### (B) Form and Contents of Instruments.

¶43 (Mo.App.) If real estate is purchased by a person under a fictitious name, the recorded deed being in such name, a mortgage in such name is good.—Windle v. Citizens' Nat. Bank, 216 S. W. 1020.

## III. CONSTRUCTION AND OPERATION.

#### (B) Parties and Debts or Liabilities Secured.

¶117 (Mo.) Provision of deed of trust securing a principal note and several interest notes that, when one note should remain unpaid five days after maturity, all the notes should become due and payable, at option of holder, does not extend time of payment of principal note and last interest note maturing at same time, being applicable only to the pre-

ceding interest notes.—Hurst Automatic Switch & Signal Co. v. Trust Co. of St. Louis, 216 S. W. 954.

#### (C) Property Mortgaged, and Estates of Parties Therein.

¶137 (Mo.) A mortgage invests the mortgagee with a legal title.—Hurst Automatic Switch & Signal Co. v. Trust Co. of St. Louis, 216 S. W. 954.

¶138 (Mo.) A mortgage invests the mortgagee with a legal title, and like title passes by deed of trust in the nature of a mortgage to the trustee.—Hurst Automatic Switch & Signal Co. v. Trust Co. of St. Louis, 216 S. W. 954.

## IV. RIGHTS AND LIABILITIES OF PARTIES.

¶209 (Mo.) Duties of trustee under deed of trust require the utmost good faith and impartiality on his part as regards both the debtor and the creditor, and likewise the grantee of the equity of redemption.—Hurst Automatic Switch & Signal Co. v. Trust Co. of St. Louis, 216 S. W. 954.

¶209 (Tex.Com.App.) The effort of a trustee in a trust deed, as attorney of beneficiary, to collect the note secured thereby was not incompatible with his duty as trustee to make a sale in the event of its nonpayment.—Thornton v. Goodman, 216 S. W. 147.

The fact that a trustee under a trust deed executed to secure a debt acts as attorney for the beneficiary in attempting to collect the debt makes it the duty of the court to scrutinize very closely every act of the trustee in the execution of the trust, but no presumption of fraud can arise from the mere relation.—Id.

## V. ASSIGNMENT OF MORTGAGE OR DEBT.

¶235 (Mo.App.) Where deed of trust is executed to secure only one note, but duplicate notes conforming to deed of trust are executed by landowner, the one first negotiated to an innocent purchaser carries with it the mortgage security and first lien on the land.—Burress v. Richardson, 216 S. W. 800.

## VII. PAYMENT OR PERFORMANCE OF CONDITION, RELEASE, AND SATISFACTION.

¶308 (Ark.) Where a contractor executed a mortgage to protect a surety on his bond, *held*, that the fact that the surety, which had made payments, etc., filed an intervention asserting rights in a judgment recovered by the contractor against the municipality, for which he was performing the work, was not an abandonment by the surety of its mortgage lien.—Peay v. Southern Surety Co., 216 S. W. 722.

## IX. FORECLOSURE BY EXERCISE OF POWER OF SALE.

¶341 (Mo.) Power in deed of trust for the sheriff to make sale on refusal or inability of the trustee to act and request of the legal holder of the note does not become operative on mere refusal of trustee to act.—Hurst Automatic Switch & Signal Co. v. Trust Co. of St. Louis, 216 S. W. 954.

¶353 (Mo.) The trustee under deed of trust being called on by the holder of the secured note to collect it out of the mortgaged property, his first duty was to notify the holder of the equity of redemption.—Hurst Automatic Switch & Signal Co. v. Trust Co. of St. Louis, 216 S. W. 954.

¶360 (Mo.) Duties of trustee under deed of trust require the utmost good faith and impartiality on his part as regards both the debtor and the creditor, and likewise the grantee of the equity of redemption; and he cannot shake off his responsibility by simple refusal to act, nor impose it on the sheriff, who by pro-



vision of the deed of trust takes only the naked power of sale on condition, among others, that the trustee refuse to perform its covenant.—Hurst Automatic Switch & Signal Co. v. Trust Co. of St. Louis, 216 S. W. 954.

—§362 (Tex.Com.App.) A mortgagee may himself act as trustee in a trust deed, and become the purchaser at a sale of the property.—Thornton v. Goodman, 216 S. W. 147.

—§369(3) (Mo.) The purchasers at sale under deed of trust discouraging bidding and thereby obtaining the property for a less amount commit a wrong against the holder of the equity of redemption, the advantage of which equity will not permit them to retain.—Hurst Automatic Switch & Signal Co. v. Trust Co. of St. Louis, 216 S. W. 954.

Contract between one planning to purchase at sale under deed of trust, and who did become the purchaser, and holder of second mortgage note, that the latter should not bid, was an unlawful agreement to suppress bidding, sufficient to authorize the owner of the equity of redemption to relief against the sale.—Id.

—§369(3) (Tex.Com.App.) A sale under a trust deed cannot be avoided merely because of inadequacy of price and an offer on the part of the grantors in the trust deed to pay the debt and expenses incident to the sale, even though the beneficiary under the trust deed was the purchaser and has not disposed of the property.—Thornton v. Goodman, 216 S. W. 147.

—§369(7) (Mo.) That one who contracted with the purchaser at sale under deed of trust that he would not bid at the sale had financial ability to purchase will, in the absence of evidence to the contrary, be presumed, in suit to set aside the sale for fraud.—Hurst Automatic Switch & Signal Co. v. Trust Co. of St. Louis, 216 S. W. 954.

Evidence in suit by owner of equity of redemption to avoid sale under deed of trust held to show an arrangement, existing for some time before the sale, between the trustee and the purchaser, that the latter should become the purchaser, and that the former would assist him by discouraging competition or by refraining from any effort to sell the property at its real value.—Id.

## X. FORECLOSURE BY ACTION.

### (1) Judgment or Decree and Execution.

—§497(1) (Tex.Civ.App.) In a suit on a note secured by deed of trust where the prayer is for judgment for plaintiff for its debt and for judgment of foreclosure for plaintiff and the trustee, and plaintiff is awarded a recovery of the debt and foreclosure of the lien is provided for in general terms without stating that such foreclosure is awarded plaintiff and the trustee, foreclosure will be presumed to have been awarded both plaintiffs.—Gregory v. South Texas Lumber Co., 216 S. W. 420.

### (J) Sale.

—§524 (Ark.) In view of Kirby's Dig. § 3262, an execution can be raised on a bond executed by purchaser at sale of mortgaged land in the manner provided in sections 3260, 3261, without an order of the court, and the execution of such a bond is wholly independent of a sale made by a chancery court in the enforcement of a decree of foreclosure, and such court, after a sale under execution, cannot confirm the sheriff's sale, or appoint a commissioner to make a deed, or issue a writ of possession.—Sumpter v. Hot Springs Savings, Trust & Guaranty Co., 216 S. W. 311.

—§529(3) (Tex.Civ.App.) A complaint setting out that one of defendants represented to plaintiffs that he would buy in the entire property which was being sold to foreclose a mortgage lien and allow them to redeem, etc., held to state a good cause of action against such defendant, who did not carry out the agreement to have the sale set aside as to him; it appearing

that by reason of the agreement competition was stifled.—Chandler v. Young, 216 S. W. 484. —§530 (Tex.Civ.App.) Where mortgagors established a homestead on part of the mortgaged premises, and on foreclosure one of the defendants agreed that he would buy in the property if sold as a whole and allow the mortgagors to redeem, but did not carry out his agreement, held the mortgagors were not, where the land was resold, etc., entitled to have that portion exclusive of their homesteads sold in separate parcels pursuant to Rev. St. 1911, art. 3756.—Chandler v. Young, 216 S. W. 484.

## MOTIONS.

See Appeal and Error, —9; Pleading, —360; Process, —155.

## MOTORCYCLES.

See Municipal Corporations, —706.

## MUNICIPAL CORPORATIONS.

See Breach of the Peace, —1; Constitutional Law, —206; Counties; Eminent Domain, —237, 246; Estoppel, —92; Evidence, —25; Health, —3; Highways, —90; Interest, —66; Judgment, —429; Negligence, —92; Schools and School Districts; Statutes, —84; Street Railroads; Taxation, —510; Trial, —251, 351; Waters and Water Courses, —118, 203.

## I. CREATION, ALTERATION, EXISTENCE, AND DISSOLUTION.

### (B) Territorial Extent and Subdivisions. Annexation, Consolidation, and Division.

—§29(3) (Ky.) That residents or owners of property in territory sought to be annexed to city of fourth class will be compelled to pay taxes to city is not, considering the benefits received, the character of injury contemplated by Ky. St. § 3483, providing that annexation will be denied upon objection of a majority of the resident voters in territory to be annexed or owners of property if there be no resident voters, if change will cause material injury to owners of real estate in the limits of the proposed extension.—City of Ludlow v. Ludlow, 216 S. W. 596.

In proceedings under Ky. St. § 3483, to annex territory to city of the fourth class, where territory proposed to be annexed was on highway and could not be used for agricultural purposes except as pasture land, with which use annexation would not interfere, and where land was suitable for municipal purposes and with benefits of annexation would appeal to homeseekers and investors as property fronting on highway, held, that annexation would not result in material injury to owners of the land; the enhanced valuation offsetting amount of taxes to city.—Id. —§29(3) (Ky.) Under Ky. St. §§ 2761-2764, an annexation of territory to a city of the first class, where 75 per cent. of the freeholders of the territory sought to be annexed have not remonstrated, there can be no annexation, unless it appears that the annexation will be to the interest of the city, and also that it will cause no manifest injury to the persons who own real estate within the territory sought to be annexed.—Langhan v. City of Louisville, 216 S. W. 1082.

—§33(9) (Ky.) In a proceeding to resist an annexation of territory to a city of the first class, under Ky. St. §§ 2761-2764, instructions for the petition, if the jury believed that the annexation will not be for the interest of the city "and" will cause injury to the territory sought to be annexed, held erroneous, since either ground would have been sufficient to defeat the annexation.—Langhan v. City of Louisville, 216 S. W. 1082.



## V. OFFICERS, AGENTS, AND EMPLOYÉS.

### (A) Municipal Officers in General.

⇒123 (Ark.) A city manager appointed, under Acts 1917, p. 568, to manage the affairs of the municipality, who has the broadest powers of supervision, is an officer, not merely an employé, an officer as distinguished from employé being of greater importance, dignity, and position, and being required to take an official oath before he assumes his office, which is a special trust or charge created by competent authority.—*McClendon v. Board of Health of City of Hot Springs*, 216 S. W. 289.

⇒124(3) (Ark.) That provision of Acts 1917, p. 568, for city manager of municipalities, that the officer need not be a resident of the city is invalid under Const. art. 19, § 3, providing that no person shall be elected or appointed to fill an office who does not possess the qualifications of an elector.—*McClendon v. Board of Health of City of Hot Springs*, 216 S. W. 289.

⇒159(5) (Tex.Civ.App.) Where a clerk of a corporation court was removed by the mayor September 10th, and the mayor filed his reasons for the removal on September 21st, and the removal was approved by the council on September 23d, the removal was effective as of September 23d, even though the removal on September 10th was improper by reason of the failure to have reasons for the removal filed at such time.—*Braden v. City of San Antonio*, 216 S. W. 282.

⇒159(6) (Tex.Civ.App.) In an action by a removed city officer to recover salary, the burden is upon such officer, if so claiming, to show that reasons for his dismissal, filed by the mayor in compliance with the provision of the city charter, were not the true reasons for the dismissal.—*Braden v. City of San Antonio*, 216 S. W. 282.

## VII. CONTRACTS IN GENERAL.

⇒244(1) (Ky.) Power of board of trustees of a town of the sixth class to make contracts is derived from the statutes constituting the charters of such towns, and a contract on a subject over which the town has no statutory power to contract, or entered into in a manner other than that prescribed by such statutes, is void so far as concerns the town.—*Staebler & Gregg v. Town of Anchorage*, 216 S. W. 348.

⇒249 (Ky.) There can be no recovery against a municipal corporation upon an implied contract to pay for services because of benefits received.—*Staebler & Gregg v. Town of Anchorage*, 216 S. W. 348.

## IX. PUBLIC IMPROVEMENTS.

### (A) Power to Make Improvements or Grant Aid Therefor.

⇒282(1) (Ky.) The power to order a street improved carries with it, as a necessary incident, the additional power to adopt such plans and specifications as are reasonably necessary to make the street not only safe and suitable, but substantial and permanent.—*Wendt v. Tucker*, 216 S. W. 61.

### (C) Contracts.

⇒339(2) (Ky.) Contract for street improvement at cost of more than \$100, entered into with lowest bidder by chairman of board of trustees of a town of the sixth class, which was a material departure from the contract for which bids had been invited and from the contract the board had authorized its chairman to make, in that it permitted town to release contractor from use of "Tarvia X" binder, provided for by the ordinance and embraced in proposal, and to substitute asphalt binder to be furnished by city, was void under Ky. St. §§ 3706, 3707.—*Staebler & Gregg v. Town of Anchorage*, 216 S. W. 348.

⇒346 (Mo.App.) The city of St. Louis held to have power to enter into a contract for construction of a sewer which provided that the contractor should pay "the proper parties all amounts due for material and labor used and employed in the performance thereof," notwithstanding that the contractor's obligations to pay materialmen were broader thereunder than the terms of Rev. St. 1909, § 1247, requiring the contractor's bond to provide for "the payment of all material used in such work and for all labor performed in such work, whether by subcontractor or otherwise."—*Hilton v. Universal Const. Co.*, 216 S. W. 1034.

⇒347(1) (Mo.App.) Under a contract and bond between a sewer contractor, the city and the surety, providing that the contractor should pay "the proper parties all amounts due for material and labor used and employed in the performance thereof," materialmen who had furnished coal consumed in the engines of the contractor and lumber used for bracing the walls of excavations and which had been subsequently lost or washed away by floods were entitled to recover; it not being necessary that the coal and lumber so furnished actually entered into the construction of the sewer, and it being sufficient that it was used and employed in the performance of the work, regardless of whether the items would have been lienable under Rev. St. 1909, § 8212.—*Hilton v. Universal Const. Co.*, 216 S. W. 1034.

⇒350 (Ky.) City, having refused to permit contractors to proceed with street improvement work under void contract, had no right to appropriate piping and tiles, which contractors had intended using in performance of contract and left upon ground of street upon discontinuance of work, since city, having repudiated contract, could not rely thereon for purpose of keeping material which would have gone into improvement.—*Staebler & Gregg v. Town of Anchorage*, 216 S. W. 348.

### (E) Assessments for Benefits, and Special Taxes.

⇒450(4) (Ark.) Where a first petition for a street and sidewalk improvement district designated it for the purpose of improving and constructing sidewalks and improving streets in the town, but the second petition, signed by a majority in value of the property owners, described the improvement by naming a less number of streets and sidewalks than those in the whole of the town or city, such substantial variance between the improvements described in the two petitions was fatal to the validity of the district.—*Stock v. Hazen Street & Sidewalk Improvement Dist.*, 216 S. W. 505.

⇒460 (Ky.) Drain and catch-basins constructed by a city as incident to a street improvement adjacent to a ravine held not a separate improvement not provided for by the ordinance, but a necessary and indispensable part of the street itself, so that their cost was properly chargeable to abutting property owners, though the ordinance did not in terms provide for them.—*Wendt v. Tucker*, 216 S. W. 61.

It is immaterial on the question whether a drain was part of a street improvement, and therefore chargeable to abutting owners, though the ordinance authorizing the improvement did not expressly provide for its construction, that such drain was laid in adjoining property instead of in the street proper.—*Id.*

⇒469(1) (Ky.) The portion of a street ordered to be improved by a city of the fourth class under Ky. St. § 3572, was the unit of the improvement, and its entire cost was chargeable against abutting owners according to the number of their front feet, though the topographical conditions made the cost at some places greater than at others.—*Wendt v. Tucker*, 216 S. W. 61.

⇒487 (Ark.) Where town and country land is assessed for the cost of a road improvement, the owner of country land can complain of no

inequalities in the assessment of town lots, except that the municipal assessments are too low as a whole.—*Wilkinson v. St. Francis County Road Improvement Dist. No. 1*, 216 S. W. 304.

## X. POLICE POWER AND REGULATIONS.

### (B) Violations and Enforcement of Regulations.

☞639(1) (Mo.App.) A prosecution for violation of a city ordinance being a civil proceeding, the sufficiency of the complaint is to be determined by the rules applicable to pleadings in other cases.—*City of Plattsburg v. Smarr*, 216 S. W. 538.

☞639(2) (Mo.App.) A complaint charging a violation of a municipal ordinance, in that plaintiff was guilty of a breach of the peace, which specified his act, consisting of an indecent proposal to a woman, as well as the ordinance, is sufficient, where the act committed and the ordinance violated were so clearly identified as to bar another prosecution.—*City of Plattsburg v. Smarr*, 216 S. W. 538.

☞641 (Mo.App.) Where defendant's own instructions failed to define terms used, he cannot complain that instructions given in behalf of the municipality, an ordinance of which he was convicted of having violated, also failed to define the terms.—*City of Plattsburg v. Smarr*, 216 S. W. 538.

☞642(3) (Mo.App.) On appeal from a conviction in the circuit court of violation of a municipal ordinance, the ordinance cannot be reviewed, where it was not included in the bill of exceptions.—*City of Plattsburg v. Smarr*, 216 S. W. 538.

Where ordinance under which plaintiff was convicted was not included in the bill of exceptions, the information cannot be held on appeal not to state an offense, unless the complaint on which information was based described acts which could not be made subject to punishment by municipality.—*Id.*

## XI. USE AND REGULATION OF PUBLIC PLACES, PROPERTY, AND WORKS.

### (A) Streets and Other Public Ways.

☞646 (Ark.) The term "public highway," in its generic sense, includes streets and alleys as well as rural roads, though it is not always so understood in the popular sense, and there is usually enough ambiguity in the use of the term to warrant examination of the context wherever used for the purpose of determining the precise meaning.—*Payne v. Road Imp. Dist. No. 1, of Marion County*, 216 S. W. 1047.

☞648 (Mo.) Where the rights of the public to land for street purposes are predicated upon user alone, the width of the way or the extent of the servitude is measured by the character of the user; for the easement cannot be broader than the user.—*City of St. Louis v. Cooper Carriage Woodwork Co.*, 216 S. W. 944.

Where public travel over tract of land of which owner was in actual occupation was not confined to a certain and well-defined line, but was variant and indiscriminately over the entire tract, including portion within extended lines of certain street, the public acquired no right of way by user to portion within extended lines of such street; the use thereof being permissive.—*Id.*

The public cannot acquire a prescriptive right to pass over land generally known over a certain and well-defined area unless its use is adverse.—*Id.*

☞654 (Mo.) While the prescriptive rights of the public cannot be conclusively admitted away by the taxing officers of the city, such acts of the municipal authorities may properly be considered as circumstances in connection with all the other facts in evidence on the issue of whether the public user was permissive

or hostile and adverse.—*City of St. Louis v. Cooper Carriage Woodwork Co.*, 216 S. W. 944.  
☞697(4) (Tex.Civ.App.) In a suit to enjoin defendants from maintaining fences or other obstructions in and upon certain streets in a named town, a petition, alleging that plaintiff was the owner of certain blocks forming part of a large body of land which had been dedicated to the public, and that all conveyances of lots had recognized the plan of dedication, and naming the streets alleged to be constructed, held sufficiently to identify the premises obstructed, since the map might be referred to, although not made a part of the petition.—*Zoeller v. Ofer*, 216 S. W. 1113.

☞705(4) (Tex.Civ.App.) If defendant caused injury to plaintiff, a jitney passenger, by collision with the jitney, by turning his automobile to the left before reaching the center of the street intersection, in violation of the traffic ordinance requirement, his act was negligence per se.—*Zucht v. Brooks*, 216 S. W. 684.

☞706(5) (Tex.Civ.App.) In action by jitney passenger for injuries from collision with defendant's automobile, evidence held to support verdict for plaintiff.—*Zucht v. Brooks*, 216 S. W. 684.

☞706(6) (Mo.App.) Where plaintiff while riding a motorcycle was struck by defendant's automobile turning across the street to enter an alley, defendant having lights, but plaintiff having none, a demurrer to the evidence held properly denied.—*Meredith v. Claycomb*, 216 S. W. 794.

☞706(7) (Mo.App.) Where plaintiff while riding a motorcycle was struck by defendant's automobile turning across the street in plaintiff's path to enter an alley, and it appeared that plaintiff carried no light, evidence merely tending to establish that he may have been guilty of contributory negligence held to make a question for the jury.—*Meredith v. Claycomb*, 216 S. W. 794.

☞706(8) (Ark.) Instruction exempting defendant from liability for injuries due to her automobile colliding with plaintiff pedestrian if defendant temporarily took her eyes off street in front to give attention to her children in the automobile was properly refused, since such act might or might not have been negligent.—*Bourland v. Baker*, 216 S. W. 707.

Instruction to effect that, if defendant operated her automobile in a negligent manner upon the street as charged in complaint of plaintiff pedestrian and his injuries were the result of said negligence, jury must find for plaintiff, did not submit issue as to liability of defendant if she was driving on wrong side of the street.—*Id.*

☞706(8) (Mo.App.) In action for personal injuries caused by a collision between plaintiff's motorcycle and defendant's automobile, wherein plaintiff alleged general and also specific acts of negligence, instructions leaving open to conjecture in what particular and when and where defendant failed to exercise the necessary high degree of care, held prejudicial.—*Meredith v. Claycomb*, 216 S. W. 794.

In an action for personal injuries in a collision between plaintiff's motorcycle and defendant's automobile wherein it appeared that plaintiff was struck while passing an alley which defendant was attempting to enter at high speed, an instruction denying recovery to plaintiff if he attempted to pass the alley after having seen defendant's machine make a turn held properly refused as disregarding plaintiff's proximity to the automobile.—*Id.*

☞706(8) (Tex.Civ.App.) If unlawful turning of defendant's automobile to left before reaching center of street intersection was cause of collision with jitney, injuring plaintiff, passenger in the jitney, it was the proximate cause, whether it was the sole cause or concurred with the jitney driver's negligence, and instruction submitting the issue whether such turning was the cause of the accident was sufficient, without

submitting the issue whether the jitney driver's negligence caused the collision.—*Zucht v. Brooks*, 216 S. W. 684.

## XII. TORTS.

### (A) Exercise of Governmental and Corporate Powers in General.

§741(1) (Tex.Civ.App.) As provisions requiring notice are in derogation of common right and should be construed with reasonable strictness and not extended by implication, the provision in the San Antonio charter that before the city should be liable for damages of any kind the person injured or some one in behalf of such person shall give written notice *held* to apply to personal injuries, and not injuries to property, as resulting from the obstruction of sewer which caused the flooding of basement of plaintiff's store, or injuries to plaintiff's automobile, which was struck by street sprinkler.—*City of San Antonio v. Pfeiffer*, 216 S. W. 207.

### (C) Defects or Obstructions in Streets and Other Public Ways.

§763(1) (Ky.) Cities have duty of exercising ordinary care to keep their streets in reasonably safe condition for public travel, such duty ordinarily extending to whole of street no matter how wide it is or what part of it is used by the public.—*City of Lancaster v. Broadbuss*, 216 S. W. 373.

Town or city, no matter how small its population, is required to exercise ordinary care to keep, not only that part of the street that has been set apart for and is customarily used by the traveling public in a reasonably safe condition, but must also exercise the same degree of care with respect to such parts of its streets as lie immediately adjacent to or in the margin of the traveled part.—*Id.*

§763(1) (Mo.App.) A city is only required to exercise reasonable and ordinary care and diligence in making its streets and sidewalks reasonably safe for the public, and is not an insurer of safety of public in use thereof.—*Francis v. City of West Plains*, 216 S. W. 808.

§807(2) (Ky.) Automobile driver who in passing wagon on street left traveled part of street and drove into portion not used by traveling public, and was injured by reason of excavation so concealed by weeds that it could not be seen from automobile, *held* not contributorily negligent, though it would not have been necessary, to have left traveled portion of street.—*City of Lancaster v. Broadbuss*, 216 S. W. 373.

§812(7) (Mo.) Notice to city that injuries to driver of wagon, due to a depression in a street, occurred "on or about" a certain date, *held* not a compliance with Acts 1913, p. 545, § 1, providing for such notices, and requiring statement of the time when the injury was received.—*Reese v. City of St. Louis*, 216 S. W. 315.

§821(13) (Mo.App.) In action against city for injuries to pedestrian sustained in stepping off sidewalk into ditch, question of whether city was negligent in failing to construct guards or siderails to prevent pedestrians from stepping off walk into ditch *held* for jury.—*Francis v. City of West Plains*, 216 S. W. 808.

§821(23) (Mo.App.) A person has a right to use a sidewalk which he knows is dangerous if he in such knowledge uses it with care to himself, such use not being contributory negligence as a matter of law, unless defect is so glaringly dangerous that no prudent person would attempt to pass over it.—*Francis v. City of West Plains*, 216 S. W. 808.

§821(24) (Mo.App.) Pedestrian, who in walking toward his home on a dark night walked along a street which he knew had a sidewalk, with no handrails, bridging a ditch, was injured by stepping off sidewalk, into ditch, was not contributorily negligent, as a matter of law, where he had intended to avoid danger by walking in middle of street, but had, be-

cause of darkness, walked upon sidewalk, and where every other street leading toward his home would have exposed him to same danger; the question being for jury.—*Francis v. City of West Plains*, 216 S. W. 808.

§822(2) (Mo.App.) In pedestrian's action against city for injuries from defective sidewalk, instruction that it was "the absolute and unqualified duty of defendant city to keep its sidewalks and streets in a reasonably safe condition" *held* erroneous, in making city an insurer, whereas it is only required to exercise reasonable and ordinary care.—*Francis v. City of West Plains*, 216 S. W. 808.

### (D) Defects or Obstructions in Sewers, Drains, and Water Courses.

§831(2) (Mo.App.) Where the proximate cause of damage to the citizen is not the governmental plan adopted by the city, but is the negligent carrying out of such plan, the city is liable, not for adopting or carrying out the plan, but for the negligent execution of it.—*Gibson v. City of St. Joseph*, 216 S. W. 50.

§845(1) (Tex.Civ.App.) As provisions requiring notice are in derogation of common right and should be construed with reasonable strictness and not extended by implication, the provision in the San Antonio charter that before the city should be liable for damages of any kind the person injured or some one in behalf of such person shall give written notice *held* to apply to personal injuries, and not injuries to property, as resulting from the obstruction of sewer which caused the flooding of basement of plaintiff's store, or injuries to plaintiff's automobile which was struck by street sprinkler.—*City of San Antonio v. Pfeiffer*, 216 S. W. 207.

§845(2) (Mo.App.) In action against a city for damages from overflow of surface water caused by alleged negligent construction of sewer, where school board had filled in grounds near point of overflow as protection against water in times of flood, court properly refused to require that school board be made a party, under Rev. St. 1909, § 8862, the school board not having been negligent, having merely exercised its rights to protect its property from overflowing surface water.—*Gibson v. City of St. Joseph*, 216 S. W. 50.

§845(5) (Mo.App.) In action against city for damages from overflow of surface water caused by alleged negligent construction of sewer, question of city's negligence *held* for jury.—*Gibson v. City of St. Joseph*, 216 S. W. 50.

## XIII. FISCAL MANAGEMENT, PUBLIC DEBT, SECURITIES, AND TAXATION.

### (D) Taxes and Other Revenue, and Application Thereof.

§957(2) (Ky.) Under second Ky. Const. the Legislature did not have authority to confer upon a city the power to exempt property from taxation in view of Bill of Rights, § 1, providing against special privileges.—*Purcell v. City of Lexington*, 216 S. W. 599.

§967(1) (Ky.) The city in disposing of or leasing its property for valuable consideration could not as a gratuity extend an exemption of taxation to its grantees or lessees.—*Purcell v. City of Lexington*, 216 S. W. 599.

A 99-year lease by a city of certain lands with perpetual privileges of renewal *held* not to show that the exemption from taxation therein was granted to the lessees for a reasonably adequate consideration, even at the date of the grant, and particularly now when the taxes on the value of the leasehold exceed the entire annual rentals under the lease.—*Id.*

§975 (Mo.App.) As between two or more general city tax bill liens, the last one in point of time is the superior in point of claim for sat-

isfaction.—Missouri Real Estate & Loan Co. v. Burri, 216 S. W. 570.

Lien founded on general taxes levied for the support of the city held superior to special improvement tax bill lien, though subsequent in point of time.—Id.

§978(8) (Ky.) Ky. St. § 3166, being a part of the charter of cities of the second class, only defines the duties of the city solicitor, and does not limit the powers of the city with reference either to the institution of actions or the employment of counsel, and as section 3187 permits a city to bring direct action in its own name by its solicitor, attorney, or other authorized agent, it may bring an action on the relation of the back tax assessor.—Purcell v. City of Lexington, 216 S. W. 599.

§980(3) (Tex.Civ.App.) In view of Houston City Charter of 1905, art. 2, § 2, providing no ordinance shall be enacted inconsistent with, nor shall the city exercise powers prohibited by, general laws or the Constitution and article 3, § 8, providing that on tax foreclosure an order of sale shall be issued and the land sold "as in other cases of foreclosure," and Vernon's Sayles' Ann. Civ. St. 1914, art. 2000, excepting judgments against executors and administrators and guardians, and article 2004, providing for payment of such taxes as a claim against the estate, a sale of ward's land under a tax judgment was invalid.—Teat v. Perry, 216 S. W. 650.

Under the Houston City Charter 1905, except as otherwise specified therein, the fees of officers in suits for sale of property to pay taxes are the same as those in similar suits for state and county taxes under Vernon's Sayles' Ann. Civ. St. 1914, art. 7691.—Id.

The 5 per cent. allowance for attorney's fees in city tax suits under Houston City Charter, art. 3, § 8, supersedes the provision of Vernon's Sayles' Ann. Civ. St. 1914, art. 7691, which is otherwise applicable, in view of articles 7693, 7699, so that such fee is allowable.—Id.

## MURDER.

See Homicide.

## MUTUAL BENEFIT INSURANCE.

See Insurance, §665-819.

## NAMES.

See Chattel Mortgages, §139, 150; Criminal Law, §915, 1032; Deeds, §31; Mortgages, §43; Sales, §234, 318.

§16(2) (Tex.Cr.App.) In a prosecution for simple assault, the alleged name of the injured party, "Matoska," and her name as testified to, "Matosky," are idem sonans.—Poldrack v. State, 216 S. W. 170.

## NATIONAL BANKS.

See Banks and Banking, §261-280.

## NAVIGABLE WATERS.

See Carriers, §320; Covenants, §102, 122; Evidence, §10; Fraud, §58.

## III. RIPARIAN AND LITTORAL RIGHTS.

§46(3) (Tex.Civ.App.) A deed conveying "all that certain accretion, alluvian and riparian right" east of a described lot, consisting of "a width of fifty feet," and extending into the waters of a bay together with a War Department permit issued to vendor granting the right to fill in the riparian right conveyed, and to erect whatever the grantee desired, so long as the buildings or filling-in did not become an unreasonable obstruction to navigation, even when construed in connection with a mortgage by vendor to secure damages for breach of warrant

by vendor within three years, held not to convey title to the fee of the submerged land, but merely a right in vendee to fill in and acquire title from the state in himself.—Westervelt v. Meuly, 216 S. W. 680.

## NEGATIVE TESTIMONY.

See Highways, §184.

## NEGLIGENCE.

See Animals, §23; Appeal and Error, §179, 882, 930, 1062; Carriers; Corporations, §494; Damages, §112; Electricity, §16, 19; Evidence, §192; Food, §25; Highways, §173, 184; Insurance, §787; Judgment, §521; Landlord and Tenant, §169; Master and Servant, §91-316; Municipal Corporations, §705, 706, 763, 807, 821, 831, 841-845; Physicians and Surgeons, §18; Pleading, §8, 369; Railroads, §303-401; Street Railroads, §95-118; Telegraphs and Telephones, §15, 62, 67, 73; Trial, §203, 251, 296; Waters and Water Courses, §118.

## I. ACTS OR OMISSIONS CONSTITUTING NEGLIGENCE.

### (C) Condition and Use of Land, Buildings, and Other Structures.

§33(2) (Tex.Civ.App.) One taking a lunch to an employé of a corporation working on its premises becomes a trespasser if, on his return, he enters on grounds without occasion for doing so.—Southwestern Portland Cement Co. v. Bustillos, 216 S. W. 268.

Where women and children habitually carry lunches to workmen upon the employer's premises, one going on the premises for such purpose is not a trespasser.—Id.

One rightfully upon an employer's grounds for the purpose of delivering lunch to an employé does not become a trespasser simply because he does not depart in the most direct and most usually traveled route.—Id.

§33(3) (Tex.Civ.App.) A boy who of his own accord crawls under a railroad's warehouse to see animals unloaded from a circus train attracting him to the place is a trespasser, and the railroad is not liable for his death by the collapse of the building caused by its insecurity and the presence of people on top of it.—Texas Mexican Ry. Co. v. Garcia, 216 S. W. 1108.

§51 (Tex.Civ.App.) A pit filled with hot ashes and burning coal is a dangerous instrumentality to be properly guarded, although located on private property remote from any public highway, where employes and others rightfully upon the premises habitually used them as a pathway.—Southwestern Portland Cement Co. v. Bustillos, 216 S. W. 268.

## II. PROXIMATE CAUSE OF INJURY.

§56(1) (Tex.) The test as to whether a given act of negligence may be deemed the proximate cause of an injury is simply whether, in the light of the attending circumstances, the injury was such as should reasonably have been anticipated as a consequence of the act.—Galveston, H. & S. A. Ry. Co. v. Bell, 216 S. W. 390.

## III. CONTRIBUTORY NEGLIGENCE.

### (A) Persons Injured in General.

§65 (Mo.App.) Negligence of plaintiff, if one of the producing or efficient causes which helped to bring about the injury, will preclude recovery, regardless of when his negligent act was committed.—Francis v. City of West Plains, 216 S. W. 808.

### (B) Children and Others Under Disability.

§85(2) (Ky.) A child is held to that degree of care for his own safety which is ordinarily

For cases in Dec.Dig. & Am.Dig. Key-No.Series & Indexes see same topic and KEY-NUMBER

exercised by children of his own age under similar circumstances.—*Collett's Guardian v. Standard Oil Co.*, 216 S. W. 356.

#### (C) Imputed Negligence.

⇒92 (Tex.Civ.App.) Where plaintiff was injured while passenger in jitney by collision with defendant's automobile, which violated traffic ordinance in not passing center of street intersection before turning to the left, negligence of the jitney driver in violating the speed ordinance was no defense, unless defendant's negligence had not concurred with the jitney driver's negligence in causing the injury; the jitney driver's negligence not being plaintiff's negligence.—*Zucht v. Brooks*, 216 S. W. 684.

### IV. ACTIONS.

#### (A) Right of Action, Parties, Preliminary Proceedings, and Pleadings.

⇒111(1) (Ark.) Under doctrine of *res ipsa loquitur*, not limited to contractual or any particular relations, a cause of action is stated by complaint alleging the blowing up, by causes unknown to plaintiffs, of a four-story business house, which with all gas and ammonia fixtures therein, was in the exclusive control of defendants, killing plaintiffs' intestate, rightfully in the building at the time, but having no duties to perform in connection with the instrumentalities occasioning the accident.—*Chiles v. Ft. Smith Commission Co.*, 216 S. W. 11.

⇒117 (Mo.App.) Where defendant relies on contributory negligence as a defense, the facts constituting such negligence must be pleaded.—*Meredith v. Claycomb*, 216 S. W. 794.

⇒119(1) (Mo.) While plaintiff in a negligence case has the right to prove all the charges of negligence, he is not required to do so, and the proof of any one or more of them is sufficient.—*Meeker v. Union Electric Light & Power Co.*, 216 S. W. 923.

⇒119(2) (Ky.) The rule requiring a custom to be pleaded before it may be shown in evidence has no application where the purpose is to prove the ordinary and usual way of doing a certain thing in order to determine whether it has been negligently done.—*White's Adm'r v. Kentucky Public Elevator Co.*, 216 S. W. 837.

⇒119(4) (Mo.App.) Where a general charge of negligence is followed by a specific charge, the specific charge supersedes the general, and, if a plaintiff recovers at all, it must be upon the specific act or acts of negligence, and not upon the general.—*Meredith v. Claycomb*, 216 S. W. 794.

⇒119(4) (Mo.App.) Averments of specific negligent acts supersede a general averment of negligence, and plaintiff must recover, if at all, on the specific acts pleaded.—*McCullough v. W. H. Powell Lumber Co.*, 216 S. W. 803.

#### (B) Evidence.

⇒130(1) (Ark.) In an action for injuries from the blowing out of a plug in the boiler of a cotton gin plant, testimony that witness went to the gin the next morning after the explosion and found the threads on the boiler to be badly worn was competent on the question of negligence, as showing the real condition at the time the accident occurred.—*Collison v. Curtner*, 216 S. W. 1059.

In an action for injury by an explosion, testimony as to the condition of the boiler 15 days after the accident was competent where there was no showing that it was in a different condition at the time the witness saw it than immediately after the injury.—*Id.*

⇒132(1) (Ark.) In an action for injury by the explosion of boiler operating a cotton gin, evidence that it was a custom for persons to enter the boiler room to interview those in charge relative to ginning cotton was competent on the issue as to whether the injured parties were trespassers, and guilty of contributory

negligence in going into a dangerous place.—*Collison v. Curtner*, 216 S. W. 1059.

#### (C) Trial, Judgment, and Review.

⇒136(5) (Mo.) If the legitimate inferences which may be drawn from the facts establish negligence, a case of negligence is made.—*Kri-nard v. Westerman*, 216 S. W. 988.

⇒136(9) (Ky.) Negligence is a question for the jury if there is room for honest difference of opinion as to the effect of the facts or reasonable inferences to be drawn therefrom.—*White's Adm'r v. Kentucky Public Elevator Co.*, 216 S. W. 837.

⇒136(15) (Tex.Civ.App.) Whether deceased, who fell into an unguarded pit, was rightly on the premises for the purpose of delivering a lunch to an employé of defendant, or was simply a trespasser, *held* a question for the jury.—*Southwestern Portland Cement Co. v. Bustillos*, 216 S. W. 268.

⇒136(26) (Mo.App.) When a plaintiff in making out his case clearly establishes that his injury was as much the result of his own negligence as that of the defendant, it is the duty of the court to declare as a matter of law that plaintiff cannot recover.—*Meredith v. Claycomb*, 216 S. W. 794.

⇒136(29) (Tex.Civ.App.) Whether a 15 year old child was guilty of contributory negligence in using a path along an unguarded pit filled with hot ashes and burning coal *held* a question for the jury.—*Southwestern Portland Cement Co. v. Bustillos*, 216 S. W. 268.

### NEGOTIABLE INSTRUMENTS.

See Bills and Notes.

### NEGROES.

See Criminal Law, ⇒730; Schools and School Districts, ⇒13, 25, 90, 106.

### NEW TRIAL.

See Appeal and Error, ⇒235, 301, 302, 305, 688, 742, 856, 979, 1015, 1077, 1078; Criminal Law, ⇒915-958, 1064, 1090, 1097, 1106, 1124; Eminent Domain, ⇒224; Habeas Corpus, ⇒4; Trial, ⇒143.

### I. NATURE AND SCOPE OF REMEDY.

⇒8 (Tex.Civ.App.) In trespass to try title, that portion of a judgment awarding a tract to certain defendants may be set aside, and a new trial granted, without disturbing a portion of the judgment which awarded another tract to another defendant on separate and distinct defenses.—*Louisiana & Texas Lumber Co. v. Southern Pine Lumber Co.*, 216 S. W. 281.

### II. GROUNDS.

#### (A) Errors and Irregularities in General.

⇒26 (Mo.App.) Under Rev. St. 1909, § 1846, a party cannot take the chance of a verdict, and then avail himself, on motion for new trial, of error that he might have urged before the cause went to the jury.—*Wamsganz v. Blanke-Wenneker Candy Co.*, 216 S. W. 1025.

#### (F) Verdict or Findings Contrary to Law or Evidence.

⇒70 (Mo.App.) Where there was no error in a trial wherein case was submitted to the jury, an order granting a new trial will be reversed on appeal, where it cannot be said as a matter of law that the verdict of the jury was not sustained by the evidence.—*Berkshire v. Holcker*, 216 S. W. 556.

#### (G) Surprise, Accident, Inadvertence, or Mistake.

⇒89 (Ky.) In an action involving the question whether an offer to sell hemp was accepted

while the offer was still open, where plaintiff had insisted that notice of acceptance given before midnight on day of offer was in time, it was to be anticipated that plaintiff would attempt to show that the offer continued longer than such day, where plaintiff's agent had so contended with defendant, so that defendant's surprise therein was not such as would be ground for a new trial under Civ. Code Prac. § 340, subsec. 3.—*Caldwell v. E. F. Spears & Sons*, 216 S. W. 83.

§97 (Ky.) Defeated party cannot upon appeal avail himself of the objection that he was entitled to a new trial on ground of surprise, where he did not ask for setting aside of swearing of jury and for continuance as soon as he became aware of it.—*Caldwell v. E. F. Spears & Sons*, 216 S. W. 83.

#### (H) Newly Discovered Evidence.

§102(5) (Tex.Civ.App.) Question as to time of closing post office should have been asked postmaster when he was on the stand, and motion for new trial based upon alleged newly discovered evidence as to time of closing is not supported by an affidavit of postmaster.—*Schlake v. Western Union Telegraph Co.*, 216 S. W. 1113.

### III. PROCEEDINGS TO PROCURE NEW TRIAL.

§143(4) (Ky.) A verdict may not be impeached, or grounds for its rendition explained by a juror's testimony, except in criminal cases to establish the fact that the verdict was determined by lot, Cr. Code Prac. § 272, so that a verdict in a civil case cannot be set aside on testimony that the jurors misunderstood instructions.—*Caldwell v. E. F. Spears & Sons*, 216 S. W. 83.

### NONSUIT.

See Dismissal and Nonsuit.

### NOTES.

See Bills and Notes.

### NOTICE.

See Appeal and Error, §305; Assignments, §85; Attachment, §209; Chattel Mortgages, §150, 153, 155; Constitutional Law, §35; Contracts, §10; Criminal Law, §1081, 1087; Divorce, §167; Electricity, §16; Homestead, §129; Insurance, §695, 755; Landlord and Tenant, §86; Mechanics' Liens, §114; Municipal Corporations, §741, 812, 845; Principal and Agent, §178; Principal and Surety, §126; Railroads, §356; Statutes, §8½; Taxation, §642; Telegraphs and Telephones, §67; Vendor and Purchaser, §231, 232, 261.

### NOVATION.

See Bills and Notes, §52.

§4 (Tex.Civ.App.) Where plaintiff buyer of seed grain never accepted or agreed upon a change of price of any article specified in original contract except upon condition, held, there was no novation.—*Pittman & Harrison Co. v. Knowlan Machine & Supply Co.*, 216 S. W. 678.

§7 (Ky.) Where an architect prepared plans for an individual, who, in his presence, transferred the contract to a hotel company, which assumed it, there was no release of the individual by the architect, as something more than mere silence on his part was necessary to prevent him from insisting upon the individual's compliance with his contract.—*O'Kain v. Davis*, 216 S. W. 354.

### NUISANCE.

See Landlord and Tenant, §170.

#### I. PRIVATE NUISANCES.

(A) Nature of Injury, and Liability Therefor.

§3(6) (Mo.) A stone quarry in the heart of a city was a nuisance where the blasting disturbed persons who dwelt in the vicinity, and caused rocks and debris to fall on a boulevard.—*Baker v. Gates*, 216 S. W. 775.

### NUNC PRO TUNC.

See Inspection, §4.

### OCCUPATION.

See Insurance, §755.

### OFFICERS.

See Attorney General; Inspection, §4; Judges; Justices of the Peace; Mandamus, §10, 72; Municipal Corporations, §123, 124, 159, 980; Public Service Commissions; Quo Warranto, §11; Railroads, §17, 179; Receivers; Schools and School Districts, §48.

### I. APPOINTMENT, QUALIFICATION, AND TENURE.

(F) Term of Office, Vacancies, and Holding Over.

§49 (Ky.) Const. § 236, authorizing the Legislature to fix the time when one elected to office shall enter on its duties, where this has not been done by the Constitution, does not authorize the shortening of the term fixed by the Constitution.—*Pinkston v. Watkins*, 216 S. W. 852.

### III. RIGHTS, POWERS, DUTIES, AND LIABILITIES.

§100(2) (Ky.) Where, pursuant to Ky. St. § 4419, the fiscal court of a county ordered the salary of the school superintendent for 1918 to 1921 to be 16 cents for each pupil child entitled to attend the common schools at such time, the school census report embracing all children between 6 and 20, but subsequently section 4364 was amended (Acts 1918, c. 138) to fix the ages of school children at 6 to 18, under Const. §§ 161, 235, the salary of the superintendent could not be so reduced, and he is entitled during his term to be paid at the rate of 16 cents per pupil between 8 and 20 years of age, the percentage of children between 18 and 20, in the absence of school census including them, to be ascertained theoretically in proportion to the latest preceding census.—*Phillips v. Broach*, 216 S. W. 80.

### OIL.

See Appeal and Error, §1050; Inspection, §4; Mines and Minerals, §74, 77, 78.

### OPTIONS.

See Brokers, §49.

### PARDON.

See Extradition, §28½.

### PARENT AND CHILD.

See Champerty and Maintenance, §7; Damages, §133, 186, 210; Death, §58; Divorce, §298, 324; Evidence, §192; Fraudulent Conveyances, §168, 278; Guardian and Ward; Habeas Corpus, §85; Infants.

§3(1) (Mo.App.) It is the primary duty of a father to support the children.—*Kershner v. Kershner*, 216 S. W. 547.

For cases in Dec.Dig. & Am.Dig. Key-No.Series & Indexes see same topic and KEY-NUMBER

⇒4 (Mo.App.) An unmarried adult is under no legal obligation to support his father, mother, brothers, and sisters, though such adult was still living in the family.—*McCullough v. W. H. Powell Lumber Co.*, 216 S. W. 803.

## PAROLE

See Extradition, ⇒28½.

## PARTIES.

See Equity, ⇒97.

For parties on appeal and review of rulings as to parties, see Appeal and Error.

For parties to particular proceedings or instruments, see also the various specific topics.

### I. PLAINTIFFS.

(A) Persons Who may or must Sue.

⇒6(1) (Ky.) Where it appears that the plaintiffs are not the real parties in interest, a special demurrer or a motion to dismiss should be sustained, in view of Civ. Code Prac. §§ 18, 21.—*Taylor v. Hurst*, 216 S. W. 96.

⇒6(2) (Ky.) The "real party in interest," within the meaning of Civ. Code Prac. §§ 18, 21, is the party who will be entitled to the benefits of the action on a successful termination thereof; one who is actually and substantially interested in the subject-matter, as distinguished from one who has only a nominal interest therein.—*Taylor v. Hurst*, 216 S. W. 96.

### V. DEFECTS, OBJECTIONS, AND AMENDMENT.

⇒80(2) (Tex.Civ.App.) In action for trespass wherein plaintiff's co-owner should have been joined as a party, plaintiff in absence of a plea in abatement may recover in proportion to his interest.—*Bassham v. Evans*, 216 S. W. 446.

## PARTITION.

See Infants, ⇒89; Judgment, ⇒564; Payment, ⇒85; Tenancy in Common, ⇒32.

### II. ACTIONS FOR PARTITION.

(B) Proceedings and Relief.

⇒81 (Ark.) Where surviving widow had conveyed her unassigned dower, court erred in decreeing a partition sale of the property subject to unassigned dower, since such sale, without first assigning dower, might have resulted in great prejudice to the heirs, and might have prevented other parties than purchaser of wife's dower interest from bidding at the sale.—*Baum v. Ingraham*, 216 S. W. 704.

⇒94(2) (Ark.) The fact that two sets of partition commissioners had made somewhat similar allotments to appellants does not relieve the trial court from determining whether the second allotment constituted a just division of the lands, where appellants' exceptions were supported by affidavits raising such an issue.—*Flurry v. Thomas*, 216 S. W. 302.

## PARTNERSHIP.

See Banks and Banking, ⇒148, 154; Compromise and Settlement, ⇒23; Executors and Administrators, ⇒221; Frauds, Statute of, ⇒18; Receivers, ⇒142; Sales, ⇒441; Subrogation, ⇒3; Trial, ⇒252; Witnesses, ⇒159.

### I. THE RELATION.

(A) Creation and Requisites.

⇒17 (Mo.App.) A partnership is largely a matter of the intention of the parties.—*Interstate Coal Co. v. Gordon*, 216 S. W. 783.

(B) As to Third Persons.

⇒37 (Mo.App.) Where plaintiff relies on a holding out as partner or firm by estoppel, he

must prove knowledge of or reliance on such fact by himself in extending credit.—*Interstate Coal Co. v. Gordon*, 216 S. W. 783.

### III. MUTUAL RIGHTS, DUTIES, AND LIABILITIES OF PARTNERS.

(A) Firm Property and Business.

⇒77 (Ky.) Partner, who sold a portion of the partnership assets, is chargeable with proceeds of sale upon action for settlement of partnership affairs.—*Davis v. Abell*, 216 S. W. 104.

### IV. RIGHTS AND LIABILITIES AS TO THIRD PERSONS.

(B) Nature and Extent of Firm Liabilities.

⇒165 (Mo.App.) If two brothers were in fact partners in a business at the time coal was purchased and delivered, one brother is liable to the seller as well as the other, regardless of whether the seller of the coal knew and relied on the actual partnership in extending credit or not.—*Interstate Coal Co. v. Gordon*, 216 S. W. 783.

(D) Actions by or Against Firms or Partners.

⇒213(1) (Mo.App.) In a suit alleging defendants to be partners and liable as such, plaintiff may prove and recover either on the theory of actual partnership or partnership by estoppel, or holding out as such, without specially pleading the estoppel.—*Interstate Coal Co. v. Gordon*, 216 S. W. 783.

⇒218(3) (Mo.App.) In an action to recover the price of coal from defendants as partners, evidence held to warrant submission to the jury of the question of actual partnership between defendants.—*Interstate Coal Co. v. Gordon*, 216 S. W. 783.

### V. RETIREMENT AND ADMISSION OF PARTNERS.

⇒230 (Ky.) A contract by which a retiring partner agreed not to re-engage in the "livery business" in a certain community, etc., precluded him from hiring his automobile to all applicants and transporting them in and about the community involved.—*Keen v. Ross*, 216 S. W. 605.

## PART PAYMENT.

See Subrogation, ⇒28.

## PARTY WALLS.

See Specific Performance, ⇒130; Vendor and Purchaser, ⇒63.

## PATENTS.

See Public Lands, ⇒178.

## PAWNBROKERS AND MONEY LENDERS.

See Constitutional Law, ⇒296.

⇒2 (Tex.Cr.App.) Acts 34th Leg. c. 28 (Vernon's Ann. Civ. St. Supp. 1918, arts. 6171a-6171i), defining loan brokers, providing regulations therefor and punishment for violation thereof, which requires every private citizen engaged in such business, not only to give a bond, but to file a written irrevocable power of attorney naming the county judge of the county as his duly authorized agent, for the purpose of accepting service and consenting that service of any civil process upon such judge shall be valid, is unconstitutional.—*Juhan v. State*, 216 S. W. 873.

## PAYMENT.

See Banks and Banking, ⇒269, 280; Corporations, ⇒83; Executors and Administrators, ⇒537; Husband and Wife, ⇒86;



Insurance, ¶602; Mortgages, ¶117; Principal and Surety, ¶183; Sales, ¶199, 359; Subrogation; Taxation, ¶810, 814; Tender; Vendor and Purchaser, ¶185.

### V. RECOVERY OF PAYMENTS.

¶82(6) (Ky.) If plaintiff was legally bound for damages for breach of contract, he cannot recover back the damages after having confessed breach of the contract, and paid money, and executed a note as settlement of the damages.—*Scobee v. Brent*, 216 S. W. 78.

¶85(1) (Ark.) Where judgment in suit for partition and division of an estate furnished the basis for a settlement, a party who by accident, oversight or mistake made a payment in excess of that required by decree was entitled to recover the excess.—*Hayes v. Bishop*, 216 S. W. 298.

### PENALTIES.

See Appeal and Error, ¶1064; Carriers, ¶30; Insurance, ¶602; Master and Servant, ¶83; Railroads, ¶254; Trial, ¶184, 296.

### PERSONAL PROPERTY.

See Husband and Wife, ¶14.

### PETITION.

See Animals, ¶50.

### PHOTOGRAPHS.

See Evidence, ¶383.

### PHYSICIANS AND SURGEONS.

See Appeal and Error, ¶1033; Trial, ¶295.

¶6(1) (Tex.Cr.App.) One who maintained offices where he treated any and all persons who might apply to him, for various and sundry disorders and diseases, without registering with the district clerk in the manner and form provided by Vernon's Ann. Pen. Code 1916, tit. 12, c. 6, art. 755, was unlawfully practicing medicine, whether or not he claimed to be a physician or a practitioner of medicine.—*Black v. State*, 216 S. W. 181.

¶18(9) (Mo.) In an action for malpractice, where defendant physician had removed a fibroid tumor from plaintiff's uterus, evidence held to justify the submission to the jury of the question whether the defendant, in operating, negligently cut plaintiff's bladder.—*Krind v. Westerman*, 216 S. W. 938.

In malpractice action against a physician, who had removed a fibroid tumor from plaintiff's uterus, evidence of negligence in cutting or tying the ureter leading from the left kidney to the bladder held to justify overruling demurrer to the evidence.—*Id.*

In an action against a physician for damages for malpractice, evidence of the certainty of plaintiff's future sufferings held sufficient to submit the question to the jury for consideration in assessing damages.—*Id.*

¶18(10) (Mo.) In malpractice action, an instruction that in performing the operation it was defendant's duty to exercise reasonable skill and care, such as an ordinarily skillful and careful surgeon is accustomed to exercise and use in like surgical operations under like circumstances, is proper, and should not be limited to "the degree of skill possessed by reasonably skillful surgeons in the community" in which defendant is practicing.—*Krind v. Westerman*, 216 S. W. 938.

In a malpractice action against a physician, the injury having resulted in other necessary operations, the inclusion in an instruction of the phrase "surgeon's fees" was not error, where plaintiff, in listing the items, had stated that she had not paid certain surgeon's fees,

and did not know what they were, and defendant's counsel waived the details, and asked that she state in a lump sum what she had paid, which she did, and plaintiff's counsel made it clear to the jury that surgeon's bills not paid were not to be considered.—*Id.*

### PLEADING.

See Justices of the Peace, ¶90, 174, 208; Limitation of Actions, ¶121, 127.

For pleadings in particular actions or proceedings, see also the various specific topics.

For review of rulings relating to pleadings, see Appeal and Error.

### I. FORM AND ALLEGATIONS IN GENERAL.

¶8(15) (Ky.) Pleading merely that deeds were obtained by fraud, without alleging the facts, is a conclusion of law, which is insufficient.—*Orider v. Sutherland*, 216 S. W. 57.

¶8(17) (Ark.) Allegations of negligence which are mere conclusions of law are insufficient.—*Chiles v. Ft. Smith Commission Co.*, 216 S. W. 11.

¶20 (Ky.) Civ. Code Prac. § 113, subd. 4, permits an alternative statement of facts where the pleader does not know which fact or set of facts are true; but to make a good cause of action each of the alternative statements must present a case entitling the pleader to relief.—*Scobee v. Brent*, 216 S. W. 78.

¶34(4) (Ky.) Where plaintiff alleges two different statements of facts, under and because of which he paid to defendant the money and executed the note in settlement of his breach of contract, for which he seeks to recover, and it cannot be determined from the complaint which alternative statement of facts were the facts of the transaction, it will be assumed on demurrer that the statement of facts alleged, which gives plaintiff no cause of action, is the true state of the case in view of rule that pleading must be construed most strongly against the pleader.—*Scobee v. Brent*, 216 S. W. 78.

¶34(6) (Mo.App.) Petition must be liberally construed after verdict.—*Highleyman v. McDowell Motor Car Co.*, 216 S. W. 52.

### II. DECLARATION, COMPLAINT, PETITION, OR STATEMENT.

¶49 (Mo.) The character of a suit is determined by the allegations in the petition, the prayer constituting no part of petition for such purpose, though it may be resorted to in determining plaintiff's conception of the petition where language of allegations is doubtful and uncertain.—*State ex rel. Brinkman v. McElhinney*, 216 S. W. 521.

¶64(2) (Mo.App.) A petition containing two counts, one on contract and the other on quantum meruit, held bad pleading.—*Wamsanz v. Blanke-Wenneker Candy Co.*, 216 S. W. 1025.

### V. DEMURRER OR EXCEPTION.

¶193(5) (Ky.) There is no state of case where one complained of can be required to answer otherwise than by a demurrer, the complaint of another, when, the facts alleged by such other having been conceded, he has no right to relief.—*Scobee v. Brent*, 216 S. W. 78.

¶193(5) (Tex.Civ.App.) Petition is subject to general demurrer, a fact necessary to be proved to sustain a recovery, neither being alleged therein, nor fairly inferable from facts alleged.—*Midland & N. W. Ry. Co. v. Midland Mercantile Co.*, 216 S. W. 627.

¶199 (Mo.App.) Imperfections in the petition do not entitle defendant, at the close of all the evidence, to a demurrer, unless the petition wholly fails to state any cause of action at all.—*Messerli v. Bantrup*, 216 S. W. 825.

¶214(1) (Ky.) A paragraph of an answer, stating facts constituting a defense to which plaintiff has declined to plead, is as effectually



For cases in Dec.Dig. & Am.Dig. Key-No.Series & Indexes see same topic and KEY-NUMBER

admitted by a demurrer as if evidence had been introduced to establish it, or there had been an agreed statement of facts showing its truth.—*Stuart v. Clements*, 216 S. W. 136.

⚡214(1) (Tex.Civ.App.) The facts alleged in petition must be taken as true on general demurrer.—*Houston Heights Water & Light Ass'n v. Gerlach*, 216 S. W. 634.

⚡214(8) (Ark.) Demurrer to the answer having been overruled, the facts set forth in the complaint and answer must be taken as true.—*Watson v. Boydston*, 216 S. W. 721.

⚡218(4) (Ky.) Where the court was in error in overruling a demurrer to the second paragraph of the answer, but not as to the third paragraph, which contained a complete defense, and plaintiff declined to plead further, there was no alternative, except to dismiss the petition.—*Stuart v. Clements*, 216 S. W. 136.

## VI. AMENDED AND SUPPLEMENTAL PLEADINGS AND REPLEADER.

⚡236(1) (Tex.Civ.App.) District Court Rule 27 (142 S. W. xix), regulating the filing of trial amendments, does not make the right to file the same dependent upon the contingency that exceptions to a pleading have been sustained; the matter being within the discretion of the court.—*Southwestern Portland Cement Co. v. Bustillos*, 216 S. W. 268.

⚡237(7) (Mo.) Where defendant, in action for personal injuries, pleaded that the consideration for a certain release was a certain amount of money and payment of hospital and doctor's bills, plaintiff cannot complain that a false release was pleaded, although the written release recited only the sum paid directly to plaintiff, defendant after the evidence was in being permitted to conform the answer to the writing and to plaintiff's objection.—*McCoy v. James T. McMahon Const. Co.*, 216 S. W. 770.

⚡243 (Mo.) The rules applicable to defectively stated causes of action have no application in cases where no cause of action is pleaded.—*Swift v. Central Union Fire Ins. Co.*, 216 S. W. 935.

⚡245(7) (Mo.) Where petition in action on parol contract insuring certain property against loss by fire stated no cause of action because it failed to plead a consideration, the defect could not be cured by amendment after judgment.—*Swift v. Central Union Fire Ins. Co.*, 216 S. W. 935.

⚡248(3) (Mo.App.) Where the gist of the action in both original and amended petitions was to recover commission due on the same sale of land, there could hardly be a departure or change of cause of action.—*McCormick v. Warman*, 216 S. W. 330.

## XI. MOTIONS.

⚡360(1) (Mo.App.) A motion to strike out which did not attack the cause for anything appearing on the face of the amended petition, or for any defect appearing on the face of any pleading of record, does not fill the office of a demurrer.—*McCormick v. Warman*, 216 S. W. 330.

⚡369(1) (Ark.) In an action against a packing company to recover for death of plaintiff's wife through eating sausage prepared by defendant and purchased by plaintiff from intermediate retail dealer, court properly required plaintiff to elect either to prosecute action on his allegation of breach of implied warranty, or on allegation of negligence in preparation of sausage.—*Drury v. Armour & Co.*, 216 S. W. 40.

⚡369(6) (Mo.App.) Defendant's motion to require plaintiff to elect between count on contract and count on quantum meruit, after it had answered by general denial and by counterclaim and had announced itself ready for trial, and after the jury had been impaneled, was made too late to be considered.—*Wamsganz v. Blanke-Wenneker Candy Co.*, 216 S. W. 1025.

## XII. ISSUES, PROOF, AND VARIANCE.

⚡381(1) (Mo.App.) Evidence and instructions should not be broader than the pleadings.—*Lorton v. Trail*, 216 S. W. 54.

## XIII. DEFECTS AND OBJECTIONS, WAIVER, AND AID BY VERDICT OR JUDGMENT.

⚡406(7) (Mo.) The petition in suit to set aside a sale under deed of trust alleging it was made pursuant to a conspiracy between the trustee and purchasers with fraudulent intent to have the property sold at much less than its value, and so resulted, is sufficient to authorize admission of evidence tending logically to prove it, insufficiency of the general charge of fraud and collusion not having been questioned by special demurrer or motion in due course of pleading asking a statement of particulars, but defendants having proceeded to trial without suggestion of such insufficiency.—*Hurst Automatic Switch & Signal Co. v. Trust Co. of St. Louis*, 216 S. W. 954.

⚡428(7) (Mo.App.) In action on contract, defendant, having failed to object to evidence as to waiver of contract, and having cross-examined adverse witnesses and examined his own witnesses, in relation thereto, cannot, after verdict has been rendered, complain of such evidence, on ground that waiver was not pleaded.—*Wamsganz v. Blanke-Wenneker Candy Co.*, 216 S. W. 1025.

## PLEDGES.

See Insurance, ⚡205, 222, 593.

⚡30(1) (Mo.) Where notes were indorsed by payee in blank, their delivery to payee's creditor carried full title and interest, and, in payee's suit on the notes in which payee failed to show redelivery, no case of pledgor or pledgee was made out, so as to give the payee right to sue thereon.—*American Forest Co. v. Hall*, 216 S. W. 740.

## POKER.

See Gaming, ⚡90.

## POLES.

See Telegraphs and Telephones, ⚡15.

## POLICE COURTS.

See Judges, ⚡7.

## POLICE POWER.

See Constitutional Law, ⚡81; Municipal Corporations, ⚡339-642.

## POSTING.

See Carriers, ⚡30.

## POST OFFICE.

See Taxation, ⚡642.

## PRACTICE.

For practice in particular actions and proceedings, see the various specific topics.

## PREFERENCES.

See Railroads, ⚡5½.

## PREMATURITY.

See Highways, ⚡139.

## PRESCRIPTION.

See Adverse Possession; Limitation of Actions.

## PRINCIPAL AND AGENT.

See Attorney and Client; Brokers; Carriers, ¶94; Contracts, ¶128; Corporations, ¶642; Courts, ¶231; Criminal Law, ¶507; Evidence, ¶148; Insurance, ¶90; Mechanics' Liens, ¶71, 76, 288, 289; Sales, ¶7; Trade Unions, ¶5; Trial, ¶244; Trusts, ¶59.

### I. THE RELATION.

#### (A) Creation and Existence.

¶3(5) (Mo.) An agent's duty is primarily to his principal for whom he acts and to whom he must account; a trustee's duty is primarily to his cestui for whom he acts and to whom he must account, though his authority comes from another.—State ex rel. Kansas City Theological Seminary v. Ellison, 216 S. W. 967.

¶23(2) (Tex.Civ.App.) Proof of agency may be made by circumstantial evidence.—Dodge v. Lacey, 216 S. W. 400.

#### (B) Termination.

¶37 (Mo.) Where a power of attorney is not naked but coupled with an interest for the purposes of the trust, there is no power of revocation unless expressly reserved or necessarily implied from other terms of the trust, which is true regardless of the form of the instrument by which the power is granted.—State ex rel. Kansas City Theological Seminary v. Ellison, 216 S. W. 967.

## II. MUTUAL RIGHTS, DUTIES, AND LIABILITIES.

#### (A) Execution of Agency.

¶78(1) (Ky.) Tobacco dealers who had employed agent to purchase tobacco for them in certain counties could not recover difference between amount purchased for them and paid for by them and amount actually delivered by agent, if shortage was the result of shrinkage or other natural loss, and not the result of agent's failure to deliver tobacco paid for the dealers.—Eskew v. H. Friedberg & Co., 216 S. W. 1076.

¶78(8) (Ky.) If defendant, having agreed to buy tobacco only for plaintiffs, bought and resold on his own account, plaintiff's measure of damages would be the difference between the proven price at which plaintiffs were selling tobacco and amount computed by adding cost of tobacco to defendant, expenses which plaintiffs were to have paid, and defendant's commission.—Eskew v. H. Friedberg & Co., 216 S. W. 1076.

## III. RIGHTS AND LIABILITIES AS TO THIRD PERSONS.

#### (A) Powers of Agent.

¶101(4) (Ark.) That an agent of a building contractor was sent to a town to superintend the construction there of buildings for a client of the contractor, and to purchase the labor and material therefor, did not give him authority, actual or apparent, to enter into a contract for the construction of another building of a different character and for another person.—Arkadelphia Milling Co. v. Campbell, 216 S. W. 20.

¶103(12) (Mo.App.) A sales agent is without power to contract for time of delivery, where the contract blank furnished him by his employer specifically provides that seller is to "ship as soon as possible," and that the order is not subject to countermand, and that any agreement not stated in the order will not be recognized, so that, in seller's action against buyer for refusal to accept goods, oral testimony was inadmissible to show understanding between seller's agent and buyer as to time of delivery.—Colorcraft Co. v. American Packing Co., 216 S. W. 831.

¶105(6) (Mo.App.) When a debtor, owing money on a promissory note, pays another as

agent, it is his duty to see that the agent is in possession of the note, or, if not in possession, that the agent has authority to receive payment, or that the holder has represented or held him out as having such authority.—Thornhill v. Masucci, 216 S. W. 819.

¶105(8) (Mo.App.) The mere fact that an agent collects, or is authorized to collect, interest does not show that he is authorized to collect principal.—Thornhill v. Masucci, 216 S. W. 819.

¶111(2) (Mo.App.) The right of an agent to sell or assist in selling lots would not give him implied authority to release a mortgage which had been made to and was owned by his principal.—Stratton v. Cole, 216 S. W. 976.

The authority to collect money on the sale of certain lots did not give agent apparent authority to release from the records a mortgage of his principal which was not in agent's possession and was not given him for collection.—Id.

That mortgagee sent paid note to mortgagor, who gave note to mortgagee's agent for purpose of having agent release mortgage securing note, was not sufficient to give agent apparent authority to procure release of another mortgage from mortgagor to mortgagee, where mortgagee had no knowledge that first note was ever in agent's possession or that agent had procured such release.—Id.

¶123(7) (Tex.Civ.App.) In suit for breach of contract for shipment of car of seed grain, evidence held to support conclusion that person who signed order for grain on behalf of defendant seller was its authorized agent to sign the contract, and that the contract was valid.—Pittman & Harrison Co. v. Knowlan Machine & Supply Co., 216 S. W. 678.

¶123(11) (Ky.) Evidence held sufficient to show that lessor had authority, from her sister and joint owner, to make lease in question.—Lawrence v. Fielder, 216 S. W. 1068.

¶137(1) (Mo.App.) Principal whose habits and course of dealing have been such as to warrant presumption that agent was authorized to act in certain capacity will be conclusively presumed to have given agent authority to do so far as may be necessary to protect the rights of third persons who have relied on such authority in good faith, and in the exercise of reasonable prudence, and will not be permitted to deny that agent had such authority.—Thornhill v. Masucci, 216 S. W. 819.

#### (C) Unauthorized and Wrongful Acts.

¶150(1) (Tex.) Generally, for the act of an agent outside of the scope of his delegated authority, the principal is not answerable.—Texas Midland R. R. v. Monroe, 216 S. W. 388.

#### (D) Ratification.

¶170(3) (Tex.Civ.App.) If G., who signed order given by plaintiff for seed grain, was not the agent of defendant seller, defendant should have promptly repudiated his agency at the time the order was received, and not continued negotiations with plaintiff on the order.—Pittman & Harrison Co. v. Knowlan Machine & Supply Co., 216 S. W. 678.

¶175(2) (Mo.App.) A principal, upon ratification of agent's contract, is bound by whatever promises, frauds, or representations the agent made to obtain the contract, whether or not authorized by or known to the principal.—Hart v. Brown, 216 S. W. 552.

#### (E) Notice to Agent.

¶178(4) (Mo.App.) Since whether goods sold were shipped "as soon as possible" must be determined from all facts and circumstances connected with the purchase, plaintiff's selling agent's knowledge of circumstances and the urgent demand for the goods is chargeable to plaintiff and should be considered.—Colorcraft Co. v. American Packing Co., 216 S. W. 831.

Although a mere sales agent is without au-

thority to alter the terms of a written contract, notice given to such agent while his agency exists, and referring to business within the scope of his authority, as to urgent need of goods ordered, is notice to his principal, and the buyer is not responsible for the agent's failure to communicate such information to his principal.—Id.

#### (F) Actions.

§194(3) (Ark.) In an action for damages due to the faulty construction of a warehouse by defendant's alleged agent wherein defendant pleaded that the agent was alone a party to the contract, an instruction, when considered as a whole *held* sufficient to submit to the jury the question of ratification by defendant.—Arkadelphia Milling Co. v. Campbell, 216 S. W. 20.

## PRINCIPAL AND SURETY.

See Assignments, §50, 55, 85; Bail, §93; Bills and Notes, §266; Bridges, §20; Corporations, §484; Estoppel, §82; Executors and Administrators, §537; Guaranty; Guardian and Ward, §15; Mortgages, §308.

### I. CREATION AND EXISTENCE OF RELATION.

#### (A) Between Individuals.

§6 (Ark.) There is a difference between the contract of a surety and that of guarantor, in that the contract of a "surety" starts with the agreement, and the liability of a "guarantor" is established for the first time with the default of the principal debtor.—Shores-Mueller Co. v. Palmer, 216 S. W. 295.

§6 (Mo.App.) Bond making surety liable for all moneys furnished employé by employer for any purposes connected with employé *held* a mere surety bond, and not a contract of guaranty.—Detroit Automatic Scale Co. v. Clinton, 216 S. W. 814.

§28 (Mo.App.) Bond making surety liable for all moneys furnished employé by employer for any purposes connected with employé *held* a mere surety bond, and not a contract of guaranty requiring notice of acceptance to guarantor.—Detroit Automatic Scale Co. v. Clinton, 216 S. W. 814.

#### (B) Surety Companies.

§57 (Ark.) Where a contractor for municipal work paid a single year's premium to a surety company, and defaults for which the company was liable occurred within that year, the company is not entitled to premiums for subsequent years, because the liabilities growing out of the defaults were not adjusted for several years.—Peay v. Southern Surety Co., 216 S. W. 722.

### II. NATURE AND EXTENT OF LIABILITY OF SURETY.

§59 (Tex.) The rules which determine the rights of uncompensated sureties are applicable in determining the rights of corporation sureties who enter into contract of suretyship for profit.—Hess & Skinner Engineering Co. v. Turney, 216 S. W. 621.

§59 (Tex.Civ.App.) Surety's liability is not to be extended by implication beyond the terms of his contract.—McGregor & Henger v. Escajeda, 216 S. W. 398.

§66(2) (Ark.) Generally the liability of the principal is the measure of the liability of the surety.—Peay v. Southern Surety Co., 216 S. W. 722.

§78 (Mo.App.) Where salesman's employment contract required salesman to furnish "a bond of indemnity for a prompt and faithful accounting to the company of all his indebtedness, including advances of money and any other loss or liability that may be sustained by the company by reason of having employed the salesman," and where bond securing sales-

man's performance of contract provided that surety should be liable for all moneys furnished by employer to salesman for any purposes connected with such salesman, salesman's contract *held* to permit advances of money.—Detroit Automatic Scale Co. v. Clinton, 216 S. W. 814.

§82(2) (Tex.Civ.App.) Where a contractor agreed to pay a subcontractor certain specified prices for building work by providing funds necessary to meet the subcontractor's weekly pay roll with final payment of the balance within 30 days after acceptance of the work, etc., and the subcontractor duly completed his contract but the weekly advancements exceeded the total sum due, *held*, that the contractor could not recover such excess from the subcontractor's sureties on a bond guaranteeing the subcontractor's faithful completion of his contract, since to do so would extend the sureties' liability beyond the terms of their bond.—McGregor & Henger v. Escajeda, 216 S. W. 398.

### III. DISCHARGE OF SURETY.

§126(6) (Ark.) Guarantor of buyer's faithful performance of sales contract by agreement attached to and made part of the sales contract is a "surety," within Kirby's Dig. §§ 7921, 7922, exonerating "surety" from liability upon creditor's failure to bring action against principal within 30 days after notice in writing to so do from surety.—Shores-Mueller Co. v. Palmer, 216 S. W. 295.

Surety's discharge from liability in Arkansas upon creditor's failure to sue principal within 30 days from receiving surety's notice to so do under Kirby's Dig. §§ 7921 and 7922, was not affected by fact that the contract was entered into in another state.—Id.

### V. RIGHTS AND REMEDIES OF SURETY.

#### (B) As to Principal.

§183 (Ark.) Generally the liability of the principal is the measure of the liability of the surety, and if a surety pay where no liability exists against the principal, such payment will be treated as a voluntary payment, not recoverable from the principal.—Peay v. Southern Surety Co., 216 S. W. 722.

Where a contractor's application for an indemnity bond provided that, in any accounting between the contractor and the surety, the surety should be entitled to credit for any and all disbursements made in good faith under the belief that it was liable, or it was necessary to make the same, the surety, having in good faith made the payments and incurred expenses in investigating claims against the contractor for nonperformance, *held* entitled to recover the same, regardless of the general rule that the liability of the surety is that of the principal.—Id.

§185 (Ark.) Under the terms of the indemnity agreement, *held*, that a commercial surety was entitled to recover from its principal, a contractor for municipal work, the amount expended on attorney's fees and traveling expenses in defending suits, etc.—Peay v. Southern Surety Co., 216 S. W. 722.

### PRIVATE ROADS.

§2(5) (Mo.) A verbal order of a county court in reference to an easement, or a right of way on a section line, which would connect property to a public road is of no avail until entered of record. (Per Goode and Graves, JJ.)—Crews v. Lombard, 216 S. W. 512.

### PRIVILEGES.

See Constitutional Law, §205.

### PROBATE OFFICERS.

See Infants, §19.

## PROBATION.

See Extradition, ¶30.

## PROCESS.

See Appeal and Error, ¶1037; Constitutional Law, ¶296; Divorce, ¶167; Guardian and Ward, ¶87; Infants, ¶89; Jury, ¶72; Pawnbrokers and Money Lenders, ¶2.

### I. NATURE, ISSUANCE, REQUISITES, AND VALIDITY.

¶4 (Ky.) A statutory guardian's suit to sell indivisible property jointly owned to pay lien debts, and divide the proceeds between the owners, falls under Civ. Code Prac. § 490, subsec. 2, and a lien creditor's debt may be set up therein and paid from the proceeds of sale before distribution, and the infant plaintiff under 14 years of age need not be made a defendant as to lien creditor's claim; particularly since the claim, although designated as "counterclaim, set-off, and cross-petition," was not a cross-petition under section 96, but a set-off under section 97, requiring no summons whether plaintiff be an infant or an adult.—*Baxter Realty Co. v. Martin*, 216 S. W. 110.

### II. SERVICE.

(C) Publication or Other Notice.

¶100 (Ky.) A warning order, under Civ. Code Prac. § 57, subsec. 7, must be spread upon the petition as required by the Code, since it takes the place of a summons, determines the date of constructive service and commencement of action, and gives the court jurisdiction over the nonresident's property, which is fixed and evidenced by the clerk's order.—*Luck v. Schabell*, 216 S. W. 1066.

### III. DEFECTS, OBJECTIONS, AND AMENDMENT.

¶155 (Mo.App.) As a motion to quash a return will lie only when the return itself is insufficient, it was not a proper mode of objection to the jurisdiction of the circuit court of a city on the ground that neither plaintiff nor defendant was a resident of such city; such alleged fact not appearing on the face of the return on the summons.—*Buddecke v. Garrels*, 216 S. W. 811.

## PROMISSORY NOTES.

See Bills and Notes.

## PROSTITUTION.

See Criminal Law, ¶338, 374, 414, 724, 1169, 1170½, 1171; Indictment and Information, ¶110; Witnesses, ¶269.

¶4 (Tex.Cr.App.) In a prosecution for procuring a female to become an inmate of a house of ill fame, testimony that a prostitute occupied a room in the hotel was admissible to show the character of the place.—*Dollar v. State*, 216 S. W. 1087.

Where in a prosecution for procuring a female to become an inmate of a house of ill fame, in which it was shown that she left place of accused and went to home of another, testimony that accused went to such home for purpose of bringing her back would be admissible regardless of whether he saw the female or whether she heard any conversation at such place to that effect.—*Id.*

Where, in a prosecution for procuring a female to become an inmate of a house of ill fame, testimony that she left place of accused and went to home of another was admissible as a predicate for further testimony that he attempted to induce her to return, but her reason for going, such as that her child was sick, would be of no importance.—*Id.*

In a prosecution for procuring a female to become an inmate of a house of ill fame, evidence held sufficient to sustain a conviction.—*Id.* ¶4 (Tex.Cr.App.) In prosecution under Pen. Code, art. 506a, for inducing D. to become an inmate of a house of prostitution kept by defendant and her husband, testimony of P., a prostitute, that she went to house in question and registered and occupied a room therein for the purpose of prostitution was admissible, though defendant was not present in the lobby of the house when P. entered and defendant's husband assigned P. a room.—*Dollar v. State*, 216 S. W. 1089.

## PUBLIC IMPROVEMENTS.

See Municipal Corporations, ¶232-487.

## PUBLIC LANDS.

See Adverse Possession, ¶7; Records, ¶6; Vendor and Purchaser, ¶231.

### III. DISPOSAL OF LANDS OF THE STATES.

¶178(3) (Tex.) The legal effect of the conveyance of a donation certificate was to invest purchaser with title to land afterward located and to make the patent when issued inure to the purchaser's benefit, although the certificate was personalty when conveyed; "conveyance" denoting an instrument which carries from one person to another an interest in land.—*Leonard v. Benford Lumber Co.*, 216 S. W. 382.

## PUBLIC SERVICE COMMISSIONS.

See Statutes, ¶283.

¶3 (Ark.) The purpose of Const. Amend. 4, being to provide for the correction of abuses, unjust discriminations, and excessive charges by transportation companies, and not the creation of any particular offices or commissions, legislative power thereunder was not exhausted by the creation of the Railroad Commission, and Act 1919, p. 411, subsequently passed, abolishing the Railroad Commission and transferring its powers and duties to the Arkansas Corporation Commission created by that act, is not unconstitutional as being in excess of the legislative power.—*Helena Water Co. v. City of Helena*, 216 S. W. 26.

## PUBLIC SERVICE CORPORATIONS.

See Carriers; Electricity; Railroads; Street Railroads; Telegraphs and Telephones.

## QUANTUM MERUIT.

See Pleading, ¶64; Work and Labor.

## QUARRELS.

See Landlord and Tenant, ¶170; Nuisance, ¶3.

## QUASHING.

See Courts, ¶231.

## QUIETING TITLE.

See Adverse Possession, ¶114, 115; Judgment, ¶618.

### I. RIGHT OF ACTION AND DEFENSES.

¶12(7) (Ky.) Where plaintiffs proved their title to the whole of each of the two tracts of land, and their actual possession of parts of each, they were in actual possession of all, unless portions in controversy were, at the time suit was filed, in actual adverse possession of defendants.—*Osborn v. Roberts*, 216 S. W. 359.

For cases in Dec.Dig. & Am.Dig. Key-No.Series & Indexes see same topic and KEY-NUMBER

## II. PROCEEDINGS AND RELIEF.

⚡44(1) (Ark.) Where plaintiffs in a suit to quiet title pray an injunction restraining defendant from taking possession of the land and interfering with their title, the burden is upon them to show that they are entitled to such relief.—*Jackson v. Lady*, 216 S. W. 506.

⚡44(5) (Ky.) That defendants, while plaintiffs were temporarily out of the state, entered upon a portion of the land without plaintiffs' knowledge or consent, and grew crops of corn thereon in 1914 and 1915, was no evidence that they were in possession on December 14, 1915, when suit was brought, since it is a matter of common knowledge that December 14th is not necessarily within the cropping season.—*Osborn v. Roberts*, 216 S. W. 359.

## QUO WARRANTO.

See Evidence, ⚡158.

## I. NATURE AND GROUNDS.

⚡11 (Tex.Civ.App.) The action of quo warranto is the proper proceedings to try title to a county office.—*Griffith v. State*, 216 S. W. 469.

## II. JURISDICTION, PROCEEDINGS, AND RELIEF.

⚡29 (Tex.Civ.App.) Although a county judge is entitled to hold the office until his successor is elected and qualified, quo warranto will lie before his successor has qualified.—*Griffith v. State*, 216 S. W. 469.

## RACE PREJUDICE.

See Criminal Law, ⚡730.

## RACING.

See Gaming, ⚡6.

## RAILROADS.

See Adverse Possession, ⚡60; Appeal and Error, ⚡1033, 1064, 1066, 1170; Bills and Notes, ⚡164; Commerce, ⚡72; Constitutional Law, ⚡299; Damages, ⚡112, 174, 188; Evidence, ⚡43, 113, 219, 450, 514; Justices of the Peace, ⚡44; Public Service Commissions, ⚡3; Street Railroads; Subscriptions, ⚡12, 15, 21; Taxation, ⚡592; Trial, ⚡186, 191, 194, 240, 244, 296.

## I. CONTROL AND REGULATION IN GENERAL.

⚡5½ [New, vol. 6A Key-No. Series]

(Ark.) The word "carriers," in Act Cong. March 21, 1918 (U. S. Comp. St. 1918, §§ 3115¼a-3115¼p), subjecting carriers under federal control to all laws and liabilities as common carriers, does not refer to the Director General who took possession of railroads under President's Proclamation of December 26, 1917, pursuant to Act Aug. 29, 1916 (U. S. Comp. St. 1918, § 1974a), and, so far as a suit under the state statute for nonpayment of wages is concerned, the railroad occupied same status after having been taken over by the government as before.—*Missouri Pac. R. Co. v. Ault*, 216 S. W. 3.

⚡5½ [New, vol. 6A Key-No. Series]

(Mo.App.) Where the government had taken over the operation of express companies together with railroads, it was the duty of an express company to give preference to governmental shipments, the carriers having been taken over as a war emergency, and shipper cannot complain of a delay caused by giving preference to governmental shipments.—*Edwards v. American Ry. Express Co.*, 216 S. W. 781.

• That defendant express company, sued for 216 S.W.—77

negligent delay, was, like the railroads, under governmental control, is not conclusive proof that defendant, and its predecessor, was made such a governmental agency as to oust the state court of jurisdiction to enter judgment.—*Id.*

⚡5½ [New, vol. 6A Key-No. Series]

(Tex.Civ.App.) Though the President, as a war measure, pursuant to Act Cong. Aug. 29, 1916, § 1 (U. S. Comp. St. § 1974a), assumed control of the railroads, such control is no ground for the abatement of suits on causes of action accruing before governmental operation.—*El Paso & S. W. Ry. Co. v. Havens*, 216 S. W. 444.

## II. RAILROAD COMPANIES.

⚡17 (Tex.Civ.App.) Under Rev. St. arts. 6445, 6446, all authority of a railroad corporation is vested in its board of directors, and the power of its officers depends on action of the board in conferring authority on them.—*Midland & N. W. Ry. Co. v. Midland Mercantile Co.*, 216 S. W. 627.

## IV. LOCATION OF ROAD, TERMINI, AND STATIONS.

⚡46 (Mo.) Where landowner contracted to plat and convey land to a railroad in consideration that it build its road to the point where the R. survey struck the H. road, and construct a depot there, such owner could disclaim and refuse to convey, where the road was deflected from the R. survey and crossed the H. road three miles away from the point fixed by the contract, and the depot was built 1,300 feet from such point, and about as far from the land; the landowner being entitled to a substantial compliance.—*Hayti Development Co. v. Barnes*, 216 S. W. 733.

## V. RIGHT OF WAY AND OTHER INTERESTS IN LAND.

⚡68 (Tenn.) Where a right of way for a "railroad, according to the provisions of the charter," was conveyed by a deed, in which the width of the right of way was left blank, held that the deed did not convey merely the width of the main line and side track, but it conveyed a right of way of the width of 200 feet, as determined by the railroad company's charter, though a later deed described a depot site 175 feet wide on one side of the track.—*Southern Ry. Co. v. Vann*, 216 S. W. 727.

An agreement by a railroad company with the owner of the fee as to the description of his land, or an agreement with another in respect thereto, such as a lease with a description not inconsistent with the use of the right of way granted, cannot estop the company, and thereby disqualify it to discharge its obligations to the public, but such agreement, if possible, will be referred to the owner's right to use the fee subject to right of way.—*Id.*

⚡69 (Tenn.) A deed by the owner of the fee to a railroad company for right of way for railroad purposes conveys only an easement.—*Southern Ry. Co. v. Vann*, 216 S. W. 727.

⚡82(1) (Tenn.) A railroad company is without power to divest itself or any part of its right of way so as to cripple it in the discharge of its duties to the public.—*Southern Ry. Co. v. Vann*, 216 S. W. 727.

⚡82(2) (Tenn.) The fact that a railroad company does not require the full width of its right of way at a particular time for railroad purposes is no evidence of an abandonment which involves an intention to cease maintaining and operating the road over the right of way, and an adverse holding of the land's surface by the fee owner, and the acquiescence of the railway company therein, do not indicate an abandonment.—*Southern Ry. Co. v. Vann*, 216 S. W. 727.

# VIII. INDEBTEDNESS, SECURITIES, LIENS, AND MORTGAGES.

## (A) Nature and Extent of Liabilities.

☞179 (Tex.Civ.App.) To recover of a railroad company on an acceptance by its president, there must be proof of authority conferred on him by its board of directors to execute the acceptance or of estoppel or ratification; and therefore pleading of these things.—*Midland & N. W. Ry. Co. v. Midland Mercantile Co.*, 216 S. W. 627.

## X. OPERATION.

### (B) Statutory, Municipal, and Official Regulations.

☞254(8) (Tex.) In an action for penalties for failure to comply with Vernon's Sayles' Ann. Civ. St. 1914, art. 6592, whether water-closets 524 feet from a depot in a town without sewers were within a reasonable and convenient distance *held* for the jury.—*Galveston, H. & S. A. Ry. Co. v. State*, 216 S. W. 393.

In an action for penalties for failure to comply with Vernon's Sayles' Ann. Civ. St. 1914, art. 6592, a verdict that defendants were guilty of not having their water-closets at a convenient place at the town named, which was without sewers, did not find the facts essential to support the imposition of penalties.—*Id.*

### (F) Accidents at Crossings.

☞303(1) (Tex.Civ.App.) A railroad company failing to use ordinary care in maintaining a public crossing in repair, is liable for injuries to a driver thrown from a wagon by the bad condition of the track without negligence on his part.—*Panhandle & S. F. Ry. Co. v. Huckabee*, 216 S. W. 666.

☞351(5) (Tex.Civ.App.) Instruction in language of Rev. St. 1911, art. 6485, providing that a "railroad shall keep such crossing in repair," with an instruction that railroad was required to use ordinary care to maintain crossing did not impose an absolute duty on the railroad.—*Panhandle & S. F. Ry. Co. v. Huckabee*, 216 S. W. 666.

### (G) Injuries to Persons on or near Tracks.

☞356(1) (Ky.) Where the public generally, with the knowledge and acquiescence of a railroad, have used its track continuously for a long time, the railroad in running trains must anticipate the presence of people on the track; the mere fact, however, that the place is within the corporate limits of a town or city, not in itself imposing on the railroad the duty of warning, looking out, or other care.—*Louisville & N. R. Co. v. Smith's Adm'r*, 216 S. W. 1063.

If the use of a railroad's track by the public was general and acquiesced in by the road, it was charged with notice of such use.—*Id.*

☞356(2) (Mo.) In order to show that the public has impliedly been given a license by a railroad company to use its track as a passway, it is necessary to show the public use itself, the knowledge of the company thereof, and its consent thereto.—*Rice v. Jefferson City Bridge & Transit Co.*, 216 S. W. 746.

☞356(3) (Ky.) Use of the tracks of the public at a place where a person was killed by a locomotive *held* sufficient to put on the railroad company the duty owing to licensees.—*Louisville & N. R. Co. v. Pugh's Adm'r*, 216 S. W. 69.

☞356(3) (Mo.) If the public indiscriminately had been, prior to the time of the killing of deceased, and then was, using a track as a footway with the knowledge and consent of the railroad, then deceased had an implied license to so use it, even though the use by the public was not so extensive as to have become notorious.—*Rice v. Jefferson City Bridge & Transit Co.*, 216 S. W. 746.

☞359(1) (Ky.) Though a railroad acquiesces in the use of its track by the public as a way, so that persons using the track become licensees,

if a pedestrian sits down or goes to sleep, he becomes a trespasser, to whom the road owes no duty other than to avoid injury to him after discovery of his peril.—*Louisville & N. R. Co. v. Smith's Adm'r*, 216 S. W. 1063.

☞369(3) (Mo.) Where one who trespassed upon the right of way of a railroad and laid down upon or so near the track that he was struck and injured, the railroad was not liable, unless the railroad's employees discovered his perilous position, and could by the exercise of reasonable care have avoided striking him.—*Rice v. Jefferson City Bridge & Transit Co.*, 216 S. W. 746.

☞370 (Mo.) If at the place of an injury there had been such use of the track by pedestrians, known to the railroad, that their presence there was naturally to be expected, the railroad was bound to keep a lookout for them, whether they were trespassers or licensees or quasi licensees.—*Rice v. Jefferson City Bridge & Transit Co.*, 216 S. W. 746.

☞386 (Ky.) One who went upon an interurban railroad track to back his team off, without looking in the direction of an approaching car, which sounded its whistle continuously for some distance before it struck him, was guilty of contributory negligence.—*Kentucky Traction & Terminal Co. v. Roschi's Adm'r*, 216 S. W. 579.

☞387 (Tex.) Contributory negligence is a defense in an action for injuries through failure of trainmen to use ordinary care to discover the person injured on the track, and to avoid infliction of injury.—*St. Louis Southwestern Ry. Co. of Texas v. Watts*, 216 S. W. 391.

☞390 (Ky.) A motorman of an interurban line, on discovering a person on the track in a perilous position, is only required to exercise such reasonable care in stopping as persons of ordinary prudence and presence of mind would exercise under like circumstances, and is not required to exercise the utmost care possible, by immediately comprehending the whole situation and losing not a second in the performance of every duty imposed upon him by a sudden emergency.—*Kentucky Traction & Terminal Co. v. Roschi's Adm'r*, 216 S. W. 579.

☞396(1) (Mo.) The presumption that servants on an electric car which ran over and killed a person on the track performed their duty in a proper manner and without negligence applies only to cases where nothing is shown but the bare fact of an injury for which redress is sought.—*Rice v. Jefferson City Bridge & Transit Co.*, 216 S. W. 746.

☞397(5) (Mo.) Knowledge of a railroad company that the public was using its track as a passway and consent thereto cannot ordinarily be established by direct proof, but must be inferred from circumstances such as long acquiescence of the railroad in the open, known, free, continuous, and extensive use of its track by the public as a footway.—*Rice v. Jefferson City Bridge & Transit Co.*, 216 S. W. 746.

In an action for death on track in the nighttime, it was error to exclude testimony as to the use of the track during the daytime by pedestrians, where the evidence tended to show that a large number of pedestrians passed over the track both day and night to meet trains at the junction of defendant's line and another railroad.—*Id.*

☞400(1) (Ky.) In an action against a railroad for a death on its track, under the evidence, though its weight was in the railroad's favor, case *held* for jury.—*Louisville & N. R. Co. v. Smith's Adm'r*, 216 S. W. 1063.

☞400(1) (Mo.) In an action for death on a railroad track, whether or not defendant was negligent *held* for the jury.—*Rice v. Jefferson City Bridge & Transit Co.*, 216 S. W. 746.

☞400(2) (Ky.) In an action against a railroad for a death on its track within the corporate limits of a town, whether decedent was a trespasser or a licensee *held* for the jury under the evidence.—*Louisville & N. R. Co. v. Smith's Adm'r*, 216 S. W. 1063.

For cases in Dec. Dig. & Am. Dig. Key-No. Series & Indexes see same topic and KEY-NUMBER

⚡400(14) (Ky.) In an action for death on interurban railroad, evidence on the issue of motorman's negligence after discovering deceased's peril caused by his efforts to save his team held insufficient to warrant the submission of the question to the jury.—Kentucky Traction & Terminal Co. v. Roschi's Adm'r, 216 S. W. 579.

⚡401(1) (Ky.) In an action against a railroad for a death on its track, instruction not qualifying the extent of the use of the track by the public to charge the railroad with the duty to look out, give signals, etc., though open to misunderstanding if alone and unexplained, held proper in view of the context and the facts.—Louisville & N. R. Co. v. Smith's Adm'r, 216 S. W. 1063.

⚡401(1) (Mo.) An instruction that, if the locus in quo "had not, for a long time prior to the date of the injury, been used as a passway by a large number of pedestrians with the knowledge and consent of defendant," the deceased was a trespasser, and defendant was not required to keep a lookout for him, and that if they found that as soon as he was seen the motorman used ordinary care to avoid striking him, they should find for defendant, was erroneous in that the latter hypothesis was correct only if the first one be true.—Rice v. Jefferson City Bridge & Transit Co., 216 S. W. 746.

⚡401(2) (Ky.) Where there was evidence that deceased was lying on defendant's track when discovered, the court should have instructed, at defendant's request, that, if the jury believed that deceased just before he was run over was sitting or lying on the track, the defendant was not liable, unless he was actually discovered in time to save him by stopping the train.—Louisville & N. R. Co. v. Smith's Adm'r, 216 S. W. 1063.

## RAPE.

See Criminal Law, ⚡369, 507, 1120, 1172.

## I. OFFENSES AND RESPONSIBILITY THEREFOR.

⚡16(1) (Mo.App.) One who had sexual intercourse with prosecutrix with her consent could not be convicted of the assault of lust, because the phrase "assault of lust" means an assault, less than felonious, with intent to have an improper sexual connection, and does not extend to a condition or state of facts where the improper sexual relation is finally consummated with the consent of the prosecutrix.—State v. Eslick, 216 S. W. 974.

⚡16(3) (Mo.App.) In order to constitute assault with intent to ravish, the defendant must have intended at the time to use all the force necessary to overcome any resistance his victim might offer.—State v. Eslick, 216 S. W. 974.

## II. PROSECUTION AND PUNISHMENT.

⚡59(20, 21) (Mo.App.) In a prosecution for rape held erroneous, in view of the evidence, to charge on the issue of assault with intent to rape.—State v. Eslick, 216 S. W. 974.

## RATIFICATION.

See Banks and Banking, ⚡154.

## REAL ACTIONS.

See Ejectment; Forcible Entry and Detainer; Injunction, ⚡111; Partition; Quietening Title; Trespass to Try Title; Venue, ⚡5.

## RECEIPTS.

See Compromise and Settlement, ⚡23.

## RECEIVERS.

See Corporations, ⚡617; Landlord and Tenant, ⚡170; Mandamus, ⚡88.

## IV. MANAGEMENT AND DISPOSITION OF PROPERTY.

### (A) Administration in General.

⚡99(2) (Ky.) While it is better practice for a receiver, before employing counsel, to obtain authority from the court, yet if, without it, he makes such employment, counsel fees are to be allowed on determination by the court that the employment was necessary and of the sum which should be allowed.—Fidelity & Columbia Trust Co. v. Grommes & Ullrich, 216 S. W. 1078.

An allowance of fees for counsel of receiver will be made only for such services as require legal knowledge and skill.—Id.

### (D) Sale and Conveyance or Redelivery of Property.

⚡142 (Ark.) Where a receiver in a partnership dissolution suit made a rental contract after a petition for sale of the partnership land had been filed, and subsequently, and before any arrangement had been made by the tenants, subtenants, and share croppers to cultivate the land, the court ordered the receiver not to rent the lands, such tenants contracted at their peril, and were bound to take notice of receiver's incapacity to conclude a binding contract without the court's sanction, since they became parties to the litigation with respect to the property.—Smith v. Murphy, 216 S. W. 719.

## V. ALLOWANCE AND PAYMENT OF CLAIMS.

⚡154(2) (Ky.) Counsel fees, when allowed, are a part of the costs of the receivership, and are entitled to priority in payment.—Fidelity & Columbia Trust Co. v. Grommes & Ullrich, 216 S. W. 1078.

## X. WRONGFUL RECEIVERSHIPS.

⚡220 (Ark.) Where the evidence shows that the receiver never actually took the property out of the owner's possession, but permitted him to continue to manage and operate it just as he had done before, the owner has not suffered any loss by the appointment, and the chancellor was correct in not allowing damages on account thereof.—General Cooperation & Timber Co. v. Hedges, 216 S. W. 712.

## RECEIVING STOLEN GOODS.

See Criminal Law, ⚡878; Larceny, ⚡27.

## RECOGNIZANCES.

See Criminal Law, ⚡1087.

## RECORDS.

See Appeal and Error, ⚡496-714, 722, 797, 803; Chattel Mortgages, ⚡90, 150, 153, 155; Courts, ⚡183; Criminal Law, ⚡1081, 1087-1124; Deeds, ⚡31, 82; Drains, ⚡35; Infants, ⚡80; Judgment, ⚡470, 497, 949; Mortgages, ⚡43; Private Roads, ⚡2; Statutes, ⚡283, 284; Vendor and Purchaser, ⚡231.

⚡1 (Tex.) The policy of the registration laws requires that the public records disclose all matters affecting land titles.—Leonard v. Benford Lumber Co., 216 S. W. 382.

⚡6 (Tex.) A conveyance of a donation certificate before location thereunder was properly recorded after location of the land, under Rev. St. 1911, art. 8323.—Leonard v. Benford Lumber Co., 216 S. W. 382.

## REFERENCE.

See Appeal and Error, ⚡220, 1022.

## III. REPORT AND FINDINGS.

⚡100(4) (Ky.) A party dissatisfied with the report of the referee must make specific excep-



tions to the report, and findings not so excepted to will be treated as approved, though unreasonable particularity is not required.—*Town of Highland Park v. Wilson*, 216 S. W. 370.  
 ⚡100(7) (Ky.) By failing to except to items of debit or credit contained in a report of the master commissioner, plaintiff waived all errors, if any, in allowing them.—*Wilson v. Smoot*, 216 S. W. 129.

## REFORMATION OF INSTRUMENTS.

See Judgment, ⚡251.

### I. RIGHT OF ACTION AND DEFENSES.

⚡17(1) (Mo.) When by mistake in drawing a deed, it does not convey the estate intended by the parties, it may be reformed to accomplish their intention, whether the mistake be one of law or fact in writing out the agreement made.—*Bramhall v. Bramhall*, 216 S. W. 766.

⚡18 (Mo.) When, by mistake in drawing a deed, it does not convey the estate intended by the parties, it may be reformed to accomplish their intention, whether the mistake be one of law or fact in writing out the agreement made.—*Bramhall v. Bramhall*, 216 S. W. 766.

⚡18 (Tex.Civ.App.) A mistake by a scrivener in drawing an instrument which would warrant a reformation applies to mistakes of law as well as mistakes of fact, and a contract can be reformed where a scrivener uses a word in a mistaken sense.—*Benson v. Ashford*, 216 S. W. 283.

### II. PROCEEDINGS AND RELIEF.

⚡32 (Mo.) One holding land under a deed giving him a life estate was not guilty of laches in failing for a number of years to bring an action to reform the deed to exclude the remaindermen from any interest in the land; plaintiff having never acquiesced in the effect of the deed, and being ignorant of its effect until shortly before he sued, and none of the remaindermen being prejudiced by the delay.—*Bramhall v. Bramhall*, 216 S. W. 766.

## REGISTERS OF DEEDS.

See Chattel Mortgages, ⚡90.

### RELEASE.

See Insurance, ⚡144, ⚡602; Novation, ⚡7; Pleading, ⚡237; Tender, ⚡14, ⚡16; Vendor and Purchaser, ⚡239.

### I. REQUISITES AND VALIDITY.

⚡18 (Mo.) Duress might be such as to render a settlement void at law, the actual application of force to compel the act of signing a release constituting an instance.—*McCoy v. James T. McMahon Const. Co.*, 216 S. W. 770.

The mere fact that one was liable for damages and for expenditures for medical services would not render void a release obtained under threat that the doctor's bill and hospital bill would not be paid, and the injured party would have to get out of the hospital, especially where leaving the hospital would not have injuriously affected the injured person.—Id.

⚡21 (Mo.) One ratifies a release obtained through duress by using the money paid to him under the release.—*McCoy v. James T. McMahon Const. Co.*, 216 S. W. 770.

⚡22 (Mo.) Where defendant, in action for personal injuries, pleaded that the consideration for a certain release was a certain amount of money and payment of hospital and doctor's bills, plaintiff cannot complain that a false release was pleaded, although the written release recited only the sum paid directly to plaintiff.—*McCoy v. James T. McMahon Const. Co.*, 216 S. W. 770.

⚡24(2) (Mo.) If the instrument or agreement relied upon as a release never existed in fact, or is void at law, no tender can be required;

but, if there is fraud in the factum, no tender is necessary, while fraud in the treaty merely renders the release voidable, in which case tender is a prerequisite to an action on the original cause.—*McCoy v. James T. McMahon Const. Co.*, 216 S. W. 770.

Tender of money paid plaintiff personally under a release signed by him would be a sufficient tender before suit, although the payment of hospital and doctor's bills was also a part of the consideration for the release, where defendant would not advise plaintiff as to the amount of such bills.—Id.

The release being only voidable and not void, the injured party was not excused from tendering back the amount of cash paid him personally by reason of the fact that he did not know what the amount of the hospital and doctor's bills were, and could not get the information from defendant.—Id.

Deceit of counsel for defendant, after suit brought, as to the amount of the hospital and doctor's bill, could not relate back and vest the plaintiff with a cause of action he did not have when he sued by reason of failure to tender back the amount of cash personally received by him before suit.—Id.

## REMAINDERS.

See Life Estates, ⚡8, ⚡12; Wills, ⚡634.

⚡6 (Mo.) In view of Rev. St. 1909, § 2872, deeds to a life tenant, executed by remaindermen, vest in the life tenant in fee the contingent interests of the remaindermen.—*Bramhall v. Bramhall*, 216 S. W. 766.

⚡14 (Mo.App.) A remainder, whether vested or contingent, is alienable.—*McClure v. Baker*, 216 S. W. 1018.

## REPAIRS.

See Easements, ⚡9; Master and Servant, ⚡316.

## REPLEVIN.

See Chattel Mortgages, ⚡139; Judgment, ⚡250; Sales, ⚡234; Sequestration, ⚡15.

### I. RIGHT OF ACTION AND DEFENSES.

⚡9 (Ky.) Where one has taken possession of, but not converted to its use, property of another, owner may recover the specific articles or their value, with damages for detention.—*Staeble & Gregg v. Town of Anchorage*, 216 S. W. 348.

### IV. PLEADING AND EVIDENCE.

⚡69(3) (Mo.App.) Where plaintiff in replevin alleged how he became invested with title to the property sought to be recovered, he is confined in proof to the allegations of the petition, regardless of whether it was necessary for him to have averred with particularity his title.—*Shellenberger v. Hill*, 216 S. W. 542.

### VI. TRIAL, JUDGMENT, ENFORCEMENT OF JUDGMENT, AND REVIEW.

⚡88 (Tex.Civ.App.) In an action to recover the value of goats wrongfully seized as damages, where defendants claimed the goats had been stolen from them by another, testimony by plaintiff that he had raised the goats on his ranch requires the issue of ownership to be submitted to the jury.—*Hernandez v. Garcia*, 216 S. W. 477.

## REPORTS.

See Eminent Domain, ⚡237; Reference, ⚡100.

## REPUGNANCY.

See Deeds, ⚡111.



**REPUTATION.**

See Criminal Law, ¶982; Malicious Prosecution, ¶59.

**RESALE.**

See Sales, ¶172.

**RES IPSA LOQUITUR.**

See Landlord and Tenant, ¶169; Negligence, ¶111.

**REVENUE.**

See Taxation, ¶193-219.

**REVIEW.**

See Appeal and Error; Certiorari.

**RIPARIAN RIGHTS.**

See Navigable Waters, ¶46.

**RISKS.**

See Master and Servant, ¶205-226.

**ROADS.**

See Private Roads.

**ROBBERY.**

See Criminal Law, ¶369, 371

**RUBBER.**

See Evidence, ¶20.

**SALES.**

See Bills and Notes, ¶64; Contracts, ¶10, 116; Corporations, ¶108; Estoppel, ¶110; Evidence, ¶158; Frauds, Statute of, ¶109; Guaranty, ¶1, 82; Intoxicating Liquors, ¶146; Judgment, ¶240, 707; Judicial Sales; Limitation of Actions, ¶41, 100; Monopolies, ¶23; New Trial, ¶89; Novation, ¶4; Partnership, ¶77; Pleading, ¶369; Principal and Agent, ¶103, 170, 178; Principal and Surety, ¶126; Sequestration, ¶17; Taxation, ¶624-692; Vendor and Purchaser.

**I. REQUISITES AND VALIDITY OF CONTRACT.**

¶1(4) (Tex.Civ.App.) Where members of a truck growers' association ordered onion crates under a contract providing for a cash payment of the first consignment, additional crates to be furnished "as needed to pack their 1917 onion crop in," the contract was not void, because of uncertainty as to the number of crates to be furnished; the maximum being fixed as the amount needed for the crop.—Mayhew & Isbell Lumber Co. v. Valley Wells Truck Growers' Ass'n, 216 S. W. 225.

¶7 (Ark.) Contract whereby manufacturer sold certain goods to so-called "salesman" to be resold by the "salesman" was a contract for the sale of goods and not a contract of agency.—Shores-Mueller Co. v. Palmer, 216 S. W. 295.

¶22(5) (Ky.) In an action for breach of a contract for sale of hemp, where both parties testified there was an offer of sale by defendant, but differed as to the time it was to remain open, held that communication of acceptance of offer on the following day was within a reasonable time.—Caldwell v. E. F. Spears & Sons, 216 S. W. 83.

A gratuitous offer to sell may be accepted within reasonable time before withdrawal.—Id. ¶23(3) (Tex.Civ.App.) A contract for the delivery of onion crates to the members of a truck growers' association, prepared by a representative of the association, accepted by the manufacturer, and delivered to the associa-

tion's representative, who thereupon made a partial cash payment, held to constitute a complete contract.—Mayhew & Isbell Lumber Co. v. Valley Wells Truck Growers' Ass'n, 216 S. W. 225.

**II. CONSTRUCTION OF CONTRACT.**

¶81(1) (Tex.Civ.App.) Time is of the essence of a contract between truck growers and a manufacturer to furnish a sufficient number of onion crates to market a designated crop of onions.—Mayhew & Isbell Lumber Co. v. Valley Wells Truck Growers' Ass'n, 216 S. W. 225.

¶81(3) (Mo.App.) The phrase, "ship as soon as possible," in a sale contract, means within a reasonable time under the circumstances of the case.—Colorcraft Co. v. American Packing Co., 216 S. W. 831.

¶85(1) (Tex.Com.App.) Seller of irrigating machinery, having agreed by written contract that the writing was the complete agreement to ship machinery within certain time, to furnish blueprints for the foundations, and to provide an engineer to supervise the installation, and instruct buyer's operators, was not required to install the machinery, being bound to do only those things specified in the contract.—Southern Gas & Gasoline Engine Co. v. Richolson, 216 S. W. 158.

¶87(3) (Ark.) In an action for breach of sale contract, evidence held sufficient to support by a preponderance the finding of the chancellor that the parties had orally agreed that the goods should be inspected at the place of manufacture, and not at the place of delivery.—General Coöperage & Timber Co. v. Hedges, 216 S. W. 712.

**III. MODIFICATION OR RESCISSION OF CONTRACT.****(A) By Agreement of Parties.**

¶90 (Tex.Com.App.) Seller, having agreed by writing to furnish certain specified machinery and do certain specified things with reference to the installation of the irrigation machinery sold, was not bound beyond the obligations specifically imposed, since all negotiations relating to installation of the machinery were merged in the written contract.—Southern Gas & Gasoline Engine Co. v. Richolson, 216 S. W. 158.

¶90 (Tex.Civ.App.) In suit for breach of contract for shipment of car of seed grain, held, under the evidence, that there was no new contract made or any merger of the original contract by one of a later date.—Pittman & Harrison Co. v. Knowlan Machine & Supply Co., 216 S. W. 678.

¶92 (Ark.) In seller's action for price of lumber, whether seller's letter and telegram of same date, to buyer, sent upon buyer's complaint that the lumber received did not conform to contract, rescinded the contract, or made an unaccepted offer to rescind on buyer reloading and rebilling lumber, as directed, held for jury.—American Hardwood Lumber Co. v. Milliken-James Hardwood Lumber Co., 216 S. W. 23.

**(C) Rescission by Buyer.**

¶128 (Tex.Civ.App.) In suit on notes given for price of engine and separator, and to foreclose mortgages securing the notes, held that return of engine and its acceptance by plaintiff seller constituted a rescission.—J. I. Case Threshing Mach. Co. v. Street, 216 S. W. 426.

**IV. PERFORMANCE OF CONTRACT.****(C) Delivery and Acceptance of Goods.**

¶168(1) (Ark.) Generally in case of an executory contract of sale the buyer is entitled to a fair opportunity to inspect or to examine the goods tendered to see if they conform to the contract, and if they do not do so buyer may reject them.—American Hardwood Lum-

ber Co. v. Milliken-James Hardwood Lumber Co., 216 S. W. 23.

☞168(1) (Ark.) Where a contract for the sale of staves was an executory one, the purchasers had the right to inspect them in order to ascertain whether they conformed to the agreement.—General Cooperage & Timber Co. v. Hedges, 216 S. W. 712.

☞168(4) (Ark.) Where seller wrote buyer that carload of lumber was being loaded for shipment, and that seller would be glad to have buyer look lumber over carefully when it was unloaded in buyer's yards, buyer had the right, before acceptance, to unload the lumber for inspection, but if buyer knew by examination of lumber in car that it did not conform to contract, the unloading of lumber constituted acceptance.—American Hardwood Lumber Co. v. Milliken-James Hardwood Lumber Co., 216 S. W. 23.

☞172 (Tex.Civ.App.) Where a contract to furnish onion crates to the members of a truck growers' association merely obligated defendant to deliver such crates as were needed for the crops of the members of the association, and did not prohibit resale, that some of the crates were disposed of to a nonmember for the use of his tenants who were members did not constitute a breach excusing seller's failure to deliver remainder of crates contracted for.—Mayhew & Isbell Lumber Co. v. Valley Wells Truck Growers' Ass'n, 216 S. W. 225.

☞174 (Tex.Civ.App.) In an action by truck growers for breach of contract to furnish onion crates, failure to make a partial payment for crates received after breach by defendant held not to excuse such breach on defendant's part.—Mayhew & Isbell Lumber Co. v. Valley Wells Truck Growers' Ass'n, 216 S. W. 225.

☞176(1) (Tex.Civ.App.) The question of waiver of breach of sale contract is mainly one of intention, and such intention cannot be inferred from acts performed under circumstances such as renders the acts involuntary or compulsory.—Mayhew & Isbell Lumber Co. v. Valley Wells Truck Growers' Ass'n, 216 S. W. 225.

☞176(4) (Ark.) Where seller of carload of lumber gave buyer right to unload lumber before acceptance for purpose of inspection, buyer had the right to accept lumber without inspecting it, in reliance upon its right to recover damages in case lumber was of a quality inferior to that specified in contract.—American Hardwood Lumber Co. v. Milliken-James Hardwood Lumber Co., 216 S. W. 23.

☞179(3) (Tex.Com.App.) Under irrigating machinery sales contract, providing that "receipt of material constitutes a waiver of any claim for damages on account of delay," buyer could not recover damages resulting from delayed installation of the machinery due to delay in delivery thereof; the claim for such damages having been waived by acceptance of machinery upon delayed delivery.—Southern Gas & Gasoline Engine Co. v. Richolson, 216 S. W. 158.

☞179(3) (Tex.Civ.App.) In an action for breach of contract to furnish onion crates to the members of a truck growers' association to harvest a designated crop of onions, acceptance of crates after the time when damages were suffered by plaintiff because of defendant's failure to furnish crates held not a waiver of the breach of contract, where such crates had been continually demanded.—Mayhew & Isbell Lumber Co. v. Valley Wells Truck Growers' Ass'n, 216 S. W. 225.

## V. OPERATION AND EFFECT.

(A) Transfer of Title as Between Parties.

☞199 (Tex.Civ.App.) Where it is the understanding of the parties that title to goats sold shall not pass until payment is made for them, title does not pass, though possession of the goats was delivered to the buyer and a bill of

sale, reciting payment, was executed.—Hernandez v. Garcia, 216 S. W. 477.

☞218½ (Tex.Civ.App.) In suit to recover value of goats wrongfully seized by defendants, evidence held insufficient to warrant a peremptory instruction for defendants on the theory that plaintiff had parted with title to the goats before the seizure by defendants.—Hernandez v. Garcia, 216 S. W. 477.

## (D) Bona Fide Purchasers.

☞234(5) (Mo.App.) If a purchaser of chattels misrepresents his identity, passing under a false name, and induces a pretended sale to himself under the belief that such sale is to another, no title passes to him from the sellers which he can pass on to another, even an innocent purchaser, the sellers not suffering the loss on any ground that they conferred on the fraudulent buyer the apparent right of ownership.—Windle v. Citizens' Nat. Bank, 216 S. W. 1020.

☞234(5) (Mo.App.) Where the purchaser of chattels bought under a false name, giving a note and mortgage, and after obtaining possession transferred the property by chattel mortgage to innocent persons, the seller was entitled to judgment in replevin against such transferees of the fraudulent buyer, for, in case of a misrepresentation of identity, no title passes which is available even to a bona fide purchaser for value.—Windle v. Citizens' Nat. Bank, 216 S. W. 1023.

## VI. WARRANTIES.

☞255 (Ark.) Where a packing company sold sausage to an intermediate retail dealer, who sold to plaintiff, there was no warranty by the company, of the wholesomeness of the food product, available to plaintiff, who could not maintain action for damages for its breach.—Drury v. Armour & Co., 216 S. W. 40.

☞263 (Ark.) There was an implied warranty of title in the sale of a mare.—E. O. Barnett Bros. v. Brown, 216 S. W. 1038.

## VII. REMEDIES OF SELLER.

(C) Recovery of Goods Delivered or Proceeds Thereof.

☞318 (Mo.App.) Sellers of personality to a buyer who passed under a false name and gave back mortgages as security in such name held not to have waived their right to reclaim the property from transferees of the fraudulent buyer, though, after they asserted their right and obtained possession of the property, they foreclosed their mortgage, believing it to be valid; waiver implying knowledge and intention, neither of which was present.—Windle v. Citizens' Nat. Bank, 216 S. W. 1020.

## (E) Actions for Price or Value.

☞359(3) (Ark.) Evidence as to alleged payment for goods sold held insufficient to show that the payment had been made.—General Cooperage & Timber Co. v. Hedges, 216 S. W. 712.

☞364(7) (Ark.) In action for price of carload of lumber, instruction that buyer had right to unload car to inspect it and to hold lumber for freight and unloading charges, if material portion was not in accordance with order, held not inconsistent with instructions that unloading of car with knowledge that lumber did not conform to contract constituted acceptance.—American Hardwood Lumber Co. v. Milliken-James Hardwood Lumber Co., 216 S. W. 23.

## VIII. REMEDIES OF BUYER.

(A) Recovery of Price.

☞393 (Ark.) Where a mare was sold under an implied warranty of title and the assurance of title which the sellers were asserting in litigation with a third person, the sellers cannot resist the buyer's suit to recover the price paid after failure of title, on the ground that any payments of purchase money were vol-

untarily made; the payments having been made before final termination of the litigation which determined title to the mare.—*E. O. Barnett Bros. v. Brown*, 216 S. W. 1038.

(C) Actions for Breach of Contract.

—417 (Tex.Civ.App.) In an action by members of a truck growers' association for breach of defendant's contract to furnish crates in which to market their 1917 crop of onions, the crates to be furnished as needed, where defendant contended that, by a more judicious distribution of crates received among the members, damages arising from failure to deliver balance of crates could have been lessened, evidence held not to show an improper distribution of the crates.—*Mayhew & Isbell Lumber Co. v. Valley Wells Truck Growers' Ass'n*, 216 S. W. 225.

—418(2) (Mo.App.) In a buyer's action against the seller for failure to furnish an article, the measure of damages is the difference between the contract price and the market value at the time of the breach.—*Sentney Wholesale Grocery Co. v. Thompson*, 216 S. W. 780.

Where a contract provided for the sale of tomatoes to be shipped when packed, there was no definite time set for performance, and the date on which the seller notified the buyer that he could not perform sets the date of the breach, and in estimating damages the market value of the tomatoes should be calculated as of that date.—*Id.*

—418(2) (Tex.Civ.App.) The measure of damages for failure to deliver merchandise is the difference in value of the merchandise when contracted for and when it should have been delivered.—*Peterson v. Appleton Nat. Bank*, 216 S. W. 1114.

—418(7) (Mo.App.) A buyer injured by breach of a sales contract must exercise reasonable care and diligence to avoid loss or minimize the damages.—*Sentney Wholesale Grocery Co. v. Thompson*, 216 S. W. 780.

—422 (Tex.Com.App.) Verdict for buyer of irrigating machines for damages to rice crop resulting from seller's breach of contract held, in view of the findings to embrace damages for delayed installation of machinery, which damages buyer, by acceptance of the machinery upon delayed delivery, had waived under stipulation of the contract.—*Southern Gas & Gasoline Engine Co. v. Richolson*, 216 S. W. 158.

(D) Actions and Counterclaims for Breach of Warranty.

—440(2) (Ark.) In action on note given for balance due on purchase of interest in drug store partnership, where defense was that plaintiff guaranteed that the stock and fixtures would invoice at a higher figure than they in fact invoiced, testimony of his representations as to invoice of stock at the time of buyer's prior purchase of another partner's interest was admissible upon issue of whether plaintiff guaranteed invoice.—*Huggins v. Smith*, 216 S. W. 1.

—441(1) (Ark.) In action on note given for partner's interest in drug store business, where defense was that plaintiff guaranteed the stock and fixtures to invoice at a higher figure than the actual invoice, evidence held to sustain verdict for defendants.—*Huggins v. Smith*, 216 S. W. 1.

—442(13) (Ark.) Where a mare was sold and used by the buyer, but the title failed, so that he sued to recover the price paid, the sellers are not entitled to a credit for the money value of the use of the mare while the buyer had her.—*E. O. Barnett Bros. v. Brown*, 216 S. W. 1038.

## SALOON KEEPER.

See Insurance, —723.

## SAUSAGE.

See Food, —25; Sales, —255.

## SCHOOLS AND SCHOOL DISTRICTS.

See Municipal Corporations, —845; Officers, —100; Taxation, —913.

### II. PUBLIC SCHOOLS.

#### (A) Establishment, School Lands and Funds, and Regulation in General.

—13 (Ky.) Cities of the fourth class have the option, under Ky. St. § 3588, to maintain separate schools for white and colored children in one district, and under one board of education, instead of organizing two districts, one white and one colored, pursuant to section 3588a, or a graded school system may be maintained, without co-operation of the city as provided for by sections 4464-4500b.—*Moss v. City of Mayfield*, 216 S. W. 842.

#### (B) Creation, Alteration, Existence, and Dissolution of Districts.

—25 (Ky.) Where the territory of a city is organized into two separate free graded public school districts, one for white and one for colored children, there are three separate and distinct municipalities, the white graded school district, the colored graded school district, and the city, which includes all people and property within its territory.—*Moss v. City of Mayfield*, 216 S. W. 842.

#### (C) Government, Officers, and District Meetings.

—48(1) (Tex.Civ.App.) The office of county superintendent of public instruction depends for its existence, under Vernon's Sayles' Ann. Civ. St. 1914, art. 2750, on the condition of the scholastic census at each general election, no election to such office being valid in a county having a scholastic population of less than 3,000, as shown by the preceding census, except in counties where the office has been created by an election held for that purpose.—*Miller v. Brown*, 216 S. W. 452.

—48(5) (Tex.Civ.App.) Since it was not the purpose of Vernon's Sayles' Ann. Civ. St. 1914, art. 2750, to create the office of county superintendent of public instruction, nor authorize the election to the same, in counties having a scholastic population of less than 3,000, as shown by the preceding census, except in counties where such office has been created by an election held for that purpose, one elected to such office in a county having a scholastic population of less than 3,000, where such office was not created by an election held for that purpose, even if termed a de facto officer, is not entitled to the emoluments of the office for the term for which elected.—*Miller v. Brown*, 216 S. W. 452.

#### (D) District Property, Contracts, and Liabilities.

—84 (Ark.) A contract between plaintiff architect and defendant school district retaining him to prepare school building plans, with a provision that the contract was void if the district was unable to secure money on its bond issue, and another instrument between the same parties on the same day under which plaintiff agreed to buy the bond issue for a specified sum, etc., held to constitute one contract, so that instruments should be construed together.—*Bliss v. Manila Special School Dist.*, 216 S. W. 700.

In an architect's action to recover fee, an instruction that, if plaintiff duly made the plans and was prepared to buy defendant school district's bond issue pursuant to another instrument executed the same day, and if the school district failed to carry out its obligations, the plaintiff could recover, but that, if plaintiff

failed to purchase the bond issue without the district's fault, to find for defendant, *Acld* proper, where the school building and bond issue agreements were signed the same day and constituted one contract.—Id.

**(E) District Debt, Securities, and Taxation.**

⌚90 (Ky.) Where the territory of a city was organized into two school districts, one white and one colored, the colored district, under Const. § 158, could incur an indebtedness for schools on vote of two-thirds of the colored voters not exceeding 2 per cent. of the value of the taxable property of colored citizens of the city, and the proportion of corporate property that the number of colored children bore to the whole number of children of school age.—*Moss v. City of Mayfield*, 216 S. W. 842.

⌚103(2) (Ky.) In view of Const. § 187, requiring separate schools for white and colored children, where the territory of a city was organized into two separate free graded public school districts, one for white and one for colored children, and the proposition to incur indebtedness for school buildings for the colored school district, to be paid by taxation on the property of the colored people only, was submitted to the colored voters and adopted, there was no violation of section 157 on any ground that two-thirds of the voters of the municipality had not authorized the indebtedness, in that the whites had not voted.—*Moss v. City of Mayfield*, 216 S. W. 842.

**SEDUCTION.**

See Criminal Law, ⌚369, 1169.

**SENTENCE.**

See Criminal Law, ⌚981-992.

**SEPARATE PROPERTY.**

See Husband and Wife, ⌚119-133.

**SEQUESTRATION.**

⌚15 (Tex.Civ.App.) Owner of sequestered property who was not a party to the sequestration proceedings could not have replevied property under Rev. St. 1911, art. 7103, providing that when property has been sequestered the defendant therein may replevy by giving bond.—*Bassham v. Evans*, 216 S. W. 446.

⌚17 (Tex.Civ.App.) Where the holder of a secured note, given for the purchase price of three mules, sought to foreclose his mortgage lien and prayed a writ of sequestration for possession of the property, the writ must be quashed, where neither the affidavit nor the petition alleged the value of each item of the property, as required by Rev. St. 1911, art. 7095.—*Gandy v. Cornelius*, 216 S. W. 467.

⌚21 (Tex.Civ.App.) In action against defendants who had obtained possession of plaintiff's premises by sequestration proceedings without making plaintiff a party thereto, the sequestration proceedings and the issuance and levy of the writ on the property is no defense.—*Bassham v. Evans*, 216 S. W. 446.

Owner attacking sequestration proceedings to which he was a party as being wrongfully sued out would be required to negative the grounds stated in the affidavit and state his damages occasioned by such wrongful act, and, if he desires punitive damages, would be required to allege that it was willful, malicious, or the like, and without probable cause.—Id.

In action against defendants who had obtained possession of premises by means of sequestration proceedings to which plaintiff had not been made a party, allegations showing a conscious disregard of plaintiff's rights by defendants *held* to authorize exemplary damages.—Id.

When real or personal property had been levied on by a writ of execution, attachment,

sequestration, or other such writ, to which the claimant or owner is not a party, he may resort to his common-law remedy for the damages inflicted by seizure thereunder.—Id.

In action for trespass in wrongfully obtaining possession of plaintiff's property by sequestration proceedings, mental anguish occasioned by the trespass cannot be recovered as actual damages; although if the trespass were malicious or with evil intent, so that exemplary damages are recoverable, mental anguish may be considered in assessing such damages, under the rule permitting the jury, in assessing such damage, to consider damage too remote to be considered strictly compensatory.—Id.

In action for trespass in wrongfully obtaining possession of plaintiff's premises by sequestration proceedings, where the allegations of the petition may have sufficiently charged a willful or evil intent and gross disregard of plaintiff's right, but the mental anguish as alleged was confined to actual damages, the petition alleging plaintiff "has suffered mental distress on account of his being deprived of the use of the said building for his said mother and father," and that he had been damaged in a sum equal to the rental value, etc., the petition would not support a recovery of exemplary damages, in which form only could damages for mental distress be recovered in such a case.—Id.

In action against defendants who had obtained possession of premises by sequestration proceedings without making plaintiff a party to the proceedings in violation of his rights as a soldier under Soldiers' and Sailors' Civil Relief Act (U. S. Comp. St. §§ 3078½-3078¾), plaintiff's measure of damages was, not recovery of purchase money installments paid, but was the value of the use of premises and any special damage to the property.—Id.

**SET-OFF AND COUNTERCLAIM.**

See Limitation of Actions, ⌚41; Process, ⌚4.

**SEWERS.**

See Municipal Corporations, ⌚741, 845.

**SHADOWS.**

See Evidence, ⌚6.

**SHELLEY'S CASE.**

See Deeds, ⌚128.

**SHERIFFS AND CONSTABLES.**

See Bail, ⌚48, 70; Jury, ⌚72; Mortgages, ⌚341.

**SHOTGUN.**

See Homicide, ⌚3.

**SIGNS.**

See Homicide, ⌚207.

**SKETCHES.**

See Appeal and Error, ⌚524.

**SLANDER.**

See Libel and Slander.

**SLAVES.**

See Marriage, ⌚16, 50.

⌚14 (Ky.) Evidence *held* to show that the father of claimant of the remainder of testator's estate was the son of testator, a former slave, and his wife, born after they had entered into a customary marriage and were living together as husband and wife so as to entitle claimant to the property.—*Cabble v. Hawkins*, 216 S. W. 345.

For cases in Dec.Dig. & Am.Dig. Key-No.Series & Indexes see same topic and KEY-NUMBER

§25 (Ky.) Where a man and a woman being slaves were married according to the custom of the slaves, their son was a legitimate child entitled to inherit under Ky. St. § 1393, so that the son's son was entitled to inherit as a grandson.—*Cabbie v. Hawkins*, 216 S. W. 845.

## SOLDIERS' AND SAILORS' CIVIL RELIEF ACT.

See Army and Navy, §34; Sequestration, §21.

## SPECIAL COUNSEL.

See Attorney General, §2.

## SPECIAL LAWS.

See Statutes, §75.

## SPECIFIC PERFORMANCE.

See Appeal and Error, §1073; Husband and Wife, §129; Judgment, §443, 656.

## II. CONTRACTS ENFORCEABLE.

§55 (Tex.Civ.App.) Where land is conveyed upon several considerations one of which is illegal, as requiring dismissal of criminal proceedings against grantor's son, but the grantee is not put in possession, and the contract remains executory, a suit for specific performance will not lie.—*Hanes v. Hanes*, 216 S. W. 272.

§64 (Ky.) Specific performance of a contract for the sale of real estate does not go as a matter of course, but is withheld or granted according as equity and justice may seem to demand under the facts and circumstances in the case.—*Clifton Land Co. v. Reister*, 216 S. W. 342.

## IV. PROCEEDINGS AND RELIEF.

§106(1) (Ky.) The assignee of a partial interest in a contract of sale of an interest in land is not a necessary party to a suit for specific performance by the vendee; but, where the vendee has assigned his entire interest, the assignee is a necessary party.—*Taylor v. Hurst*, 216 S. W. 95.

§121(10) (Ark.) In purchaser's action for specific performance defended on ground of rescission of contract by mutual consent, finding that there had been no rescission held not against the preponderance of the evidence.—*Feibelman v. Hill*, 216 S. W. 702.

§130 (Ky.) Where a contract for the sale of a parcel of land on which was a building included the east wall of the building, and it appeared that the east wall was a party wall, in which the adjoining owner had an easement, held that, where the purchaser was anxious to consummate the contract with a deduction for the value of the easement, a decree of specific performance with a reasonable deduction was proper.—*Clifton Land Co. v. Reister*, 216 S. W. 342.

## STATE HIGHWAY COMMISSIONERS.

See Highways, §71.

## STATES.

See Dismissal and Nonsuit, §71.

## STATUTE OF FRAUDS.

See Frauds, Statute of.

## STATUTE OF LIMITATIONS.

See Limitation of Actions.

## STATUTES.

See Constitutional Law.

For statutes relating to particular subjects, see the various specific topics.

## I. ENACTMENT, REQUISITES, AND VALIDITY IN GENERAL.

§5 (Ark.) Since less than 30 days elapsed from the date of Governor's proclamation for extraordinary session, when Sp. Act Sept. 30, 1919, was approved by him, the record conclusively shows that Const. art. 5, § 26, was not complied with, and the act will be held unconstitutional and void.—*Booe v. Road Improvement Dist. No. 4, Prairie County*, 216 S. W. 500.

§8½(1) (Ark.) An express amendment to a local statute falls within the requirements of the Constitution with reference to notice of the introduction of bills for local statutes.—*Payne v. Road Imp. Dist. No. 1 of Marion County*, 216 S. W. 1047.

§64(4) (Ark.) The invalidity of the provision of Acts 1917, p. 568, providing for city managers of municipalities, that such officer need not be a resident of the city does not carry with it the entire act, for it can be stricken out and leave the act as a whole a complete law, capable of enforcement.—*McClendon v. Board of Health of City of Hot Springs*, 216 S. W. 239.

## II. GENERAL AND SPECIAL OR LOCAL LAWS.

§75 (Tenn.) Acts 1919, c. 149, § 9, empowering highway commission immediately upon filing of condemnation suit to take possession of the property designated, is not subject to the objection that it is a suspension of general law for the benefit of particular individuals.—*State Highway Department v. Mitchell's Heirs*, 216 S. W. 336.

Acts 1917, c. 74, § 5, authorizing condemnation suits for acquisition of right of way for highways to be prosecuted without cost bond, is not subject to objection that it is a suspension of general law for the benefit of particular individuals.—*Id.*

Conceding that general laws governing condemnation (Thomp. Shan. Code, §§ 1845-1859, 1861-1865), would otherwise apply such laws may be repealed or modified in their application to the highway commission and the several counties acting under Acts 1917, c. 74, and Acts 1919, c. 149, and these agencies may be authorized to proceed in a different manner, since special laws may be passed affecting agencies of the state.—*Id.*

## IV. AMENDMENT, REVISION, AND CODIFICATION.

§130 (Ark.) Const. art. 5, § 21, providing that no bill shall be so altered or amended on its passage through either house as to change its original purpose, applies only to amendments to a bill during its progress through the houses of the Legislature, and does not apply to an amendment of a former statute.—*White River Lumber Co. v. White River Drainage Dist. of Phillips and Desha Counties*, 216 S. W. 1043.

§141(1) (Ark.) The amendment of Acts 1915, p. 338, creating the Northwest Arkansas tick eradication district by Acts 1917, p. 195, § 1, providing that the original act "be amended so as to include the following named counties," did not violate Const. art. 5, § 22, providing that no law shall be revised, amended, or extended by reference to its title only.—*Boyer v. State*, 216 S. W. 17.

§141(2) (Ark.) Acts 1913, p. 751, § 20, repealing Acts 1911, p. 200, § 7, specifying the nonapplication of such drainage act of 1911 to Phillips and Crittenden counties, held not violative of Const. art. 5, § 23, as an attempt to

extend a law by reference to title only; the Constitution not prohibiting repeal of statute, or part thereof, by reference to title.—*White River Lumber Co. v. White River Drainage Dist. of Phillips and Desha Counties*, 216 S. W. 1043.

#### V. REPEAL, SUSPENSION, EXPIRATION, AND REVIVAL.

§161(1) (Ky.) Repeals by implication are not favored and will not be declared except it be impossible to permit both statutes to stand, and if both acts can be reasonably construed together so as to harmonize them, both will be sustained, and if that cannot be done without violence to some part of the language employed in one or both, they should be so construed that as much as possible of each will remain.—*Thomas v. Hurst Home Ins. Co.*, 216 S. W. 308.

§169 (Ark.) At common law the repeal of a repealing law revived the original law repealed.—*White River Lumber Co. v. White River Drainage Dist. of Phillips and Desha Counties*, 216 S. W. 1043.

§170 (Ark.) Where repealing act operates by implication, and does not directly or expressly repeal the original act, the provision of Const. art. 5, § 22, that laws shall not be revived by reference to title only, does not apply, and therefore the act repealed may be revived by reference to its title in a subsequent act expressly repealing the act in which by implication the original act was repealed.—*Faucette v. Patterson*, 216 S. W. 300.

Acts 1917, p. 1149, providing for the construction of a highway, held revived by expressed words in Acts 1919, p. 327, repealing in express terms Acts 1919, p. 134, all on the same subject.—*Id.*

#### VI. CONSTRUCTION AND OPERATION.

##### (A) General Rules of Construction.

§178 (Ky.) Ky. St. § 458, providing that "the words 'real estate or land' shall be construed to mean lands, tenements and hereditaments, and all rights thereto and interests therein other than a chattel interest," is a part of chapter 26 of the statutes dealing with and announcing rules for construction of statutes and is of general application where rules of construction are necessary to a correct interpretation of the language of the statute, but not applicable where the statute by its terms provides otherwise.—*Purcell v. City of Lexington*, 216 S. W. 599.

§188 (Ky.) When language is clear and unambiguous, it will be held to mean what it plainly expresses.—*Gilbert v. Greene*, 216 S. W. 105.

§189 (Ky.) Phrases and sentences are to be construed according to the rules of grammar, unless there are adequate grounds for departure therefrom, either in the context or in the consequences which would result from a literal interpretation.—*Gilbert v. Greene*, 216 S. W. 105.

§190 (Ky.) When the intention of Legislature is so apparent from the face of a statute that there can be no question as to its meaning, there is no room for construction.—*Gilbert v. Greene*, 216 S. W. 105.

§191 (Ky.) Words of common use are to be understood in their natural, plain, ordinary, and genuine signification as applied to the subject-matter of the enactment.—*Gilbert v. Greene*, 216 S. W. 105.

§192 (Ky.) Words and phrases are used in their technical meaning if they have acquired one, and in their popular meaning if they have not.—*Gilbert v. Greene*, 216 S. W. 105.

§218 (Ky.) The rule that resort will be had to contemporaneous construction in construing a statute is not applicable unless the statute is ambiguous and uncertain in its terms,

and it is really difficult to ascertain its true meaning, and an erroneous interpretation by administrative officials for a term of years will not be adopted where its meaning is plain and easily understood.—*Gilbert v. Greene*, 216 S. W. 105.

§226 (Tex. Civ. App.) Since the Workmen's Compensation Act (Vernon's Sayles' Ann. Civ. St. 1914, arts. 5246h-5246zzzz) is largely copied from the Massachusetts Act, it should receive the same construction as that given the latter act by the courts of that state.—*Home Life & Accident Co. v. Corsey*, 216 S. W. 464.

§233 (Tenn.) Law is presumed to be made for the subject or citizen only, and the sovereign is not reached by a statute unless named therein, or unless by necessary implication.—*State Highway Department v. Mitchell's Heirs*, 216 S. W. 336.

#### VII. PLEADING AND EVIDENCE.

§283(2) (Ark.) The presumption that where an act is duly signed by the Governor, deposited with the Secretary of State, and published as a law, every requirement was complied with in its passage, is not conclusive, and the courts in determining the validity of the statute may look to the journals and others records of the Legislature to ascertain whether the constitutional requirements have been observed.—*Helena Water Co. v. City of Helena*, 216 S. W. 26.

Mere silence of the legislative records concerning the successive steps in the passage of a bill, except as to matters of which the Constitution requires a record on the journals, is not sufficient to overcome the presumption of regularity in the passage of a bill arising from the enrolled copy signed by the Governor and deposited with the Secretary of State.—*Id.*

The presumption that Acts 1919, p. 411, creating the Arkansas Corporation Commission, was regularly passed by the Legislature, is not overcome by recitals of the Senate journal that two amendments were adopted, where they did not appear on the enrolled statute signed by the Governor and deposited with the Secretary of State.—*Id.*

§283(2) (Ark.) The presumption is always in favor of the legality of the legislative proceedings, and, where the record of which the court can take judicial knowledge does not show to the contrary, the proceedings are conclusively presumed to have been in accordance with the constitutional requirement as to notice.—*Booe v. Road Improvement Dist. No. 4, Prairie County*, 216 S. W. 500.

The passage of Sp. Act Sept. 30, 1919, authorizing road improvement district to issue bonds, is conclusive that Const. art. 5, § 25, providing that notice of intention to apply for passage of special law shall be given at least 30 days prior to introduction of bill, was complied with, unless the record, of which the court may judicially take notice, shows otherwise.—*Id.*

§284 (Ark.) In determining the validity of a statute, evidence outside the record, consisting of the oral testimony of the secretary of the Senate and its journal clerk, that the Senate did not recede from two amendments which according to the records were adopted, but do not appear in the engrossed bill or the enrolled statute, is inadmissible to overcome the presumption of regularity arising from the enrolled statute.—*Freer v. Ft. Smith Light & Traction Co.*, 216 S. W. 31.

§284 (Ark.) In determining whether passage of Sp. Act Sept. 30, 1919, was in compliance with Const. art. 5, § 25, testimony of the Governor cannot be considered, since it is no part of the record required to be kept by the Constitution, and of which the court may take judicial notice.—*Booe v. Road Improvement Dist. No. 4, Prairie County*, 216 S. W. 500.

## STATUTES CONSTRUED.

## UNITED STATES.

## CONSTITUTION.

Amend. 14 ..... 336  
 Art. 1, § 8 ..... 259, 763

## INTERSTATE COMMERCE ACT.

Act 1887, Feb. 4, ch. 104, 24  
 Stat. 379.

Ch. 104 ..... 989

## STATUTES AT LARGE.

1887, Feb. 4, ch. 104, 24  
 Stat. 379. See Inter-  
 state Commerce Act.  
 1903, Feb. 19, ch. 708, 32  
 Stat. 847 ..... 798  
 1906, June 29, ch. 3591,  
 § 2, 34 Stat. 586 ..... 798  
 1908, April 22, ch. 149, 85  
 Stat. 65 ..... 320  
 1910, Aug. 29, ch. 418, 39  
 Stat. 645 ..... 3  
 1916, Aug. 29, ch. 418, §  
 1, 39 Stat. 645 ..... 444  
 1918, March 8, ch. 20, 40  
 Stat. 440 ..... 446  
 1918, March 8, ch. 20, §§  
 100-103, 200-205, 40  
 Stat. 440-442 ..... 259  
 1918, March 8, ch. 20, §§  
 203, 204, 300-302, 40  
 Stat. 442-444 ..... 446  
 1918, March 21, ch. 25, 40  
 Stat. 451 ..... 3

## COMPILED STATUTES

1916 or 1918.  
 1974a ..... 3, 444  
 8563 et seq. .... 989  
 8569, 8597-8599 ..... 798  
 8657-8665 ..... 320

## COMPILED STATUTES 1918.

1974a, note ..... 3  
 3078 $\frac{1}{4}$ a-3078 $\frac{1}{4}$ e ..... 259  
 3078 $\frac{1}{4}$ a-3078 $\frac{1}{4}$ ss ..... 446  
 3115 $\frac{1}{4}$ a-3115 $\frac{1}{4}$ p ..... 3

## COMPILED STATUTES ANNOTATED SUPPLEMENT 1919.

1974a, note ..... 3  
 3078 $\frac{1}{4}$ a-3078 $\frac{1}{4}$ e ..... 259  
 3078 $\frac{1}{4}$ a-3078 $\frac{1}{4}$ ss ..... 446  
 3115 $\frac{1}{4}$ a-3115 $\frac{1}{4}$ p ..... 3

## PRESIDENT'S PROCLAMATION.

1917, Dec. 26, 40 Stat.  
 1733 ..... 3

## ARKANSAS.

## CONSTITUTION.

Amend. 4 ..... 26  
 Art. 5, § 21 ..... 1043  
 Art. 5, § 22 ..... 17, 300  
 Art. 5, § 23 ..... 1043  
 Art. 5, §§ 25, 26 ..... 500  
 Art. 6, § 19 ..... 500  
 Art. 7, § 28 ..... 690  
 Art. 7, § 34 ..... 15  
 Art. 9, § 3 ..... 308  
 Art. 19, § 3 ..... 289

## KIRBY'S DIGEST.

§§ 142-159 ..... 44  
 § 734 ..... 505

## § 793. Amended by Laws

1917, p. 1121 ..... 695  
 §§ 953, 954 ..... 1040  
 1233 ..... 695  
 1563 ..... 33  
 3260-3262 ..... 311  
 3898, 3902 ..... 308  
 4431, subsec. 4 ..... 36  
 4432 ..... 36  
 5073 ..... 44  
 5445-5448 ..... 38  
 6649. Amended by Laws  
 1905, p. 538, § 1 ..... 3  
 7897 ..... 8  
 §§ 7921, 7922 ..... 295

## ROAD LAWS 1919.

## Volume 1.

Page 359, § 3 ..... 690  
 Page 706 ..... 690  
 Page 725, §§ 21, 22 ..... 690

## Volume 2.

Page 1631 ..... 1047

## LAWS.

1905, p. 538, § 1 ..... 3  
 1909, p. 852, § 32. Amend-  
 ed by Laws 1913, p. 745,  
 § 5 ..... 1043  
 1911, p. 200, § 7. Repeal-  
 ed by Laws 1913, p. 751,  
 § 20 ..... 1043  
 1911, p. 364 ..... 690  
 1913, p. 279, § 29 ..... 1039  
 1913, p. 348 ..... 289  
 1913, pp. 745, 751, §§ 5,  
 20 ..... 1043  
 1915, p. 98 ..... 716  
 1915, p. 338 ..... 17  
 1915, p. 338. Amended by  
 Laws 1917, p. 193, § 1 ..... 17, 694  
 1915, p. 684 ..... 707  
 1917, p. 195, § 1 ..... 17, 694  
 1917, p. 568 ..... 289  
 1917, p. 1121 ..... 695  
 1917, p. 1149 ..... 300  
 1919, p. 105 ..... 721  
 1919, pp. 134, 327 ..... 300  
 1919, p. 411 ..... 26

## KENTUCKY.

## CONSTITUTION 1799.

Art. 10, § 1 ..... 599

## CONSTITUTION 1891.

§§ 157, 158 ..... 842  
 160 ..... 852  
 161 ..... 80  
 167 ..... 852  
 170 ..... 599  
 §§ 171, 183, 184 ..... 105  
 187 ..... 842  
 192 ..... 584  
 235 ..... 80  
 236 ..... 852

## CIVIL CODE OF PRACTICE.

§§ 18, 21 ..... 95  
 28 ..... 62  
 36, subsec. 3 ..... 110  
 52 ..... 1066  
 57, subsec. 7 ..... 1066  
 §§ 96, 97 ..... 110  
 113, subsec. 4 ..... 76  
 317 ..... 342  
 340 ..... 86  
 340, subsec. 3 ..... 83  
 371 ..... 62

422 ..... 121  
 439 ..... 344  
 490, subsec. 2 ..... 110  
 §§ 493, 497 ..... 110  
 601 ..... 116  
 §§ 734, 738, 741 ..... 98  
 753, subsec. 4 ..... 93

## CRIMINAL CODE OF PRACTICE.

§ 272 ..... 83

## STATUTES 1915.

§ 11 ..... 359  
 112-15 ..... 584  
 112-15, subsecs. 1, 5 ..... 584  
 458 ..... 599  
 459 ..... 105  
 553 ..... 58  
 567 ..... 584  
 589 ..... 850  
 950 ..... 61, 370  
 1393 ..... 345  
 §§ 1780, 1786 ..... 850  
 1906 ..... 344, 612  
 1910 ..... 344  
 2120 ..... 121  
 2138 ..... 848  
 2204 ..... 101  
 2739, subsec. 15 ..... 356  
 2761-2764 ..... 1082  
 3166, 3187 ..... 599  
 3480b, subsec. 5 ..... 852  
 3483 ..... 596  
 3572 ..... 61  
 §§ 3588, 3588a ..... 842  
 3706, 3707 ..... 348  
 3918 ..... 76  
 §§ 4022, 4030, 4033, 4039,  
 4049, 4050 ..... 599  
 § 4364. Amended by Laws  
 1918, ch. 138 ..... 80  
 4370 ..... 105  
 4419 ..... 80  
 4464-4500b ..... 842  
 4839 ..... 98

## STATUTES SUPPLEMENT 1918.

§ 4019 ..... 105

## LAWS.

1885-86, ch. 1150 ..... 101  
 1906, ch. 22, art. 18, § 1 ..... 105  
 1916, chs. 19, 28 ..... 368  
 1918, ch. 138 ..... 80

## MISSOURI.

## CONSTITUTION.

Art. 2, § 22 ..... 1013

## REVISED STATUTES 1889.

§§ 5856-5858 ..... 754  
 § 5859. Amended by Laws  
 1895, p. 197 ..... 754  
 § 6796 ..... 817

## REVISED STATUTES 1909.

§§ 70-74 ..... 332  
 302, subsec. 4 ..... 922  
 1247 ..... 1034  
 1730 ..... 740  
 1753. Amended by Laws  
 1915, p. 224 ..... 521  
 1778 ..... 573  
 1812 ..... 770  
 1846 ..... 1025  
 § 1912, 1913 ..... 817  
 1972 ..... 831  
 2048 ..... 834  
 2173 ..... 1015  
 2375 ..... 547, 576

2535	766
2783	835
2881	994
2872	766
3037	954
4484	571
4713	1004
4750	47
5290	1013
5308	334, 1013
5309	48, 334
5312	1013
5313	48
§ 5426, 5427	803
§ 5573, 5578, 5584, 5591,	
5599, 5601, 5614	949
6354	976
§ 7179-7182, 7185	736
7588	831
§ 7660, 7726	539
8212	1034
§ 8235a-8235g. Added by	
Laws 1911, p. 314, § 1	556
8304	547
8862	50
9909	773
§ 10001, 10002, 10004	740
10022, 10024, 10026	773
10090, subsecs. 3, 5	52
10092	541
§ 10383, 10384, 10387	994
10446. Amended by	
Laws 1913, p. 658, § 15;	
Laws 1917, p. 450, § 13	981
10533	981
10668	918
§ 11551, 11552, 11593	763

## CITY CHARTERS.

St. Louis, 1876, art. 6, § 9	944
St. Louis, 1914, Schedule,	
§ 2	944

## LAWS.

1895, p. 197	754
1895, p. 221	817
1911, p. 177	1013
1911, p. 292, § 22	815
1911, p. 314, § 1	556
1913, p. 241, § 16	530
1913, p. 545, § 1	315
1913, p. 658, § 15	981
1915, p. 224	521
1917, p. 450, § 13	981

## TENNESSEE.

## CONSTITUTION.

Art. 1, §§ 8, 21	336
Art. 11, § 8	336

## THOMPSON'S SHANNON'S CODE.

§§ 681-684	336
§ 1844 et seq.	336
§§ 1845-1859, 1861-1865	336

## PRIVATE LAWS.

1917, chs. 25, 131	336
--------------------	-----

## LAWS.

1917, ch. 74	336
1917, ch. 74, § 5	336
1919, ch. 149	336
1919, ch. 149, § 9	336

## TEXAS.

## CONSTITUTION.

Art. 1, § 10	1096
Art. 5, § 3	856
Art. 5, § 8	251
Art. 5, § 11	222
Art. 5, § 16	251

Art. 12, § 6	146
Art. 16, §§ 50, 51	903

## CODE OF CRIMINAL PROCEDURE 1911.

Art. 253	1091
Arts. 320-351	624
Arts. 450, 451	1086
Art. 457	182
Art. 845	869
Art. 918. Amended by	
Laws 1919, ch. 18	168

## PENAL CODE 1911.

Art. 506a	1089
Art. 578	477
Art. 1008	397
Art. 1105	161, 867
Art. 1107	867
Art. 1147	161
Art. 1305	878
Art. 1314	880
Arts. 1433-1435, 1439	1091

## VERNON'S ANNOTATED CODE OF CRIMINAL PROCEDURE 1916.

Art. 183	172
Arts. 216, 217	1100
Art. 472	880
Art. 559	172
Art. 735	170, 172
Art. 736	170
Art. 737	170, 172
Arts. 737a, 743	172
Arts. 919, 920	183
Art. 938	172

## VERNON'S ANNOTATED CODE OF CRIMINAL PROCEDURE SUPPLEMENT 1918.

Arts. 5246-2, 5246-82	475
-----------------------	-----

## VERNON'S ANNOTATED PENAL CODE 1916.

Art. 755	181
Art. 1009	170
Art. 1241	167

## VERNON'S ANNOTATED PENAL CODE SUPPLEMENT 1918.

Art. 820k	488
Arts. 820yy, 820z	394

## REVISED STATUTES 1895.

Arts. 3502a, 3502b	251
--------------------	-----

## REVISED STATUTES 1911.

Arts. 271-300	469
Art. 1521, subd. 6. Amend-	
ed by Laws 1917, ch. 75,	
§ 1	385

Arts. 1526, 1528	856
------------------	-----

Art. 1559	259
-----------	-----

Art. 1830, subds. 5, 6	284
------------------------	-----

Art. 1830, subd. 12	284, 422
---------------------	----------

Art. 1903. Amended by	
-----------------------	--

Laws 1917, ch. 176, § 1	284
-------------------------	-----

Art. 1971. Amended by	
-----------------------	--

Laws 1913, ch. 59	862
-------------------	-----

Art. 1985	205, 1101
-----------	-----------

Art. 2073	647
-----------	-----

Arts. 2108-2114	469
-----------------	-----

Arts. 2184-2190	251
-----------------	-----

Arts. 2396, 2397	257
------------------	-----

Arts. 3271, 3273, 3275,	
-------------------------	--

3675	437
------	-----

Art. 3690	655
-----------	-----

Art. 3756	484
-----------	-----

Arts. 3966, 3967	236
------------------	-----

Art. 4122	251
-----------	-----

Arts. 4617, 4618	254
------------------	-----

Art. 4694	238
-----------	-----

Art. 4741	669
Art. 4746	896
Arts. 5654, 5655	901
Arts. 6445, 6446	627
Arts. 6823, 6824, 6842	382
Art. 6845	666
Art. 6857	382
Art. 7095	467
Art. 7103	446
Art. 7209 et seq.	480
Art. 7221	480
Arts. 7733, 7734	491

## VERNON'S SAYLES' ANNOTATED CIVIL STATUTES 1914.

Art. 1238	213
Art. 1594	222
Art. 1593	424
Art. 1830, subd. 14	491
Art. 1944	638
Art. 1984a	249
Arts. 2000, 2004	650
Art. 2021	910
Art. 2750	452
Arts. 2994, 3024, 3031	469
Art. 3065	283
Arts. 3235, 3385	618
Art. 3960	262
Art. 4177	441
Art. 4297	618
Arts. 4621, 4622, 4624	1101
Art. 4643	222
Art. 4653	491
Art. 4847	669
Arts. 5246b-5246zzzz	404, 639

Art. 6592	393
Art. 7211	167
Arts. 7691, 7693, 7699	650

## VERNON'S ANNOTATED CIVIL STATUTES SUPPLEMENT 1918.

Art. 1521, subd. 6	385
Art. 1903	284
Art. 4621	1101
Arts. 6171a-6171i	873
Art. 7687a	687

## CITY CHARTERS.

Houston. Sp. Laws 1905,	
ch. 17	650
Houston, art. 2, § 2. Sp.	
Laws 1905, ch. 17	650
Houston, art. 3, § 8. Sp.	
Laws 1905, ch. 17	650

## SPECIAL LAWS.

1905, ch. 17	650
1905, ch. 17, art. 2, § 2	650
1905, ch. 17, art. 3, § 8	650

## LAWS.

1913, ch. 32	1101
1913, ch. 59	862
1913, ch. 113, § 20	669
1913, ch. 179	639
1915, ch. 28	873
1915, ch. 147, § 1	687
1917, ch. 75, § 1	385
1917, ch. 103, pt. 2, § 6a	459
1917, ch. 176, § 1	284
1917, ch. 194	1101
1917, ch. 207. Amended	
by Laws 1917 (1st Called	
Sess.) ch. 31; Laws 1917	
(3d Called Sess.) ch. 13	394
1917 (1st Called Sess.) ch.	
31	394
1917 (3d Called Sess.) ch.	
13	394
1918 (4th Called Sess.) ch.	
28	1100
1919, ch. 18	168



For cases in Dec.Dig. & Am.Dig. Key-No.Series & Indexes see same topic and KEY-NUMBER

## STIFLING COMPETITION.

See Mortgages, 369, 529.

## STREET RAILROADS.

See Appeal and Error, 837; Commerce, 72; Constitutional Law, 283; Taxation, 37, 40, 47, 151; Trial, 252.

### II. REGULATION AND OPERATION.

95(3) (Mo.) Under the vigilant watch ordinance of the city of St. Louis, it was the duty of a street railway's motorman operating through a street at an intersection, where he saw a child crossing the street, to have kept a vigilant watch for the first appearance of danger, and to have stopped the car on such appearance in the shortest time and space possible.—*Esstman v. United Rys. Co. of St. Louis*, 216 S. W. 526.

Danger to a child, and the duty of the motorman of defendant street railway's car to stop it in the shortest time and space possible, began the instant the child left the sidewalk to the knowledge of the motorman, bound headlong for the track, though it seemed he was headed directly for the center of the car rather than ahead of it.—*Id.*

117(13) (Mo.) In an action for injuries to a child by a street car, questions whether the car was stopped by the motorman after the first appearance of danger within the shortest time and space possible, in view of the situation, and whether, had it been so stopped, the child would have been injured, held for the jury under the evidence.—*Esstman v. United Rys. Co. of St. Louis*, 216 S. W. 526.

118(5) (Tex.Civ.App.) In an action for injuries to the driver of a buggy struck by a street car when the horse became unmanageable, a charge requiring the jury to find that the motorman "actually discovered" the driver's peril before the latter would be entitled to a verdict was not erroneous as failing to require the jury to find that the motorman "realized" and "appreciated" the peril.—*Paris Transit Co. v. Fath*, 216 S. W. 482.

An instruction that if the jury believed that plaintiff was on the street car tracks in a position of peril due to the balking or fright of his horse, and the motorman actually discovered him in that position in time to have stopped the car before the collision, but failed to do so, then to find for plaintiff, was not erroneous as imposing a greater duty than the law required.—*Id.*

## STRIKES.

See Master and Servant, 341; Trade Unions, 5, 9.

## SUBMERGED LANDS.

See Covenants, 102, 122.

## SUBROGATION.

3(3) (Ky.) In action for settlement of partnership affairs, where property of one of the partners was attached for the satisfaction of his part of the firm's obligations, a partner who pays attached partner's share of the partnership debts, under agreement to so do is entitled to be subrogated to third partner's rights under the attachment lien.—*Davis v. Abell*, 216 S. W. 104.

23(8) (Tex.) Bank, which advanced money to bridge building contractor to pay wages of laborers and later secured an order on county which retained balance due under bridge contract, held not subrogated to the rights of the laborers, and not protected by contractor's bond as to the debt.—*Hess & Skinner Engineering Co. v. Turney*, 216 S. W. 621.

28 (Ark.) There can be no subrogation except in favor of one who has paid an entire obligation of a third person to another, payment of

a portion only of the debt not giving rise to the right.—*Barton v. Matthews*, 216 S. W. 698.

## SUBSCRIPTIONS.

See Corporations, 80, 83; Fraud, 11; Husband and Wife, 86.

12 (Tex.Com.App.) Where citizens of town agreed to contribute toward construction of railroad to the town under a contract entered into with railroad by a committee of the citizens, and individually executed notes payable to railroad upon completion of road within certain time, the liability of a citizen so subscribing was severable and not joint, extended only to amount subscribed, and was not affected by any agreement of the committee not authorized by the contract.—*Wellington Railroad Committee v. Crawford*, 216 S. W. 151.

15(1) (Tex.Com.App.) A contract, whereby a railroad company agreed to construct and operate a railroad to a town, in consideration of which citizens agreed to do certain things and pay a certain bonus to the company, held to be an entire contract, so that complete performance by the company was necessary to the acquisition by it of any rights, though certain things were to be done and certain payments made before completion of road, since apportionment of benefits to subscribers on partial performance was impossible, and their payments were mere advancements which could be recovered back on failure to perform.—*Wellington Railroad Committee v. Crawford*, 216 S. W. 151.

21(1) (Tex.Com.App.) Where citizens of a town agreed to make certain payments and do certain things in consideration of construction and operation of a railroad, and executed notes to railroad conditioned upon completion of track, within certain time, railroad contractors to whom notes had been transferred could not, upon failure to complete road within required time, recover on notes, notwithstanding citizens' breach of contract making performance within required time impossible, where contractor, despite breach, treated contract as in force, since contractors, upon breach, had right either to ignore breach and claim rights under contract, or treat contract as at an end and sue for breach.—*Wellington Railroad Committee v. Crawford*, 216 S. W. 151.

21(4) (Tex.Com.App.) In an action on notes given by subscribers to a bonus to a railroad and made conditional upon completion of road by certain date, railroad contractor to whom notes had been transferred suing on notes notwithstanding failure to complete road within required time could not avoid such condition upon ground of breach of contract by the citizens making such completion impossible without pleading such breach.—*Wellington Railroad Committee v. Crawford*, 216 S. W. 151.

A contract, whereby citizens of a town agreed to make certain payments to and do certain things for railroad upon completion and operation of railroad, being an entire contract, a railroad contractor suing on the citizens' notes could not recover without alleging performance of the contract.—*Id.*

## SUNDAY.

See Master and Servant, 83.

## SUPERSEDEAS.

See Appeal and Error, 485, 803; Municipal Corporations, 980.

## SURETYSHIP.

See Principal and Surety.

## TAILINGS.

See Life Estates, 12.

## TALLY SHEETS.

See Elections, ¶293.

## TAXATION.

See Adverse Possession, ¶95; Appeal and Error, ¶9, 80, 843; Commerce, ¶72; Constitutional Law, ¶70, 205, 288; Drains, ¶70, 79; Evidence, ¶372; Highways, ¶135-148; Municipal Corporations, ¶29, 487, 957, 967, 975, 978, 980.

## II. CONSTITUTIONAL REQUIREMENTS AND RESTRICTIONS.

¶37 (Mo.) Assessment by the State Board of Equalization, under Rev. St. 1909, §§ 11551, 11552, of the tangible property and franchises of an electric railroad owning and operating thirty-six hundredths of a mile of track on a bridge between Missouri and Illinois at the city of St. Louis held constitutional.—State ex rel. Hagerman v. St. Louis & E. St. L. Electric Ry. Co., 216 S. W. 763.

¶40(5) (Mo.) If Rev. St. 1909, §§ 11551, 11552, providing for the taxation of franchises other than that of corporate entity, were valid and applicable, taxes assessed thereunder against an electric railway company were lawful, though the state board of equalization omitted to make assessments under the same statutes against other railroads liable.—State ex rel. Hagerman v. St. Louis & E. St. L. Electric Ry. Co., 216 S. W. 763.

¶47(4) (Mo.) Taxation of an electric railroad company owning under contract with the owners certain easements in a bridge was not double taxation, and therefore violative of the Constitution, because the bridge was also assessed for taxation against its owners.—State ex rel. Hagerman v. St. Louis & E. St. L. Electric Ry. Co., 216 S. W. 763.

## III. LIABILITY OF PERSONS AND PROPERTY.

## (B) Corporations and Corporate Stock and Property.

¶113 (Ky.) While the act of March 15, 1916 (chapter 19), requires the payment by fire insurance companies of a per centum tax on the gross premium receipts to defray the expenses of the fire marshal's office, the act of March 22d, 1916 (chapter 28), provides that the provision of any other act relating to insurance companies passed at that session shall not apply to domestic co-operative or assessment fire insurance companies, and to the extent of any repugnancy or inconsistency the latter act must prevail so that such an insurance company is not subject to the tax.—Thomas v. Hurst Home Ins. Co., 216 S. W. 368.

¶151 (Mo.) When a street railway obtained permission to operate on a public bridge for 50 years, the legislative grant vested in the railway a valuable "franchise," wholly distinct from its franchise of artificial entity, and specifically assessable for taxation under Rev. St. 1909, §§ 11551, 11552; a "franchise" implying a privilege conferred by law to do that which does not belong to the citizens of the country generally as a common right.—State ex rel. Hagerman v. St. Louis & E. St. L. Electric Ry. Co., 216 S. W. 763.

Assessment by the state board of equalization, under Rev. St. 1909, §§ 11551, 11552, of thirty-six hundredths of a mile of railroad on a bridge between Missouri and Illinois, owned and operated by an electric railway in the city of St. Louis, held not invalid as an attempt to tax property outside the jurisdiction of the state.—Id.

## (D) Exemptions.

¶193 (Ky.) Neither Ky. St. §§ 458 and 4022, which merely classify property, nor section 4049, determining which of the owners of successive interests shall be liable ordinarily for taxes upon the whole, can be construed to ex-

empt the owner of a valuable chattel interest in the real property from taxes thereon, regardless of whether the owner of the freehold pays taxes on the whole as contemplated, since such construction would bring it within the inhibition of Const. § 170, against any exemption in favor of such property, as well as in violation of Ky. St. § 4030, taxing all personal and real estate at its fair cash value, and section 4050, requiring personal property to be separately stated and valued.—Purcell v. City of Lexington, 216 S. W. 599.

¶219 (Ky.) Ky. St. § 4049, does not exempt from taxation the leasehold interest in land and only excuses the owner thereof from listing it separately for taxation when its value is an inseparable part of and included in the ordinarily larger interest remaining in the owner of the freehold, and tenants are liable for taxes on leasehold which has a separate and independent cash value that can be estimated at its fair voluntary sale price, even if as between themselves the taxes ought to be paid, under section 4049, by the lessor, and are recoverable by the lessee from lessor under section 4083.—Purcell v. City of Lexington, 216 S. W. 599.

## V. LEVY AND ASSESSMENT.

## (C) Mode of Assessment in General.

¶338 (Ky.) Where an instrument, though technically a lease, demised to lessees every beneficial interest in the land in perpetuity, retaining only a technical fee with a small annual rental exacted, lessee's interest is not such a lesser interest in the land as was contemplated by Ky. St. § 4049, should be listed by the owner of the first freehold estate, and included in the taxes paid by the owner, but is a larger and more valuable interest, taxable in the name of the lessee not under some special statute as section 4030 in case of oil leases, but on the broad ground of being property different from ordinary leases, having taxable values of their own not included in the real estate value assessable against the owner.—Purcell v. City of Lexington, 216 S. W. 599.

¶347 (Ky.) Neither Ky. St. §§ 458 and 4022, which merely classify property, nor section 4049, determining which of the owners of successive interests shall be liable ordinarily for taxes upon the whole, can be construed to exempt the owner of a valuable chattel interest in the real property from taxes thereon, regardless of whether the owner of the freehold pays taxes on the whole as contemplated, since such construction would bring it within the inhibition of Const. § 170, against any exemption in favor of such property, as well as in violation of Ky. St. § 4030, taxing all personal and real estate at its fair cash value, and section 4050, requiring personal property to be separately stated and valued.—Purcell v. City of Lexington, 216 S. W. 599.

## (E) Assessment Rolls or Books.

¶421(3) (Mo.) A description of land as "11 acres more or less ne pt se nw 22-25-10 2500," is too uncertain to constitute a valid tax assessment and basis for a lien, since no boundaries are given, and judgment sale could convey no particular parcel of land.—State ex rel. Smith v. Williams, 216 S. W. 535.

## VI. LIEN AND PRIORITY.

¶510 (Mo.App.) As between two or more liens for general taxes due city or state, the last one in point of time is the superior in point of claim for satisfaction.—Missouri Real Estate & Loan Co. v. Burri, 216 S. W. 570.

## VIII. COLLECTION AND ENFORCEMENT AGAINST PERSONS OR PERSONAL PROPERTY.

## (B) Summary Remedies and Actions.

¶592 (Mo.) Under Rev. St. 1909, § 11593, in suits against railroads for delinquent taxes, a

copy of the tax bill need not be filed with the petition.—State ex rel. Hagerman v. St. Louis & B. St. L. Electric Ry. Co., 216 S. W. 763.

### IX. SALE OF LAND FOR NONPAYMENT OF TAX.

⚡642 (Tex.Civ.App.) In suit by state to foreclose tax lien for delinquent taxes for year 1915, where notice required by Acts 34th Leg. c. 147, § 1 (Vernon's Ann. Civ. St. Supp. 1918, art. 7637a), although not mailed to defendant by May 1, 1916, was mailed June 2, 1916, and suit was filed after 90 days from mailing of such notice, state was entitled to judgment and foreclosure, all other requirements of the law having been complied with; the time of giving notice being immaterial, provided taxpayer has 90 days' time from such notice before suit is filed.—State v. Guana, 216 S. W. 687.

⚡668 (Tex.Civ.App.) Costs in excess of lawful amount taxed by reason of clerk's error in making out an original order of sale upon tax foreclosure renders the judgment therein a nullity as against a minor owner, regardless of the smallness of the amount.—Teat v. Perry, 216 S. W. 650.

⚡692 (Tex.Civ.App.) If a tax sale judgment was without binding force, the objection that the attack upon it was a collateral one would make no difference.—Teat v. Perry, 216 S. W. 650.

### XI. TAX TITLES.

#### (C) Actions to Confirm or Try Title.

⚡810(3) (Tex.Civ.App.) In an action of trespass to try title, defended on the ground of tax title, evidence in the absence of objection thereto held sufficient to show that taxes paid by defendants for certain years constituted a valid lien against the land, for which defendants should recover from plaintiff owner.—Teat v. Perry, 216 S. W. 650.

⚡814(1) (Tex.Civ.App.) In plaintiff's suit in trespass to try title to land claimed by others under tax sale, held that equity and conscience required that defendants be given back what they were properly shown to have paid out for such taxes as constituted a lien upon the property, particularly in view of the petitioner's offer to do all equity required of plaintiff.—Teat v. Perry, 216 S. W. 650.

### XIV. DISPOSITION OF TAXES COLLECTED, AND FAILURE OF LOCAL AUTHORITIES TO COLLECT.

⚡913(½) [New, vol. 7A Key-No. Series] (Ky.) In view of Const. §§ 171, 183, 184, Ky. St. § 459, and the history of revenue legislation, the common school fund is entitled to share in the income from inheritance taxes collected for the "general use of the commonwealth," under Acts 1906, c. 22, art. 19, § 1, and to receive the same apportionment of the whole as it receives of the ad valorem tax under Ky. St. Supp. 1918, § 4019, designating certain portions of the tax collected for "ordinary expenses of the government" for "support of common schools" and other specified purposes, notwithstanding Ky. St. § 4370, since funds for "general use of the commonwealth" are for the support of the whole government and distinguished from the funds for "ordinary expenses of the government," distinguished from common school fund by Ky. St. Supp. 1918, § 4019, are not to be restricted to the common usual or ordinary expenses necessary to carry into effect ordinary powers of the commonwealth.—Gilbert v. Greene, 216 S. W. 105.

### TAX RECEIPTS.

See Evidence, ⚡372.

## TELEGRAPHS AND TELEPHONES.

See Evidence, ⚡148.

### I. ESTABLISHMENT, CONSTRUCTION, AND MAINTENANCE.

⚡15(2) (Ky.) The duty of a telephone company requires it only to maintain its wires and poles in a reasonably safe condition for travel upon the highway along which the line runs.—Flummer's Adm'r v. Tri-State Telephone Co., 216 S. W. 133.

⚡15(4) (Ky.) The duty of a telephone company requires it only to maintain its wires and poles in a reasonably safe condition for travel upon the highway along which the line runs, and such a company is not liable for death of one killed by reason of the negligent cutting of a tree, which fell upon the wires and caused a pole to fall upon the deceased, even though the telephone company, negligently allowed the pole to become decayed around the bottom.—Flummer's Adm'r v. Tri-State Telephone Co., 216 S. W. 133.

⚡19 (Tex.Civ.App.) If plaintiff did not own telephone wires, he had no right, title, or interest therein, and if he had no right of user on telephone poles sold to defendant telephone company, he cannot complain of the removal of the wire and has no cause of action for being excluded from use.—Miller v. Bandera Independent Telephone Co., 216 S. W. 900.

### II. REGULATION AND OPERATION.

⚡62 (Tex.Civ.App.) Where a telephone company was a domestic corporation domiciled in B. county and had no property in J. county, its transfer over its switchboard to another telephone company, with which it had an agreement to pay for connections, and with which it was required by Vernon's Sayles' Ann. Civ. St. 1914, art. 1238, to make physical connections, of a call for a party in J. county, held not to support a contention that defendant had contracted to deliver the message in J. county so as to make one company liable for the negligence of the other and authorize suing defendant in J. county.—Texarkana Telephone Co. v. Blisard, 216 S. W. 213.

⚡65(2) (Ark.) In an action by the sender of a telegram, offering a client a loan on real estate at \$8,000, but erroneously transmitted by defendant as \$3,000, no recovery for loss of profits could be had, where it was not alleged that the sendee would have accepted the loan had the message been correctly transmitted.—Security Mortgage Co. v. Western Union Telegraph Co., 216 S. W. 10, 1043.

⚡66(4) (Tex.Civ.App.) Evidence held to support verdict of \$250 for vexation, annoyance, and inconvenience caused plaintiff subscriber by reason of his telephone being wrongfully disconnected by defendant company.—Southwestern Telegraph & Telephone Co. v. Riggs, 216 S. W. 403.

⚡67(2) (Tex.Civ.App.) Where a telegram announcing a death was addressed to husband and did not mention his wife, defendant company was not chargeable from the message itself with knowledge of the relationship between the wife and deceased person mentioned in message.—Meadows v. Western Union Telegraph Co., 216 S. W. 211.

⚡67(3) (Ark.) In a broker's action against a telegram company for erroneously transmitting a message, offering a client a \$3,000 loan instead of an \$8,000 one, as intended, only nominal damages could be recovered; the message constituting but a step in proposed negotiations for the loan.—Security Mortgage Co. v. Western Union Telegraph Co., 216 S. W. 10, 1043.

⚡71 (Tex.Civ.App.) Verdict of \$250 for vexation, annoyance, and inconvenience caused plaintiff subscriber by reason of his telephone being wrongfully disconnected by defendant

company held not so excessive as to show passion or prejudice.—*Southwestern Telegraph & Telephone Co. v. Riggs*, 216 S. W. 403.  
 ¶73(1) (Tex.Civ.App.) In suit by husband for the benefit of his wife against defendant company for damages due to negligence in transmitting and delivering two death messages, held that peremptory instruction for defendant should be sustained on the ground that no negligence was shown either in the transmission of the message or in its delivery.—*Meadows v. Western Union Telegraph Co.*, 216 S. W. 211.

## TENANCY IN COMMON.

See Joint Tenancy; Parties, ¶80; Trespass to Try Title, ¶35.

## II. MUTUAL RIGHTS, DUTIES, AND LIABILITIES OF COTENANTS.

¶15(11) (Tex.Civ.App.) Where a tenant in common takes adverse possession of land, notoriously using and enjoying it adversely and claiming to own it, it becomes a question of fact for the jury as to whether limitations are not in favor of such tenant.—*Martinez v. Bruni*, 216 S. W. 655.

¶32 (Tex.Civ.App.) Where an ousting tenant in common incurred necessary expenses in defending common title, other tenants in common on obtaining partition must bear their just proportion of such expenses.—*Martinez v. Bruni*, 216 S. W. 655.

## III. RIGHTS AND LIABILITIES OF COTENANTS AS TO THIRD PERSONS.

¶43 (Tex.Civ.App.) One of two joint tenants cannot make a valid contract of sale of the entire title to the joint property without the consent of the other.—*Dodge v. Lacey*, 216 S. W. 400.

¶55(3) (Tex.Civ.App.) In action for trespass to property owned by two brothers, both should join in the action.—*Bassham v. Evans*, 216 S. W. 446.

## TENDER.

See Insurance, ¶602; Release, ¶24; Vendor and Purchaser, ¶185.

¶14(5) (Tex.Civ.App.) Where, on the maturity of a 15-year endowment policy, the amount due thereon was in dispute, company's act in sending to assignee of policy draft for its admitted liability thereon, payable, however, to both original insured and assignee, with release of any further claims or demands on account of the policy, was not such an unconditional tender of its admitted debt as assignee was entitled to.—*Manhattan Life Ins. Co. v. Stubbs*, 216 S. W. 896.

¶16(2) (Mo.) A failure to accept a tender made in the reply cannot be held conclusively to show that a tender before suit would have been refused, and hence one suing on cause involving a voidable release cannot, under Rev. St. 1909, § 1812, avoid the release by making a tender in his reply, on the ground that he did know what the entire consideration for the release was until after suit.—*McCoy v. James T. McMahon Const. Co.*, 216 S. W. 770.

## THREATS.

See Homicide, ¶300.

## TICK.

See Animals, ¶34, 36; Statutes, ¶141.

## TIME.

See Appeal and Error, ¶621, 655, 662, 797, 1127; Contracts, ¶306; Criminal Law, ¶1081, 1087, 1106, 1109, 1110; Electricity, ¶16; Homestead, ¶183; Insurance, ¶602;

Sales, ¶22, 81; Taxation, ¶642; Trial, ¶63; Vendor and Purchaser, ¶78.

## TITLE.

See Carriers, ¶72.

## TORTS.

See Assault and Battery, ¶33-43; Forcible Entry and Detainer, ¶24; Fraud, ¶9-65; Husband and Wife, ¶102; Libel and Slander, ¶9; Malicious Prosecution, ¶3-63; Municipal Corporations, ¶741-845; Negligence, ¶33-136; Nuisance, ¶3; Telegraphs and Telephones, ¶66, 71; Trespass, ¶12-27; Trover and Conversion.

## TRADE CAMPAIGN.

See Commerce, ¶40; Corporations, ¶642.

## TRADE UNIONS.

See Master and Servant, ¶341.

¶5 (Mo.App.) The officers and members of a labor union were bound by the acts of its business agent within the scope of his authority as such.—*Clarkson v. Laiblan*, 216 S. W. 1029.

Where a labor union's business agent had authority to enforce its rules, if, in exercising such authority, he threatened to call a strike in the event the company employing a former member of the union did not cancel and annul the member's contracts, the officers and members of the union were liable for his acts, though they did not specifically give him authority to threaten any one.—*Id.*

If the business agent of a labor union had authority to act for it in threatening strikes against an employing company unless it discharged a former member of the union, the officers and members of the union were liable for the acts of the business agent and the manner in which he performed them, irrespective of malice toward plaintiff on their part.—*Id.*

The members of a voluntary association, such as a labor union, are liable for the wrongful acts of the agent of the association within the scope of his authority, though they have no knowledge of such acts, and do not direct him in performing them or approve of their commission.—*Id.*

¶9 (Mo.App.) In an action against the officers and members of a labor union by its former member for damages to him when the business agent of the union by threats of strikes forced the company which employed the member and had contracted with him to discharge him and annul his contracts, instruction that, if defendant officers and members ratified the acts of the business agent of the union, verdict must be for plaintiff member, held sustained by evidence.—*Clarkson v. Laiblan*, 216 S. W. 1029.

## TRESPASS.

See Animals, ¶70; Injunction, ¶46; Negligence, ¶33, 136; Parties, ¶80; Railroads, ¶359, 369, 370, 400; Sequestration, ¶21; Tenancy in Common, ¶55.

## I. ACTS CONSTITUTING TRESPASS AND LIABILITY THEREFOR.

¶12 (Tex.Civ.App.) Every unauthorized entry upon land of another is a trespass, and is a willful trespass if intended and deliberate.—*Bassham v. Evans*, 216 S. W. 446.

## II. ACTIONS.

(A) Right of Action and Defenses.

¶20(3) (Ky.) Possession in plaintiff without title is sufficient to maintain an action in trespass against one who has no title.—*Eureka Coal & Mineral Co. v. Johnson*, 216 S. W. 91.

For cases in Dec.Dig. & Am.Dig. Key-No.Series & Indexes see same topic and KEY-NUMBER

⚡20(4) (Ky.) Actual possession of lands at the time of the trespass is necessary to enable a plaintiff without title to recover against a trespasser, and, where the land is not inclosed or embraced within a well marked boundary, a mere claim of ownership under an oral agreement for purchase with an occasional cutting and removing of timber from parts of the land not occupied by the defendant is not sufficient.—Eureka Coal & Mineral Co. v. Johnson, 216 S. W. 91.

⚡27 (Ark.) In an action for trespass by a purchaser of land at execution sale against the former owner, defendant could set up as a defense that the execution sale was not according to law.—Sumpter v. Hot Springs Savings, Trust & Guaranty Co., 216 S. W. 311.

## TRESPASS TO TRY TITLE.

See Adverse Possession, ⚡7, 115; Boundaries, ⚡32; Deeds, ⚡73, 118; Evidence, ⚡182, 271, 372, 460; New Trial, ⚡8; Taxation, ⚡810, 814; Trial, ⚡141, 352; Witnesses, ⚡130, 164.

## II. PROCEEDINGS.

⚡32 (Tex.) In trespass to try title, allegations that defendants unlawfully withheld possession from plaintiff, that the property was occupied and used by defendants, and that plaintiff feared defendants would injure the property, *held* sufficiently to charge an eviction subsequent to the date of his possession of the premises, notwithstanding that the date upon which plaintiff had possession was erroneously stated.—Shumaker v. Byrd, 216 S. W. 862.

⚡32 (Tex.Civ.App.) A petition, alleging plaintiff's ownership in fee simple of land, that defendant was in possession thereof and forcibly detaining it from plaintiff, with facts showing plaintiff's right to possession, though not literally complying with the fiction prescribed by Rev. St. art. 7733, for petition in trespass to try title, and not containing the indorsement required by article 7734, substantially complies with those statutes and shows the suit to be for recovery of land.—Evans v. Hudson, 216 S. W. 491.

⚡33 (Tex.Civ.App.) A petition substantially complying with the requirements of a petition in trespass to try title prescribed by Rev. St. art. 7733, though not literally complying therewith, is sufficient to support an amended petition containing all the allegations of fact required by that article.—Evans v. Hudson, 216 S. W. 491.

⚡35(2) (Tex.Civ.App.) In trespass to try title, defendant filing a plea of not guilty as well as one of limitations, may show that he was a tenant in common with his codefendants, and had an interest in the fee of less than a whole by virtue of a timber deed.—Louisiana & Texas Lumber Co. v. Southern Pine Lumber Co., 216 S. W. 281.

⚡39(1) (Tex.Civ.App.) In trespass to try title, evidence as to the terms upon which plaintiff purchased the property from its immediate predecessor in title *held* immaterial and properly excluded.—Delta Land & Timber Co. v. Spiller, 216 S. W. 414.

## TRIAL

See Costs; Criminal Law, ⚡649-878; Equity, ⚡42; Jury; Justices of the Peace, ⚡180; New Trial; Reference; Venue.

For trial of particular actions or proceedings, see also the various specific topics.

For review of rulings at trial, see Appeal and Error.

216 S.W.—78

## III. COURSE AND CONDUCT OF TRIAL IN GENERAL.

⚡26 (Ky.) Refusal to postpone the trial for an hour for arrival of witness, delayed by train accident, or to allow affidavit of what he would say to be read as his testimony, was error; he having been defendant's only eyewitness, and having been in the court the day for which case was set, the day before it was called, and having absented himself without defendant's knowledge or consent.—Louisville & N. R. Co. v. Pugh's Adm'r, 216 S. W. 69.

## IV. RECEPTION OF EVIDENCE.

### (A) Introduction, Offer, and Admission of Evidence in General.

⚡48 (Mo.App.) Where an offer of evidence was mixed up with matters clearly incompetent, the court was not required to sort out the competent from the incompetent, but could reject the whole.—Hart v. Brown, 216 S. W. 552.

### (B) Order of Proof, Rebuttal, and Reopening Case.

⚡66 (Tex.Civ.App.) Generally the question of reopening the evidence after the parties have rested lies in the discretion of the court.—Massachusetts Bonding & Ins. Co. v. Florence, 216 S. W. 471.

⚡68(1) (Tex.Civ.App.) In an action on a health insurance policy, based on a disability caused by hernia, wherein defendant set up a release from liability for disability due to such cause, it was error to exclude such release, where through inadvertence it was not formally offered in evidence until the close of the evidence, and this though trial court entertained view that release constituted no defense.—Massachusetts Bonding & Ins. Co. v. Florence, 216 S. W. 471.

### (C) Objections, Motions to Strike Out, and Exceptions.

⚡75 (Ky.) Where there was no specific objection to testimony that a certain deed had been made, and where no request or demand was made for a certified copy of the deed, though witness offered to introduce certified copy, right to object to the evidence on the ground that the record was the best evidence was waived.—Virginia Iron, Coal & Coke Co. v. Combs, 216 S. W. 846.

⚡76 (Mo.) Where no objections in such respects were made at the time, that questions asked witnesses on reputation were not in proper form, and that some of the witnesses stated that plaintiff's general reputation was bad without first having qualified by stating that they knew his reputation, they were waived.—Boyers v. Lindhorst, 216 S. W. 536.

⚡86 (Tex.Civ.App.) In an action for the burning of grass on leased land, an objection to testimony of plaintiff and his son as to reasonable value of the grass, when they were not shown to be qualified to testify as to its market value, was not well taken, and the testimony was admissible to show that the leased premises were used by plaintiff exclusively for pasture and their reasonable value therefor.—Galveston, H. & S. A. Ry. Co. v. Harris, 216 S. W. 430.

⚡90 (Mo.) An objection that an answer was not responsive and was improper was waived, where no motion was made to strike it out.—Boyers v. Lindhorst, 216 S. W. 536.

⚡105(2) (Tex.Civ.App.) Where defendant insurer did not object to the introduction of evidence establishing facts which would have been shown by the inventory had it not been destroyed, *held* that objections to such evidence cannot be raised by assigning error to refusal of motion for direction of verdict.—Westchester Fire Ins. Co. v. Biggs, 216 S. W. 274.

# V. ARGUMENTS AND CONDUCT OF COUNSEL.

☞121(1) (Tex.Civ.App.) There being evidence that though Dr. M., who testified that he found plaintiff uninjured, was first called in by plaintiff to attend him, continuance of his attendance was at request of R., defendant's surgeon, statement of plaintiff's counsel in argument that R. sent M. to see plaintiff was unobjectionable.—Galveston, H. & S. A. Ry. Co. v. White, 216 S. W. 285.

☞129 (Tex.Civ.App.) The rule that it is reversible error to permit an attorney to advise a jury what the legal effect of their answer to an issue would be is subject to the exception that a party, whose counsel improperly pursues a line of argument not called for by the facts, will not be heard to complain of reply of adverse party's counsel thereto.—Panhandle & S. F. Ry. Co. v. Huckabee, 216 S. W. 668.

In parents' action for son's death, where defendant's counsel, after submitting issue of number of years son would have continued to contribute to parents' support and requesting jury to consider evidence thereon, stated in argument to jury that their only answer thereto could be, "We don't know," parents' counsel had the right to tell jury to make answer some number of years or none, and that answer of "We don't know," would have caused mistrial; such argument being in reply to improper arguments of defendant's counsel.—Id.

☞133(6) (Tex.Civ.App.) Reiterated statement in argument by plaintiff's counsel, without support in the evidence, that a doctor, who testified that there was nothing the matter with plaintiff, was a fake, held not prejudicial, the jury having been instructed to disregard it, and counsel having been twice fined for repeating it.—Galveston, H. & S. A. Ry. Co. v. White, 216 S. W. 265.

# VI. TAKING CASE OR QUESTION FROM JURY.

(A) Questions of Law or of Fact in General.

☞139(1) (Tex.Civ.App.) The trial court is never justified in giving a peremptory charge where reasonable minds differ respecting a particular issue under investigation.—Westchester Fire Ins. Co. v. Biggs, 216 S. W. 274.

☞141 (Ky.) Since the fact is clearly established that the condition of the ladder in grain tank which deceased had been directed to clean had nothing to do with his death, the court did not err in refusing to submit the case on account thereof.—White's Adm'r v. Kentucky Public Elevator Co., 216 S. W. 837.

☞141 (Tex.Civ.App.) In action of trespass to try title, it was not improper for the court to declare facts properly in evidence and undisputed as part of his findings without submitting the matter to the jury.—Martinez v. Bruni, 216 S. W. 655.

☞143 (Ky.) Where the existence of a fact necessary to a cause of action depends on contradictory evidence, a question is presented for the jury, and it is only where, after admitting plaintiff's testimony and every fair inference from it to be true, he still has failed to make out his case, that the court should direct a verdict against him.—Collett's Guardian v. Standard Oil Co., 216 S. W. 356.

☞143 (Mo.App.) If verdict is deemed to be against the weight of the evidence, trial court may grant one new trial, but cannot originally pass on disputed issue, which was for jury.—Messerli v. Bantrup, 216 S. W. 825.

☞149 (Mo.App.) Defendant appellant is not in a position to assert that plaintiff failed to make a case for the jury where he conceded otherwise by joining in submitting the case without demurring to the evidence.—Hart v. Brown, 216 S. W. 552.

☞149 (Mo.App.) In an action to establish a materialman's lien, claimants conceded that

the matter of husband's agency for wife was a question for the jury, where they did not offer a demurrer to defendants' evidence nor ask a peremptory instruction, but joined in asking instructions on the disputed issue and without objection submitted it on the evidence to a jury called at their request under Laws 1911, p. 316, § 8235f.—Berkshire v. Holcker, 216 S. W. 556.

## (B) Demurrer to Evidence.

☞156(3) (Mo.App.) On demurrer to evidence in personal injury action, evidence for plaintiff of master's failure to provide proper lights in place of work must be taken as true.—Baldwin v. Hanley & Kinsella Coffee Co., 216 S. W. 998.

In passing on demurrer to evidence, the evidence must be viewed in the light most favorable to plaintiff, giving him the benefit of every reasonable inference, and if to reasonable minds the evidence is susceptible of two inferences, one supporting a right of recovery, the other fatal thereto, the case is for the jury.—Id.

## (D) Direction of Verdict.

☞177 (Ark.) Where both parties request peremptory instructions and do nothing more, they assumed the facts to be undisputed and submit to the judge the determination of the inferences to be drawn therefrom.—Oil Trough Gin Co. v. Director General of Railroads, 216 S. W. 310.

☞181 (Tex.) Rev. St. 1911, art. 1971, as amended by Acts 1913, c. 59, providing that objections to the "charge" of the court shall be presented to the court before it is read to the jury, and that all objections not so made and presented shall be waived, is not applicable to a peremptory charge; the trial court having already decided that there is no issue to go to the jury.—Shumaker v. Byrd, 216 S. W. 862.

# VII. INSTRUCTIONS TO JURY.

(A) Province of Court and Jury in General.

☞186 (Mo.) In an action for death on track, an instruction, pointing out that there was a gravel road on the right of way running along and parallel with defendant's track "which was convenient for and was used by pedestrians," and then telling the jury that if pedestrians did not frequently and continuously use the track deceased had no implied license to use it, was erroneous, as being a comment on the evidence and argumentative.—Rice v. Jefferson City Bridge & Transit Co., 216 S. W. 746.

☞191(8) (Mo.) In an action for death of one killed on track by an electric car, an instruction, assuming that plaintiff's deceased was lying in weeds near the track and was not standing up just prior to being struck, held erroneous; the fact being disputed.—Rice v. Jefferson City Bridge & Transit Co., 216 S. W. 746.

In an action for death on railroad track, an instruction on the last clear chance doctrine was erroneous as assuming as true the disputed fact that deceased was not seen by the motor-man until the car was within 30 feet of him.—Id.

☞191(10) (Tex.Civ.App.) A charge submitting issues of negligence causing injury to servant which prefaced such issues with the words "if you find," etc., did not assume that defendant was guilty of the negligence submitted.—El Paso & S. W. Ry. Co. v. Havens, 216 S. W. 444.

☞191(11) (Mo.App.) In action for personal injuries alleged to have resulted from collision between trains, an instruction that damages be assessed at such sum as would compensate plaintiff for such injuries held erroneous, as assuming that such injuries were the result of the collision, in view of issue that plaintiff's principal bodily ailment was not caused by collision, on which the evidence was conflicting.—Hoover v. St. Louis Electric Terminal Ry. Co., 216 S. W. 934.

For cases in Dec.Dig. & Am.Dig. Key-No.Series & Indexes see same topic and KEY-NUMBER

⇒194(9) (Tex.) In action by state against railroad for penalties for failure to comply with Vernon's Sayles' Ann. Civ. St. 1914, art. 6592, an instruction to find for the state, if the railway company failed to maintain at its station or within its passenger depot suitable and separate water-closets, or if they found that the railroad company failed to maintain such closets within a reasonable and convenient distance from the depot, was erroneous and prejudicial, where the real issue was whether the closets were in a reasonable distance from the station, and the uncontradicted evidence showed that the railway did not have any closets within its passenger depot; the first part of the charge being virtually an instruction to find for the state, regardless of how the real issue in the case might be determined.—Galveston, H. & S. A. Ry. Co. v. State, 216 S. W. 393.

⇒194(17) (Mo.) In an action for death on railroad track, an instruction that failure of the railroad to notify relatives of the deceased that he was injured should not be considered as tending to show negligence on the part of the railroad, under certain circumstances, held erroneous, as being an invasion of the province of the jury.—Rice v. Jefferson City Bridge & Transit Co., 216 S. W. 746.

⇒194(20) (Mo.App.) In an action by a tenant of an apartment who stepped into a hole in the yard and was injured, an instruction that, if under all the evidence in the case the verdict should be for plaintiff, the jury would assess her damage in such sum, etc., is not objectionable as an instruction to find for plaintiff if she stepped into the hole and was injured.—Milton v. Holtzman, 216 S. W. 828.

#### (B) Necessity and Subject-Matter.

⇒203(3) (Mo.) It was not error for the court to refuse to instruct the jury in a negative form, when it had already instructed them in an affirmative form.—Doody v. California Woolen Mills Co., 216 S. W. 531.

⇒203(3) (Tex.Civ.App.) In action for injuries to employé from negligence of employer, refusal to give employer's special charge grouping and presenting in an affirmative way the defenses of employer to employé's charge of negligence held error.—Bering Mfg. Co. v. Sedita, 216 S. W. 639.

⇒210(2) (Mo.App.) The giving of an instruction on effect of witness knowingly swearing falsely rests largely in the discretion of a trial court.—Milton v. Holtzman, 216 S. W. 828.

#### (C) Form, Requisites, and Sufficiency.

⇒228(1) (Tex.Civ.App.) In a personal injury action, it is not error to submit the different items of damage conjunctively in the main charge.—Melton v. Manning, 216 S. W. 488.

⇒232(2) (Tex.Civ.App.) Where court submitted cause on sole issue whether deed from defendant and wife to plaintiff was intended as a mortgage or security, a charge on burden of proof, and question whether defendant after conveying the land remained in possession and attorned to plaintiff as his landlord for such time as would be a bar under statute of limitations, held necessary.—Ellis v. Haynes, 216 S. W. 249.

⇒233(1) (Ky.) Every litigant on a trial by jury is entitled, when he requests it, to have his cause of action or ground of defense presented by instructions which would enable the jury to find for him if the evidence warrants it; and if there are two grounds of defense or two causes of action, either one of which would entitle him to a verdict, the instruction must be so drawn as to permit the verdict to be in his favor if either ground is sustained by evidence.—Langhan v. City of Louisville, 216 S. W. 1082.

⇒240 (Ark.) Instruction that if plaintiff brakeman "was employed by the defendant company as alleged in his complaint, and was working on its railroad under orders and direc-

tions of its foreman, and while in the exercise of ordinary care for his own safety, and when he did not assume the risk," was injured on account of the negligence of the defendant or any of its agents, servants, or employes, verdict should be for plaintiff, was not argumentative and misleading.—A. L. Clark Lumber Co. v. Edwards, 216 S. W. 18.

⇒240 (Ark.) Requested instruction "that the law does not impose on the railroad company the duty of so providing for the safety of persons going from the train to the boat, in this case, that they will encounter no possible danger and meet with no casualties in the use of the appliances provided," was argumentative in form, and for that reason would not have to be given.—Yazoo & M. V. R. Co. v. Hill, 216 S. W. 1054.

⇒240 (Mo.) In an action for death on track, an instruction, pointing out that there was a gravel road on the right of way running along and parallel with defendant's track, "which was convenient for and was used by pedestrians," and then telling the jury that, if pedestrians did not frequently and continuously use the track, deceased had no implied license to use it was erroneous, as being a comment on the evidence and argumentative.—Rice v. Jefferson City Bridge & Transit Co., 216 S. W. 746.

⇒244(4) (Mo.) An instruction that in determining whether a motorman used ordinary care they could take into consideration "the darkness of the night, the presence of weeds or grass, the speed of the car, the natural excitement under which an ordinary person would labor in coming suddenly upon a person in so great a peril," etc., was erroneous in singling out particular facts and giving them undue prominence.—Rice v. Jefferson City Bridge & Transit Co., 216 S. W. 746.

In an action for death on track, a group of instructions as a whole held erroneous by reason of their number and reiterations, giving undue emphasis to defendant's theory that the deceased was a trespasser, and consequently that defendant owed him no duty until after he was actually seen by the motorman in a position of peril.—Id.

⇒244(6) (Ark.) In an action for damages due to the faulty construction of a warehouse by defendant's alleged agent wherein defendant pleaded absence of agency, an instruction that, if the agent was defendant's foreman in the construction of another building and purchased the material therefor, such fact alone was not sufficient evidence of his authority to bind defendant in the construction of the warehouse, held not erroneous as invading the province of the jury by singling out circumstances established at trial.—Arkadelphia Milling Co. v. Campbell, 216 S. W. 20.

#### (D) Applicability to Pleadings and Evidence.

⇒249 (Tex.Civ.App.) A general charge purporting to instruct particularly on question of abstract law cannot be challenged on the ground that the evidence as to the issue, which was one relating to the existence of an alleged lost deed, was insufficient to take the matter to the jury.—Martinez v. Bruni, 216 S. W. 655.

⇒250 (Mo.App.) Instruction authorizing jury to consider humiliation and disgrace suffered by plaintiff, in assessing damages for assault, was error, where there was no allegation of such element, and no evidence thereof.—Traw v. Heydt, 216 S. W. 1009.

⇒251(1) (Mo.App.) Instructions should not be broader than the pleadings.—Lorton v. Trail, 216 S. W. 54.

⇒251(2) (Mo.App.) Where the negligent manner in which a city brought a sewer to an end and in which provision was made for reception of water in a creek was relied on, a requested instruction, based on size and sufficiency of



sewer as such, was properly refused.—*Gibson v. City of St. Joseph*, 216 S. W. 50.

⚡251(4) (Ky.) Where there was no plea of quantum meruit by plaintiff, the trial court erred in submitting the case to the jury on quantum meruit instructions over defendant's objections and exceptions, since plaintiff may not declare on an express contract, and recover on an implied contract, even though the evidence shows it.—*O'Kain v. Davis*, 216 S. W. 354.

⚡251(8) (Ark.) The use of the word "any" in an instruction authorizing recovery for injury to a brakeman, if injury was found to be due to negligence of defendant or "any of its servants," held not to render instruction objectionable as failing to limit the consideration to acts of negligence alleged; the language being understood as referring to the negligence in the particulars charged.—*A. L. Clark Lumber Co. v. Edwards*, 216 S. W. 18.

⚡252(4) (Mo.App.) In the absence of evidence warranting a finding of actual partnership between defendants, the issue should not have been embraced in the instructions.—*Interstate Coal Co. v. Gordon*, 216 S. W. 783.

⚡252(6) (Mo.App.) Instruction authorizing jury to consider defendant's financial condition, business, or station in society, in assessing plaintiff's damages for assault, was unwarranted, where there was no competent evidence as to such facts.—*Traw v. Heydt*, 216 S. W. 1009.

⚡252(9) (Mo.) In an action for injuries to a child whose foot was run over by a street car, instruction that if the jury found that the child ran from the east side of the street into the car "at or near the rear trucks thereof," etc., held erroneous as misleading; there being no evidence that the child ran into the car at or near the rear trucks.—*Esstman v. United Rys. Co. of St. Louis*, 216 S. W. 526.

⚡253(1) (Ark.) Court cannot be required to cover every phase of the case in one instruction.—*American Hardwood Lumber Co. v. Milliken-James Hardwood Lumber Co.*, 216 S. W. 23.

⚡253(1) (Mo.App.) Plaintiff's instruction, directing a verdict, was not objectionable by reason of omission of parts of defendant's defense; the rule being that no part of plaintiff's case can be omitted.—*Gibson v. City of St. Joseph*, 216 S. W. 50.

#### (E) Requests or Prayers.

⚡260(1) The refusal of requests covered by instructions given is not improper.

—(Mo.App.) *Fore v. Rodgers*, 216 S. W. 566; (Tex.Civ.App.) *Moye v. Park*, 216 S. W. 205; *Southwestern Portland Cement Co. v. Bustillos*, Id. 288; *Buchanan v. Gribble*, Id. 899.

⚡260(1) Court did not err in refusing a requested instruction fully covered by another requested instruction which was given.

—(Ark.) *A. L. Clark Lumber Co. v. Edwards*, 216 S. W. 18;

(Mo.App.) *Berkshire v. Holcker*, Id. 556.

⚡260(1) (Tex.Civ.App.) It was not error to refuse requested charges which were, in effect, the same as given in the main charge, which corresponded to the allegations in the petition.—*Melton v. Manning*, 216 S. W. 488.

⚡260(3) (Tex.Civ.App.) Where, in personal injury action, the trial court placed the burden of proof on plaintiffs as to every material allegation in their petition, it was unnecessary to repeat that instruction at defendant's request; there being no showing that the jury were misled as to the burden of proof being on plaintiffs as to defendant's negligence and amount of damages, which is the test.—*Zucht v. Brooks*, 216 S. W. 684.

⚡260(8) (Ark.) In action by plaintiff for death of her husband, caused by his attempting to jump from a stage plank provided by the defendant railroad for him and other pas-

sengers being transferred from coaches to transfer boat, which was to carry them across the river, requested instructions as to carrier not having to furnish absolutely safe premises held fully covered by instruction given.—*Yasoo & M. V. R. Co. v. Hill*, 216 S. W. 1064.

In such action requested instruction that the law does not impose on the carrier the duty of so providing for the safety of persons going from train to boat that they will encounter no possible danger held to be covered by matters embraced in given instructions.—Id.

⚡261 (Ky.) Where party offers an instruction on a point of law, which the court refuses to give because of some defect in form or substance, it is the duty of the court to prepare and give a proper instruction on that point.—*Clifton Land Co. v. Reister*, 216 S. W. 342.

⚡267(1) (Mo.App.) Where a requested instruction was full and complete as given, by the court, it could not be said that the court erred in striking out part of the instruction as requested.—*Berkshire v. Holcker*, 216 S. W. 556.

⚡267(2) (Mo.) An instruction obscure before modification by the court, and not materially aided by the modification, should be redrawn.—*Esstman v. United Rys. Co. of St. Louis*, 216 S. W. 526.

#### (F) Objections and Exceptions.

⚡273 (Tex.Civ.App.) In a broker's action for commission, where the court's charge submitted only three issues and the controlling issues were exceedingly few and simple, and the court adjourned from 11:45 a. m. until 2:30 p. m., requiring that all special issues be prepared in the interval, and appellant prepared and filed objections to the court's charge, and it does not appear what further objections appellant wanted to prepare, the assignment that the court erred in not granting more time must be overruled.—*Varn v. Moeller*, 216 S. W. 234.

⚡278 (Ark.) The instruction that if the jury found for plaintiffs, their verdict would be, "We, the jury, find for the plaintiffs (and write therein any sum which you may so find)," was in the usual form and good against general objection.—*Wofford v. De Queen Real Estate Co.*, 216 S. W. 710.

#### (G) Construction and Operation.

⚡285 (Mo.) An instruction must be read in connection with the evidence.—*Esstman v. United Rys. Co. of St. Louis*, 216 S. W. 526.

⚡295(4) (Mo.) In an action for malpractice, an instruction on the question of reasonable certainty of future operations and suffering, while the use of the word "may" might give the jury the meaning of "bare possibility," instead of "reasonable certainty," yet where the instruction refers to such suffering as the jury "believes she will in the future endure," the word "may" was not likely to mislead, and must be considered as harmless, and not warranting reversal.—*Krind v. Westernman*, 216 S. W. 938.

⚡295(7) (Ark.) Where an instruction related only to one kind of assumed risk, the ordinary hazards of the service, contention that it ignored the question of assumption of risk, based on patent dangers known to plaintiff brakeman, submitted in another instruction given at defendant's request, cannot be sustained; the instructions not being conflicting, but to be considered in harmony with each other.—*A. L. Clark Lumber Co. v. Edwards*, 216 S. W. 18.

⚡296(2) (Tex.) In action to recover penalties for failure of railway to comply with *Vernon's Sayles' Ann. Civ. St. 1914*, art. 6592, an instruction to find for the state if defendant failed and neglected to maintain at its station or depot, or within its passenger depot, suitable and separate water-closets, or if they found that the railroad company failed to maintain such closets within a reasonable and convenient distance from the depot, was not cured by a



contradictory instruction to find for defendant if the closets were within a reasonable and convenient distance from the station.—*Galveston, H. & S. A. Ry. Co. v. State*, 216 S. W. 393.

⚡296(3) (Ark.) An instruction to effect that, if defendant operated her automobile in a negligent manner on the street as charged in complaint of plaintiff pedestrian and his injuries were the result of said negligence, jury must find for plaintiff, *held* not subject to objection that it imposed an extraordinary degree of care on defendant to prevent the injury in view of other instructions.—*Bourland v. Baker*, 216 S. W. 707.

⚡296(4, 5) (Ark.) Where other instructions given made plaintiff's right of recovery depend on his own freedom from negligence, the instructions being in this respect too favorable to defendant, it was unnecessary to incorporate the question of contributory negligence in instruction on measure of damages.—*A. L. Clark Lumber Co. v. Edwards*, 216 S. W. 18.

⚡296(7) (Mo.) Part of an instruction in a negligence case, "You would not be warranted in surmising a state of facts as to how the injury might have happened, but it devolves on the plaintiff to show by the evidence adduced facts which constitute negligence as defined by these instructions," was not erroneous as suggesting to the jury that there was an absence of proof as to how the injury occurred, when construed in connection with the other instructions.—*Rice v. Jefferson City Bridge & Transit Co.*, 216 S. W. 746.

⚡296(12) (Mo.App.) Failure to define certain words in the giving of an instruction, if error, was cured by instruction, given at instance of complaining party, defining such words.—*Wams-ganz v. Blanke-Wenneker Candy Co.*, 216 S. W. 1025.

## VIII. CUSTODY, CONDUCT, AND DELIBERATIONS OF JURY.

⚡309 (Ky.) While the result of jurors' observations on a view is evidence which in making up their verdict they may consider in connection with the other evidence, they cannot arbitrarily disregard all the other evidence and base their verdict solely on the result of their observations.—*Husbands v. Paducah & I. R. Co.*, 216 S. W. 840.

## IX. VERDICT.

### (A) General Verdict.

⚡343 (Tex.Com.App.) Verdict, in being construed, should be viewed in the light of the testimony.—*Southern Gas & Gasoline Engine Co. v. Richolson*, 216 S. W. 158.

### (B) Special Interrogatories and Findings.

⚡349(3) (Tex.Civ.App.) Vernon's Sayles' Ann. Civ. St. 1914, art. 1984a, leaves with the court discretion to submit special issue without request.—*Ellis v. Haynes*, 216 S. W. 249.

⚡350(1) (Tex.Civ.App.) The rule as to the affirmative submission of each group of facts to the jury has no application to cases submitted on special issues.—*Zucht v. Brooks*, 216 S. W. 684.

⚡350(4) (Tex.Civ.App.) In action to set aside a judgment based on trustee's sale of land, on ground that land was homestead and that sale was simulated for purpose of obtaining a loan, *held* error, in view of the evidence, to refuse to submit issues concerning defendant's actual or constructive notice that the land was a homestead, and that sale was simulated, defendant being a purchaser of secured vendor's lien note.—*Brooker v. Wright*, 216 S. W. 196.

⚡350(4) (Tex.Civ.App.) In action for commissions on sale of property by broker, requested special issue, embracing making of agreement not germane to real issue in the case, *held* properly refused.—*Varn v. Moeller*, 216 S. W. 234.

⚡351(5) (Tex.Civ.App.) In a broker's action for commission, where the court had submitted

to the jury in the first two issues in his general charge, the ultimate and controlling issues of the case *held* not error to refuse to submit any one of the requested special issues.—*Varn v. Moeller*, 216 S. W. 234.

⚡351(5) (Tex.Civ.App.) In jitney passenger's action for injuries from collision with defendant's automobile where trial court submitted issue whether defendant turned to the left before reaching center of street intersection, it was unnecessary to further ask jury whether defendant went straight ahead across the intersecting street on the right-hand side of the street he was on.—*Zucht v. Brooks*, 216 S. W. 684.

⚡352(2) (Tex.Civ.App.) In a broker's action for commission, where the court's charge submitted only three issues and the controlling issues were exceedingly few and simple, and the court adjourned from 11:45 a. m. until 2:30 p. m., requiring that all special issues be prepared in the interval, and appellant prepared and filed objections to the court's charge, and it does not appear what further objections appellant wanted to prepare, the assignment that the court erred in not granting more time must be overruled.—*Varn v. Moeller*, 216 S. W. 234.

⚡352(4) (Tex.Civ.App.) In trespass to try title, where defendants relied on lost deed, and the only admissible testimony showed that the grantor had conveyed all of her interest in one tract except one league, while inadmissible testimony was that the lost instrument included all the grantor's interest in another tract except one league, it was proper to exclude a special issue relating to conveyance of "all her interest" in the second tract.—*Martinez v. Bruni*, 216 S. W. 655.

In trespass to try title, where plaintiff sought to recover lands in one tract which defendants claimed had been conveyed to their ancestor by lost deed, the refusal of the court to submit a special issue as to conveyance of another tract was proper.—*Id.*

⚡355(2) (Tex.Civ.App.) Where each special issue was divided by letter into several questions, jury's answer numbered to correspond with number of issue, and not by the divisions as letter, *held* sufficiently intelligible for rendition of judgment.—*Panhandle & S. F. Ry. Co. v. Huckabee*, 216 S. W. 666.

## X. TRIAL BY COURT.

### (A) Hearing and Determination of Cause.

⚡386(3) (Mo.App.) Requested declarations of law correct so far as they went, but not covering the whole case, were properly refused.—*Colorcraft Co. v. American Packing Co.*, 216 S. W. 831.

### (B) Findings of Fact and Conclusions of Law.

⚡389 (Mo.App.) Where the court refused to make findings of fact and conclusions of law upon a party's request as required by Rev. St. 1909, § 1972, such party could ask to have his points of law presented without losing his rights under the statute.—*Colorcraft Co. v. American Packing Co.*, 216 S. W. 831.

⚡393(1) (Mo.App.) Rulings of court at trial and the finding for defendant are not sufficient for the conclusions of law and the finding of fact required by Rev. St. 1909, § 1972.—*Colorcraft Co. v. American Packing Co.*, 216 S. W. 831.

## TROVER AND CONVERSION.

See Courts, ⚡39; Landlord and Tenant, ⚡252.

## II. ACTIONS.

### (D) Damages.

⚡44 (Ky.) Owner's measure of damages against one who appropriates to its use or sells or destroys his property is the reasonable value of the property when converted or sold or de-

stroyed.—*Staeble & Gregg v. Town of Anchorage*, 216 S. W. 348.

## TRUST DEEDS.

See Mortgages.

## TRUSTS.

See Appeal and Error, §1022; Bills and Notes, §443; Costs, §32; Executors and Administrators, §473, 474; Insurance, §586; Joint Adventures, §5; Master and Servant, §77; Monopolies, §23; Principal and Agent, §3, 37.

### I. CREATION, EXISTENCE, AND VALIDITY.

#### (A) Express Trusts.

§1 (Ky.) A "parol trust" is a right of property operated without writing by one party for the benefit of another, a "trust" being a confidence reposed in one person, called the "trustee," for the benefit of another, called the "cestui que trust," with the property held by the former for the benefit of the latter, and implies two estates or interests, one equitable and the other legal.—*Moore v. Shifflett*, 216 S. W. 614.

§37½ (Mo.) To be enforceable, a voluntary trust must be fully executed, that is, so fully consummated that nothing remains to be done by the grantor or donor to complete the transfer of title.—*State ex rel. Kansas City Theological Seminary v. Ellison*, 216 S. W. 967.

In order to execute a voluntary trust, it is necessary that the trustor do everything that can be done, the character of the property comprising the trust considered, to transfer the property to the trustee in such mode as will effectually pass title, which he may do (1) by declaring himself a trustee for the purposes of the settlement, (2) by transferring the property to a trustee for such purposes, or (3) by actually transferring the property to the persons for whom he intends to provide.—Id.

Where trustors were not in possession of the assets of the estate of a decedent whose heirs they were, and had only an equitable title thereto, only a symbolic delivery thereof to their trustee was possible, and in order for their power of attorney to be construed as having effected such delivery it must be taken either as a declaration by the grantors that they held the assets as trustees, as having passed their title to the trustee, or as having passed the title directly to the beneficiaries.—Id.

§59(1) (Mo.) A completed trust, though voluntary, can be revoked only by consent of all the beneficiaries, unless the power of revocation is reserved.—*State ex rel. Kansas City Theological Seminary v. Ellison*, 216 S. W. 967.

§59(2) (Mo.) A power of attorney not coupled with an interest was a mere naked power or authority, and one of its main incidents was the right of revocation: for, where trustors used such an instrument to create the trust, they intended to reserve and did reserve the right of revocation.—*State ex rel. Kansas City Theological Seminary v. Ellison*, 216 S. W. 967.

#### (C) Constructive Trusts.

§103(3) (Ky.) A constructive trust is raised, where husband and wife agreed to purchase land jointly, to pay for it by the joint and combined labors of themselves and their respective children by former marriages, and to have it conveyed to them jointly, so that the children of each would eventually take the share of their respective parent, and the wife died before full payment, and the husband thereafter took deed to himself, on the understanding and agreement that he would reconvey to the wife's children her half interest, and they, pursuant thereto, continued to his death to help to cultivate it to pay therefor,

she and they fully carrying out their agreement, and he continued to his death to recognize the binding force of the agreement, but neglected to convey.—*Middleton v. Beasley*, 216 S. W. 591.

§103(3) (Tex.Civ.App.) Where wife did not place money in her husband's hands to buy land, but he had her money and invested it in land, the effect was a loan to him, and he owed her a debt, and she had no right, title, or interest in the land, only holding a lien on the same.—*Koger v. Clark*, 216 S. W. 434.

### III. APPOINTMENT, QUALIFICATION, AND TENURE OF TRUSTEE.

§166(2) (Ky.) Where a wife, who died in 1912, by will appointed her husband, with whom she had lived since 1871, as trustee for their children, before the court will remove him as trustee at the suit of a daughter something more must appear than failure to make reports and settlements as required by law, and more than a mere neglect to realize all that possibly could be realized from the trust property.—*Wilson v. Smoot*, 216 S. W. 129.

### IV. MANAGEMENT AND DISPOSAL OF TRUST PROPERTY.

§179 (Ky.) Under a will creating an active trust in the trustee without joint beneficial interest in the trust property, he is accountable only for the management of the property in the mode pointed out by the settlor in the trust instrument, as an ordinarily prudent business man would be required to do under like circumstances.—*Wilson v. Smoot*, 216 S. W. 129.

§182 (Ky.) A trustee under his wife's will "for the benefit of the children" performs his duty by preserving, improving, and keeping the property in a way that will be beneficial to the children when they shall come into possession of it on his death, when the trust expires.—*Wilson v. Smoot*, 216 S. W. 129.

§239 (Tex.Civ.App.) One of several trustees in whom confidence has been reposed jointly, with no power given him, either expressly or by implication, to act singly, cannot sell the entire title to the trust property without the consent of the others.—*Dodge v. Lacey*, 216 S. W. 400.

### VI. ACCOUNTING AND COMPENSATION OF TRUSTEE.

§308 (Ky.) When a trustee fails to keep his accounts in an intelligent manner, the penalty is to charge him with the value of the use of the trust property for the purpose to which it is devoted, and to credit the sum with legitimate expenses and reasonable compensation.—*Wilson v. Smoot*, 216 S. W. 129.

## TURPENTINE LEASES.

See Frauds, §129.

## UNIONS.

See Trade Unions.

## UNITED STATES.

See Army and Navy; Constitutional Law, §299; Evidence, §43; Railroads, §5½.

## UNITED STATES RAILROAD ADMINISTRATION.

See Constitutional Law, §299; Evidence, §43; Railroads, §5½.

**USURY.**

See Interest, ⚡27; Judgment, ⚡429.

**I. USURIOUS CONTRACTS AND TRANSACTIONS.****(A) Nature and Validity.**

⚡1 (Mo.) In the absence of a law limiting the rate of interest, there can be no usury.—Whitworth v. Davey, 216 S. W. 736.

⚡42 (Mo.) Unless the rate of interest exceeds the applicable statutory maximum, there is no usury.—Whitworth v. Davey, 216 S. W. 736.

⚡49 (Mo.) In contract fixing rate at 8 per cent. provision for compounding semiannually was void.—Whitworth v. Davey, 216 S. W. 736.

Compounding interest in violation of Rev. St. 1909, § 7185, prohibiting compounding oftener than once a year, is illegal, but is not of itself usury.—Id.

⚡55 (Mo.) Where one is acting merely as trustee under trust deed, and not for lender, the lender is not liable for such trustee's exaction of a commission and fees for publication of notice of sale not actually made because of discharge of debt by payment, and such exaction does not render the loan usurious.—Whitworth v. Davey, 216 S. W. 736.

**(B) Rights and Remedies of Parties.**

⚡102(1) (Mo.) Rev. St. 1909, § 7182, gives a right to recover all interest charged in excess of the legal rate solely for a violation of sections 7179, 7180, 7181, and does not give such right of recovery for a violation of section 7185, prohibiting compounding interest oftener than once a year.—Whitworth v. Davey, 216 S. W. 736.

Though contract provided for compounding of interest semiannually, there can be no recovery under Rev. St. 1909, § 7182, of all interest charged in excess of the legal rate, where amounts paid do not aggregate a sum equal to the amount of the principal note, with interest at 8 per cent. compounded annually.—Id.

**VENDOR AND PURCHASER.**

See Adverse Possession, ⚡63; Army and Navy, ⚡34; Brokers, ⚡49; Deeds, ⚡94; Estoppel, ⚡30; Executors and Administrators, ⚡377; Guardian and Ward, ⚡69, 70, 87, 90, 107, 114, 131; Homestead, ⚡128, 129; Husband and Wife, ⚡129, 273; Judgment, ⚡117; Judicial Sales, ⚡51; Mines and Minerals, ⚡74; Mortgages, ⚡6, 209, 362, 369, 524; Partition; Public Lands, ⚡178; Railroads, ⚡46; Sales; Specific Performance, ⚡55, 64, 106, 130; Tenancy in Common, ⚡43; Trusts, ⚡239; Venue, ⚡5.

**I. REQUISITES AND VALIDITY OF CONTRACT.**

⚡44 (Ky.) Evidence that son's widow and children made no attempt to assert title upon father's eviction of their representative from certain land, and did not sue father, notwithstanding his acts of ownership over land, and that father continued to pay taxes, and permitted children other than such son to build houses thereon, held to support view that father had not sold land to son.—Creech v. Creech, 216 S. W. 127.

**II. CONSTRUCTION AND OPERATION OF CONTRACT.**

⚡63 (Ky.) A contract for the sale of land with a building thereon, as well as the tendered deed, held to include the entire wall on the eastern side of the property.—Clifton Land Co. v. Reister, 216 S. W. 342.

⚡78 (Ark.) Time was not of the essence of the contract for sale of land for a price payable in five equal annual installments with interest at the rate of 10 per cent., where contract did

not expressly so stipulate; such condition not necessarily resulting from the nature and circumstances of the contract.—Feibelman v. Hill, 216 S. W. 702.

**III. MODIFICATION OR RESCISSION OF CONTRACT.****(B) Rescission by Vendor.**

⚡95(1) (Tex.Civ.App.) If vendor sues to foreclose his lien, he has elected to affirm the contract and rely upon his debt and lien, and after such suit stands in the position of a mortgagee, and cannot rescind the contract as executory.—Bassham v. Evans, 216 S. W. 446.

**IV. PERFORMANCE OF CONTRACT.****(D) Payment of Purchase Money.**

⚡185 (Ark.) Where time was not of the essence of contract for purchase of land, tender of payment by purchaser before vendor had made attempt to declare a forfeiture entitled purchaser to conveyance of land.—Feibelman v. Hill, 216 S. W. 702.

**V. RIGHTS AND LIABILITIES OF PARTIES.****(C) Bona Fide Purchasers.**

⚡231(4) (Tex.) Although the literal terms of Rev. St. 1911, arts. 6842, 6857, would require that all persons be held to know what appears on the face of a duly recorded instrument, registration of an instrument thereunder only carries notice of its contents to those bound to search for it, among whom are subsequent purchasers under the grantor in a recorded instrument.—Leonard v. Benford Lumber Co., 216 S. W. 382.

A purchaser of land from heirs, whom purchaser believed to have only an undivided interest, must take notice of statements in prior recorded conveyance from an ancestor of the heirs setting forth facts showing the true ownership of the land.—Id.

⚡231(9) (Tex.) In view of Rev. St. 1911, arts. 6824, 6842, 6857, a purchaser of land must take notice of conveyances of such land recorded in a county from which a new county in which the land is situated was taken.—Leonard v. Benford Lumber Co., 216 S. W. 382.

⚡231(16) (Mo.) A purchaser of land is charged with constructive notice of the contents of recorded contract to convey.—Hayti Development Co. v. Barnes, 216 S. W. 733.

⚡231(16) (Tex.) Patentees of land or their assignees cannot ignore a recorded conveyance of a donation certificate executed before the location of the land; such instrument having the legal effect to determine in whole or in part to whose benefit the patent itself inures.—Leonard v. Benford Lumber Co., 216 S. W. 382.

⚡232(1) (Mo.) Possession by his widow of decedent's homestead is constructive notice to a purchaser thereof of whatever rights she has therein, including her right under his unprobated will; the purchaser having no right to attribute her possession solely to her right as widow.—Jones v. Nichols, 216 S. W. 962.

⚡232(5, 6) (Tex.Civ.App.) A purchaser from a vendee, whose vendor remains in possession, is not bound to go beyond the deed from such vendor conveying the title, where it has been properly executed and registered.—Brooker v. Wright, 216 S. W. 196.

⚡232(8) (Tex. Civ. App.) Where plaintiff, knowing that others had open and notorious possession of a portion of the premises, acquired a claim to lands, for the purpose of asserting in judicial proceedings title so acquired, he cannot be deemed a bona fide purchaser, though the deeds under which defendants claimed title were not recorded.—Martinez v. Bruni, 216 S. W. 655.

⚡232(9) (Tex.Civ.App.) The possession of a tenant of vendor's grantor, as a matter of law,

merely puts proposed vendee upon "inquiry," and affects him with notice of such facts as would, by the exercise of due diligence, have brought home to an ordinarily prudent man knowledge of the real facts.—*Brooker v. Wright*, 216 S. W. 196.

⚡232(10) (Tex.Civ.App.) Though defendants might be regarded as tenants in common of plaintiff's grantor, their visible and notorious possession was sufficient to put plaintiff on notice and prevent him from being a bona fide purchaser, even though the conveyances under which defendants claimed were unrecorded.—*Martinez v. Bruni*, 216 S. W. 655.

⚡239(4) (Mo.App.) Release of mortgage from the records secured by presentation of forged note by one who was not the legal owner or holder of note was fraudulent and void even as to subsequent purchasers for value and in good faith.—*Stratton v. Cole*, 216 S. W. 976.

## VI. REMEDIES OF VENDOR.

### (A) Lien and Recovery of Land.

⚡261(4) (Tex.Civ.App.) Innocent purchaser of secured vendor's lien note may enforce it against the land, although it grew out of a simulated sale of a homestead made to raise a loan.—*Brooker v. Wright*, 216 S. W. 196.

One purchasing a secured vendor's lien note from an innocent purchaser may enforce it against the land, although he had notice before the purchase that the note arose out of a simulated sale of a homestead.—*Id.*

Innocent purchaser of a secured vendor's lien note may enforce it against the land, although the person from whom he purchased it was a purchaser with notice that it arose out of a simulated sale of a homestead.—*Id.*

⚡284 (Tex.Civ.App.) Whether purchaser of secured vendor's lien note had notice, constructive or actual, that note arose out of a simulated sale of a homestead, held for the jury.—*Brooker v. Wright*, 216 S. W. 196.

## VII. REMEDIES OF PURCHASER.

### (B) Actions for Breach of Contract.

⚡351(6) (Ark.) Where, in a suit to cancel a deed given in exchange of lands on ground of fraud, it appeared that defendant falsely represented that a certain portion of the land would be embraced in the deed, he would be liable to plaintiffs for the difference in the value between the land which he represented would be conveyed and that which was in fact conveyed as of the date of the conveyance.—*Cannon v. Foster*, 216 S. W. 698.

## VENUE.

See Appeal and Error, ⚡1172; Criminal Law, ⚡737, 761, 763, 764, 772, 1144; Injunction, ⚡111; Telegraphs and Telephones, ⚡62.

## I. NATURE OR SUBJECT OF ACTION.

⚡5(1) (Mo.) Where action was one in equity for an accounting, and not an action to declare and decree a constructive trust, the action, where both parties lived in city of St. Louis, should have been brought therein, and not in the St. Louis county circuit court; the action being one in which the judgment would not affect the title to real estate within Rev. St. 1909, § 1753, as amended by Laws 1915, p. 224.—*State ex rel. Brinkman v. McElhinney*, 216 S. W. 521.

⚡5(2) (Tex.Civ.App.) In view of Rev. St. 1911, art. 1830, subds. 5 and 12, venue of an action to foreclose a vendor's lien may be laid in the county where the land is situated.—*Hurst v. Crawford*, 216 S. W. 284.

⚡5(2) (Tex.Civ.App.) Under the express provision of Rev. St. 1911, art. 1830, subd. 12, fixing venue of suits to foreclose liens on land, suit to recover on notes and foreclose a trust deed or mortgage securing them may be

brought in the county where the land is situated, though defendant resides in another county.—*McGhee v. Shely*, 216 S. W. 422.

⚡5(3) (Tex.Civ.App.) The venue of a suit which was primarily to recover possession of land, though injunction is asked as relief ancillary to the main suit, is governed by Vernon's Sayles' Ann. Civ. St. 1914, art. 1830, subd. 14, permitting suit for the recovery of land to be brought in the county where land is situated, not by article 4653, requiring suits for injunction to be brought in the county of defendant's residence.—*Evans v. Hudson*, 216 S. W. 491.

An original and amended petition, which alleged plaintiff's ownership of the land and its detention from him by defendants, and prayed for title and possession of lands and also for an injunction to restrain rounding up and driving off cattle from the land and damaging windmills thereon, states a cause of action to recover land in which the injunction is merely ancillary to the main relief.—*Id.*

## II. DOMICILE OR RESIDENCE OF PARTIES.

⚡21 (Tex.Com.App.) Parties who acquired notes after action to recover possession thereof had been brought, having acquired their rights pendente lite, were in no position to assert a right to be sued in the counties of their respective residences.—*Wellington Railroad Committee v. Crawford*, 216 S. W. 151.

## VERBAL ORDERS.

See Private Roads, ⚡2.

## VERDICT.

See Criminal Law, ⚡878; Trial, ⚡343-355.

## VESTED RIGHTS.

See Constitutional Law, ⚡107.

## VOLUNTARY TRUSTS.

See Trusts, ⚡37½, 59.

## WAIVER.

See Reference, ⚡100.

## WAR.

See Army and Navy, ⚡34; Constitutional Law, ⚡299; Evidence, ⚡43; Railroads, ⚡5½.

## WATER-CLOSETS.

See Appeal and Error, ⚡1064; Railroads, ⚡254; Trial, ⚡194, 296.

## WATERS AND WATER COURSES.

See Evidence, ⚡10; Municipal Corporations, ⚡845; Navigable Waters.

## V. SURFACE WATERS.

⚡118 (Mo.App.) The right to fight surface water by embanking against it may be exercised regardless of whether the act causes damages to adjoining proprietors.—*Johnson v. Leazenby*, 216 S. W. 49.

⚡118 (Mo.App.) Owner of land near point of overflow of surface waters caused by city's negligent construction of sewer was not negligent in filling in land as a protection against the water, but merely exercised its right to protect its property from overflowing surface water.—*Gibson v. City of St. Joseph*, 216 S. W. 50.

For cases in Dec.Dig. & Am.Dig. Key-No.Series & Indexes see same topic and KEY-NUMBER

## VIII. ARTIFICIAL PONDS, RESERVOIRS, AND CHANNELS, DAMS, AND FLOWAGE.

§179(4) (Ky.) In action for mandatory injunction to require adjoining owner to remove obstruction of flow of water in stream, where evidence showed that natural location of stream was on plaintiff's side of line, and that defendant had merely placed five or six rocks on bank of stream, where it was cutting into his land, to prevent it from further encroaching upon him, and failed to show that defendant's act caused additional water to flow on plaintiff's land, judgment granting injunction *held* against the great preponderance of the evidence.—*Tackitt v. Newsom*, 216 S. W. 376.

## IX. PUBLIC WATER SUPPLY.

### (A) Domestic and Municipal Purposes.

§203(3) (Ark.) The phrase "uniform and without discrimination" as used in a charter given by a municipal corporation to persons who were to furnish water to the city and inhabitants *held*, in view of the evidence, to mean that every residence and business house using water must pay the same amount per month for water, irrespective of the amount used.—*Town of Lonoke v. W. Y. Bransford & Son*, 216 S. W. 38.

§203(5) (Ark.) A contract with a municipal corporation to furnish water "at the same stipulated price" *held*, in view of the evidence, to fix the rates at what they had been in the past; "price" implying value usually in money, "stipulated price" ordinarily meaning an agreed or fixed amount of money for a commodity, and when preceded by the word "same," necessarily meaning a definite amount or rate prevailing in the past.—*Town of Lonoke v. W. Y. Bransford & Son*, 216 S. W. 38.

§203(11) (Ark.) Contracts between municipal corporations and public utilities such as water works companies are placed in the same category as contracts between individuals, and the enforcement thereof cannot be interrupted upon the ground that they will result in the bankruptcy of the utility, the only remedy for such a condition being a modification of the rates by mutual agreement, Kirby's Dig. §§ 5445-5448, only conferring the power upon a municipal corporation to revise downward an unreasonable rate established in a franchise without the consent of the public utility.—*Town of Lonoke v. W. Y. Bransford & Son*, 216 S. W. 38.

## WEAPONS.

See Carriers, §283, 347, 565; Homicide, §3, 145.

§6 (Tex.Cr.App.) One who borrows a pistol and carries it home by the most practicable route does not violate the law prohibiting unlawful carrying of a pistol.—*Wilson v. State*, 216 S. W. 881.

§7 (Tex.Cr.App.) A person may carry a pistol from his home to his store or from one store to another with the bona fide intent of leaving it at the place to which it is carried, provided pistol is not carried habitually or in roundabout ways or while loitering along streets or unnecessarily deviating from the route to the place to which it is being carried.—*Cassi v. State*, 216 S. W. 1099.

§11(1/4) (Tex.Cr.App.) Employé who was directed by employer to carry a pistol from one place of business to another may lawfully execute such order with the bona fide intent of leaving it at place to which it is carried, provided the pistol is not carried habitually or in roundabout ways, or while he is loitering along the streets or unnecessarily deviating from the route to the place to which it is being carried.—*Cassi v. State*, 216 S. W. 1099.

§17(6) (Tex.Cr.App.) Refusal to instruct as to acquittal if accused, charged with unlawfully carrying a pistol, borrowed pistol and was

carrying it home by the most practicable route and came upon his brother engaged in trouble, and after the difficulty turned back to his brother's store to ascertain whether his brother was injured, and there left the pistol for a day or two, was error.—*Wilson v. State*, 216 S. W. 881.

## WILLS.

See Deeds, §97; Descent and Distribution; Executors and Administrators; Judgment, §707; Life Estates, §21.

### IV. REQUISITES AND VALIDITY.

#### (A) Nature and Essentials of Testamentary Dispositions.

§87 (Ark.) The apparent character of an instrument should never be converted by interpretation into an instrument of a different character, unless its provisions, when harmonized, if possible, are inconsistent with its apparent character.—*Sutton v. Sutton*, 216 S. W. 1052.  
 §88(2) (Ark.) Instrument in the form of a warranty deed, headed "Warranty Deed," and referred to in body of instrument and in acknowledgment as "deed," conveying land to grantee, "and unto his heirs and assigns forever," *held* a deed, and not a will, notwithstanding habendum clause making deed imperative prior to grantors' death; such clause not defeating the passing of title, but merely reserving possession to grantors during their lifetime.—*Sutton v. Sutton*, 216 S. W. 1052.

#### (B) Form and Contents of Instruments.

§107 (Ky.) Two holographic wills *held* to pass a fee, as expressed in the second instrument, although the other, before being changed by erasures and interlineations with a lead pencil, gave only a life estate; it being apparent that the second instrument was written to put the changed clause in a more enduring form.—*Sleet v. Atwood*, 216 S. W. 350.

#### (C) Execution.

§119 (Mo.) Where attesting witnesses signed after attorney who had drawn will had stated in testator's presence and hearing that testator wished them to attest will, and after testator had himself signed will, there was a publication of will, there having been, in effect, a declaration by testator that it was his last will.—*Lohmann v. Lohmann*, 216 S. W. 518.

If testator, either by words, acts, signs, or conduct, makes clear to the witnesses that he intends the paper signed to be his will, there is a publication.—*Id.*

## V. PROBATE, ESTABLISHMENT, AND ANNULMENT.

### (A) Probate and Revocation in General.

§211 (Mo.) Evidence *held* insufficient to show participation by a widow in the fraud of her children, who, though their father, by will not probated, had devised his lands to his widow, mortgaged interests therein, as though the father had died intestate.—*Jones v. Nichols*, 216 S. W. 962.

#### (B) Evidence.

§288(3) (Tex.Civ.App.) In a suit to annul a will admitted to probate, the burden is on plaintiffs suing to set it aside for want of capacity, or undue influence to establish such matters, and every presumption will be indulged in favor of the will.—*Cook v. Denike*, 216 S. W. 437.

§294 (Tex.Civ.App.) Under Rev. St. art. 3271, specifying proof required for probate, in a suit to set aside the probate of a will, witnesses to the probate can testify that testatrix was of age and of sound and disposing mind; that the witnesses were credible, and would have known it if she had revoked her will.—*Cook v. Denike*, 216 S. W. 437.

## (K) Review.

§378 (Tex.Civ.App.) Under Rev. St. art. 3273, requiring testimony for the probate of a will to be reduced to writing and subscribed in open court, and article 3275, permitting a copy of such testimony to be read in evidence on the trial of the same matter in any other court, the written testimony on the hearing for probate is admissible in a suit to set aside the probate tried in the district court on appeal.—Cook v. Denike, 216 S. W. 437.

## VI. CONSTRUCTION.

## (A) General Rules.

§439 (Ky.) Where testator's intention is plainly expressed, no technical rule of construction will be permitted to defeat it.—Prindible v. Prindible, 216 S. W. 583.

§439 (Mo.App.) A will must be construed in conformity with the intention of testator.—Lomax v. Cramer, 216 S. W. 575.

§440 (Ky.) It is the duty of the courts to arrive at the intention of the testator, if possible, from the language employed.—Knox v. Knox, 216 S. W. 844.

§441 (Ky.) The testator's intention which must govern the construction of his will is the intention he had when and while making his will, to ascertain which the will must be construed in the light of the existing surrounding circumstances at such time.—Noel v. Jones, 216 S. W. 98.

§481 (Mo.) Though title to land does not pass by will till will is probated, on probate thereof, however long after testator's death, there being no limitation for probate, the will relates back, and conveys title as of the date of testator's death, except as against intervening innocent purchasers.—Jones v. Nichols, 216 S. W. 962.

§490 (Ky.) Where a testator resided upon a farm for more than 20 years previous to executing his will, and had purchased it separately from his other lands, it must be assumed he knew that it contained only 400 acres, instead of "about 425 acres."—Noel v. Jones, 216 S. W. 98.

In identifying real property defectively described in a will, evidence as to the character, condition, use, and designation of all of testator's lands may be considered in ascertaining his intentions when using the descriptive terms, but not to create a devise or contradict the will.—Id.

## (D) Description of Property.

§561(2) (Ky.) A devise of "the home place, known as the Proctor farm, containing about 425 acres," construed as devising the "Proctor farm," containing 400 acres, together with his other adjacent lands used in connection therewith to make up such amount, and excepting a certain tract of 113 acres which for two or more years prior to making the will testator had listed for taxation as a separate tract from the home place, and which other terms of the will showed was not intended to be included in this devise, but to pass as remainder.—Noel v. Jones, 216 S. W. 98.

§578(3) (Ky.) Ky. St. § 4839, providing that "a will shall be construed with reference to real and personal estate \* \* \* to speak and take effect, as if \* \* \* executed immediately before testator's death, unless a contrary intention shall appear," does not have the effect of passing after-acquired city houses and lots, which are lands under the designation "remainder of my lands," in a devise where testator designates as "lands" farm property only, and specifically described his houses and lots devised, thus indicating a contrary intention, notwithstanding a residuary clause should be construed liberally to prevent intestacy.—Noel v. Jones, 216 S. W. 98.

## (E) Nature of Estates and Interests Created.

§602, 603(5) (Ky.) Where testator gave his wife all of the property "feeling confident that she will make a fair allowance to" his children, and added the words "I make no restrictions on her remarriage except in case she does she shall at once make proper provision for my children," the wife took an absolute estate subject to be defeated to the extent of a proper provision for testator's children in case she remarried.—Prindible v. Prindible, 216 S. W. 583.

§617 (Ky.) A clause in a will giving to testator's wife all household effects absolutely, and the "use and benefit of his property, both real estate and personal, during her life," followed by a clause directing division after her death, held consistent with a subsequent clause requesting executors not to file inventory but to qualify and sell the property and wind up the affairs as soon as in their judgment was expedient; and the widow was entitled to the use and income of the property itself for life, free from the executors' power to sell until after her death.—Hornaby v. Hornaby, 216 S. W. 88.

§627(5) (Mo.App.) Will bequeathing "to my brother \* \* \* and wife \$5,000" held to entitle brother, upon wife's death before testator, to the entire legacy; it having been testator's intention to give brother and wife the legacy as one person, and to create an estate by the entirety.—Lomax v. Cramer, 216 S. W. 575.

A testator is presumed to have known that a gift to husband and wife creates an estate by the entirety.—Id.

## (F) Vested or Contingent Estates and Interests.

§629 (Ky.) When there are two or more periods fixed in the instrument for the happening of a contingency upon which an unlimited estate in land will devolve, that one will be selected which will vest the fee-simple title and give the devisee an absolute estate.—Knox v. Knox, 216 S. W. 844.

§634(8) (Ky.) Where testator, who had devised his property to his wife for life, with remainder to his children, added a codicil directing that, in event of her remarriage, she should have a child's part, that the lands should be divided by commissioners, and that portions of any child not then 21 years of age should not be sold until that child became of age, "each child's part to come back to the other children if they should die without bodily heirs," held that, on the death of the widow, who did not remarry, those children who had reached their majority took their shares of the estate in fee, not subject to being divested by their death without bodily heirs.—Knox v. Knox, 216 S. W. 844.

§634(12) (Mo.App.) Where testator created life estate, with remainder to his two sisters, to be divided equally, and if either died the survivor should receive the whole, the sisters had an estate which both or either could transfer.—McClure v. Baker, 216 S. W. 1018.

## (H) Estates in Trust and Powers.

§692, 693 (Ky.) A will, creating a life estate in certain property and providing that it "may be sold and amounts reinvested at his discretion," held to give life tenant the right to sell the land and convey title in fee and reinvest the proceeds at his discretion, and that without an order of court.—Hanson's Guardian v. Hanson, 216 S. W. 613.

## VII. RIGHTS AND LIABILITIES OF DEVISEES AND LEGATEES.

## (A) Nature of Title and Rights in General.

§740(8) (Mo.App.) An agreement between two beneficiaries under a will and their husbands,

For cases in Dec.Dig. & Am.Dig. Key-No.Series & Indexes see same topic and KEY-NUMBER

whereby on death of either beneficiary before coming into possession her share of the proceeds of the sale of land devised should go to her husband, was based upon a good consideration; the mutuality of the promises being sufficient.—*McClure v. Baker*, 216 S. W. 1018.

Where testator created life estate in land, to be sold on death of life tenant, with remainder in one-half of proceeds to his two sisters, an agreement between them and their husbands that on death of either sister before coming into possession her share should go to her husband, was not violative of statute requiring conveyance of interest in land to be by acknowledged deed, being a contract with reference to personal property.—*Id.*

(C) **Advancements, Ademption, Satisfaction, and Lapse.**

§777 (Mo.App.) Where under a will donees are to take as joint tenants or as a class, there is no lapse on account of the death of one or more, but the entire gift goes to the survivor.—*Lomax v. Cramer*, 216 S. W. 575.

## WIRES.

See Telegraphs and Telephones, §15.

## WITNESSES.

See Appeal and Error, §994, 1005; Criminal Law, §594, 595, 598, 656, 665, 673, 867, 1036, 1054, 1163, 1168; Depositions; Evidence; Trial, §26.

### II. COMPETENCY.

(C) **Testimony of Parties or Persons Interested, for or against Representatives, Survivors, or Successors in Title or Interest of Persons Deceased or Incompetent.**

§130 (Tex.Civ.App.) In trespass to try title, where defendants relied on a lost deed, testimony by one of the defendants that he saw and read the deed which conveyed the premises to his father, and from whom he inherited an interest, is admissible, despite Rev. St. 1911, art. 3690, declaring that in actions by or against executors or administrators or guardians in which judgment may be rendered for or against them as such neither party shall be allowed to testify as to any transaction with or statement by the testator, intestate, etc.—*Martinez v. Bruni*, 216 S. W. 655.

§144(1) (Mo.App.) In action to establish validity of note and deed of trust which on the face of the records had become inoperative on account of fraudulent release procured by presentation of forged note, the death of person who procured release did not preclude plaintiff from testifying under Rev. St. 1909, § 6354, prohibiting party from testifying where the party to contract or cause of action is deceased, where such person was not a party to the note and deed of trust sought to be established and was not in contractual relationship to plaintiff.—*Stratton v. Cole*, 216 S. W. 976.

§159(1) (Ky.) In suit by a partnership against a decedent's estate to recover overpayments on advances made by decedent, the members of plaintiff firm, decedent being dead, could not explain the details of the several transactions between them and decedent.—*Wilson v. McCullough Bros.*, 216 S. W. 74.

§164(2) (Tex.Civ.App.) In trespass to try title, where defendants relied on a lost deed, testimony by one of the defendants that he saw and read the deed which conveyed the premises to his father and from whom he inherited an interest is admissible, despite Rev. St. 1911, art. 3690.—*Martinez v. Bruni*, 216 S. W. 655.

### III. EXAMINATION.

(A) **Taking Testimony in General.**

§246(1) (Mo.App.) In prosecution for selling intoxicating liquor, where member of city

council had testified for defendant as to bad reputation of prosecuting witness, who had been until recently a member of the city police force, court's conduct in questioning witness as to why appointment was made, if reputation of prosecuting witness was bad, held not improper.—*State v. Stephens*, 216 S. W. 550.

§248(2) (Mo.) Answer of a police officer in an action for malicious prosecution, upon being asked concerning the general reputation of the plaintiff for peace and quiet in the community in which he lived, that it was bad among the officers of the district, was not responsive and was improper.—*Boyers v. Lindhorst*, 216 S. W. 536.

(B) **Cross-Examination and Re-Examination.**

§266 (Tex.Civ.App.) The fact that a party introduced the deposition of a witness does not entitle the adverse party to call such witness at the trial for the purpose of oral cross-examination.—*Cook v. Denike*, 216 S. W. 437.

§268(10) (Tex.Cr.App.) Where the state's witness identified a fluid which he claimed to have bought from defendant as whisky, stating that he tasted it after medicine had been put in it, and that it then tasted like whisky, it was permissible to show, on cross-examination, the kind of medicine put into the fluid.—*West v. State*, 216 S. W. 186.

§269(12) (Tex.Cr.App.) In prosecution for pandering, defined by Pen. Code, art. 506a, where defendant's husband testified that he did most of the housework because his wife was sickly, held, that cross-examination of husband developing that defendant was not ill all the time was germane to the direct examination.—*Dollar v. State*, 216 S. W. 1089.

§269(13) (Tex.Cr.App.) In prosecution for pandering, defined by Pen. Code, art. 506a, where defendant's husband testified that he did most of the housework because his wife was sickly, and gave date and locality of his meeting and marriage with his wife, held, that cross-examination of husband developing that defendant had been raised near San Angelo, and had been in Arizona and New Mexico, and that she was not ill all the time, was germane to the direct examination.—*Dollar v. State*, 216 S. W. 1089.

### IV. CREDIBILITY, IMPEACHMENT, CONTRADICTION, AND CORROBORATION.

(B) **Character and Conduct of Witness.**

§350 (Tex.Cr.App.) Where defendant testified in his own behalf, the state on cross-examination was authorized to show his previous conviction and suspended sentence as a means of affecting his credibility, though defendant had not placed his reputation before the jury as being an honest, law-abiding citizen.—*Gordon v. State*, 216 S. W. 184.

§357 (Mo.App.) In prosecution for selling intoxicating liquor, where defense had made an attack on reputation of prosecuting witness for truth and veracity, and where a witness, in answer to question of whether he knew what reputation of prosecuting witness was, answered, "I have never heard it called into question," court's refusal to strike out answer was proper where it did not appear at time of such refusal that witness was not well acquainted with prosecuting witness.—*State v. Stephens*, 216 S. W. 550.

(C) **Interest and Bias of Witness.**

§370(2) (Tex.Cr.App.) In a prosecution for violation of the local option law, defendant should have been allowed to introduce evidence showing that a cousin of the state's witness was under indictment for the sale of intoxicating liquors, and that defendant was a witness against her; it being his theory that the state's witness was biased against him, and trying to



obtain his conviction to prevent prosecution of his cousin.—*West v. State*, 216 S. W. 186.  
 ⚡370(6) (Tex. Cr. App.) In a prosecution for a murder which followed a quarrel in which deceased accused defendant of being out with a certain woman on a certain date, in which the question whether defendant was out with such woman was sharply contested, defendant should have been allowed to ask a witness testifying thereto as to his friendship toward deceased and their relations and other questions which might throw light on the witness' motive for testifying.—*Parker v. State*, 216 S. W. 178.

#### (D) Inconsistent Statements by Witness.

⚡379(9) (Tex. Cr. App.) A witness may be asked what he testified to before the grand jury, for the purpose of impeachment.—*Biscoe v. State*, 216 S. W. 174.  
 ⚡395 (Tex. Cr. App.) Statements made by accused cannot be testified to by him as corroborative of his testimony; such statements being only admissible to corroborate one impeached by proof of former contradictory statements.—*Medford v. State*, 216 S. W. 175.  
 ⚡395 (Tex. Cr. App.) Where sister of prosecutrix had testified to having seen her father in bed with and on top of prosecutrix, and defendant, on cross-examination, endeavored to make sister admit that she had told other parties that she had not so seen him and prosecutrix, and had introduced witnesses who testified that sister had stated that she had not so seen them, it was proper for state to corroborate testimony of sister by evidence that sister had made statements to others similar to the testimony given by her.—*Armstrong v. State*, 216 S. W. 1098.

#### (E) Contradiction and Corroboration of Witness.

⚡406 (Tex. Civ. App.) Exclusion of evidence, in personal injury action, that plaintiff was conveyed from a house of ill fame shortly before the accident, was proper, as it would not tend to contradict her testimony that she had been receiving \$15 a week for piano playing in a theater.—*Zucht v. Brooks*, 216 S. W. 684.  
 ⚡414(2) (Tex. Cr. App.) Statements made by accused cannot be testified to by him, as corroborative of his testimony; such statements being only admissible to corroborate one impeached by proof of former contradictory statements.—*Medford v. State*, 216 S. W. 175.

### WOMEN.

See Evidence, ⚡20.

### WORDS AND PHRASES.

"Account stated."—*Locke v. Woodman* (Mo. App.) 216 S. W. 1006.  
 "Any."—*Drainage Dist. No. 1 of Bates County v. Bates County* (Mo.) 216 S. W. 949.  
 "Assault."—*Haverbekken v. State* (Tex. Cr. App.) 216 S. W. 397.  
 "Assault of lust."—*State v. Eslick* (Mo. App.) 216 S. W. 974.  
 "At once."—*Washington v. State* (Tex. Cr. App.) 216 S. W. 869.  
 "At the same stipulated price."—*Town of Lonoke v. W. Y. Bransford & Son* (Ark.) 216 S. W. 38.  
 "Breach of the peace."—*City of Plattsburg v. Smarr* (Mo. App.) 216 S. W. 538.  
 "Carrier."—*Missouri Pac. R. Co. v. Ault* (Ark.) 216 S. W. 3.  
 "Cestui que trust."—*Moore v. Shifflett* (Ky.) 216 S. W. 614.  
 "Charge."—*Shumaker v. Byrd* (Tex.) 216 S. W. 862.  
 "Chose in action."—*Leffingwell v. Evans* (Ky.) 216 S. W. 58.  
 "Class suit."—*City of Dallas v. Armour & Co.* (Tex. Civ. App.) 216 S. W. 222.  
 "Conveyance."—*Leonard v. Benford Lumber Co.* (Tex.) 216 S. W. 382.

"Creditor."—*Des Arc Oil Mill Co. v. McLeod* (Ark.) 216 S. W. 1040.  
 "Dangerous instrumentality."—*Collett's Guardian v. Standard Oil Co.* (Ky.) 216 S. W. 356.  
 "Debt."—*Des Arc Oil Mill Co. v. McLeod* (Ark.) 216 S. W. 1040.  
 "Deed."—*Sutton v. Sutton* (Ark.) 216 S. W. 1052.  
 "Discharge."—*Highleyman v. McDowell Motor Car Co.* (Mo. App.) 216 S. W. 52.  
 "Dormitory."—*Newell v. Boatmen's Bank* (Mo.) 216 S. W. 918.  
 "Engaged in saloon business."—*Sovereign Camp, Woodmen of the World, v. Wernette* (Tex. Civ. App.) 216 S. W. 669.  
 "Entitled."—*Alford v. New York Life Ins. Co.* (Mo.) 216 S. W. 754.  
 "For such period."—*State v. Kitchen* (Mo. App.) 216 S. W. 981.  
 "Franchise."—*State ex rel. Hagerman v. St. Louis & E. St. L. Electric Ry. Co.* (Mo.) 216 S. W. 763.  
 "Furnish."—*Collison v. Curtner* (Ark.) 216 S. W. 1059.  
 "General use of the commonwealth."—*Gilbert v. Greene* (Ky.) 216 S. W. 105.  
 "Gift causa mortis."—*Moore v. Shifflett* (Ky.) 216 S. W. 614.  
 "Gift inter vivos."—*Moore v. Shifflett* (Ky.) 216 S. W. 614.  
 "Guarantor."—*Shores-Mueller Co. v. Palmer* (Ark.) 216 S. W. 295.  
 "Include survey."—*Yonts v. Adams* (Ky.) 216 S. W. 82.  
 "Indictment."—*Kennedy v. State* (Tex. Cr. App.) 216 S. W. 1086.  
 "Interested."—*City of Dallas v. Armour & Co.* (Tex. Civ. App.) 216 S. W. 222.  
 "Judgment."—*Turner's Heirs v. Turner* (Ark.) 216 S. W. 44.  
 "Land."—*Noel v. Jones* (Ky.) 216 S. W. 98;  
*Purcell v. City of Lexington* (Ky.) Id. 599.  
 "Last county assessment."—*Watson v. Boydston* (Ark.) 216 S. W. 721.  
 "Lawful fence."—*Burchett v. Leslie* (Ky.) 216 S. W. 850.  
 "Legally established road."—*State v. Kitchen* (Mo. App.) 216 S. W. 981.  
 "Life insurance."—*Manhattan Life Ins. Co. v. Stubbs* (Tex. Civ. App.) 216 S. W. 896.  
 "Livery business."—*Keen v. Ross* (Ky.) 216 S. W. 605.  
 "Loss."—*Manhattan Life Ins. Co. v. Stubbs* (Tex. Civ. App.) 216 S. W. 896.  
 "Matrimonial agreements."—*Runge v. Freshman* (Tex. Civ. App.) 216 S. W. 254.  
 "Murder."—*Brooks v. State* (Ark.) 216 S. W. 705.  
 "Necessary injury."—*McCullough v. W. H. Powell Lumber Co.* (Mo. App.) 216 S. W. 803.  
 "Occupancy."—*Carneal v. State* (Tex. Cr. App.) 216 S. W. 626.  
 "Occupied."—*Davidson v. State* (Tex. Cr. App.) 216 S. W. 624.  
 "Officer."—*McClendon v. Board of Health of City of Hot Springs* (Ark.) 216 S. W. 289.  
 "Or."—*Drainage Dist. No. 1 of Bates County v. Bates County* (Mo.) 216 S. W. 949.  
 "Parol trust."—*Moore v. Shifflett* (Ky.) 216 S. W. 614.  
 "Party."—*City of Dallas v. Armour & Co.* (Tex. Civ. App.) 216 S. W. 222.  
 "Pending."—*American Indemnity Co. v. Noble* (Tex. Civ. App.) 216 S. W. 441.  
 "Premises."—*Godfrey v. Martha Inv. Co.* (Mo.) 216 S. W. 822.  
 "Price."—*Town of Lonoke v. W. Y. Bransford & Son* (Ark.) 216 S. W. 38.  
 "Private residence."—*Hornbuckle v. State* (Tex. Cr. App.) 216 S. W. 880.  
 "Proceeding."—*City of St. Louis v. Cooper Carriage Woodwork Co.* (Mo.) 216 S. W. 944.  
 "Property right."—*Gates v. Gates* (Mo. App.) 216 S. W. 573.



For cases in Dec.Dig. & Am.Dig. Key-No.Series & Indexes see same topic and KEY-NUMBER

"Ptomaine."—Drury v. Armour & Co. (Ark.) 216 S. W. 40.  
 "Public highway."—Payne v. Road Imp. Dist. No. 1 of Marion County (Ark.) 216 S. W. 1047.  
 "Real estate."—Purcell v. City of Lexington (Ky.) 216 S. W. 599.  
 "Real party in interest."—Taylor v. Hurst (Ky.) 216 S. W. 95.  
 "Release."—Highleyman v. McDowell Motor Car Co. (Mo. App.) 216 S. W. 52.  
 "Repairs."—Collison v. Curtner (Ark.) 216 S. W. 1059.  
 "Required."—Music v. Commonwealth (Ky.) 216 S. W. 116.  
 "Rescission."—J. I. Case Threshing Mach. Co. v. Street (Tex. Civ. App.) 216 S. W. 426.  
 "Sale."—Beck v. State (Ark.) 216 S. W. 497.  
 "Same."—Town of Lonoke v. W. Y. Bransford & Son (Ark.) 216 S. W. 38.  
 "Ship as soon as possible."—Colorcraft Co. v. American Packing Co. (Mo. App.) 216 S. W. 831.  
 "Stipulated price."—Town of Lonoke v. W. Y. Bransford & Son (Ark.) 216 S. W. 38.  
 "Surety."—Shores-Mueller Co. v. Palmer (Ark.) 216 S. W. 295.  
 "Total incapacity for work."—Home Life & Accident Co. v. Corsey (Tex. Civ. App.) 216 S. W. 464.  
 "Trust."—Moore v. Shifflett (Ky.) 216 S. W. 614.

"Trustee."—Moore v. Shifflett (Ky.) 216 S. W. 614.  
 "Uniform and without discrimination."—Town of Lonoke v. W. Y. Bransford & Son (Ark.) 216 S. W. 38.  
 "Willful."—Howard v. State (Tex. Cr. App.) 216 S. W. 168.  
 "Without delay."—State v. Dolan (Mo. App.) 216 S. W. 334.

## WORK AND LABOR.

§10 (Ky.) One who performs services for an individual or private corporation under a void contract may recover for services upon the ground that the law has raised a promise to pay reasonable value therefor.—Staebler & Gregg v. Town of Anchorage, 216 S. W. 348.

## WORKMEN'S COMPENSATION ACTS.

See Master and Servant, §356-411; Statutes, §226.

## WRIT OF ERROR.

See Appeal and Error.

## WRITS.

See Attachment; Certiorari; Execution; Garnishment; Habeas Corpus; Injunction; Mandamus; Process; Quo Warranto; Replevin; Sequestration.





